IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, INC., et al.,	)	
	)	
Plaintiffs,	)	No. 13-465 C
	)	(Judge Sweeney)
v.	)	
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

DEFENDANT'S RESPONSE TO THE COURT'S SEPTEMBER 20, 2016 ORDER REGARDING PAYMENT OF PLAINTIFFS' EXPENSES

Defendant, the United States, respectfully submits this brief in response to the Court's instruction – contained in the Court's September 20, 2016 Opinion and Order (Sept. 20 Decision) that granted plaintiffs' motion to compel – that the United States file a memorandum "[e]xplaining why the court should not require defendant 'to pay [plaintiffs'] reasonable expenses incurred in making the motion [to compel], including attorney's fees.'" Sept. 20 Decision at 81.

The Court's instruction in the Sept. 20 Decision was presumably based upon the language of RCFC 37(a)(5)***(A)***, which generally *requires* that the Court award reasonable expenses to the movant when the motion is granted, in its entirety, unless the opposing party's position was substantially justified. Subsequent to the Sept. 20 Decision, however, the United States Court of Appeals for the Federal Circuit granted in part the Government's petition for a writ of mandamus, which caused the Court to vacate part of the relief provided to plaintiffs in the Sept. 20 Decision. *See In re United States*, No. 17-104, 2017 WL 406243, *5-8 (Fed. Cir. Jan. 30, 2017); Order, Jan. 31, 2017, ECF No. 353.

As a result of the Federal Circuit's mandamus order, the ultimate resolution of plaintiffs' motion to compel was "granted in part and denied in part," requiring that the Court apply RCFC 37(a)(5)***(C)***, which provides that the Court *may apportion* the reasonable expenses for the motion. For the reasons addressed below, neither party should be awarded expenses related to plaintiffs' motion to compel. Federal courts applying Rule 37(a)(5)(C) routinely decline to apportion expenses when: (1) apportioning expenses would not advance the resolution of the case; (2) the opposing party's position was substantially justified; or (3) the award would be unjust. *See*, *e.g.*, *Confidential Informant 59-05071 v. United States*, 121 Fed. Cl. 36, 51 (2015) (declining to apportion expenses when further proceedings regarding fees would be counterproductive to resolution of the case). As we demonstrate, all of those factors militate against an apportionment of expenses here.

BACKGROUND

I. Plaintiffs' Motion To Compel

In November 2015, plaintiffs filed a motion to compel production of certain documents that we withheld for privilege. Pls. Mot. to Compel ("Pls. Mot."), ECF No. 270. After acknowledging that, "for months," the parties met and conferred regarding the Government's privilege assertions, plaintiffs explained that "guidance from the Court is needed" with respect to those assertions. Pls. Mot. at 1. Indeed, before plaintiffs filed their motion, the parties met and conferred on several occasions, the United States reconsidered several, previous assertions, and the parties narrowed the universe of specific documents as to which genuine disputes existed. *See* Def. Resp. to Pls. Mot. to Compel ("Def. Br.") at 3-5, ECF No. 284.

Upon filing their motion, plaintiffs sought three forms of relief: (1) a variety of categorical, legal determinations concerning the scope of the deliberative process and bank

examination privileges, and whether FHFA may assert those privileges; (2) a blanket instruction directing the Government to reevaluate all of its privilege log entries; and (3) an order directing the Government to produce fifty-eight documents protected by the presidential communications privilege, deliberative process privilege, and/or bank examination privilege that plaintiffs identified on Exhibit 1 to their motion.[1] *Id.* at 36-37. The United States submitted its opposition in January 2016, along with declarations from David Pearl (then-Executive Secretary, Department of the Treasury) and Christopher Dickerson (Senior Associate Director, Federal Housing Finance Authority (FHFA), Department of Enterprise Regulation), in which they formally invoked the deliberative process and bank examination privileges.

In May 2016, at the Court's request, the Government provided the Court with copies of the documents identified in Exhibit 1 to plaintiffs' motion for *in camera* review. In June 2016, the Government filed a declaration from Nicholas McQuaid (then-Deputy White House Counsel) in support of the Government's assertion of the presidential communications privilege with respect to four of those documents.

