

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

PUEBLO of ZUNI,)	
)	
Plaintiff,)	
)	
v.)	No. CIV 01-1046 WJ/WPL
)	
UNITED STATES of AMERICA;)	
MICHAEL O. LEAVITT, Secretary of the)	
United States Department of Health and)	
Human Services; and CHARLES W. GRIM,)	
Director of the Indian Health Service,)	
United States Department of Health and)	
Human Services,)	
)	
Defendants.)	

**DEFENDANTS’ SURREPLY TO PLAINTIFF’S MOTION TO COMPEL DISCOVERY
AND TO PLAINTIFF’S UNTIMELY MOTION FOR ENLARGEMENT OF TIME**

INTRODUCTION

This Surreply responds to arguments raised for the first time in Plaintiff’s Reply (docketed as #171), to which Defendants have not had the opportunity to respond. Plaintiff’s primary new contention is that Defendants have waived all claims of privilege related to the internal litigation risk assessments, created by the Indian Health Service (“IHS”) after the Supreme Court’s decision in Cherokee Nation v. Leavitt, 125 S. Ct. 1172 (2005). As explained herein, before any obligation to provide a privilege log arose, Defendants were entitled to have the Court’s ruling on their timely objections to Plaintiff’s discovery requests. Plaintiff’s other new argument--that Defendants should re-produce shortfall data in electronic format because it contains metadata that they otherwise do not have--should be denied as untimely and unsupported.

I. DEFENDANTS HAVE NOT WAIVED ANY PRIVILEGES RELATED TO THE PRODUCTION OF IRRELEVANT AND BURDENSOME DOCUMENTS.

Back in May 2005, Plaintiff propounded class certification discovery requests to IHS directed at core work product (and otherwise privileged) litigation assessment information and documents to which Defendants timely objected in July 2005 as improper, irrelevant, not reasonably calculated to lead to the discovery of relevant evidence, privileged, overbroad, and unduly burdensome. (Pl.’s Ex. 4.) Although Plaintiff failed to challenge these objections within 20 days as required by this Court’s local rules,¹ Plaintiff now claims that Defendants’ objections are waived because Defendants did not submit a privilege log at the time they served their responses. (Reply at 18-20.) This argument is meritless. In their Opposition (docketed as #158), Defendants have briefed their relevancy, burden, and privilege objections to Plaintiff’s requests in tandem with producing a privilege log for the parties and the Court. This procedure fully complied with the Federal Rules of Civil Procedure, and consequently, no privilege has been waived.

A. The Federal Rules Do Not Require a Party to Produce a Privilege Log While Other Good Faith Objections Are Pending.

Under Federal Rule of Civil Procedure 26(b)(5), a party withholding documents “otherwise discoverable” must assert a claim of privilege by making “the claim expressly and [by describing] the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.” Fed. R. Civ. P. 26(b)(5). Defendants have faithfully adhered to this Rule. In construing this obligation, a leading D.C. Circuit case has held that a

¹ The only issue timely before this Court pertains to deposition questions put to Mr. Black and Mr. Demaray concerning the creation of those assessments. (Opp. at 12-13.)

privilege log need only be produced after a court has ruled upon other objections. See United States v. Philip Morris Inc., 347 F.3d 951, 954 (D.C. Cir. 2003) (“In short, if a party’s pending objections apply to allegedly privileged documents, the party need not log the document until the court rules on its objections.”) (citation and internal quotation marks omitted). “Waiver is not automatic, particularly if the party reasonably believed that its objections applied to the document.” Id.; see also Fed. R. Civ. P. 26(b)(5) adv. committee’s notes (1993) (explaining that “[t]he obligation to provide pertinent information concerning withheld privileged materials applies only to items ‘otherwise discoverable’” and that a party making good faith objections on other grounds, such as undue burden, need not provide a privilege log or its equivalent until after the court rules on those objections). In contrast, the “serious sanction” of waiver is reserved for cases involving “unjustified delay, inexcusable conduct, and bad faith.” Philip Morris, 347 F.3d at 954 (quoting First Sav. Bank, F.S.B. v. First Bank Sys., Inc., 902 F. Supp. 1356, 1361 (D. Kan. 1995)).²

