

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

GUADALUPE L. GARCIA, JR., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 1:00CV02445
	)	Judge Robertson
ANNE VENEMAN, Secretary of the	)	
United States Department of Agriculture,	)	
	)	
Defendant.	)	
	)	

**PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION  
TO PLAINTIFFS' MOTION FOR EXPENSES**

**INTRODUCTION**

Pursuant to LCvR 7(d), plaintiffs submit this reply to Defendant's Opposition to Plaintiffs' Motion for Expenses ("Opposition"). As discussed below, defendant improperly invoked the deliberative process privilege. In addition, defendant has failed to support her claims of attorney-client and attorney work product privileges. Defendant's failure to provide the requested documents or to comply with the procedures prescribed by the May 8, 2003 Protective Orders forced plaintiffs to file the Motion to Compel. Furthermore, defendant's refusal to provide the documents was not substantially justified. In light of defendant's actions, plaintiffs have submitted, pursuant to the Court's suggestion, a motion for costs and are entitled to the reasonable expenses, including attorney fees requested in that motion. For the reasons set forth more fully herein and in plaintiffs' Motion for Expenses ("Motion"), that Motion should be granted in its entirety.

## ARGUMENT

### I. PLAINTIFFS' MOTION FOR EXPENSES SHOULD BE GRANTED BECAUSE DEFENDANT'S ASSERTIONS OF PRIVILEGE WERE NOT SUBSTANTIALLY JUSTIFIED.

#### A. Defendant's Assertion Of Privilege Is Without Merit.

Fed. R. Civ. P. 37(a)(4) provides, in pertinent part, that:

If the motion [to compel] is granted or if the . . . requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party . . . whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain . . . discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

Id. Defendant fails to satisfy even one of the three exceptions. First, as discussed more fully in Plaintiffs' Motion, plaintiffs attempted to allow defendant to correct the many shortcomings with her privilege log and to provide the documents that clearly fell outside the protection of any of the asserted privileges. Motion at 3. Despite plaintiffs' good faith effort to obtain discovery without the assistance of the Court, defendant refused to provide 148 of the approximately 889 documents in question unless plaintiffs agreed to allow defendant to invoke selectively the deliberative process privilege. In addition, defendant refused to provide documents withheld under claims of privilege that were not set forth in the privilege log. Invoking attorney-client and attorney work product privileges, defendant continued to withhold documents whose authors were unknown. Indeed, defendant continued to withhold the latter documents despite the Court's January 20, 2004 Order.

Second, defendant failed to establish the “substantially justified” exception. Defendant contends that she was forced to claim the deliberative process privilege because plaintiffs’ refused to agree that “defendant’s production of the documents not be deemed a waiver of the privilege with respect to future discovery requests.” Opposition at 3. However, the cases that defendant relies on in her opposition establish that defendant was not entitled to assert the privilege in the first instance. See, e.g., Chaplaincy of Full Gospel Churches v. Johnson, 217 F.R.D. 250, 257 (D.D.C. 2003). Indeed, in Chaplaincy, the court held that “[w]hen there is any reason to believe that government misconduct has occurred . . . our court of appeals has made clear that the deliberative-process privilege disappears altogether. . . . Under this government-misconduct exception, the Court does not engage in the usual balancing test, but simply concludes that the privilege does not ‘enter the picture at all.’” Id. at 257 (emphasis added) (quoting In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency, 145 F.3d 1422, 1425 (D.C. Cir. 1998)).

In In re Subpoena Duces Tecum, the D.C. Circuit specifically ruled the “[i]f the plaintiff’s cause of action is directed at the government’s intent, however, it makes no sense to permit the government to use the privilege as a shield. For instance, it seems rather obvious to us that the privilege has no place in a Title VII action or in a constitutional claim for discrimination.” Id. at 1424 (footnote omitted). The court further indicated that

[t]he Supreme Court struggled in Crawford-El and Webster with governmental claims that discovery in such a proceeding should be limited, but no one in any of these cases ever had the temerity to suggest that the privilege applied. The argument is absent in these cases because if either the Constitution or a statute makes the nature of governmental officials’ deliberations the issue, the privilege is a nonsequitur. The central purpose of the privilege is to foster government decisionmaking by protecting it from the chill of potential disclosure. If Congress creates a cause of action that

[deliberately] exposes government decisionmaking to the light, the privilege's raison d'être evaporates.