II. <u>The Court's September 20, 2016 Decision</u>

On September 20, 2016, the Court granted plaintiffs' request for production of the fifty-six contested documents identified in Exhibit 1 to its motion. *See generally* Sept. 20 Decision at 81. The Court largely adopted the Government's legal arguments regarding the scope and procedural requirements for the governmental privileges asserted. *See* Sept. 20 Decision at 20-21, 25 n.14.

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[1] Exhibit 1 to plaintiffs' motion identified fifty-eight documents. Having the opportunity to reevaluate those documents, the Government subsequently produced two documents identified on Exhibit 1. *See* Sept. 20 Decision at 80. The Court's opinion concerned the remaining fifty-six contested documents.

In the Court's analysis of the fifty-six contested documents, the Court declined to credit Mr. Pearl's and Mr. Dickerson's sworn declarations that the challenged documents met the substantive requirements for the deliberative process privilege because they reflected predecisional deliberations. *Compare*, *e.g.*, *id.* at 33-34 *with* Dickerson Decl. ¶¶ 20-22; *compare*, *e.g.*, Sept. 20 Decision at 59-62 *with* Pearl Decl. ¶¶ 26-29. Moreover, the Court determined that all of the documents as to which we asserted the deliberative process privilege were not "deliberative" because, in a few cases, the Court could not identify the authors or all recipients of the documents, *see*, *e.g.*, *id.* at 51 (documents 26-37), or the documents' deliberative nature was not "apparent on their face." *See*, *e.g.*, *id.* at 68 (documents 38-51). Nonetheless, the Court proceeded as if the documents contained predecisional deliberations and sought to balance the parties' competing interests to determine whether such documents were subject to disclosure. *See*, *e.g.*, *id.* at 27, 45.

The Court applied a five-factor balancing test to each of those documents and held that "plaintiffs' evidentiary need for the information outweighs defendant's interest in preventing the document's disclosure." *See*, *e.g.*, *id.* at 76 (citing *In re Subpoena*, 967 F.2d 630, 634 (D.C. Cir. 1992)). The Court applied the same balancing test with respect to ten documents as to which FHFA asserted the bank examination privilege, and reached the same result. *See*, *e.g.*, *id.* at 35 (citing *Wultz v. Bank of China Ltd.*, 61 F. Supp. 3d 272, 282 (S.D.N.Y. 2013)).

With respect to four documents withheld on the basis of the presidential communications privilege, the Court determined that three of the documents were not protected by the privilege because the Court could not verify the authors or recipients of a draft memorandum (document no. 15), ascertain the title of a Treasury employee listed on an email chain (document no. 17), or "independently verify" that a particular document was sent or drafted by the former Director of

the National Economic Council (document no. 19). *Compare* Sept. 20 Decision at 49 *with* McQuaid Decl. ¶¶ 6-8. In any event, the Court determined that, even if all four documents "were clearly protected by the privilege, it would not affect the court's ultimate conclusion that plaintiffs have established a need for them." Consequently, the Court ordered production of the four documents. *Id*.

III. The Federal Circuit's Mandamus Decision

After the Court granted plaintiffs' motion to compel production of all documents specifically identified in its motion, the Government petitioned the Federal Circuit for a writ of mandamus. After briefing by the parties and *in camera* review of the documents, the Federal Circuit determined that mandamus relief was warranted with respect to certain privileged documents at issue in the Sept. 20 Decision.[2] Of the sixteen documents it considered, the Federal Circuit granted mandamus with respect to eight. The Federal Circuit determined that all documents over which we asserted the presidential communications privilege were "'presumptively privileged,'" and that plaintiffs failed to "provide a 'focused demonstration of need'" sufficient to overcome that privilege. *In re United States*, 2017 WL 406243, *7 (quoting *In re Sealed Case*, 121 F.3d, 729, 744, 746 (D.C. Cir. 1997)). With respect to certain documents protected by the deliberative process privilege, the Federal Circuit identified "no basis in the record" that plaintiffs needed the requested documents, and emphasized that the information contained in the documents was "available from other sources." *Id.* at *5-7.