In this instance, Defendants not only raised good faith relevancy, burdensome, and privilege objections to some of Plaintiff’s requests, they also prepared and provided a privilege log to the

² The cases cited by Plaintiff are inapposite. In Peat, Marwick, Mitchell & Co. v. West, the withholding party did not interpose or brief any non-privilege objections and did not provide a log either at the time it responded to the discovery requests or at the time it filed its opposition to a motion to compel. See 748 F.2d 540, 541 (10th Cir. 1984). It was not until the withholding party filed a motion for reconsideration that it provided sufficient detail supporting the privileges for the court to assess their applicability. See id. at 542. Only under this unique circumstance was waiver found to be appropriate. See id. In Banks v. Office of the Senate Sergeant-at-Arms and Doorkeeper, the withholding party had repeatedly indicated in response to requests that counsel “was in the process of preparing the requested privilege log,” and only later objected that no obligation to prepare a log existed. See 226 F.R.D. 113, 115 (D.D.C. 2005). Also, in prior proceedings pertaining to these documents, the withholding party failed to argue that the obligation to log documents did not arise until the court resolved the party’s pending objections on grounds other than privilege. See id. (“[T]o put it mildly, this argument comes awfully late.”).

Court and Plaintiff as part of their Opposition so that Defendants' objections could be ruled upon at one time. Under no circumstances have Defendants waived any of their claimed privileges.³

Once Plaintiff's unsupported waiver claim is dispensed with, the application of the attorney-client, work-product, and deliberative-process privileges is undisputable. (Opp. at 16-27.) The documents sought by Plaintiff were documents prepared for pending or anticipated litigation, the subject matter of which was IHS's internal assessment of the litigation and the risk to the Agency under various adverse scenarios. (Opp. at 16-24.) These documents are quintessential work product. They also contained confidential communications between IHS employees and IHS attorneys, such that the attorney-client privilege applies. (Opp. at 24-25.) Finally, the documents contained assessments that were initially used to assist IHS decision-makers in considering the policy implications of the Cherokee decision. (Opp. at 25-27.) Defendants have more than satisfied their burden to demonstrate the application of the claimed privileges.

B. Defendants Have Meritorious and Good Faith Relevance and Burden Objections to Plaintiff's Requests for the Privileged Litigation Estimates.

As detailed in Defendants' Opposition, the litigation estimates at stake in this Motion are not

³ Plaintiff's waiver argument is particularly disingenuous as Plaintiff followed an identical procedure in responding to Defendants' discovery requests: Plaintiff interposed privilege objections to certain requests but did not produce a privilege log until the issue of whether certain documents were privileged was challenged and briefed before the Court. See Pl.'s Resp. to Defs.' Interrog. Nos. 30, 31, 35 (attached as Ex. J); Pl.'s Reply to Mot. to Strike (docketed as #105). Plaintiff also interposed privilege objections to Defendants' Request for Production 14 on both August 10 and September 6, 2005, (attached as Ex. K) without producing a log. Finally, Plaintiff did not respond at all to Defendants' Third and Fourth Sets of Document Requests, but has since stated that there are privileged materials that fall within the scope of these requests. See Oct. 12, 2005 Ltr. from L. Miller to R. Hines (attached as Ex. L). Plaintiff has waived any argument that Rule 26(b)(5) requires a log at the time of service of responses as this argument is contrary to the position that Plaintiff has taken in this very litigation.

only privileged, but they are irrelevant to both the merits of this case and, more important, to the narrow typicality, numerosity, and commonality questions related to class certification as set forth in the Court’s limiting discovery Order. Pre-certification discovery is necessarily limited to prevent burdensome discovery demands and to preclude parties from attempting gratuitous fishing expeditions when the propriety of a class is hardly assured. See Rodriguez v. Banco Central, 102 F.R.D. 897, 903-05 (D.P.R. 1984) (“It is [] well settled that discovery which is irrelevant or burdensome should not be allowed during pre-certification stages, and discovery on the merits should not be had prior to the pre-certification issue.”); see also Tracy v. Dean Witter Reynolds, Inc., 185 F.R.D. 303, 304-05 (D. Colo. 1998) (“The recognized need for pre-certification discovery is subject to limitations which may be imposed by the court, and any such limitations are within the sound discretion of the court.”); Nat’l Org. For Women v. Sperry Rand Corp., 88 F.R.D. 272, 277 (D. Conn. 1980) (same). Nonetheless, even under the broadest definition of relevance encompassed by Rule 26(b)(1), Defendants have demonstrated why the contested litigation estimates are irrelevant. See Herbert v. Lando, 441 U.S. 153, 177 (1979) (warning that “the requirement of Rule 26(b)(1) that the material sought in discovery be ‘relevant’ should be firmly applied”).

