

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

INTRODUCTION

Plaintiff’s Motion to Compel seeks an internal rough estimate of the Indian Health Service’s (“IHS”) potential litigation exposure. These estimates, prepared after an adverse Supreme Court decision and in anticipation of ongoing and future litigation, integrated advice of counsel and were prepared with the understanding that attorneys might rely on them in advising the agency. Beyond preparing for litigation, agency decision-makers also wanted these estimates to candidly evaluate the effect of the Supreme Court decision on program policy and resources. This material is protected by the work-product, attorney-client, and deliberative-process privileges.

Moreover, because these estimates are nothing more than a complicated set of guesses based on inherently flawed, unconfirmed data (data already produced to Plaintiff), they are irrelevant to the

issue of class certification and the underlying merits. Indeed, this discovery dispute underscores that class certification is improper in this case, as the only way to perfect the data would be tribe-by-tribe, contract-by-contract scrutiny. Thus, Plaintiff's Motion to Compel and corresponding untimely Motion for an Enlargement of Time should be denied in full.

FACTUAL AND PROCEDURAL BACKGROUND

This putative class action lawsuit is a contract dispute. It arises under the Indian Self-Determination and Education Assistance Act ("ISDA"), 25 U.S.C. §§ 450-450n and the Contract Disputes Act ("CDA"), 41 U.S.C. §§ 601 et seq. It involves a challenge to the amount of funding for contract support costs ("CSC") by IHS under 22 of Plaintiff's contracts in effect between fiscal years 1993 and 1998. (Am. Compl. ¶¶ 1, 49-51; docketed as #5.) In December 2001, this case was stayed pending the outcome of the Supreme Court's decision in Cherokee Nation v. Leavitt, which the Court decided on March 1, 2005. See 125 S. Ct. 1172 (2005). Narrow in scope, the Cherokee decision concerned the viability of one particular defense to an ISDA breach of contract claim, namely, insufficient congressional appropriations. See id. at 1181. Because Congress had appropriated lump-sum appropriations for IHS in fiscal years 1994-1997, the Supreme Court held that the Secretary could not defend against a claim for breach of an ISDA contract in effect during these years on the basis of inadequate appropriations. See id.

On March 17, 2005, the Court lifted the stay and, after a scheduling conference on April 19, 2005, Chief Magistrate Judge Garcia issued a Scheduling and Discovery Order (docketed as #52) that, inter alia, established a "phase one discovery" program "directed toward the Rule 23 issues of numerosity, commonality of questions of law or fact, typicality of claims or defenses, and whether the representative part[y] will fairly and adequately protect the interests of the class."

While the initial Order established a limited 90-day schedule for completion of class discovery, that deadline currently has been extended to December 13, 2005. Over the course of this extended discovery period, Defendants have produced approximately 30,000 pages of documents, answered numerous interrogatories, and responded to 35 requests for admission.

FACTS UNDERLYING THE CURRENT DISPUTE

Rather than focusing its discovery requests on documents or testimony relevant to class certification, the bulk of Plaintiff's discovery requests have centered on obtaining CSC "shortfall data," summaries thereof, and IHS's internal assessments of its potential liability. Generally speaking, CSC shortfall data represents a series of rough estimates made for the purposes of annual reporting to Congress pursuant to 25 U.S.C. § 450j-1(c). Defs.' Ex. A ¶¶ 6-8. As set forth more fully below, shortfall data (regardless of format) has little connection to the promises that were made in any particular ISDA contract. Id. ¶¶ 5-8. Notwithstanding this fact and the fact that Defendants have produced voluminous amounts of CSC shortfall data to Plaintiff, Plaintiff now seeks to obtain Defendants' litigation assessments, assessments that were prepared using shortfall data but also containing advice of counsel and other opinions and assessments made by IHS officials.

CSC Shortfall Data. Unless certain exceptions apply, the ISDA directs, inter alia, the Secretary of HHS, upon the request of an Indian tribe, to enter into self-determination contracts. See 25 U.S.C. § 450f(a)(1); id. § 450b(i). ISDA contracts, like all contracts, are negotiated between two parties, are in effect for a limited period of time, and involve funding specific to the programs or services under contract. See id. §§ 450f, 450j(c), 450j-1(a), 450l(a)(2). Other provisions describe what law applies to these contracts and what should be included therein. See id. § 450j-1(a). No provision provides the actual amount of funding that must be included; the amounts to be included

in any ISDA agreement are the subject of individual negotiations between IHS and each contractor. See id. §§ 450j-1(a)(3)(B), 450l(a)(2). It is thus the negotiated agreement itself, and the terms and conditions therein, that may create a particularized right to monetary relief if breached.¹ See generally Cherokee Nation, 125 S. Ct. at 1177.

The ISDA provides that IHS may award as CSC:

[T]he costs of reimbursing each tribal contractor for reasonable and allowable costs of (i) direct program expenses for the operation of the Federal program that is the subject of the contract, and (ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract, except that such funding shall not duplicate any funding [already provided].

25 U.S.C. § 450j-1(a)(2). With respect to CSC, there are two unique concepts that Plaintiff conflates in its Motion: The first is the amount that IHS has promised to any particular tribal contractor in its ISDA contract for CSC, called the “CSC award.” The second, called “CSC need,” is a more elusive concept and is described in more detail below.

IHS makes “CSC awards” to tribal contractors under their ISDA contracts out of its annual appropriation. Defs.’ Ex. A ¶ 5. In years prior to 1998, the amounts IHS allocated for CSC were based on the amounts that Congress designated for that purpose in the annual committee reports that accompanied the agency’s appropriation.² Id. With the possible exception of 1994, IHS’s total

¹ A court’s subject matter jurisdiction over a claim for breach of an ISDA contract depends on whether the contractor has properly exhausted the contract claims by “presenting” the claims to government contracting officers. See 25 U.S.C. §§ 450m-1(a), (d) (incorporating CDA into ISDA for all claims for monetary relief); 41 U.S.C. § 605(a) (requiring government contractors to present their contract claims to government contracting officers).