Id. (citations omitted) (emphasis added); see also Plaintiffs' Reply To Defendant's Opposition To Plaintiffs' Motion To Compel ("Reply") at 4.

To establish the government-misconduct exception, one must show "an adequate factual basis for believing that the requested discovery would shed light upon government misconduct." Chaplaincy, 217 F.R.D. at 257. In the instant matter, plaintiffs are alleging, inter alia, government misconduct in the form of disparate treatment discrimination in the administration of United States Department of Agriculture ("USDA") farm credit programs, including both loan making and loan servicing. Furthermore, plaintiffs have supplied an abundant amount of evidence establishing USDA's misconduct, consisting of declarations from Hispanic farmers and former USDA employees, and various reports of investigations conducted by Congress, the Civil Rights Action Team, the Office of Inspector General and other government entities. Based on this information, plaintiffs have adequately provided a reasonable belief that misconduct occurred at USDA, therefore, defendant could not rely on the deliberative-process privilege in the first instance. Had defendant completely examined the cases that she cited in her Opposition, she would have discovered that she was unable to assert deliberative process privilege and that plaintiffs were entitled to the documents being withheld.

Assuming arguendo that defendant could invoke the deliberative process privilege, defendant failed to meet the necessary requirements. Once the government asserts the privilege, "the court must balance the party's need against the harm that may result from disclosure . . . ." Id. To invoke properly a deliberative process claim, the government must have the head of the agency review each of the documents, include a description of the documents, and assess the consequences of disclosure of the information. See Wainwright v. Washington Metropolitan Area Transit Authority, 163 F.R.D. 391, 396 (D.D.C. 1995). As the Court noted in its January 20, 2004, Order,

defendant failed to properly invoke the deliberative process privilege. In an attempt to properly invoke the privilege, defendant filed a revised Declaration of James Little on the morning of the in camera inspection. Defendant contends that the late-filed revised declaration cured the problems with defendant's previous assertion of the deliberative process privilege. This argument, however, is wide of the mark. While Mr. Little now purports to have reviewed all of the allegedly deliberative process documents, his declaration is in all other respects identical to his earlier declaration and thus remains every bit as conclusory as the initial declaration. See Reply at 5 & n.4. Mr. Little states that USDA withheld 148 documents based on deliberative process privilege. Simply put, Mr. Little's revised declaration, as did the initial declaration, falls short of establishing the elements of the deliberative process privilege. As the foregoing makes clear, defendant's failure to produce the documents to plaintiffs was not substantially justified.

Defendant makes several other ineffective arguments in her Opposition that will be briefly discussed. Defendant contends that plaintiffs' refusal to agree to the defendant's selective waiver 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). However, Bigelow is clearly distinguishable from the instant case. As previously discussed in Plaintiffs' Reply at 5-6, Bigelow involved a third party intervener television station which sought to obtain access to documents that the government defendant in that case claimed were protected by the deliberative process privilege. According to the court, the government recognized the plaintiffs' need for the information and voluntarily agreed to disclose the information pursuant to a stipulation limiting its dissemination. In partially denying the intervener's request for materials, the court concluded that the government's willingness to cooperate in resolving a discovery dispute with plaintiffs should not later be held against it. See id. at 115.

Unlike Bigelow, this case does not involve a third party intervener seeking to disseminate the materials. Furthermore, the government has not freely volunteered to produce any documents to plaintiffs in the spirit of resolving a discovery dispute.<sup>1</sup> In fact, what the defendant sought, and plaintiffs could not agree to, was the right to invoke selectively the deliberative process privilege against plaintiffs in this litigation. In other words, if defendant deemed the documents allegedly covered by the deliberative process privilege to be harmless, she would produce them, but if she later concluded that similar documents were somehow problematic in that they supported plaintiffs' contentions of disparate treatment discrimination, then defendant would be free to invoke the privilege. Respectfully, this is not a minor point and is clearly distinguishable from Bigelow. Indeed, plaintiffs could not, in good conscience, agree to defendant's selective waiver condition because defendant's own offer made claim that she could not satisfy the requirements of the deliberative process privilege,<sup>2</sup> wholly apart from the fact that the assertion of that privilege was clearly improper given the allegations in the instant case. Chaplaincy, 217 F.R.D. at 257.