First, the Agency’s internal litigation assessments are not damage calculations, much less “class-wide damage calculations,” as Plaintiff incorrectly contends. (Reply at 2, 4, 6, 24, n.2.) As Defendants’ Opposition details, the litigation estimates that Mr. Demaray was asked to prepare in response to the Cherokee decision did not depend upon factual or legal scrutiny of any individual ISDA contractor’s claims. (Opp. at 7-8, 14-15.) No more than generalized guesses based on worst-case scenarios, they were developed using assumptions and opinions that do not parallel the quantum

of proof necessary to establish liability, let alone a right to damages.⁴ (Opp. at 14-15.)

Second, the litigation assessments are irrelevant based on close scrutiny of Plaintiff's own argument as to why it purportedly believes production of the assessments is necessary. Plaintiff has invented the quintessential straw-man argument. Claiming again and again that Defendants have asserted a particular defense, Plaintiff argues that the litigation assessments must be produced to refute that defense. No fewer than seven times, Plaintiff's Reply states in one form or another that "Defendants' principal defense to certification of that class [is] their contention that damages for the [contract support costs or "CSC"] shortfalls cannot be calculated on a class-wide basis." (Reply at 1, 2, 6-7.) The problem is this: Defendants have yet to file an opposition to class certification (as Plaintiff has not yet filed a motion for class certification), and thus Plaintiff cannot and does not know Defendants' actual position on the feasibility of class-wide damages. Plaintiff should not be permitted to put words in Defendants' mouth and then claim entitlement to certain discovery because of what Defendants purportedly "said." But even were Defendants to raise such an argument, it is strained to argue that Defendants' rushed assessment of worst case scenarios--bearing no relation to the burden of proof in this case--could ever rebut such an argument.

In fact, Defendants' opposition to class certification will more likely raise a critical

⁴ The logical conclusion of Plaintiff's argument is that Defendants could equally demand defensive "damages discovery" of Plaintiff's own private litigation assessments, including tribal estimates of the rough cost of litigating this very action; estimated costs and damage assessments depending on whether a class is certified or not; internal deliberations over whether litigation costs could impact Tribal programs; or even cost-benefit analyses based on candid evaluations of whether the Pueblo of Zuni's individual claims will succeed on the merits. Applying Plaintiff's logic, Defendants could properly demand production of these documents to rebut Plaintiff's assertions of damages in the Complaint. These analyses, however, would be patently irrelevant--both to the limited question of class certification as well as to the merits of Plaintiff's claims.

preliminary issue: the infeasibility and inefficiency of making liability determinations in a class action lawsuit—where the putative class consists of more than 300 contractors, each with multiple contracts entered over the course of many years in which the relevant legal background (e.g., statutory language limiting available appropriations) has changed—because before the Court can make a liability determination, the terms of each contract as well any applicable limit on appropriations must be construed.⁵ Similarly, any attempt by Plaintiff to rebut this argument would not be assisted by Defendants’ preliminary and internal litigation risk assessments, where Mr. Demaray did not review the terms of any individual contract. (Opp. at 14-16.)

At bottom, the litigation estimates are privileged and irrelevant to the issues that will be before the Court on class certification. When documents requested have no relevance, it is necessarily burdensome to produce them. Under Rule 26(b)(2), a court must balance the benefit of the discovery sought with “the burden or expense” on the party from whom the discovery is sought. See Fed. R. Civ. P. 26(b)(2)(iii). Thus, even a minor burden in this circumstance would outweigh the “benefit” of irrelevant discovery requests.