² Since 1998, Congress has expressly limited the total amount of annual CSC available directly in IHS’s annual appropriations acts. See, e.g., Dep’t of the Interior & Related Agencies Appropriations Act, Pub. L. No. 105-83, 111 Stat. 1543, 1582-833 (1997).

allocations for CSC have been insufficient to fund the total amount requested by the Tribal contractors for CSC in each year since at least 1993. Id. Thus, IHS and each tribal contractor had to agree on the amount that IHS would award to the contractor for any given year for CSC. Id. The amount of the CSC award ultimately negotiated has been based on the availability of appropriations, agency policies in effect in any particular year, IHS's prior fiscal year award to the Tribal contractor, and the status and timing of any new assumptions of IHS programs by the Tribal contractor. Id. The amount of the award is generally included in the tribal contractor's annual ISDA contract or annual funding agreement. Id.

Because Congress was aware that it had not appropriated the full amounts that the tribal contractors were requesting for CSC, it directed the Secretary to submit "shortfall reports." See 25 U.S.C. § 450j-1(c). Although the reporting requirement has changed over the years, Congress generally has sought, inter alia, an annual accounting of the amount of funds awarded by IHS and an accounting of any deficiency in funds needed to provide full CSC to all tribal contractors. See id. In response to this statutory reporting directive, IHS has sought to collect shortfall data from each of its twelve Area Offices since at least 1993. Defs.' Ex. A ¶ 6. IHS has generally sought to identify, on an annual basis, (1) the full amount of CSC that the Tribal contractor believed was needed to run its ISDA programs ("CSC need"), and (2) the amount that IHS was able to award for CSC. Id. ¶ 7. Then, in order to determine the CSC "shortfall," IHS subtracted the amount of the CSC award from the amount of the CSC need. Id.

In some instances, the amount identified as a Tribal contractor's CSC "need" was reached after a negotiation between the Tribal contractor and IHS, but was still considered to be an estimate. Id. As part of the negotiation, IHS staff was to make certain adjustments to avoid the inclusion of

impermissible costs in the CSC need amount. Id. This was done in some instances and not in others. Id. In other instances, particularly when IHS was unable to award any CSC for a new program, the amount of CSC need that IHS identified was an amount provided by the Tribal contractor without any review or negotiation by IHS. Id. In almost all instances, however, the amount of CSC need that IHS reported utilized unaudited or projected costs of running programs, outdated or preliminary indirect cost rates, and other non-final amounts. Id.

In other words, IHS never considered CSC “need” or the resulting shortfall data to represent an amount that the agency “owed” to a tribal contractor--or even an amount that the agency would one day award to the tribal contractors--but merely an estimate or a guide for Congress to use in assessing the need for additional CSC appropriations. Id. ¶ 8. IHS has never had the luxury of being able to allocate sufficient resources to the task of preparing shortfall data to ensure that the amounts included take into account all of the various factors that would need to be considered if one was to attempt to ascertain a Tribal contractor’s need for CSC. Id.

Discovery Related to CSC Shortfall Data. Throughout the class discovery period, Defendants have interposed objections to the requests for CSC shortfall data as irrelevant to the narrow issue of class certification in this breach of contract case, as the only relevant promises are those included in the ISDA contracts and because the shortfall data itself is highly unreliable. Nonetheless, Defendants have produced, inter alia, (1) draft and final CSC shortfall reports from 1994, 1997, and 1998-2001; (2) spreadsheets containing draft CSC shortfall data from 1993, 1995, and 1996; (3) draft area shortfall reports from 1993-2001; and (4) assorted other documents (charts, e-mails) summarizing the available CSC shortfall data for 1993-2001. Id. ¶¶ 32-39. In fact, Plaintiff’s Motion does not seek CSC shortfall data, but merely objects to the format in which Defendants

produced it. As might be expected, CSC shortfall data for the time period 1993-2001 exists in multiple formats, and reflects varying degrees of accuracy and completeness. Id. ¶ 31. Defendants have satisfied their discovery obligations by producing CSC shortfall data in paper format.

Internal IHS Post-Cherokee Litigation Estimates. Plaintiff has also sought discovery of post-Cherokee litigation estimates, prepared for internal use by IHS in the immediate aftermath of that adverse decision. Naturally, IHS was concerned about its potential exposure to additional liability should other tribes begin to allege that they were similarly situated when compared to the plaintiffs in the Cherokee case. IHS and HHS believed it should assess the potential liability for such claims as a part of its litigation strategy in addressing pending and potential litigation, as well as the potential impact on current and future agency policies related to ISDA contracting. Id. ¶¶ 11, 14, 15; Defs.’ Ex. B ¶¶ 7, 10. IHS, HHS, as well as the Office of Management and Budget of the Executive Office of the President (“OMB”), the agency responsible for the budget of all federal agencies, wanted to consider the general extent of any financial exposure resulting from the Cherokee decision under several different scenarios. Defs.’ Ex. A ¶¶ 11, 14, 15, 18, 26; Defs.’ Ex. B ¶¶ 7, 8, 10.

Ron Demaray, an employee of IHS, was tasked with quantifying the agency’s potential financial exposure resulting from Cherokee. Defs.’ Ex. A ¶ 15; Pl.’s Ex. 3 at 110. His financial assessment was intended for use (1) by the agency and its attorneys in preparing for the pending litigation and (2) by policy decision-makers in evaluating whether any agency policies would need reconsideration in light of the Cherokee decision and its potential financial consequences. Defs.’ Ex. A ¶ 15; Defs.’ Ex. B ¶ 7; Pl.’s Ex. 3 at 136-38; Pl.’s Ex. 2 at 166-67. Mr. Demaray used the CSC shortfall data as his starting point. Defs.’ Ex. A ¶¶ 20, 30. He received legal input from agency counsel about establishing parameters for the estimate, such as taking into account some legal

defenses generally available to the agency, and the contours of the pending litigation. Id. ¶¶ 19, 20; Pl.’s Ex. 3 at 157-60. Between March 11 and March 29, 2005, Mr. Demaray began to adjust the shortfall data, taking into account both the advice of counsel and his personal and professional opinions about the inherent problems with the CSC shortfall data (discussed more fully below). Defs.’ Ex. A ¶ 20; Pl.’s Ex. 3 at 146-47. By March 29, Mr. Demaray had prepared several different versions of his litigation assessment, but each iteration generally considered the worst-case scenario for IHS, i.e., that all other tribal contractors made claims for their CSC shortfall for all years, that they were similarly situated in all respects with the tribal contractors who had prevailed before the Supreme Court, and that each contractor would ultimately satisfy its burden of proof in some forum. Defs.’ Ex. A ¶ 20. The estimates were not shared outside of IHS, HHS, and OMB.³ Id. ¶¶ 21-29; Pl.’s Ex. 2 at 167; Pl.’s Ex. 3 at 137-38, 157, 161.