Moreover, the Federal Circuit credited Mr. Dickerson's and Mr. Pearl's declarations that (1) certain documents were predecisional, even if undated, *id.* at *5, and (2) other documents

[2] Although the Government's mandamus petition described the categories of documents at issue in the Sept. 20 Decision, the Federal Circuit limited its review to the sixteen documents we expressly identified. *See In re United States*, 2017 WL 406243, at *4.

were deliberative, when this Court determined that the "deliberative nature of the document[s] was 'not apparent on [their] face.'" *Id.* at *4 (citation omitted in original). With respect to the remaining eight documents, the Federal Circuit declined to hold that the Government's privilege assertions were invalid, but determined that the Government did not satisfy the stringent standard for mandamus. *Id.* at *8-9. In response to the Federal Circuit's writ of mandamus, this Court vacated portions of the Sept. 20 Decision, thus denying certain relief it had previously granted. *See* Order, Jan. 31, 2017, ECF No. 353.

ARGUMENT

I. Apportioning Expenses On Plaintiffs' Motion To Compel Would Unnecessarily Protract The Resolution Of This Case

Unlike Rule 37(a)(5)(A), which mandates an award of fees unless the opposing party's position was substantially justified or an award would be unjust, apportioning expenses pursuant to Rule 37(a)(5)(C) is permissive. *Compare* RCFC 37(a)(5)(A)(ii)-(iii) *with* RCFC 37(a)(5)(C). Courts routinely decline to apportion fees when doing so would not advance the resolution of the case, *see Confidential Informant 59-05071 v. United States*, 121 Fed. Cl. 36, 51 (2015), or when further proceedings regarding those expenses would impose unnecessary burdens on the Court. *See Bernat v. City of California City*, No. 10-cv-305, 2010 WL 4008631, at *9 (E.D. Cal. Oct. 12, 2010) (noting the "burden on the court" associated with resolving the parties' motions for expenses).

In this case, apportioning expenses would be counter-productive to the Court's resolution of plaintiffs' claims. Jurisdictional discovery has been ongoing for nearly three years, and, given that the Government produced the documents for which the Federal Circuit declined to grant mandamus, the Government anticipates no further proceedings regarding plaintiffs' motion to compel. Apportioning expenses would require the Court and the parties to devote

significant resources to evaluating the reasonableness of the expenses on an already-decided discovery motion—as well as how to apportion them—rather than resolving the fundamental question regarding the Court's jurisdiction to entertain plaintiffs' claims. Such a result would be at odds with the Court's expectation that the parties will soon commence briefing on the Government's motion to dismiss. *See* Order, Jan. 31, 2017, ECF No. 354 (ordering joint status report providing schedule for further briefing on pending motion to dismiss). On this basis alone, the Court should decline to apportion expenses for plaintiffs' motion to compel.

II. The United States' Objection To The Production Of Documents Subject To Governmental Privileges Was Substantially Justified

Unlike Rule 37(a)(5)(A), Rule 37(a)(5)(C) does not specify a standard for determining whether (or how) to apportion expenses when a discovery motion is both denied in part and granted in part; however, some courts have adopted Rule 37(a)(5)(A)(ii)'s "substantial justification" standard. *See Carlson v. City of Spokane*, No. 13-CV-0320, 2014 WL 11513082, at *4 (E.D. Wash. Aug. 14, 2014); *see also Ross-Hime Designs, Inc.*, 124 Fed. Cl. at 79. Pursuant to Rule 37(a)(5)(A)(ii), the court "must not" grant expenses when a party's opposition to a discovery motion was "substantially justified." A party's opposition is "substantially justified" when its position has a "'reasonable basis in both law and fact,'" or when its position reflects "'a genuine dispute[,] or if reasonable people could differ as to the appropriateness of the contested action.'" *Lester v. City of Lafayette*, 639 F. App'x 538, 541, 542 (10th Cir. 2016) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)); *see also Alexander v. FBI*, 186 F.R.D. 144, 147 (D.D.C. 1999). Conversely, "a party's position is not substantially justified if there is no legal support for it, if the party concedes the validity of his opponent's position after [costing] everyone time and money, or, worse, defies an unequivocally clear obligation." *Boca*

Investerings P'Ship v. United States, No. Civ. A 97-602, 1998 WL 647214, at *3 (D.D.C. Sept. 1, 1998) (citations omitted).

