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

PUEBLO OF ZUNI, on behalf of itself and all others similarly situated,	)	
Plaintiff,	)	
v.	)	
UNITED STATES OF AMERICA; et al.,	)	Case No. CIV 01-1046 WJ/WPL
	)	Filed Electronically
Defendants.	)	

PLAINTIFF'S SUR-REPLY IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL (Dkt. 136)

Offering nothing new in support of their privilege assertions, Defendants' Surreply narrowly focuses on whether the Defendants' privileges, if any, have been waived, and on the Defendants' failure to disclose "metadata" contained in its computer-stored documents.

As to the former, Defendants' argument against waiver boils down to the interesting proposition that "litigation estimates" and "litigation assessments" have no relevance to the litigation they concern. That is a difficult proposition to fathom. *See* Plaintiff's Reply at 5-7. Absent a reasonable and good faith basis for objecting to Plaintiff's discovery on non-privilege grounds, the Defendants' failure to identify and log the existence and nature of a very small set of responsive documents, despite repeated requests to do so, constitutes a waiver of any privilege otherwise applicable to those documents. *Id*. at 18-20. As to Defendants' objection to the Plaintiff's "metadata" argument, the Defendants do not contest that the withheld documents in question actually contain metadata, as the Defendants' belated production makes abundantly clear. *Id*. at 23, n.20.

Their claim of prejudice regarding the Plaintiff's Reply argument on this point is mooted by Defendants' opportunity fully to respond by surreply.

A. The Defendants' Failure to Assert a Reasonable and Good Faith Non-Privilege Objection, Combined with Their Failure to Disclose and Log the Existence of Responsive Documents, Warrants a Finding that Defendants Waived Any Otherwise Applicable Privilege.

The Defendants argue that no waiver occurred here because they had no duty to provide a privilege log for the 18 documents they now seek to withhold until the Court first rules on Defendants' relevancy objection. (Although the Defendants also asserted an "undue burden" objection, Defendants now concede that the "undue burden" objection was merely derivative of the relevancy objection, and that any burden was, in fact, "minor."[1]) To support this argument, the Defendants assert that a reasonable good faith non-privilege objection absolutely relieves a litigant of the duty also to assert a privilege objection (and to produce a privilege log) – indeed, even to disclose that responsive documents exist – until the Court first resolves the non-privilege objection. The Defendants both over-state the rule and fail to meet its most basic requirements.

Contrary to Defendants' re-characterization of the relevant rule (supported by selective quotation, *see* Surreply at 3), Rule 26(b)(5) does not sanction Defendants' conduct here. Rule 26(b)(5)'s Commentary carefully instructs that when a litigant seeks to object based upon privilege as well as undue burden, the litigant may: (1) assert in good faith that responding to the discovery request would be unduly burdensome; but (2) respond with a limited disclosure to the extent doing

[1] Defs. Surreply at 7 ("When documents requested have no relevance, it is necessarily burdensome to produce them."); *id.* (conceding that to disclose the existence of the damage calculations [6 of the 18 withheld documents] would have been "a minor burden in this circumstance"). The limited set of documents shown on the privilege log attached to the Defendants' Opposition confirms the "minor burden." *See* Exh. E.

so would not be unduly burdensome, and (3) log any privileged documents falling within that self-limited disclosure. The Commentary further suggests that the responding party should inform the requesting party that the response is a limited disclosure, so that the requesting party is on notice other documents exist and can raise the issue in court.

That is a far cry from what the Defendants did here. Contrary to the Commentary, Defendants here made no disclosure, they provided no privilege log, and they failed even to disclose that any responsive documents existed. They also failed to make a good faith assertion that producing the 18 responsive documents they later identified would have been unduly burdensome. Defendants' conduct thus falls far outside the safe harbor outlined in the Commentary for limited discovery responses. (It also falls outside the expectations of this Court. *Cf.* Local Rule 26.3(e) (requiring the responding party to support any objection with "a description of the nature of the [withheld] documents . . . to enable the demanding party to contest the claim").)

Defendants heavily rely upon *United States v. Philip Morris*, 347 F.3d 951 (D.C. Cir. 2003). But there, the court noted that a responding party must "reasonably believe[ ]" that its non-privilege-based objection applies to the documents at issue. *Id*. at 954. "[I]f the court determines that the objection does not cover the allegedly privileged document, or that the objection was not made in good faith as Rule 26(g) requires. . . , the court may then decide whether the party should be deemed to have waived the privilege." *Id.* Here, the Defendants cannot "reasonably believe[ ]" that "litigation estimates" or "litigation assessments" addressing this litigation have no possible relevance to this litigation. After all (and as discussed previously, *see* Reply at 5-7) under Rule 26(b)(1) a plaintiff is entitled to "discovery regarding any matter, not privileged, that is relevant to the claim

or defense of any party . . . " Further, "[r]elevancy is broadly construed, and a request for discovery should be considered relevant if there is 'any possibility' that the information sought may be relevant to the claim or defense of any party." *Sonnino v. University Kansas Hosp. Authority*, 220 F.R.D. 633, 646 (D.Kan. 2004) (emph added). While there may be reasonable disagreement over the application of various privileges, it defies common sense to insist that documents concerning certain litigation estimates are not "relevant" to that litigation within the meaning of Rule 26(b)(1).[2]