Discovery Related to the Post-Cherokee Litigation Estimates. On May 27, 2005, Plaintiff propounded, inter alia, Request for Production 3, which sought “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 due to IHS’s underpayment of Tribal contract support cost requirements from 1993 through the present.” Pl.’s Ex. 4 at 5-6. The request contained numerous sub-parts. Id.

On July 14, 2005, Defendants timely objected that the Request sought documents that were

³ Mr. Demaray does not regularly prepare estimates similar to the post-Cherokee litigation exposure estimates. Pl.’s Ex. 3 at 138. The closest similar activity occurred in response to a congressional request for information. Id. at 139-40. The agency’s response, however, was different in kind from the post-Cherokee estimate, because the response to the congressional inquiry was a recitation of shortfalls, while the litigation exposure estimate contained adjustments. Id. at 146-47. Defendants have already produced IHS’s response to the congressional inquiry. Defs.’ Ex. C.

irrelevant, not reasonably calculated to lead to the discovery of relevant evidence, overbroad, and unduly burdensome. Id. at 4-5, 6-7. Defendants also objected that it improperly sought documents protected from discovery by the attorney-client, deliberative-process, and work-product privileges and did not produce any documents. Id. at 2, 4-5, 6-7.

In early August, Defendants' counsel received a letter from Plaintiff's counsel asking Defendants to either withdraw certain objections or to supplement their discovery responses to Plaintiff's Requests for Production. Pl.'s Ex. 7; Defs.' Ex. D. By letter dated August 15, 2005, Defendants responded that they had fully complied with their discovery obligations. Pl.'s Ex. 7. In addition, Defendants noted that Plaintiff's objections were untimely and were therefore waived under Local Rules 26.6 and 37.1. Id. Nonetheless, Defendants endeavored to address some of Plaintiff's concerns and further supplement its responses. Id. Plaintiff did not thereafter file a motion to compel, but instead served a Third Set of Discovery Requests, dated August 16, 2005. Pl.'s Ex. 5. These requests, in the form of both document production requests and interrogatories, again sought the details of internal agency damage calculations. Id. at 3-5. This was also the first time Plaintiff formally requested CSC shortfall data in electronic format. Id. at 7.

Defendants again objected to, inter alia, the irrelevance of these new discovery requests, and the fact that the requests pertaining to internal damage estimates sought materials protected by the attorney-client, deliberative-process, and work-product privileges. Id. at 3-8. Defendants also objected to the fact that the discovery sought was largely duplicative of Requests for Production 2 and 3, to which Defendants had already lodged objections that Plaintiff failed timely to challenge under Local Rule 26.6. Id.

On September 20, 2005, Plaintiff deposed Douglas Black, Director of IHS's Office of Tribal

Programs and Mr. Demaray's supervisor. Plaintiff's counsel questioned Mr. Black regarding the post-Cherokee litigation estimate. Pl.'s Ex. 2 at 165-67. Defendants' counsel objected to this line of questioning as invading the work-product, attorney-client, and deliberative-process privileges, id. at 157-67, but permitted Mr. Black to answer generally about the purpose of preparing the estimate, id. at 166-67. Mr. Black described it as "[a] response to the Supreme Court decision, potential risk identification, in a very broad manner, potential risk." Id.

At Mr. Demaray's deposition on September 22, 2005, Plaintiff's counsel asked whether Mr. Demaray had ever prepared an estimate of the potential financial impact on IHS of the Cherokee decision. Mr. Demaray testified that he had. Pl.'s Ex. 3 at 110. Mr. Demaray testified that he understood it was necessary to estimate the agency's potential litigation exposure because of the pendency of other litigation related to Cherokee, id. at 133, and that he was asked to do so in late March of 2005, immediately after the Cherokee decision was issued, id. at 110-11. At the time of his deposition, he could not recall the precise genesis of the request to estimate the potential litigation exposure. Id. at 109, 110, 113. He testified that he prepared the estimate himself, id. at 113, but that he had conferred with counsel as part of its preparation, id. at 157-60. He also testified that he had submitted the estimate to Mr. Black and most likely other individuals, but was unable at that time to recall additional individuals to whom he submitted it. Id. at 137-38, 157. He was certain, however, that the litigation exposure estimate was intended for IHS attorneys, because it pertained to agency litigation. Id. at 136-38, 157. When questioned about the actual estimate and how he prepared it, however, Defendants' counsel objected on the bases of the attorney-client, deliberative-process, and work-product privileges and instructed Mr. Demaray not to answer. Id. at 111, 134, 167.

SUMMARY OF COUNTER-ARGUMENTS

All of the information and documents that Plaintiff seeks in its Motion to Compel are irrelevant to class certification and, for the most part, privileged. There is also a serious discrepancy between, on the one hand, the substance of Plaintiff's Motion, and, on the other hand, Plaintiff's proposed order. Although Plaintiff's proposed order would have the Court compel responses to Plaintiff's Requests for Production 2, 3, 5, 6, and 23, Interrogatories 23 and 25, and provide responses outside of the time frame set forth in the First Amended Complaint (1993-2001),⁴ see Pl.'s Ex. 1, the only written discovery requests that Plaintiff's Motion actually addresses are Request for Production 3 and Interrogatory 23 (seeking litigation damage estimates) and Request for Production 23 (seeking CSC shortfall data in electronic format), see Pl.'s Mem. at 5-6. As Plaintiff has failed to address Defendants' objections to any discovery requests other than these three requests, all other challenges to Defendants' objections have been waived.