Beyond the patent irrelevance and burdensomeness of Plaintiff’s requests, the requests were uniquely improper as they expressly sought information and documents prepared by IHS and its attorneys for purposes of pending and anticipated litigation. See, e.g., Pl.’s Ex. 4 at 5 (“Produce all documents relating to draft or final calculations of damages that might be determined against the Government in the event of a successful class action . . . [including communications prepared for

⁵ Plaintiff appears to think that liability is a foregone conclusion: “The Pueblo does not seek IHS’s calculations to prove liability, for the Supreme Court in Cherokee has already done that. Thus IHS no longer faces the risk of a damning liability admission.” (Reply at 7 n.8.) Plaintiff’s characterizations are demonstrably false. See Cherokee, 125 S. Ct. at 1181.

or by the Office of the General Counsel]”). This request, like the others at issue in this Motion, specifically sought Defendants’ assessment of damages related to pending or anticipated litigation. In other words, Plaintiff’s requests are not directed at discoverable documents within whose scope privileged information happens to be found; the requests expressly aim to obtain the privileged materials of Plaintiff’s adversary. Under these circumstances, the Court may determine that these requests are necessarily improper. See generally Shenker v. Sportelli, 83 F.R.D. 365, 367 (E.D. Pa. 1979) (declining to find waiver of objections when certain discovery requests were found to be clearly improper on relevance grounds, even when withholding party had failed to serve any objections or responses to the requests).

II. PLAINTIFF’S NEW ARGUMENT ABOUT METADATA DOES NOT COMPEL PRODUCTION OF THE SHORTFALL DATA IN ELECTRONIC FORMAT.

Plaintiff fails to distinguish in its Reply the difference between IHS’s internal post-Cherokee litigation estimates and the underlying shortfall data. But the distinction is very important. In contrast to the litigation estimates Defendants did withhold, the shortfall data underlying the litigation risk assessments were copiously produced to Plaintiff. (Opp. at 6-7.) Therefore, Plaintiff’s only claim with respect to the shortfall data is that Defendants should re-produce it in electronic format. In a new argument raised in its Reply, Plaintiff now seeks to justify this demand by stating that “metadata”—such as when a document was created and edited and by whom--associated with the electronic format will reveal new information relevant to the putative class claims. (Reply at 23-24.)

Under current Federal Rule of Civil Procedure 34(b), written in the disjunctive, Defendants had the option of producing the documents as they are kept in the ordinary course of business or producing them in paper format to correspond with the categories in the request. See Fed. R. Civ.

P. 34(b). By the time Plaintiff specified that it wanted the electronic format, Defendants had already expended vast resources to produce in a timely fashion this (largely irrelevant) material in paper format in response to Plaintiff's original request. (Pl.'s Ex. 6 at 1, 4.) Defendants objected that another round of production of what Plaintiff itself describes as "massive documentation," (Pl.'s Ex. 5 at 7-8), would be unduly burdensome and sought some justification. (Pl.'s Ex. 5 at 7-8.) Plaintiff only responded that electronic documents are more "searchable." (Pl.'s Ex. 4, 13 at 2.) Only now in its Reply does Plaintiff argue for access to metadata. This request should be denied as untimely.

As with any discovery request, the benefit of the discovery must also be balanced against the burdensome nature of production. See Fed. R. Civ. P. 26(b)(2). Here, Plaintiff fails to explain the benefit of the metadata to the issues before the Court. Thus, Plaintiff's late-created claim for Defendants to re-produce documents in a different format should be dismissed outright. Moreover, producing a new round of shortfall data in electronic format is not simply a matter of burning a CD and mailing it. The data was collected from 12 Area Offices and IHS headquarters and exists in multiple formats. (Opp. at 28.) Sifting through the electronic versions of the "massive documentation" is as resource-intensive as producing the paper version.

Regardless of format and despite Defendants having already produced this data, the underlying shortfall data is also not relevant to class certification or the merits. As explained more fully in Defendants' Opposition, shortfall data represents a series of rough estimates made for the purpose of annual reporting to Congress. (Opp. at 3-6.) Throughout the class certification discovery, Defendants interposed objections to Plaintiff's requests for shortfall data as seeking irrelevant material, both because the data is irrelevant to the issues of numerosity, commonality, and typicality at issue during class certification and because the data itself is highly unreliable. (Opp. at 3-6, 13.)