Given that the Plaintiff's discovery request was relevant on its face, Defendants at a minimum were required to disclose to Plaintiff the existence of the damage calculations–even if they were not going to log the documents notwithstanding the Commentary's suggestion otherwise. But Defendants chose evasion. At best, Defendants' objected to the Plaintiff's discovery without first making a reasonable inquiry into the existence of responsive information (which would explain the failure to disclose even the public estimates provided to Congress).[3] At worst, counsel knew of the

[2] Although Defendants protest that the Plaintiff is putting into Defendants' mouth an argument against class certification that they have not yet squarely asserted, far more probative to the issue is the care Defendants take not to disclaim any assertion that class damages are not ascertainable on a class basis. Indeed, Defendants' Surreply repeats the incorrect assertion that this case can only proceed on an individualized basis. Surreply at 7. So long as this issue remains relevant to the Court's assessment of class certification, the Plaintiff is entitled to all relevant discovery in support of its claim (subject to any timely and properly established privilege).

[3] Rule 26(g) requires the person signing the discovery responses to certify that he or she made a "reasonable inquiry" regarding the discovery requests. To comply with this Rule and the spirit of the discovery rules generally, the Defendants should have conducted a thorough review of their files for global, class-wide shortfall calculations in order to respond to Requests for Production Nos. 3 and 5(4). This is particularly so when the Plaintiff informed the Defendants that it believed a report to Congress existed. Pls. Exh. 7, p.4 (challenging the Pueblo's counsel to prove it). Mr. Demaray appeared to readily know of such global shortfall calculations during his deposition. Pls. Exh. 3 at 124 (discussing "RD-1") and attachment to Exh. 3 ("RD-1"); *Id.* at 140-141 (discussing report to Congress). But instead of a diligent inquiry, the Defendants never produced the "RD-1" type report or the report to Congress until *after* the filing of this Motion. Exh. C, p.3 (Nov. 10, 2005 letter discussing Exh. 14 (excerpt of report to Congress) and Exh. 18 (2/7/2005 version of "RD-1" type report)); *compare* Opp. at 8, n.3 (misleading the Court regarding the timing of this disclosure).

documents but purposefully chose to 'fudge' about whether they existed. *See e.g.* Surreply at 11 (recognizing that Defendants did not disclose the existence of responsive documents, but cutely adding that "at no time did Defendants suggest that there were no documents" either). Either way, the Defendants failed to act reasonably and in good faith. Were it not for the ensuing depositions, the existence of the Defendants' global, class-wide damage calculations would have remained hidden from the Plaintiff and this Court.[4]

While waiver should only be found in appropriate circumstances, the circumstances here are sufficiently egregious to warrant such a finding, particularly given (1) Defendants' non-existent undue burden objection, (2) Defendants' unfounded relevancy objection, and (3) Defendants' repeated failure to disclose even the existence of responsive information.

B. Defendants Have Not Been Prejudiced by Plaintiff's Discussion of "Metadata."

In its opening Motion, the Plaintiff raised the issue of hidden information embedded in electronic files. Dr. Mather's supporting Affidavit stated that "hard copies will not disclose specific formulas employed by IHS in calculating Tribal contract support cost requirements and shortfalls."

[4] Defendants assert that the Plaintiff has adopted the same procedure of asserting privilege but not providing a log. Surreply at 4 n.3. On the contrary, the Plaintiff has either fully responded to timely-filed discovery or has informed the Defendants of limitations in the response based on reasonable good faith objections. For example, the Plaintiff responded to the Defendants' Interrogatories by specifically identifying the nature of all applicable agreements (and no official log was needed given these were not requests for production). Exh. J. As for RFP 14, the Plaintiff informed the Defendants that it would be disclosing all documents required by Rule 26(a)(2)(B), a reasonable reading of what was required for expert disclosures. The Defendants never questioned this response (until now) and thus are deemed to have accepted it under Rules 26.6 or 37.1. As the Defendants acknowledge, the Third and Fourth Discovery requests were untimely and thus the Plaintiff had no obligation to respond. That being said, contrary to the Defendants assertion, after the Plaintiff completed a thorough review of its records, the Plaintiff provided a detailed privilege log regarding the documents discussed in the October 12 letter. Exh. 19 (Nov. 29, 2005 letter from Miller to Hines with attached privilege log).

Dkt. No. 141, p.3, ¶ 7.[5] Since Defendants had not produced any electronic files at that point, the Plaintiff could only speculate about the content of the Defendants' electronic documents based on knowledge about the properties of electronic files generally. Isom, David K., *Electronic Discovery Primer for Judges,* 2005 Fed. Cts. L. Rev.1 (2005), at Sec. II.O (discussing distinctions between "data" and "metadata").[6] In its Reply, the Plaintiff could expand on this discussion because in the intervening period Defendants produced a few EXCEL documents showing previously hidden metadata. Only then could the Plaintiff know the full extent to which the Defendants' original paper disclosures of computerized information were incomplete. Tellingly, the Defendants do not deny that the other electronic documents they have withheld from production contain hidden formulas and additional content such as hidden columns. *See e.g.*, Reply 23 and n.20.