With respect to the issues actually presented to the Court, Plaintiff's Motion to Compel responses to Request for Production 3 and Interrogatory 23 should be denied as untimely, irrelevant to class certification, and, with respect to discovery pertaining to litigation damage estimates, privileged. These objections are based on the fact that Plaintiff failed to move under Local Rules 26.6 and 37.1 to challenge Defendants' objections in a timely manner, that the agency's internal damage estimates are irrelevant to numerosity, typicality and commonality (and even to the

⁴ In the proposed order submitted with its Motion, Plaintiff drafted language that would have the Court compel the production of CSC shortfall data for years outside of the time frame set forth in the First Amended Complaint, which is 1993-2001. Plaintiff, however, does not even mention this issue in its Motion, let alone attempt to explain how such CSC shortfall data could possibly be relevant to this case.

underlying claims), and that they are protected by the work-product, attorney-client, and deliberative-process privileges, as demonstrated by the declarations of Robert Mc Swain (Defs.' Ex. B), Ronald Demaray (Defs.' Ex. A), and the attached privilege log (Defs.' Ex. E). Similarly, although the Motion to Compel Mr. Demaray and Mr. Black's testimony pertaining to internal litigation estimates is the only issue timely before the Court, the Motion to Compel this testimony should be denied as irrelevant and privileged.

Finally, Plaintiff's Motion to Compel the production of CSC shortfall data in electronic format in response to Request for Production 23 should be denied as untimely because it is duplicative of prior discovery requests, as well as irrelevant. By the time Plaintiff specified the format it preferred--to which it is not necessarily entitled under Federal Rule of Civil Procedure 34(b)--Defendants had already complied with its discovery obligations relating to the production and had produced responsive documents in paper format, despite their irrelevance to class certification.

ARGUMENT

I. THE ONLY PORTION OF PLAINTIFF'S MOTION TO COMPEL THAT IS TIMELY BEFORE THE COURT PERTAINS TO DEPOSITION TESTIMONY.

The Court need not even address the majority of Plaintiff's Motion, because the only discovery dispute properly before this Court concerns Plaintiff's deposition questions to Mr. Demaray and Mr. Black regarding the post-Cherokee litigation exposure estimates. Styling its Motion in part as one to "enlarge time," Plaintiff apparently hopes to evade Local Rule 26.6. District of New Mexico Local Rule 26.6 provides that a party wishing to challenge objections to written discovery requests must proceed under Rule 37.1 within twenty (20) calendar days of service of an objection, and "[f]ailure to proceed within this time period constitutes acceptance of the objection."

Accordingly Plaintiff had until August 8, 2005, to challenge Defendants' timely objections by way of a motion to compel under Rule 37.1. Plaintiff failed to do so. Plaintiff then attempted to circumvent the local rule by re-serving largely identical interrogatories, including Interrogatory 23, Pl.'s Ex. 5 at 4, and then moving to "enlarge time" when the period for making such a motion has long passed. Plaintiff has not set forth any cause for this untimely request for an 'extension,' let alone good cause. Orderly discovery and adherence to the local rules militate that Plaintiff's Motion for an "extension" be denied.

II. THE INFORMATION AND DOCUMENTS SOUGHT ARE IRRELEVANT.

This is a contract case in the midst of class certification discovery. As noted, ISDA contracts, like all contracts, are negotiated between two parties, are in effect for a limited period of time, and involve funding specific to the programs or services under contract. See 25 U.S.C. §§ 450f, 450j(c), 450j-1(a), 450l(a)(2). Consequently, every claim of breach of an ISDA contract is necessarily individualized. Each claim may also give rise to specific legal defenses that apply to it alone, such as release, accord and satisfaction, and in the case of ISDA contracts, failure to exhaust. See, e.g., 41 U.S.C. § 605(a). As pertinent here, the claims and defenses involve (1) whether Plaintiff has properly and timely presented its claims, as is required by the CDA and any other applicable statute of limitation, (2) whether all other jurisdictional prerequisites have been satisfied, i.e., whether the claims are ripe and not moot, whether there has been final agency action, and whether Plaintiff has in fact suffered a concrete and particularized injury in fact, (3) what IHS promised in the specific contracts that Plaintiff alleges were breached, (4) whether these promises were, in fact, breached, and (5) whether Defendants have any defenses to these claims, such as release, waiver, or res judicata.

Given the nature of the claims and defenses in this case, the only factual--and thus

discoverable--information and documents that are relevant are (1) documents demonstrating whether or not Plaintiff (and any other tribal contractor) has properly and timely exhausted its claims, (2) Plaintiff's (and any other tribal contractor's) contracts and associated contractual documents, (3) documents setting forth CSC amounts that IHS awarded to Plaintiff (and any other tribal contractors) under its contracts, and (4) any release documents, prior claims, and prior settlements that are applicable to Plaintiff's (or any other tribal contractor's) contracts or claims. The fact that Plaintiff seeks to represent a putative class does not change the nature of the discovery related to the underlying dispute; in fact, the class certification determination is largely legal, *i.e.*, whether, "after a rigorous analysis," the elements of Rule 23 have been satisfied. See General Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982).

The post-Cherokee litigation exposure estimates are entirely irrelevant to the claims and defenses in this case. At best, they are generalized guesses. They were developed using assumptions and opinions that do not parallel the quantum of proof necessary to prove a claim. Defs.' Ex. A ¶ 20. In addition, the estimates reflect worst-case scenario assumptions and lack any nexus to the merits of the actual claims and defenses in the litigation, much less to class certification issues. Id. For example, Mr. Demaray did not compare the CSC shortfall data he used with each tribal contractor's contracts, award documents, or indirect cost rate agreements for any particular year. Id. Nor did Mr. Demaray review the specific contractual promises made by IHS in any ISDA contract. Id. Nor did he consider any other tribe-specific factors, including whether any tribal contractors had released IHS from any further claims under their contracts. Id. Instead, he made a hurried assessment, based on faulty underlying data, in order to give his supervisors an idea, even if largely overstated, of the worst-case scenarios facing the agency. Id. ¶¶ 20, 21, 30. Finally, the estimates do not reflect IHS's

final considered judgment over a more extended period of time. Defs.' Ex. B ¶ 14; Defs.' Ex. A ¶ 14.

