

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUADALUPE L. GARCIA, JR., <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:00CV02445
)	
ANN VENEMAN, Secretary of)	Judge: James Robertson
Agriculture,)	
)	
Defendant.)	
_____)	

DEFENDANT’S OPPOSITION TO PLAINTIFFS’ MOTION FOR EXPENSES

INTRODUCTION

Plaintiffs have made an exorbitant fee request resulting from a discovery dispute which is partly of plaintiffs' own making and is otherwise largely the result of harmless error. Defendant produced a wealth of information in discovery but raised legitimate objections which it would be unjust to sanction. In fact, defendant faced a Hobson's choice of either being attacked for objecting or being accused of waiving applicable protections. In any event, none of the documents, whether privileged or not, can help them show commonality or otherwise make a case for class certification. Under these circumstances, defendant should not be required to bear the costs of plaintiffs' apparently ineffectual discovery challenges.

If any expenses are granted, plaintiffs' fee request is far outside the bounds of what court normally allow for similarly run-of-the-mill discovery motions. They have requested compensation for layers of staff members at rates significantly higher than permissible under relevant standards. They have also only vaguely described some of the work performed and have

claimed costs that are noncompensable. Plaintiffs' request for expenses should therefore be denied or radically reduced to fall within reasonable limits.

ARGUMENT

PLAINTIFFS' MOTION FOR EXPENSES SHOULD BE DENIED

1. **The Circumstances Surrounding Defendant's Objections Would Make An Award Of Fees Unjust**

Fed. R. Civ. P. 37(a) provides that if a court grants a motion to compel, it "shall, after affording an opportunity to be heard, require the party . . . whose conduct necessitated the motion . . . to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees." Fed. R. Civ. P. 37(a)(4). However, a court may not award Rule 37 expenses if it finds that "the opposing party's nondisclosure, response, or objection was substantially justified or that other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(a)(4). An opposing party's objection qualifies as "substantially justified" if "'there is a genuine dispute or if reasonable people could differ as to the appropriateness of the contested action.'" Chaplaincy of Full Gospel Churches v. Johnson, 217 F.R.D. 250, 255 (D.D.C. 2003) (quoting Pierce v. Underwood, 487 U.S. 552, 565 (1988)).

District courts are entrusted with broad discretion regarding whether to impose sanctions under Rule 37. Bonds v. District of Columbia, 93 F.3d 801, 808 (D.C. Cir. 1996). The award of expenses is intended to "deter the abuse implicit in carrying or forcing a discovery dispute to court when no genuine dispute exists." Chaplaincy, 217 F.R.D. at 255 (quoting Cobell v. Norton, 213 F.R.D. 16, 29 (D.D.C. 2003)). The "central requirement of Rule 37 is that any sanction must be just." Chaplaincy, 217 F.R.D. at 255 (quoting Bonds, 93 F.3d at 808). No

sanctions are warranted in the instant case.

The circumstances surrounding defendant's assertion of the deliberative process privilege make an award of fees unjust for that portion of the discovery. In order to resolve the matter without judicial intervention, defendant volunteered to produce the documents it had withheld pursuant to the deliberative process privilege.¹ Defendant's offer was subject to one reasonable condition, however, *i.e.*, that defendant's production of the documents not be deemed a waiver of the privilege with respect to future discovery requests. Defendant had no reasonable choice but to condition her production on an agreement that would protect the confidentiality of as yet unknown privileged information which might be requested in the future.

Plaintiffs' refusal to agree to this condition was contrary to authority which holds that the government "should not be penalized because of its cooperation in resolving litigation discovery disputes." Bigelow v. District of Columbia, 122 F.R.D. 111, 115 (D.D.C. 1988). Moreover, the Court ultimately ruled that defendant's offer to produce the documents did not waive the privilege.² Jan. 20, 2004 Memorandum Order. Had plaintiffs originally agreed to the reasonable nonwaiver condition ultimately upheld by the Court, defendant would have produced the materials without judicial intervention months before they were produced, and plaintiffs would

¹ The offer was made in view of the fact that the deliberative process privilege is not absolute, *i.e.*, it requires a balancing of the detrimental effects of disclosure against the necessity for production shown. See Redland Soccer Club, Inc. v. Department of the Army of the United States, 55 F.3d 827, 854 (3rd Cir. 1995).