Plaintiff's attempt to condemn Defendants' explanation of the nature of the shortfall data--how it is collected, its purpose, and its problems--by pointing to IHS's reliance upon that data in reports to "the President, to Congress, and to the Supreme Court," (Reply at 3-5), also fails. While there is no dispute that IHS has used this data as an estimate to the President and Congress when reporting on CSC shortfall, IHS does not use this data to report to the President or Congress about actual amounts of CSC that were promised under an ISDA contract. (Opp. at 3-6.)

Plaintiff also argues as evidence of the Agency's reliance upon the shortfall data that IHS made representations to the Supreme Court in Cherokee based upon shortfall data of "the potential 'up to \$100 million' in liability IHS might face." (Reply at 3.) This rough estimate was provided to advise the Court of the additional pending ISDA litigation which could possibly result in liability for IHS. The amount, and any similar amount that does not take into account individual contractual terms, cannot be relevant to a determination of what IHS promised to any particular contractor.

At the heart of Plaintiff's argument is an unfounded claim--really no more than a wish on Plaintiff's part--that the shortfall data constitutes an admission of liability. This is inaccurate. A shortfall report is a tool prepared by IHS for Congress with the aim of securing additional funding from Congress for future ISDA agreements. (Opp. at 5-6.) The shortfall data stands independent from any promises made to an ISDA contractor and thus is not relevant evidence in this action.

III. PLAINTIFF'S REPLY CONTAINS NUMEROUS MISSTATEMENTS AND FALSE INSINUATIONS ABOUT DEFENDANTS' CONDUCT.

Plaintiff's Reply (like their Motion) is replete with both factual misstatements and demonstrably false insinuations about Defendants' conduct in the course of discovery. For example, Plaintiff's Reply states: "The IHS deponents testified that the CSC shortfall data and calculations

at issue were prepared by Mr. Demaray [sic], on his own initiative, in response to the Cherokee decision.” (Reply at 8; emphasis added). Mr. Demaray’s deposition testimony, excerpted as Plaintiff’s Exhibit 3 at 110-11, directly contradicts Plaintiff’s assertion:

[Plaintiff’s Counsel]: Okay. When were the estimates done?

[Mr. Demaray]: Shortly after the Cherokee decision, so March, April, that time frame.

[Plaintiff’s Counsel]: Since you said I don’t know, I take it this was not at your own initiative, correct?

[Mr. Demaray]: No. I was asked to do it.

Similarly, Plaintiff suggests that Defendants deliberately concealed the existence of the estimates in contravention of the discovery rules. (Reply at 24.) As evidenced by correspondence, however, Defendants made clear that they were not responding to Request for Production 3 for the reasons discussed in the Opposition and at no time did Defendants suggest that there were no documents within the scope of that Request. (Pl.’s Ex. 7 at 3-4.)

To reinforce its spurious narrative about bad faith conduct, Plaintiff makes insinuations regarding the location and disclosure of a document in which IHS responded to a congressional request with a recitation of shortfalls. Plaintiff’s Reply states: “Defendants denied there existed any communications with Congress regarding such matters, and even challenged Pueblo’s counsel to prove otherwise,” (Reply at 24), and “Defendants even withheld a published report IHS provided to Congress,” (Reply at 20 n.18). Here again, Plaintiff wrongly equates the internal litigation estimates with the underlying shortfall data and incorrectly suggests that a document of congressional questions and answers related to CSC shortfall prepared in 1998 or 1999, (Reply at 24, citing to n.18), somehow contradicts the statements made by counsel in the exchange of letters about the dissemination of post-Cherokee liability assessments prepared in 2005. Plaintiff’s own exhibits demonstrate that Defendants did not engage in improper behavior. (Pl.’s Ex. 3, 7, 9.)

CONCLUSION

For the foregoing reasons and those set forth in Defendants' Opposition, Plaintiff's Motion to Compel and Plaintiff's Untimely Motion to Enlarge Time should be denied in full. Plaintiff's request for attorney's fees should also be denied.

Respectfully submitted,

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