Defendant also suggests that the motion to compel resulted in only an in camera inspection. This statement is disingenuous. The Court clearly set forth "principles" with respect to discovery and held that any documents that the defendant continued to withhold after reviewing the "principles" would be subject to an in camera inspection. In addition, that Order

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<sup>1</sup> There is no basis for the defendant's assertion in footnote 2 that the court's order to produce the documents allegedly subject to the deliberative process privilege "was the result of defendant's volunteering to do so." Opposition at 3 n.2. The court merely indicated that it was ordering the defendant to produce the documents and the production would not be deemed a waiver.

<sup>2</sup> Similarly, it is one thing to say that disclosing documents to plaintiffs subject to a stipulation limiting the use of the documents would not result in harm to the deliberative process while disclosure of the same documents to a television station seeking to broadcast the documents would be harmful to the deliberative process. It is, however, quite another matter to say, as in the instant case, that defendant is willing to produce the documents to plaintiffs if plaintiffs agree that she can selectively invoke the deliberative process privilege against them, but if plaintiffs refuse to so agree then the disclosure that defendant is offering to provide suddenly becomes harmful to the deliberative process. Simply put, defendant cannot have it both ways.

was followed up by the Court with its February 18, 2004 Order compelling production of certain documents. Furthermore, it was the Court that invited plaintiffs to file a motion for costs. As for the assertion that “the court also indicated it would be inclined to sustain defendant’s objections to the production of some of the documents with unknown authors,” that comment was made with respect to one document that was hand picked by defense counsel and shown to the court. See Affidavit of Stephen S. Hill (“Hill Affidavit”) at ¶ 9 (Exhibit 1). Moreover, for most of the one hour that the court actually spent reviewing documents, it ordered, without comment, defendant to produce the vast majority of the documents it reviewed. Id.

Defendant further asserts that “the attorney-client or deliberative process privileges, or the work product doctrine, applied to every one of the documents withheld.” Opposition at 5. However, defendant fails to provide any support for this contention. As plaintiffs made clear in their Motion to Compel, it is well settled that not every document prepared by an attorney is privileged. See Motion at 15-20; see also Evans v. Atwood, 177 F.R.D. 1, 3 (D.D.C. 1997); Cobell v. Norton, 213 F.R.D. 16, 24 (D.D.C. 2003). In Cobell, a case relied upon by defendant, the court granted plaintiffs motion to compel after it determined that the requested information did not meet the privilege requirements because the information was neither 1) confidential or 2) made for the purpose of securing legal advice or services. In the instant case, a number of the documents do not contain any confidential information. In addition, as discussed more fully in Plaintiffs’ Motion to Compel, some of the documents that defendant claimed were subject to the attorney-client and the attorney work product privileges had been previously produced to Mr. Davis and other Hispanic farmers in response to their request for copies of their loan files. See Motion at 15-20. Simply put, defendant’s assertion that all the documents withheld were privileged does not withstand scrutiny. Indeed, aside from the 148 deliberative process documents improperly withheld, defendant has produced subsequent to the in camera inspection

an additional 480 documents. Hill Affidavit at ¶ 10. Thus, of the approximately 889 documents listed on the revised privilege log, defendant has already produced 628 documents.<sup>3</sup>