² The Court ordered defendant to produce the deliberative process materials, but that order was the result of defendant's volunteering to do so. See Cullins v. Heckler, 108 F.R.D. 172, 175 (S.D.N.Y. 1985) (Plaintiffs only nominally prevailed in the motion to compel and award of fees was erroneous where magistrate's order to produce information was a result of the government's volunteering).

not have incurred the expenses they are now claiming. An award of fees under these circumstances would therefore be unjust.

Additional special circumstances warrant the denial of fees here. While plaintiffs' motion to compel was granted, the result was merely an in camera inspection at which the Court directed defendant to narrow her objections to cover only those materials whose protection was absolutely essential.³ Although the Court overruled some of defendant's assertions of the attorney-client privilege and work product doctrine, Feb. 18, 2004 Order, it did not indicate they were wholly unjustified. Moreover, at the in camera inspection, the Court also indicated it would be inclined to sustain defendant's objections to the production of some documents with unknown authors and that the objections might not be improper as previously suggested. Jan. 20, 2004 Memorandum Order.

There is no evidence that defendant has engaged in the sort of deliberate and abusive discovery tactics that sanctions are intended to deter. The Court found that defendant had not properly invoked the deliberative process privilege, Jan. 20, 2004 Memorandum Order, but the error was easily corrected and the outcome was identical: all the documents in question were deemed by declarant James R. Little to be privileged. In any event, defendant had originally offered to produce the documents and thereby avoid any dispute over the matter.

Similarly, the Court ordered the release of documents inadvertently omitted from the privilege log or inadvertently produced, January 20, 2004 Memorandum Order, but since the errors were inadvertent and there is no indication that they resulted from negligence, sanctions

³ On February 13, 2004, defendant complied with this directive and produced all documents to plaintiffs except those whose protection was absolutely critical.

against defendant would be pointless to deter similar occurrences in the future. Furthermore, a total of only thirty-seven documents fell into these categories. The errors were therefore minor in view of the fact that defendant produced more than 140,000 pages of documents and claimed protection for almost 900 documents. The errors were also harmless given that last spring plaintiffs had universal access to all documents, both privileged and nonprivileged, before they were copied.⁴

An award of expenses “is intended to ‘deter the abuse implicit in carrying or forcing a discovery dispute to court when no genuine dispute exists.’” Chaplaincy, 217 F.R.D. at 255 (quoting Cobell v. Norton, 213 F.R.D. at 29); see also Cullins v. Heckler, 108 F.R.D. 172, 175 (S.D.N.Y. 1985) (award of fees is a punitive measure meant to deter the abusive and frivolous resort to the judiciary). This purpose is not served in the present case, where defendant’s objections were not overruled in wholesale fashion or found to be abusive. Indeed, because the attorney-client or deliberative process privileges, or the work product doctrine, applied to every one of the documents withheld, defendant had no choice but to object. Had she failed to object with respect to any one of the documents, she would have risked waiving protection for the remainder. This possibility was particularly likely given that plaintiffs had already argued waiver in connection with deliberative process materials. Defendant raised valid objections in connection with each document, not to obstruct discovery, but to avoid the harms that the privileges were designed to prevent. Plaintiffs’ request for expenses should therefore be denied.

⁴ Because of the volume of materials involved, in order to expedite the production process, the Court directed defendant to make the named plaintiffs’ files available to plaintiffs prior to defendant’s review of the files and assertion of privilege or protection. Plaintiffs were directed to look at the documents and designate those they wished to have copied. Plaintiffs asked for copies of all the documents.