Courts have been skeptical of the relevance of analogous liability estimates related to contract disputes, as expressed by an insurance company establishing case reserves or reinsurance contracts. See, e.g., Am. Med. Sys. v. Nat'l Union Fire Ins. Co., 1999 WL 781495, at **1-2 (E.D. La. Sept. 29, 1999) (denying motion to compel discovery of insurer's reinsurance agreements for risk insured in disputed policy as irrelevant); Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 139 F.R.D. 609, 611-12 (E.D. Pa. 1991) (Rhone I) (describing reinsurance information as "at best evidence of undisclosed unilateral intention, which would not be material to the interpretation of the insurance contract here at issue"), upheld on reconsideration, Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 1991 WL 237636, at *4 (E.D. Pa., Nov. 7, 1991) ("Because reserves do not amount to an admission of liability, and because there may have been reasons for setting reserves unrelated to the instant claims, such information is of little relevance and is potentially misleading." (internal citations omitted)); Leski, Inc. v. Fed. Ins. Co., 129 F.R.D. 99, 106 (D.N.J. 1989) (recognizing that alleged relevance of reinsurance information is "very tenuous" because such decisions are based on "business considerations and not questions of policy interpretation").

As one court explained in denying a motion to compel on relevance grounds, "estimates of potential liability do not normally entail an evaluation of coverage based upon a thorough factual and legal consideration." Rhone I, 139 F.R.D. at 613. This analysis directly applies to the litigation estimates here. Mr. Demaray's estimates were not based on factual or legal scrutiny of each tribe's contractual claims, but rather evaluated the potentiality of liability in the aggregate, based on a variety of assumptions that would be unlikely to bear out in reality. Defs.' Ex. A ¶¶ 20, 21, 30.

Moreover, in providing the estimates to agency officials, at no time did Mr. Demaray represent that he had full confidence in the underlying data; in fact, just the opposite. *Id.* ¶ 30. He explained that the estimates were based on figures that he could not verify and that if the agency were called upon to determine actual CSC shortfalls, much more work would be necessary. *Id.* The post-Cherokee estimates, based on unreliable and unverified data, are not reasonably calculated to lead to discoverable information related to either class certification or the merits of this case.⁵

III. THE POST-CHEROKEE LITIGATION ESTIMATES ARE PRIVILEGED.

A. The Litigation Estimates are Protected by the Work-Product Doctrine.

The work-product doctrine has long preserved a “zone of privacy in which a lawyer can prepare and develop legal theories and strategy ‘with an eye toward litigation’ free from unnecessary intrusion by his adversaries.” United States v. Adlman, 134 F.3d 1194, 1196-97 (2d Cir. 1998) (quoting Hickman v. Taylor, 329 U.S. 495, 510-11 (1947)). Federal Rule of Civil Procedure 26(b)(3) codifies work-product protection for documents and tangible things, while intangible work product “reflected . . . in interviews, statements, memoranda, correspondence, briefs, mental

⁵ The CSC shortfall data, underlying the litigation estimates, is itself entirely irrelevant to class certification and the merits of this action and is demonstrably unreliable. Plaintiff’s contracts do not mention that IHS will award an amount set forth in a shortfall report. See, e.g., Defs.’ Ex. F. In fact, shortfall data is not generated to ascertain what any particular ISDA contract promised; its purpose is to provide estimated information to Congress pursuant to the reporting requirement in 25 U.S.C. § 450j-1(c). Defs.’ Ex. A ¶¶ 6, 7. CSC shortfall amounts utilize unaudited or projected costs of running programs, outdated or preliminary indirect cost rates, and other non-final amounts. *Id.* ¶ 7. The CSC shortfall data is also unreliable. Mr. Demaray has been emphatic about the inherent inaccuracy and incomplete nature of the CSC shortfall data. He has identified significant discrepancies and inaccuracies with the CSC shortfall data over the years. *Id.* ¶¶ 9, 30, 31; Pl.’s Ex. 3 at 117-20, 149-55, 232. As these inaccuracies have been identified, Mr. Demaray and his colleagues have instructed the Area Offices to correct these mistakes on a prospective basis--but earlier shortfall data has never been adjusted to correct these problems. Defs.’ Ex. A ¶ 9.

impressions, personal beliefs, and countless other tangible and intangible ways” remains protected under Hickman. See 329 U.S. at 505; see also In re Cendant Corp. Sec. Litig., 343 F.3d 658, 662 (3d Cir. 2003); Comm of Mass. v. First Nat’l Supermarkets, Inc., 112 F.R.D. 149, 152 (D. Mass. 1986) (denying motion to compel answers to interrogatories seeking to reproduce contents of tangible work product protected under Rule 26(b)(3) as invading broader work-product protection of Hickman); United States v. Dist. Council of New York City, 1992 WL 208284, at *7 (S.D.N.Y. Aug. 18, 1992) (“Although the work product doctrine is most commonly applied to documents and things, unjustified disclosure of the opinions or mental processes of counsel may occur when questions are posed which seek information at depositions or in interrogatories.”) (collecting cases).

Under Rule 26(b)(3), before “a party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation . . . by or for another party or by or for that other party's representative” the party seeking the work product must make a showing of “substantial need” and an inability “without undue hardship to obtain the substantial equivalent of the materials by other means.” Fed. R. Civ. P. 26(b)(3). While work-product protection is often couched in terms of the attorney’s role, the Rule also protects work product prepared by a party. The plain language of the Rule “protects materials prepared for any litigation . . . as long as they were prepared by or for a party to the subsequent litigation.” Frontier Ref. Inc. v. Gorman-Rupp Co., Inc., 136 F.3d 695, 703 (10th Cir. 1998) (quoting FTC v. Grolier Inc., 462 U.S. 19, 25 (1983)).

“Analysis of one’s case in anticipation of litigation is a classic example of work product, and receives heightened protection under Fed. R. Civ. Proc. 26(b)(3).” Adlman, 134 F.3d at 1196-97 (internal citations and quotation marks omitted). The notes to Rule 26(b)(3) explain that requiring litigants to make a special showing before discovering trial preparation materials “reflects the view

that each side's informal evaluation of its case should be protected, that each side should be encouraged to prepare independently, and that one side should not automatically have the benefit of the detailed preparatory work of the other side." Fed. R. Civ. P. 26(b)(3) advisory committee's notes (1970 amendments); Adlman, 134 F.3d at 1199. As one district court observed, "a party, in managing its litigation, should not be forced to provide materials to its opponent that necessarily reflect its lawyers' mental impressions regarding the litigation and containing its agents' mental impressions concerning the cost of the litigation." Rhone I, 139 F.R.D. at 615.

