UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUADALUPE L. GARCIA, *et al.*,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action No. 00-2445 (JR)
	:	
ANN V. VENEMAN, Secretary, United States Department of Agriculture,	:	
	:	
Defendant.	:	

MEMORANDUM ORDER

This troubled case has been on my docket for a little over two years, since it was reassigned from another judge of this Court. Plaintiffs' motion for class certification had already been filed when the case was transferred to me on February 1, 2002, and the government had moved to strike the class action allegations. The class action issue remains unresolved and has given rise to a difficult discovery struggle.

Plaintiffs filed their second supplemental memorandum in support of their motion to certify the class on July 17, 2002. I denied the class certification motion on December 2, 2002. Plaintiffs contemplated an emergency appeal but persuaded me instead to allow discovery to proceed and, in effect, to permit them to take another crack at class certification. I held a status conference January 15, 2003 to discuss the scope of additional discovery, and held another one on April 29, 2003.

According to my notes, the question of privilege arose at the April 29 status conference. I directed the defendant to produce documents under a protective order and with the understanding that any privilege would not be waived by production. The parties were back before me on July 15, 2003, again quarreling about discovery. At that time, again according to my notes, plaintiffs' counsel indicated a willingness to review the government's files immediately, without prejudice to the government's right to claim privilege afterwards.

Then plaintiffs apparently changed their minds. On September 25, 2003, they moved to compel discovery, having refused to accept the government's offer to forego assertion of the deliberative process privilege with respect to documents that were responsive to plaintiffs' discovery requests, if plaintiffs would only agree that said production would not amount to a general waiver. I granted the motion to compel on January 20, 2004, laid down a series of principles, and called for an *in camera* conference to review the documents that had been withheld.

Plaintiffs have now moved for their expenses in filing the motion to compel. They have documented 82.9 hours of attorney billing time, ranging from $120 to $455 per hour, and 13 hours of paralegal time at $195 per hour, plus Lexis and Westlaw services and miscellaneous charges, for a total of $37,564.08. Rule 37(a)(4) requires an award of expenses to a successful

movant unless the Court finds that the "opposing parties's non-disclosure response or objection was substantially justified or that other circumstances make an award of expenses unjust." If an award is made, it is to pay "the reasonable expenses incurred in making a motion, including attorneys fees." Id. I will grant an award, but it will be very substantially reduced from that which is requested, both because "reasonable people could differ as to the appropriateness of [at least part of] the contested action," Chaplain C 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)), and because an award of $37,564.08 would be far in excess of what seems reasonable in the premises.

On the "substantially justified" point, a great deal of this motion to compel would have been unnecessary if the plaintiffs had accepted the government's offer to produce documents for inspection without waiving its privileges. That is what I thought would happen at the close of the status conference held on April 29, 2003, and plaintiffs' insistence on litigating the issue rather than looking first at the documents and resolving the issue later justified the government's assertion of at least the deliberative process privilege. Moreover, although my order of January 20 found it "improper" for the government to invoke attorney-client privilege and work-product protection for documents whose authors were unknown, during the *in camera*

inspection I saw a substantial number of documents fitting that category as to which the government's assertion of the privilege was clearly justified.

With regard to the reasonableness of the requested fee, although I, like any judge, appreciate the professional polish given to a motion when a case is staffed the way this one has been, a Rule 37 sanctions award should not pay for polish. A perfectly serviceable motion to compel could have been prepared and filed by a single lawyer in no more than a couple of days.

The Court's Rule 37(a)(4) award is for $5000, with this proviso: that, if plaintiffs ultimately prevail and are entitled to move for an award of attorneys' fees at the close of the case, they will have leave to submit the hours not compensated by this order as part of such a motion.

JAMES ROBERTSON
United States District Judge