2. Defendant's Assertion Of The Privilege Was Substantially Justified

Furthermore, defendant's objections were substantially justified. The Declaration of James R. Little ("Little Dec.") describes each category of documents withheld on deliberative process, attorney client, or work product grounds so as to make clear that each document meets applicable legal standards. The Declaration is further punctuated by specific examples that show why the documents are protected, or at the very least, why reasonable people could differ as to whether they should be protected. A reasonable person could easily conclude, for example, that a letter from FSA's Regional Office of General Counsel to the United States Attorney's office regarding a proposed answer in litigation involving a plaintiff-borrower falls within the attorney-client privilege. See Little Dec. ¶ 39. Similarly, a memorandum from an FSA state director asking a USDA official to respond to allegations in this litigation and providing guidance to that effect could reasonably be deemed to contain attorney work product. See Little Dec. ¶ 50. Defendant's objections to disclosure were therefore reasonable and created a genuine dispute as to whether or not the materials in question were privileged. See Cobell v. Norton, 213 F.R.D. at 14 (opposition to a motion is substantially justified "if the motion raised an issue about which reasonable people could genuinely differ") (quoting 8A Wright, Miller & Marcus, Federal Practice and Procedure § 2288 (2d ed. 1994)). Because defendant's position was substantially justified, see Fed. R. Civ. P. 37(a)(4), no fees should be awarded.

3. Plaintiffs' Claim For Expenses Is Excessive

Plaintiffs bear the burden of establishing entitlement to a fee award, documenting the appropriate hours and justifying the reasonableness of the rates. Covington v. District of Columbia, 57 F.3d 1101, 1107 (D.C. Cir. 1995), cert. denied, 516 U.S. 1115 (1996). The usual

method of calculating reasonable attorney's fees is to multiply the hours reasonably expended in the litigation by a reasonable hourly fee, producing a "lodestar" amount. Board of Trustees v. Madison Hotel, 43 F. Supp. 2d 8, 11 (D.D.C. 1999). Relevant factors to be considered in determining the lodestar amount are the time and labor required; the novelty and difficulty of the questions; the skill requisite to properly perform the legal service; the customary fee; the experience, reputation, and ability of the attorneys; and awards in similar cases. See Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-719 (5th Cir. 1974). Based on these factors, plaintiffs' request for \$37,564.08 is excessive.

a. The motion to compel involved straightforward legal issues and required no specialized skill

Plaintiffs filed a garden-variety motion to compel concerning the deliberative process and attorney-client privileges and the work product doctrine. Plaintiffs' relatively routine arguments consisted of (1) an unnecessary challenge to defendant's assertion of the deliberative process privilege; (2) the erroneous contention that documents drafted by nonattorneys cannot be subject to the attorney client privilege or work product doctrine; (3) the assertion that documents whose authors are unknown cannot be protected (although the Court indicated otherwise at the in camera inspection); (4) the argument that sixteen documents deserved no protection because they had been inadvertently produced or omitted from the privilege log⁵; and (5) a claim that the Court should conduct an in camera inspection. None of these arguments involved complex factual or legal issues. The very number of attorneys who worked on this relatively routine matter

⁵ Defendant subsequently determined that six documents had been inadvertently produced, and thirty-one had been withheld but inadvertently omitted from the privilege log. All such documents are now in plaintiffs' hands.

undercuts any claim that unique expertise is required. The documents at issue were clearly described and listed on defendant's privilege log, so the drafting of plaintiffs' motion did not require a burdensome marshaling of information. In view of the straightforward nature of the discovery issues in question, plaintiffs' request for \$37,564.08 to reimburse them for 97.15 attorney or paralegal hours for their work on the matter is excessive.