In Rhone I, the court upheld work-product protection for case reserves, which the court reasoned were "an assessment of the value of the claim taking into consideration the likelihood of adverse judgment." 139 F.R.D at 613. The court found that the essence of the reserve was an estimate of potential liability, and did not typically entail factual and legal scrutiny of any particular claim. See id. In addition, where the reserves were "established based on legal input, the results and supporting papers most likely will be work-product and may also reflect attorney-client privilege communications." Id. at 614. Not only would individual case reserve figures "reveal the mental impressions, thoughts, and conclusions of an attorney in evaluating a legal claim," but aggregate reserve figures also "may give some insight into the mental processes of the lawyers." Id. The court noted that:

[T]his is not a situation where mental impressions are merely contained within and comprise a part of another document and can easily be redacted. Instead, the aggregate and average figures are derived from and necessarily embody the protected material. They could not be formulated without the attorney's initial evaluations of specific legal claims.

Id. at 614-15; see also Simon v. G.D. Searle & Co., 816 F.2d 397, 406 (8th Cir. 1987) ("Some of the areas in which the work-product doctrine forecloses discovery are easily comprehended . . . One

obvious example is the need for protection against forced revelation of a party's evaluation of his case . . .” (quoting Edward H. Cooper, Work-Product of the Rules Makers, 53 Minn. L. Rev. 1269, 1283 (1969)); Montgomery v. Aetna Plywood, Inc., 1996 WL 189347, at *2 (N.D. Ill. Apr. 16, 1996) (denying motion to compel production of valuation reports produced in anticipation of litigation as protected work product).

The post-Cherokee litigation exposure estimates sought by Plaintiff have many indicia of protected work product, both within the meaning of Rule 26(b)(3)'s protections of tangible documents prepared by a party or an attorney in anticipation of litigation, see Fed. R. Civ. P. 26(b)(3), and within Hickman's broader protection against disclosure to an adverse party of an attorney's mental impressions, opinions and conclusions regarding a legal claim.

1. The post-Cherokee litigation estimates were prepared by a party in response to pending and potential litigation, with the input of attorneys.

First, there can be no doubt that Mr. Demaray, one of Defendant's agents, prepared the draft estimates “in anticipation of litigation.” Mr. Demaray repeatedly testified at his deposition that he was asked to prepare the estimate in direct response to the Cherokee decision and the related, pending or future litigation, including this action. Pl.'s Ex. 3 at 133, 157; see also Pl.'s Ex. 2 at 167. Accordingly, the draft estimates constitute tangible materials prepared by a party in anticipation of litigation, and are therefore protected from discovery under Rule 26(b)(3), absent a showing of undue burden or substantial hardship.

Second, like the case reserve figures in Rhone I that were mere estimates of potential liability, prepared in anticipation of litigation, and integrating attorney advice, Mr. Demaray prepared the litigation exposure estimates using parameters that integrated the requests and advice of counsel.

Defs.' Ex A ¶¶ 15, 19, 20-24; Pl.'s Ex. 3 at 157-60. Therefore the estimates are inherently opinion work-product material, see Rhone I, 139 F.R.D. at 614-15, and enjoy an even higher level of protection than "fact work product." Frontier Ref., 136 F.3d at 704 n.12; see also Rhone I, 139 F.R.D. at 614 (protecting as work product case reserve figures calculated by party using legal input from counsel because such input is among the "mental processes that go to the essence of the lawyer's expertise--establishing the value of a legal claim and the fees and expenses that may be incurred in its defense" and that "litigation's ultimate cost to the client has great significance in determining whether a lawsuit will be tried or settled and, if settled, for what amount").

2. Defendants have already produced the underlying shortfall data.

In general, work-product protection does not protect the "facts concerning the creation of work-product or facts contained within work-product," nor does it "preclude inquiry into the mere fact of an investigation." Resolution Trust Corp. v. Dabney, 73 F.3d 262, 266 (10th Cir. 1995). Here, "the mere fact" that IHS conducted post-Cherokee litigation exposure estimates has not been concealed. Defendants have submitted Mr. Demaray's declaration that describes the facts concerning the creation of the exposure estimates. Most of all, Defendants have already produced the underlying data relied upon by Mr. Demaray in preparing the estimates. To the extent that Mr. Demaray adjusted the data, those adjustments were directly informed by attorney input and his own opinions for purposes of litigation. Accordingly, Plaintiff is not entitled to them.⁶

⁶ Plaintiff relies on two cases that are inapposite. Pl.'s Mem. at 14. First, Resolution Trust Corp. v. Dabney involved an attorney who improperly instructed a witness not to answer any questions and made blanket work-product objections to questions "which clearly did not call for work product material," including facts pertinent to the party's claim. See 73 F.3d at 266. Here, Defendant's counsel only instructed Mr. Demaray not to answer the specific questions that would reveal quintessential work product. Second, In Re Grand Jury Proceedings involved a

Plaintiff asserts that it is entitled to the litigation risk exposure estimates because “IHS has a pre-existing statutory duty to compile shortfall data of this kind and report on it to Congress,” and claims that “[t]he damage estimate is merely a compilation of the facts contained in these mandatory records.” Mem. at 16. These assertions are wholly without basis. The statutory requirement does not call for any such litigation assessment. See 25 U.S.C. 450j-1(c). Moreover, Mr. Demaray testified that the estimates were not simply CSC shortfall data and that he did not usually create estimates similar to the one he was asked to prepare in the aftermath of Cherokee. Pl.’s Ex. 3 at 138.

3. Plaintiff cannot demonstrate a substantial need for the estimates.

As discussed infra in Part II, the post-Cherokee litigation exposure estimates constitute “information of very tenuous relevance, if any relevance at all, as well as constituting work product material.” Rhone I, 139 F.R.D. at 613. Necessarily, therefore, Plaintiff cannot demonstrate a substantial need for the estimates, nor can refusing to disclose them cause an undue burden.