Because the expense-shifting provision in Rule 37(a)(5) is a "punitive measure meant to deter abusive and frivolous resort to the judiciary . . . [it] is not routinely imposed." *Cullins v. Heckler*, 108 F.R.D. 172, 175 (S.D.N.Y. 1985). Accordingly, the burden on a party to show that its position was substantially justified when resisting a motion to compel is a "forgiving one." *Cobell v. Norton*, 226 F.R.D. 67, 91 (D.D.C. 2005) (quoting *Boca Investerings P'ship*, 1998 WL 647214, at *2).

Ultimately, we prevailed on plaintiffs' motion to compel as to all documents protected by the presidential communications privilege and certain documents protected by the deliberative process privilege.[3] With respect to the remaining documents, our opposition to plaintiffs' motion was supported by legal arguments that were largely accepted by this Court in the Sept. 20 Decision and by the Federal Circuit in its mandamus decision. Moreover, we supported our position with declarations from Mr. McQuaid, Mr. Pearl, and Mr. Dickerson in which these witnesses formally invoked the privileges at issue and described the potential harm to the Government should the Court require the production of the documents sought by the plaintiffs. Because our opposition was supported by a substantially justified legal and factual record, the Court should decline to apportion expenses on plaintiffs' motion to compel.

[3] Although apportioning expenses is unwarranted, to the extent that the Court permits the plaintiffs to pursue a claim for expenses, "fairness would require the court to give the government an opportunity under Rule 37(a)(5)(C) to seek an apportionment of reasonable expenses for the work it has performed [in this Court and in the Federal Circuit] in connection with its response" to the portion of plaintiffs' motion to compel seeking production of documents protected by the presidential communications privilege and certain documents protected by the deliberative process privilege. *Confidential Informant 59-05071*, 121 Fed. Cl. at 51.

A. **Both The Federal Circuit And This Court Largely Accepted The Government's Position On The Legal Issues Raised In Plaintiffs' Motion**

In this case, plaintiffs acknowledged the existence of genuine legal disputes concerning the applicability of the deliberative process and bank examination privileges when they requested a determination of the "proper legal standards as clarified by the Court" concerning such privileges. *See* Pls. Mot. at 10. The "clarifications" of the Federal Circuit and of this Court were largely consistent with the United States legal positions, demonstrating that our opposition to plaintiffs' motion was substantially justified.

First, the Federal Circuit confirmed that the Government's position regarding the presidential communications privilege was legally and factually correct, and ordered mandamus relief with respect to all documents over which we asserted that privilege. *In re United States*, 2017 WL 406243, at *8. Significantly, the Federal Circuit rejected plaintiffs' argument that Mr. McQuaid's declaration was procedurally defective. *Id.* at *8.

Second, the Federal Circuit affirmed this Court's ruling that FHFA may invoke the deliberative process privilege and ordered mandamus relief with respect to FHFA00092209. *Id.* at *6; *see also* Sept. 20 Decision at 23 (noting that FHFA Director Watt properly delegated the authority to invoke the deliberative process privilege to Mr. Dickerson). Moreover, notwithstanding plaintiffs' argument that the Federal Circuit should not recognize the bank examination privilege, the Federal Circuit did not disturb this Court's determination that FHFA may also assert that privilege in its capacity as the regulator of the GSEs. *See In re United States*, 2017 WL 406243, *8; Sept. 20 Decision at 20 (citing *FHFA v. JPMorgan Chase & Co.*, 978 F. Supp. 2d 267 (S.D.N.Y. 2013)).

Third, this Court rejected plaintiffs' argument that documents containing financial information or constituting forecasts are categorically outside the scope of the deliberative process privilege. Sept. 20 Decision at 25-26 n.14.

Finally, the Court acknowledged that documents dated after the decision in question may be protected by the deliberative process privilege when they reflect predecisional deliberations. Sept. 20 Decision at 78 (citing *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 257 (D.C. Cir. 1977); *Ford Motor Co. v. United States*, 94 Fed. Cl. 211 (2010)).

Because briefing on the motion to compel presented genuine, good-faith disputes regarding the legal contours of governmental privileges, which were largely resolved in favor of the United States, apportioning expenses pursuant to RCFC 37(a)(5)(C) is unwarranted.