b. Plaintiffs' request exceeds fees awarded in similar situations

Attorney's fees "are to be awarded with an eye to moderation seeking to avoid either the reality or the appearance of awarding windfall fees." Monaghan v. SZS 33 Assocs., L.P., 154 F.R.D. 78, 84 (S.D.N.Y. 1994) (quoting Harb v. Gallagher, 131 F.R.D. 381 (S.D.N.Y. 1990)). Plaintiffs' fee request is outside the ballpark of what has been considered reasonable for preparing similar discovery motions. See Batson v. Neal Spelce Assocs., 765 F.2d 511, 516 (5th Cir. 1985) (court abused its discretion in assessing over \$30,000 in attorney's fees and costs against party for failing to comply with discovery order); Liew v. Breen, 640 F.2d 1046, 1051 (9th Cir. 1981) (award of \$7000 for efforts to secure an order compelling discovery was excessive); Equal Employment Opportunity Comm'n v. Accurate Mechanical Contractors, 863 F. Supp. 828, 834-35 (E.D. Wisc. 1994) (twenty-two hours was an unreasonably large amount of time for preparing a motion to compel lacking highly complex legal issues, and instead \$800 would be allowed for five hours); Browning v. Peyton, 123 F.R.D. 75, 80 (S.D.N.Y. 1988) (request for more than \$25,000 in fees and costs to prepare motion for protective order was unreasonable, and only \$6567 would be allowed). Only much smaller sums have ordinarily been allowed. See, e.g., Marquis v. Chrysler Corp., 577 F.2d 624, 642 (9th Cir. 1978) (\$2000 discovery sanction was reasonable); Grant v. Sullivan, 134 F.R.D. 107, 116 (M.D. Pa. 1990)

(award of \$13,874.63 for pursuing a motion to compel was reasonable); American Hangar, Inc. v. Basic Line, Inc., 105 F.R.D. 173, 177-78 (D. Mass. 1985) (\$625 would be awarded for motion to compel, and nine hours attorney time for preparing motion to compel consisting of nine pages of documents was unreasonable); Bryant v. City of Marianna, Fla., 532 F. Supp. 133, (N.D. Fla. 1982) (award of \$2675.50 for failure to provide discovery was reasonable); Chesa Internat'l, Ltd. v. Fashion Assocs., 425 F. Supp. 234, 238 (S.D.N.Y. 1977) (award of \$2885 for attorney's fees incurred as a result of failure to comply with discovery order was reasonable). Compared to the amounts courts have routinely awarded in situations like this one, plaintiffs' request for expenses is at least several times greater than what is reasonable.

c. Plaintiffs' claimed hours are duplicative and excessive

Plaintiffs spent approximately 73.25 hours drafting their motion to compel and reply brief, totaling thirty-six pages. Three different attorneys and a paralegal worked on the motion. The duplication of effort resulting from this overstaffing should not be compensated.

The reasonable fee to which a prevailing party is entitled should not include compensation for attorney time that is "excessive, redundant, or otherwise unnecessary." Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). No reimbursement is appropriate for "duplicative or unrelated hours," for "nonproductive time," or for time resulting from attorney overstaffing. Id. at 433. If the same task is performed by more than one lawyer, multiple compensation should be denied. Singer v. Shannon & Luchs, 779 F.2d 69, 70-71 (D.C. Cir. 1985); see, e.g., Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980) (denying as excessive hours billed "where three attorneys are present at a hearing where one would suffice"). Plaintiffs should not be reimbursed for the 17.75 hours that Ms. Samolyk, Ms. Fiorina, and Mr. Anderson

spent on the motion to compel, since it was not necessary for three lawyers and a paralegal to draft it, and in any event, the total of 73.25 hours is unreasonably high.

With respect to Mr. Hill's 55.5 hours of work on the motion, plaintiffs failed to exercise billing judgment. See Action on Smoking and Health v. C.A.B., 724 F.2d 211, 224 (D.C. Cir. 1984) ("Lawyers claiming fees from the government must exercise 'billing judgment'"). His hours should be reduced by at least 35% in view of the uncomplicated nature of the discovery issues in the case and the fact that courts have usually allowed only a fraction of the hours Mr. Hill has claimed. Particularly because Mr. Hill is apparently a senior attorney at his firm who charges a premium for his work, it should be expected that he could perform the necessary work more efficiently and with little assistance.