Plaintiff relies on Wheeling-Pittsburgh Steel Corp. v. Underwriter Laboratories, Inc., 81 F.R.D. 8, 11 (N.D. Ill. 1978), for the proposition that work-product did not protect a defendant’s employee from answering deposition questions concerning the calculation of damages. Plaintiff, however, fundamentally misunderstands Wheeling-Pittsburgh. In that case, the defendant brought a counterclaim for damages against the plaintiff. See 81 F.R.D. at 11. However, when the plaintiff sought to depose the defendant’s employee on the defendant’s own counterclaim damage

non-employee accountant who compiled discoverable business records into worksheets. See 658 F.2d 782, 784 (10th Cir. 1981). In rejecting work-product protection for the worksheets, the court emphasized several key factual findings, namely that the worksheets reflected none of the attorney’s mental impressions, and that the accountant was not within the corporate structure. See id. at 784-85. Here, as discussed above, the estimates are more than mere compilations of already discoverable business records prepared by a nonparty.

calculations, the defendant's employee improperly refused, claiming work-product. See id. The defendant in that case, therefore, balked at providing discovery on an issue where the defendant actually bore the burden of proof at trial--its own counterclaim damages. See id. at 12. In the instant case, Defendants do not bear the burden of calculating Plaintiff's damages. Wheeling-Pittsburgh is entirely inapplicable to the facts of this case.⁷

Plaintiff claims further that Defendants are "running" from the shortfall reports, "but refuse to permit the Plaintiff access to the source data necessary to explore their new 'more accurate' data." Pl.'s Mem. at 18. These assertions are also incorrect. Defendants have already permitted Plaintiff access to the underlying CSC shortfall data. Mr. Demaray has emphasized that the CSC shortfall data itself contains many gaps, discrepancies, and inaccuracies. Defs.' Ex. A ¶¶ 9, 30, 31. He also made this point to the decision makers--that there were serious problems with the CSC shortfall data underlying his estimates. Id. ¶ 31. At bottom, because the financial exposure estimates are simply irrelevant to the question of class certification, Plaintiff cannot show a "substantial need" for the estimates. And if Plaintiff cannot even meet the standard for "fact work product," it is impossible to meet the higher standards for opinion work product.⁸ See Frontier Ref., 136 F.3d at 704.

4. Mr. Demaray's deposition testimony was consistent and proper.

By mischaracterizing the nature of questions and sequence of testimony that occurred at Mr. Demaray's deposition, Plaintiff has suggested that Mr. Demaray fabricated his recollection that he

⁷ Not only is Wheeling-Pittsburgh inapplicable to the facts of this case, but Plaintiff's reliance upon that precedent is remarkable in light of Plaintiff's own expressed difficulty in providing discovery on the basis for its damage claims. Defs.' Ex. G.

⁸ Plaintiff's Motion does not argue, nor could it under the facts, that work-product protection has been waived.

consulted with counsel in preparing the litigation exposure estimates. Pl.'s Mem. at 10-11, 15. Even a cursory read of Plaintiff's own selection from Mr. Demaray's deposition, however, shows that no such impropriety occurred. Mr. Demaray was unshakeable in his understanding that he was asked to estimate the agency's financial exposure because of the Cherokee decision and pending litigation, and further, that the estimate was ultimately destined for agency counsel and other agency decision makers. Pl.'s Ex. 3 at 133, 136-38, 157.

Mr. Demaray was candid in his inability to recall precisely who passed down the instruction to generate the estimate in the first place, see, e.g., id. at 109, 113, or how the estimate was ultimately transmitted to counsel and to the agency decision makers, only that he was confident that those individuals were the ultimate recipients of the estimates, see, e.g., id. at 136-38; Defs.' Ex. A ¶¶ 14-15. While Mr. Black did indeed testify that, to his knowledge, attorneys were not involved in preparing the estimate, Pl.'s Ex. 2 at 159, Mr. Black did not actually possess personal knowledge of what Mr. Demaray relied upon in developing the estimates. Mr. Demaray is the one who prepared the estimates, not Mr. Black. Pl.'s Ex. 3 at 113.

Plaintiff's counsel generally asked circuitous and confusing questions that frequently mischaracterized the deponent's own testimony. Plaintiff should not be surprised that when Mr. Demaray was asked a simple, direct question, namely "[d]id you ask an attorney for advice in developing your estimate?" Mr. Demaray was able to answer with a simple, direct answer, "[y]es." Id. at 158-59. Despite Plaintiff's efforts to impute falsification of testimony, Mr. Demaray's deposition was entirely consistent. There is no contradiction, for example, in stating that he believed he did the work of generating the estimate on his own, id. at 113, and his recollection of asking the attorney advice about developing the estimate, id. at 157-59, such that the estimate "included some

adjustments” as “an assessment of potential liability,” *id.* at 146. It is improper for Plaintiff to make speculative and unfounded challenges to Mr. Demaray’s integrity in order to avoid the application of work-product protection.

B. The Litigation Estimates are Protected by the Attorney-Client Privilege.

“The attorney-client privilege is one of the oldest recognized privileges for confidential communications.” *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998). The privilege protects confidential communications between an attorney and client relating to a legal matter for which the client has sought legal advice. *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The purpose of the privilege is to “encourage full and frank communication between attorneys and their clients and thereby to promote broader public interests in the observance of law and administration of justice.” *Id.* Although the privilege protects communications, it does not protect the otherwise discoverable facts underlying the communications. *See id.* at 395-96. In the government context, the privilege applies to communications between an agency and the attorneys that represent it. *See Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997). Here, the estimates were communicated to attorneys for the purpose of obtaining legal advice on behalf of the agency about pending litigation in the aftermath of *Cherokee*. Pl.’s Ex. 3 at 137-38, 157; Defs.’ Ex. A ¶¶ 16, 21-24. Thus, they are shielded from disclosure by virtue of the attorney-client privilege.

Plaintiff’s argument, that the post-*Cherokee* litigation exposure estimates are “facts” that cannot be shielded by the attorney-client privilege, is without merit. Setting aside the grave relevance and reliability concerns, the litigation estimates are not discoverable as “facts.” First, Defendants have already disclosed the shortfall data that underlies the estimates. Defs.’ Ex. A ¶¶ 32-39. Mr. Demaray evaluated the aggregated data to reflect both his opinion about the shortfall data

and attorney advice. Id. ¶¶ 20. Thus, disclosure of the litigation estimates would disclose privileged opinions, not facts. Disclosing the litigation estimates would have the effect of asking Mr. Demaray to testify about both his impressions that he communicated to an attorney and communications made by counsel. Simply because these communications are expressed in the form of a spreadsheet does not vitiate the privilege. “Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary.” Upjohn, 449 U.S. at 396 (quoting Hickman, 329 U.S. at 516 (Jackson, J. concurring)).