B. The United States' Positions On The Challenged Documents Were Reasonably Based On The Considered Judgments Of Senior Government Officials, Presented In Sworn Declarations Similar To Those Previously Accepted By This Court

Apportioning expenses is also unwarranted because the declarations we submitted in support of our privilege assertions were consistent with declarations this Court has previously accepted in support of assertions of governmental privileges, and we believed we satisfied the requirements for invoking these privileges. *See Dairyland Power Coop. v. United States*, No. 04-106C, 2008 WL 8776547, *5 (Fed. Cl. Mar. 17, 2008) (Decls. of Fred F. Fielding and Susan A. Smith, ECF No. 240-1 at 3-16) (presidential communications privilege); *Huntleigh USA Corp. v. United States*, 71 Fed. Cl. 726, 727-28 (2006) (Decl. of Kip Hawley, ECF No. 80-4 at 2) (deliberative process privilege). *Cf. Grant v. Sullivan*, 134 F.R.D 107, 114 (M.D. Pa. 1990) (awarding expenses where defendant "fail[ed] to provide any factual basis for believing that harm would result from production of documents" as to which he asserted deliberative process). In *Estes v. United States*, No. 13-1011C, 2016 WL 4919997 (Fed. Cl. Sept. 16, 2016), this Court

concluded that declarations provided by the Bureau of the Fiscal Service—declarations that resemble the declarations provided in this case—sufficiently supported the Government's assertions of the deliberative process privilege. *See Estes v. United States*, No. 13-1011C (Fed. Cl.) (ECF No. 71-2 at 3 and ECF No. 71-3 at 3).

With respect to the privileges asserted, Mr. McQuaid, Mr. Pearl, and Mr. Dickerson provided sworn declarations that reflected their thorough consideration of the documents at issue, explained the policy considerations to which those documents related, described the contexts in which they were generated, and identified the harm to the Government should the Court require production. That the Federal Circuit credited the statements contained in the declarations when granting mandamus relief further demonstrates that our opposition to plaintiffs' motion was supported by a reasonable factual basis. *In re United States*, 2017 WL 406243, at *5-9.

III. <u>Apportioning Plaintiffs' Expenses Would Be Unjust</u>

Even if the Court were to determine that our opposition to plaintiffs' motion to compel was not substantially justified with respect to issues upon which we did not prevail, apportioning expenses in this case would be unjust because such relief would not advance the judicial-economy rationale behind Rule 37(a)(5). *See Nalco Chem. Co. v. Hydro Tech., Inc.*, 148 F.R.D. 608, 619 (E.D. Wis. 1993) (declining to apportion expenses where "other circumstances would make an award unjust"); s*ee also Boca Investerings P'Ship*, 1998 WL 647214, *3 (even when a party's position was not substantially justified, district court declined to award fees because such an award would not further the judicial economy rationale behind Rule 37(a)(5)); *Chaplaincy of Full Gospel Churches v. Johnson*, 217 F.R.D. 250, 261 (D.D.C. 2003), *vacated on other grounds*, *In re England*, 375 F.3d 1169 (D.C. Cir. 2004) ("awarding reasonable expenses against

the defendants would not be just and would not serve the rule's purpose of deterring unwarranted discovery objections").

Such an apportionment would be especially unjust given that the discovery sought by plaintiffs "threaten[ed] to intrude upon and interfere with the decision-making process of the President and executive agencies." *See In re United States*, 2017 WL 406243, at *3. Consequently, the Court should follow the lead of the Federal Circuit, which ordered that "[e]ach side shall bear its own costs" on the mandamus petition. *In re United States*, 2017 WL 406243, at *9. The nature of the parties' disagreements concerning three governmental privileges necessitated plaintiffs' motion to compel. Indeed, plaintiffs asked the Court to clarify the applicability of the deliberative process and bank examination privileges to the documents at issue because a reasonable disagreement existed concerning the scope of these privileges, and the parties had otherwise avoided motion practice for several months. Pls. Mot. at 10. Before plaintiffs filed their motion, the parties met and conferred, and narrowed the universe of specific documents as to which there were genuine disputes. *See* Def. Br. 3-5. Because the courts—not the litigants—were uniquely situated to resolve the parties' competing interests, *see* Sept. 20 Decision at 14, and, ultimately, the Government's position merited mandamus relief from the Federal Circuit, apportioning expenses would be unjust.

CONCLUSION

For these reasons, we respectfully request that the Court decline to apportion expenses associated with plaintiffs' motion to compel.

Respectfully submitted,

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