d. Plaintiffs' hourly rates exceed the maximum permitted

Plaintiffs claim hourly rates ranging from \$120 to \$455 for attorney time, and \$195 per hour for paralegal time.⁶ In determining an hourly rate that is reasonable, a court considers whether "the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." Blum v. Stenson, 465 U.S. 886, 890 n.11 (1984). Federal courts in Washington, D.C. employ the annually adjusted Laffey Matrix rates to determine market rates. Covington v. District of Columbia, 57 F.3d at 1109; see Laffey v. Northwest Airlines, Inc., 572 F. Supp. 354 (D.D.C. 1983), aff'd in part, rev'd in part on other grounds, 746 F.2d 4 (D.C. Cir. 1984), cert. denied, 472 U.S. 1021 (1985).

⁶"Rates" sought by plaintiffs: Hill – \$455; Anderson - \$445; Samolyk – \$235; Fiorina - \$195; contract attorney – \$120.

Assuming that Mr. Hill has twenty or more years of experience as an attorney, the 2003 market rate for his work is \$370.00 per hour according to the Laffey Matrix. Similarly, the market rate for paralegals is \$100 per hour. Plaintiffs' fees should therefore be capped at these amounts. If fees are awarded for attorneys with less experience, they should also track the amounts on the Laffey Matrix.

e. Plaintiffs are entitled only to fees associated with the preparation of their motion

Plaintiffs have sought fees for approximately 13 hours spent "review[ing] documents" on 8/22/03 (\$682.50 for Mr. Hill and \$1380 for a contract attorney); roughly 9.6 hours "work[ing] on" the privilege log or "review[ing] documents" on 9/16/03 (\$910), 9/18/03 (\$1365), 9/22/03 (\$1213.33), and 9/24/03 (\$910); 14 hours "review[ing] the revised privilege log on 9/16/03 (\$840); and 4.25 hours "review[ing]" FSA files on 9/18/03 (\$510). They fail to explain the purpose of this work or how it relates to their motion to compel. Plaintiffs are entitled to recover only fees associated with their preparation of the motion to compel. See Batson v. Neal Spelce Assocs., 765 F.2d 511, 516 (5th Cir. 1985) (“[O]nly those expenses, including fees, caused by the failure to comply may be assessed against the noncomplying party”); Foxley Cattle Co. v. Grain Dealers Mutual Ins. Co., 142 F.R.D. 677, 681 (S.D. Iowa 1992) (“awards of expenses pursuant to Rule 37(a)(2) are limited to expenses incurred in obtaining the order to compel”).

Moreover, to receive compensation in this Circuit, plaintiffs are required to provide “a detailed description of the subject matter of the work.” In re Donovan, 877 F.2d 982, 994 (D.C. Cir. 1989). Without a more specific description, neither the Court, nor defendant, can determine the merits of plaintiffs’ fee request for working on or reviewing the privilege log or other

documents. National Ass'n of Concerned Vets. v. Secretary of Defense, 675 F.2d 1319, 1327 (D.C. Cir. 1982). The \$7810.83 in fees requested for this time should therefore be disallowed.

f. Plaintiffs' claimed costs must be discounted

Plaintiffs have charged \$692.75 for Lexis or Westlaw research and \$11.00 for spiral binding of their motion, neither of which is compensable. See, e.g., Hirschey v. F.E.R.C., 777 F.2d 1, 6 (D.C. Cir. 1985) (overhead items cannot be reimbursed); Photo Data v. Sawyer, 533 F. Supp. 348, 353 (D.D.C. 1982) (miscellaneous costs are not recoverable). They should therefore be deducted from plaintiffs' claim.

CONCLUSION

Plaintiffs should be reimbursed, if at all, for 36 hours of work (65% of 55.5 hours) performed by Mr. Hill at the rate of \$370.00 per hour, for a total of \$13,320.00 in expenses.

Respectfully submitted,

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Dated: Feb. 25, 2004

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 25, 2004, Defendant's Opposition to Plaintiffs' Motion for Expenses was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon plaintiffs' counsel as follows:

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