Defendant offers a number of excuses as to why her unjustly withholding documents should be deemed harmless. However, defendant ignores the fact that while the government drags out the discovery process and unjustly withholds documents, countless Hispanic farmers are being harmed by the ongoing discrimination and these delays are increasing the cost of litigation to plaintiffs. Defendant took two months to copy the documents that plaintiffs requested. Defendant supplied the documents on the morning of the July 15, 2003, status hearing. In addition to this extensive period of time to make copies, defendant supplied an initial privilege log almost a month later on August 8, 2003. (See Exhibit 2.) Moreover, defendant submitted a revised privilege log on September 12, 2003, a month after providing the initial privilege log.<sup>4</sup> Once she finally supplied a privilege log, there were a large number of obviously improper privilege claims. Rather than cure the discrepancies, instead defendant offered a self-serving selective waiver condition to plaintiffs with respect to only 148 of the approximately 889 withheld documents. Defendant now argues that “[t]here is no evidence that defendant has engaged in the sort of deliberate and abusive discovery tactics that sanctions are intended to deter.” Opposition at 4. Plaintiffs believe that although there is sufficient evidence to support a claim that defendant has engaged in deliberate and abusive discovery tactics, the law however does not require such a strenuous standard. See Cobell, 213 F.R.D. at 29 (“There is no requirement that the court find that counsel acted in bad faith.”). Indeed, the absence of bad faith is only relevant to the choice of sanction rather than whether a sanction should be imposed. Marquis v. Chrysler Corp., 577 F.2d 624, 642 (9<sup>th</sup> Cir. 1978). Even negligent failures to allow reasonable discovery may be punished. Expenses are awarded when the opposing party forced a

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<sup>3</sup> Plaintiffs have not had time, owing to travel schedules and other demands to review the remaining 261 documents still withheld to determine the appropriateness of those privilege claims. Hill Affidavit at ¶ 10.

<sup>4</sup> The revised privilege log is Exhibit 1 to Plaintiffs’ Motion To Compel.

discovery dispute to court when no genuine dispute existed. See Cobell, 213 F.R.D. at 29; Chaplaincy, 217 F.R.D. at 255. The facts above clearly demonstrate that the defendant forced a discovery dispute to court when no genuine dispute existed. By her own reckoning, albeit guided by the Court, defendant concludes that she improperly withheld at least 628 documents. Therefore, plaintiffs' motion for expenses should be granted.

**II. PLAINTIFF'S MOTION FOR EXPENSES SHOULD BE GRANTED BECAUSE PLAINTIFFS' CLAIM FOR EXPENSES IS REASONABLE.**

Fed. R. Civ. P. 37(a)(4) makes clear that "reasonable expenses . . . including attorney's fees" are available when a party prevails on a motion to compel discovery. See Fed. R. Civ. P. 37(a)(4). In determining reasonable attorney fees in this circuit, courts conduct a three part analysis: (1) a determination of the reasonable number of hours expended, (2) a determination of the reasonable hourly rate, and (3) where appropriate, a determination of a multiplier or other adjustment. The Gray Panthers Project Fund v. Thompson, No. 01-01374 (HHK), 2004 U.S. Dist. LEXIS 2555, at \* 13 (D.D.C. Feb. 23, 2004) (citing Covington v. District of Columbia, 57 F.3d 1101 (D.C. Cir. 1995)). Plaintiffs submit that the amount of time expended, plaintiffs' hourly rates and other expenses related to the Motion to Compel, are all reasonable and supported by applicable case law.

**A. Plaintiffs' Motion to Compel Was Made Complicated by Defendant's Efforts to Thwart Meaningful Discovery.**

Defendant claims that "[p]laintiffs filed a garden-variety motion to compel concerning the deliberative process and attorney-client privileges and the work product doctrine" and that 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 . . . (4) the argument that sixteen documents deserved no protection because they had been inadvertently

produced or omitted for the privilege log; and (5) a claim that the Court should conduct an in camera inspection.” Opposition at 7 (footnote omitted). Defendant further asserted that none of these arguments involved complex factual or legal issues.<sup>5</sup>

First, although the factual or legal issues involved may not have been complex, defendant’s behavior has complicated the discovery process. Defendant withheld an extraordinary amount of documents under claims of privilege – nearly 900 documents. As previously noted, defendant produced an original privilege log consisting of 108 pages (produced on August 8, 2003) followed by a revised privilege log that consisted of 110 pages (produced on September 12, 2003). Neither log was a model of clarity regarding why documents were being withheld. As an initial matter, plaintiffs could not even determine the differences between the two logs without a painstaking and detailed line by line comparison of the two. In fact, in a number of instances, the only difference between the two logs consisted of additions or deletions of certain pages of certain documents. Hill Affidavit at ¶¶ 4-5. In addition, the logs had to be compared to “placeholder” sheets in defendant’s production which indicated that a document or a portion of a document had been withheld from production. Second, it is precisely because the documents at issue were not “clearly described” on defendant’s privilege logs, that plaintiffs had to marshal significant efforts to assess the validity of defendant’s privilege claims.