There has been no waiver of the attorney-client privilege. The post-Cherokee litigation exposure estimates were only shared (1) within IHS, (2) with agencies (HHS and OMB) that have decision-making and oversight authority over IHS. Defs.’ Ex. A ¶¶ 16-29; Pl.’s Ex. 3 at 137-38, 157. Accordingly, Plaintiff’s argument that the estimates were too widely circulated within the Executive Branch to maintain protection of the privilege fails on its face. These litigation estimates were uniquely prepared, and were not shared. Pl.’s Ex. 138-40, 146-47.

C. The Litigation Estimates are Protected by the Deliberative-Process Privilege.

The litigation estimates are also protected by the deliberative-process privilege, which protects inter-agency and intra-agency deliberations and advice, the disclosure of which is injurious to the federal government’s decision-making functions because it tends to inhibit the frank and candid discussion necessary to effective government. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150-52 (1975); EPA v. Mink, 410 U.S. 73, 87 (1973). The privilege is ancient and is “predicated on the recognition that the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl.” Dow Jones & Co. v. United States Dep’t of Justice, 917 F.2d 571, 573 (D.C. Cir. 1990) (internal quotation marks omitted). “[A]n

agency often needs to rely on the opinions and recommendations of . . . its own employees. Such consultations are an integral part of the deliberative process; to conduct this process in public view would inhibit frank discussion of policy matters and likely impair the quality of decisions.” Ryan v. Dep’t of Justice, 617 F.2d 781, 789-90 (D.C. Cir. 1980).

An agency may sustain its burden of demonstrating the applicability of the privilege by showing that the contested information is “predecisional and deliberative.” Access Reports v. Dep’t of Justice, 926 F.2d 1192, 1194 (D.C. Cir. 1991). The “predecisional” prong permits ‘the government to withhold documents and other materials that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.’’ In re Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997) (internal citation and quotation marks omitted). The privilege protects from disclosure “subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.” Coastal States Gas Corp. v. Dep’t of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980). “[W]hile the agency need not show ex post that a decision was made, it must be able to demonstrate that ex ante, the document for which executive privilege is claimed related to a specific decision facing the agency.” Tigue v. United States Dep’t of Justice, 312 F.3d 70, 80 (2d Cir. 2002). “The key question in identifying deliberative material is whether disclosure of the information would discourage candid discussion within the agency.” Access Reports, 926 F.2d at 1195 (citation and quotation marks omitted). Moreover, “[j]ust because part of a document contains numbers and mathematical calculations does not necessarily mean that it is factual” for the purposes of deliberative process. See Jowett, Inc. v. Dep’t of Navy, 729 F. Supp. 871, 877 (D.D.C. 1989).

Here, the post-Cherokee litigation exposure estimates were prepared to help the agency

candidly evaluate the consequences of that decision on more than simply the pending litigation strategy, but also to consider whether agency policies relating to tribal contracting would have to be reconsidered. Defs.’ Ex. B ¶ 10. More specifically, the estimates were used in discussing the policy implications of the Cherokee decision including its potential impact on: (1) the future of ISDA contracting (i.e., the agency’s ability to enter into contracts and specific new terms that would be desirable); (2) IHS’s budget preparation; (3) the structure of the IHS appropriation; and (4) the source of funds for the payment of any judgments entered as a result of the Cherokee decision. Id. The estimates reflected advisory opinions, recommendations, and deliberations related to specific liability issues, the disclosure of which would clearly discourage candid discussions within the agency. Id. ¶ 14. Accordingly, the estimates were both deliberative and predecisional.⁹

III. PLAINTIFF IS NOT ENTITLED TO DUPLICATIVE PRODUCTION OF SHORTFALL DATA IN ELECTRONIC FORMAT.

Plaintiff also moves to compel CSC shortfall data in electronic format. CSC shortfall, regardless of format, is not reasonably calculated to lead to the discovery of relevant evidence. See supra n.5. Nonetheless, Defendants have diligently produced CSC shortfall data and have complied with Federal Rule of Civil Procedure 34(b) which requires “[a] party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.” (emphasis added). This rule is written in the alternative. Defendants organized the discovery responses and labeled them to correspond

⁹ There has also been no showing that the deliberative-process privilege has been overcome by Plaintiff’s assertions of need. As explained above, Plaintiff has been provided with the underlying CSC shortfall data and, moreover, the litigation estimates are simply irrelevant to the question of class certification and the merits of this action.

with the categories in Plaintiff's requests. Plaintiff is not entitled to a wholly duplicative round of production.

Furthermore, Plaintiff seeks something that does not exist. Contrary to Plaintiff's assertions, there is no master database of shortfall data, no centralized Excel document that Defendants have kept from Plaintiff's grasp. Defs.' Ex. A ¶¶ 31. Dr. David Trigg Mather, whose affidavit Plaintiff relies upon to support the assertion that all of the shortfall data documents "are readily available and can be furnished to the Plaintiff in electronic format," Pl's Mather Aff. at 3, is belied by his admission at deposition that he has no personal knowledge of how IHS maintains its shortfall data, and that his existing knowledge is limited to what agency officials told him. Defs.' Ex. H at 180-81, 183-85. While it is true that Mr. Demaray does maintain some CSC shortfall data in spreadsheets, there is no question that the overall shortfall data is maintained in multiple formats.

Ultimately, the bulk of Plaintiff's argument relating to the need for shortfall data to be produced in electronic format devolves to a complaint that many of the pages produced were illegible. However, the first time Defendants even learned there was a legibility problem was in Plaintiff's Motion. Defs.' Ex. I. With this Motion, therefore, Plaintiff has sought to involve the Court in a dispute that was not the subject of a sufficient attempt to confer among the parties pursuant to Rule 37(a)(2)(B) and Local Rule 7.1. Since learning of the illegibility problems, Defendants have endeavored to cure the problem. Illegibility, therefore, is a non-issue, and does not confer upon Plaintiff the right to the electronic format.

CONCLUSION

For the reasons set forth above, Plaintiff's Motion to Compel and for an (untimely) Enlargement of Time should be denied in full.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2005, I sent, via electronic mail, a copy of Defendants' Opposition to Plaintiff's Motion to Compel Discovery and to Plaintiff's Untimely Motion for Enlargement of Time, with Exhibits, addressed to:

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