This history explains Plaintiff's greater discussion of the metadata issue in Plaintiff's Reply. Defendants cannot claim prejudice from that discussion, for the Court has granted Defendants full leave to respond to that Reply. Apparently other than their ill-considered prejudice claim, Defendants have no response.

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[5] The Plaintiff also argued that disclosure of paper documents "has not only produced voluminous paper records that in significant measure are hardly decipherable, much less usable (*see* Exhibits A-C to Mather Affidavit), it has denied the Plaintiff the ability to examine the computerized records in order to make its case that global class damages can indeed fairly be quantified." Dkt. 137 (Mem. in Supp. of Motion), p. 5.

[6] It is not as if the Defendants are not aware the EXCEL documents contain formulas. *See* Exh. 20 (requesting "all electronic spreadsheets and/or worksheets referred to by . . . [a deponent] in any format, as long as both the data and the formulas used to generate the data are produced").

C. Other Mischaracterizations by the Defendants.

The Plaintiff briefly responds to three of Defendants' additional mis-statements:

1. The Defendants continue to insist that the Supreme Court's decision in *Cherokee* left open defenses based upon contract language and did not resolve most of the liability issues in this case (at least in so far as the lump-sum year claims are concerned). *See* Surreply at 7 n.5. But the Supreme Court in *Cherokee* interpreted a controlling statute that applies to all Tribal contractors, making consideration of the six contracts at issue there unnecessary. *Cherokee Nation v. Leavitt*, 125 S.Ct. 1172, 1181 (interpreting 25 U.S.C. § 450j-1(b)). In this respect, the Court addressed, not just a defense, but IHS's "sole defense" in refusing to fully fund CSCs during the 1990s. *Cherokee*, 125 S.Ct. at 1177 (addressing IHS's failure fully to fund two tribal contractors) (emph. added).[7]

Other judges have similarly recognized that the ISDA's "availability clause" was IHS's sole defense during this period. *Shoshone-Bannock v. Leavitt*, --- F.Supp.2d ---, 2005 WL 3610351 (Dec. 13, 2005 Op. and Order), *discussing Cherokee* 125 S.Ct. at 1177; *Appeals of Seldovia Village Tribe*, I.B.C.A. No. 3862, 2003 WL 22422891 (noting that "lack of 'available' funds" was the only basis IHS asserted for failing to incorporate the Tribe's full CSC requirement into the contract). *See also* Exh. 3, Demaray Dep. at 28-29 (discussing application of the IHS CSC policy), and Exh. 21, Demaray Dep. at 179-180 (discussing reason for underpayments); *Cherokee v. Leavitt*, Nos. 02-1472, 03-853 (U.S.), JA at 222 (¶ 29) ("Cherokee's funding was not increased above that amount because Congress did not appropriate additional funding for contract support costs to the IHS for existing

[7] Plaintiff notes here its earlier oversight in not properly attributing the *Shoshone-Bannock* court's quotation from this passage of the Supreme Court's opinion. Reply at 6 n.6.

contracts") (Affid. of Dir., IHS Div. of Fin. Mgt., dated Sept. 3, 1999). Any new defense today would be nothing more than *post hoc* rationalization. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947); *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574-75, 1577 (10th Cir. 1994).

2. The Defendants continue to mischaracterize the purpose of the CSC shortfall reports. Surreply at 10 (stating that the report is a tool IHS uses to "secur[e] additional funding from Congress for future appropriations"); *see also* Opp. at 5, Demaray Dep. at 3, ¶ 6. Congress required shortfall reports in order to get "reliable and objective data," because the agencies acted so poorly in underfunding Tribal contractors' CSCs. S.Rep. No. 100-274, at 32 (1987).

3. The Plaintiff did not misrepresent Mr. Demaray's testimony. Surreply 11. Mr. Demaray testified that he did the first estimate on his own. Reply at 8-9, *quoting* Ex. 3 at 133; *see also* Exh. B, Demaray Aff. 8, ¶ 16. Subsequent "litigation estimates" (Surreply at 11, citing Exh. 3 at 110-11) appear to reference later stages of Mr. Demaray's work. Moreover, due to defense counsel's vigorous objections and overbroad instructions to the deponents, both the Black and Demaray depositions remain incomplete, with the full story of the litigation estimates and other damage assessments still remaining to be told (a gap that hopefully will be filled with the granting of this Motion).

For the foregoing reasons, and those stated in prior briefing on this Motion, Plaintiff respectfully requests that this Court grant its Motion to Compel (Dkt. 136).

Respectfully submitted this 19th day of January 2006.

SONOSKY, CHAMBERS, SACHSE,
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/s/ Lloyd B. Miller

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CERTIFICATE OF SERVICE

I hereby certify that I sent by electronic mail, or caused to be sent by electronic mail, a true and correct copy of the **PLAINTIFF'S SUR-REPLY IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL (Dkt. 136),** to the following attorneys of record (or their co-counsel) this 19th day of January 2006:

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