Moreover, as noted in Plaintiffs’ Motion to Compel, many of defendant’s privilege claims were highly questionable. For example, a document authored by Richard D. Ladd, Esq. was withheld under the attorney work product doctrine. Mr. Ladd was not, however, an attorney for the defendant, but was opposing counsel representing one of the named plaintiffs in this case in a separate matter. Plaintiffs’ Motion to Compel at 10. Many documents for which defendant conceded that the authors were unknown were withheld subject to claims of attorney-client

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<sup>5</sup> The fact that the Motion to Compel does not involve, according to defendant, complex factual or legal issues actually undercuts defendant’s position. Because, if the issues were as clear cut as defendant contends, then how does defendant explain her improper withholding of at least 628 of 889 documents?

privilege or attorney work product doctrine. The sheer volume of the privilege log, aggravated by the fact that the month after serving the initial log defendant served a revised log with no way of readily determining what, if any, changes had been made in the revised log, greatly added to the burden confronting plaintiffs in preparing the Motion to Compel.<sup>6</sup>

Lastly, defendant criticizes a number of plaintiffs' arguments as unnecessary or wrong. However, in its January 20, 2004 Order, the Court apparently disagreed. In that Order, the Court indicated that the government's invocation of the deliberative process privilege had not been properly invoked, as plaintiffs had argued in Plaintiffs' Motion To Compel at 6-7. See January 20, 2004 Order at 1. Moreover, the Court held that the government's invocation of the attorney-client privilege and attorney work product protection for documents whose authors are unknown was improper. Id. And, as is well settled in this circuit, the Court also acknowledged that defendant's inadvertent production of privileged documents waived the privilege as to those documents. Plaintiffs' arguments, contrary to defendant's characterization, were obviously both necessary and correct.

**B. Plaintiffs' Fee Request Is In Line With Awards In Similarly Complex Cases.**

A primary concern in any attorney fee case is that the fee award be reasonable. Adcock-Ladd v. Secretary of Treasury, 227 F.3d 343, 349 (6<sup>th</sup> Cir. 2000). Plaintiffs' attorney fee request is reasonable. Plaintiffs claim 82.9 hours of attorney time and 13 hours of paralegal time related to preparation of Plaintiff's Motion to Compel. Motion at 6. Within those hours, plaintiffs produced a memorandum in support of their motion and a reply, along with a number of substantial appendices and exhibits. In addition, plaintiffs had to carefully review 218 pages of privilege logs listing some 889 claims of privilege. Significantly, that plaintiffs' claimed

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<sup>6</sup> It bears noting that plaintiffs were forced to file a Motion to Compel only after defendant flatly refused to follow the procedure set forth on the May 8, 2003 Protective Order – a protective order that was drafted primarily by defendant

expenses are reasonable is clearly demonstrated by one of the very cases cited by defendant in opposing the instant Motion.

Indeed, in a case cited by the defendant for the proposition that an award of only \$13,874.63 was reasonable for a motion to compel, that court found that two attorneys' expenditure of 77 hours and 40 minutes on a motion compel discovery was reasonable. Grant v. Sullivan, 134 F.R.D 107, 111 (M.D. Pa. 1990). In that case, plaintiffs filed a motion to compel responses to nine interrogatories and nine requests for production of documents. There is no indication in the record that the nine interrogatories and nine document requests raised any particularly complex issues of either law or fact. Moreover, in that 1990 case, the reasonable rates for the attorneys who worked on the matter ranged from only \$120 to \$150 per hour. Defendant's argument that \$13,874.63 would be a reasonable award for plaintiffs' motion to compel must also mean that defendant believes that the expenditure of 77 hrs and 40 minutes on what was apparently a motion involving nine interrogatories and nine document requests was also reasonable. Using this standard with Mr. Hill's 2003 billing rate, that same motion would cost approximately \$35,335.30 in legal fees alone. In terms of actual lawyer time, plaintiffs in the instant case, moving to compel discovery involving nearly 900 documents withheld on the basis of various alleged privileges and two privilege logs totaling 218 pages, billed only five hours more than lawyers moving to compel responses to nine interrogatories and nine document requests.<sup>7</sup> Id.

The other cases cited by defendant to support her propositions that plaintiffs' request is excessive are clearly distinguishable. Those cases involve discovery issues and motions that were far less complicated than that which plaintiffs have filed. See, e.g., Foxley Cattle v. Grain Dealers Mutual Insurance Co., 142 F.R.D. 677, 681 (motion did nothing more that set forth

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<sup>7</sup> While plaintiffs did list an additional 13 hours of paralegal time, that time was spent cite checking and cross referencing the case citations and the document numbers of the documents discussed in the briefs and the appendices thereto to ensure the accuracy of the citations, quotes and document designations. Given the number of each such documents and cases, 13 hours can hardly be said to be excessive.

chronology and was not accompanied by any brief and failed to cite any authority); Batson v. Neal Spelce Assocs., 765 F.2d 511, 516 (5<sup>th</sup> Cir. 1985)(district court assessed attorney’s fees for discovery matters not related to failure to comply with court’s order); C.K. Liew v. Breen, 640 F.2d 1046 (9<sup>th</sup> Cir. 1981) (discovery dispute involving a single discovery question).

**C. Plaintiffs’ claimed Hours are Neither Duplicative Nor Excessive.**

Defendant makes a bald and wholly unsupported assertion that plaintiffs’ claimed hours are duplicative and excessive. Similarly, defendant asserts that “[t]hree different attorneys and a paralegal worked on the motion,” and such “duplication of effort resulting from this overstaffing should not be compensated.” Opposition at 9. First, it is clear that the mere fact that more than one attorney works on a matter does not make their work duplicative, and neither does the fact that different attorneys at different levels worked on it. Poole v. Textron, 192 F.R.D. 494, 508 (D. Md. 2000) (the involvement of different lawyers of different experience levels is reasonable). Second, it is apparent that defendant has not taken the time to carefully examine plaintiffs’ detailed explanation of time spent on Plaintiffs’ Motion to Compel. As plaintiffs make clear in their detailed time entries, contract attorneys reviewed the privilege logs, control sheets and related documents, Mr. Hill also reviewed that privilege log for suspect privilege claims, conducted research and drafted the Motion to Compel and its accompanying memorandum in support and the Reply, and Mr. Anderson reviewed the final draft of the motion. What should be abundantly clear from these entries is that each attorney performed a wholly different function from the other with respect to completing plaintiffs’ Motion To Compel and Reply.

Defendant's argument the Mr. Hill has failed to exercise billing judgment is equally unavailing. An attorney must exercise ““billing judgment”” by ““writing off unproductive, excessive, or redundant hours’ when seeking fee awards.” Tasch, Inc. v. Unified Staffing & Assocs., No. 02-3531, 2003 U.S. Dist. LEXIS 23451, at \* 15 (E.D. La. Dec. 30, 2003). Again, there is nothing in plaintiffs’ time sheets nor in any credible critique offered by defendant that

demonstrates that Mr. Hill billed for unproductive or redundant hours. Thus, this argument should be dismissed out of hand.

**D. Plaintiffs Hourly Rate Claim Is Reasonable Under Covington v. District of Columbia.**

The justification of the reasonableness of an attorneys' rates entails least three elements: (1) the attorney's billing practices; (2) the attorneys skill, experience and reputation, and (3) the prevailing market rates in the relevant community. Covington v. District of Columbia, 57 F.3d 1101, 1107 (D.C. Cir. 1995). In challenging defendants hourly rate asserted, defendant focuses on the third element and argues that the court is bound by the Laffey Matrix. The Laffey Matrix assesses a billing rate, for instance, for Mr. Hill, as an attorney with twenty plus years of experience, at \$370.00 per hour. The Laffey Matrix, however, is but one way to demonstrate the "prevailing market rates in the community." Id. at 1109. In Covington, the court stated that "[i]n order to demonstrate [prevailing market rates in the relevant community] plaintiffs *may* point to such evidence as an updated version of the Laffey matrix . . . or their own survey of prevailing market rates in the community." Id. (Emphasis added.) In that connection, plaintiffs assert that Mr. Hill's billing rate is actually below the prevailing rate in this community for partners of comparable experience at other large Washington, DC firms. Hill Affidavit at ¶ 7. Moreover, to the extent that the Laffey Matrix caps its rates at twenty plus years of experience it is unrealistic. Id. at ¶ 8. Mr. Hill has been practicing law for approximately 27 years. A lawyer with 27 years of experience will in this marketplace command a higher billing rate than one with only twenty years of experience. Id.

Furthermore, plaintiffs submit that the first Covington element –the attorney's billing practices - is where the focus should be. Counsel's current billing rate should be the starting point for assessing the reasonableness of counsel's hourly rate. EEOC v. Accurate Mechanical Contractors, Inc., 863 F. Supp. 828, 835 (E.D. Wis. 1994) (the attorney's standard hourly rate is the best measure of the attorney's reasonable hourly rate). In that connection, Mr. Hill's standard hourly rate is \$455 per hour. Based upon a survey of firms of comparable size in Washington,

DC, partners with Mr. Hill's years of experience have billing rates of from \$500-\$600 per hour. Hill Affidavit at ¶ 7. Thus, Mr. Hill's billing rate can hardly be properly characterized as a premium rate. Id.

**E. All Plaintiffs' Fees Are Associated With Plaintiffs' Preparation of Plaintiffs' Motion to Compel.**

Defendant's other challenges to plaintiffs' claim of fees for time associated with preparation of plaintiffs' Motion To Compel are also off base. For example, defendant challenges plaintiffs' expenditure of time for reviewing documents related to plaintiff's Motion to Compel. That such activity would be associated with plaintiffs' preparation of plaintiffs' motion is fairly elementary. Plaintiffs would dare say that it would be impossible to draft an adequate motion without doing such review. See Hill Affidavit at ¶¶ 3-6.

Significantly, the cases cited by defendant to support her proposition that "only those expenses, including fees, caused by the failure to comply may be assessed against the noncomplying party," Batson, 765 F.2d at 516, are inapposite. In Batson, the district court had erroneously assessed fees for discovery matters that were not even related to non complying party's failure to comply. And, in Foxley Cattle, the second case defendant cites for that same proposition, the court refused to compensate the defendant for "considerable time for various communications with [the] client and opposing counsel regarding the underlying discovery request, all of which predate the motion to compel." 142 F.R.D. at 681. (Emphasis added.) Clearly, in the case at bar, all of plaintiffs' time claimed regarding the Motion to Compel is well documented and contemporaneous to plaintiffs' preparation of said motion. See Hill Affidavit at ¶ 2 ("[i]f there was any doubt whatsoever concerning the purpose of the time billed, I did not include it").

**F. Plaintiffs Are Clearly Entitled To Compensation For Legal Research And Document Charges.**

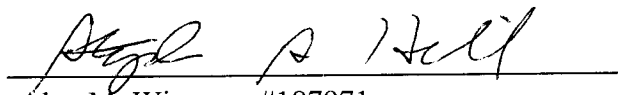
Defendant's claim that charges for legal research (Lexis and Westlaw) and other specific expenses related to the preparation of plaintiffs' Motion to Compel are not compensable is

simply wrong. First, the D.C. Circuit has found that charges for “computer research [are] appropriate.” Hirschey v. FERC, 777 F.2d 1, 6 (D.C. Cir. 1985). Second, it is well settled that charges for items such as copies or preparing a document for filing with the court are equally compensable in this context. See, e.g., Hoffman v. Telecommunications, Inc., No. 76-223-C2, 1986 U.S. Dist LEXIS 24690, at \*15 (D. Kan. June 3, 1986) (court granted expense award to plaintiffs for copy fees but reduced request where plaintiff charged fifty-five cents per copy).

### CONCLUSION

For the foregoing reasons and for the reasons set forth in Plaintiffs’ Motion To Compel, plaintiffs request the court enter an order compelling the defendant to pay the sum of \$38,270.83 (\$37,564.08 (attorneys’ fees), \$695.75 (legal research fees) and \$11.00 (velobinding fees)) to plaintiffs as reasonable expenses, including attorneys’ fees, incurred in connection with Plaintiffs’ Motion To Compel.

Respectfully Submitted,



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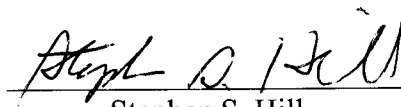
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Date: March 3, 2004

## CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2004 Plaintiffs' Reply To 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 the following:

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