No. 13-465C
(Judge Sweeney)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, INC., et al.,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

DEFENDANT'S REPLY IN SUPPORT OF ITS RESPONSE TO THE COURT'S SEPTEMBER 20, 2016 ORDER REGARDING PAYMENT OF PLAINTIFFS' EXPENSES AND RESPONSE TO PLAINTIFFS' MOTION FOR AN APPORTIONMENT OF EXPENSES

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Pursuant to the Court's March 7, 2017 order (ECF No. 360)—which, among other things, directed the filing of response and reply briefs in connection with the United States' response (Def. Resp., Feb. 21, 2017, ECF No. 356) to the Court's request for an explanation for why the Court should not require the Government to pay reasonable expenses—the United States respectfully submits this reply to the response (Pls. Br., March 20, 2017, ECF No. 362) that was filed by plaintiffs, Fairholme Funds, Inc., et al.

In our prior brief, we demonstrated that, because plaintiffs' motion to compel was only *partially* successful, the issue before the Court is whether the parties' expenses related to the motion should be *apportioned*. *See* RCFC 37(a)(5)(C). We further demonstrated that neither party should be awarded expenses because (1) the Government's opposition to plaintiffs' motion to compel was substantially justified and (2) apportioning expenses would, in this instance, be inconsistent with the rationales underlying Rule 37(a)(5)(C). *See* Def. Resp. at 6-12.

In their response, although conceding the applicability of Rule 37(a)(5)(C)'s discretionary apportionment of expenses, plaintiffs advance an unreasonably mechanical apportionment that subordinates a nuanced analysis of substantial justification to a simplistic

tallying of the number of documents that the Government was ultimately required to produce. Plaintiffs' fundamental position appears to be that a party is only substantially justified when it *prevails*, *see, e.g.*, Pls. Br. at 17 (arguing that the Government cannot show it was "'justified' in withholding" any documents when it did not "prevail" with respect to those documents), and that plaintiffs' alleged 86 percent "win ratio" (based upon the percentage of contested documents that the Government produced) warrants the Court's award of 86 percent of their alleged expenses. Although plaintiffs repeatedly assert that they seek no expense for the portions of the motion to compel that they *lost*, those statements merely illuminate plaintiffs' mistaken presumption that the Court should uncritically allow them to recover their expenses for the portions of the motion that they *won*.

Rule 37(a)(5) specifies that the Court "must not" award expenses when the non-prevailing party's position is substantially justified or other circumstances make an award unjust. *See* RCFC 37(a)(5)(A).[1] Rather than meaningfully addressing these exceptions, plaintiffs assume that their alleged "win ratio" renders those exceptions inapplicable, such that their entitlement to an apportionment of expenses is a *fait accompli*. However, because both exceptions are applicable, the Court should decline to apportion any expenses associated with plaintiffs' motion to compel and allow the parties to dedicate their time and resources to completing jurisdictional discovery.

[1] Unlike Rule 37(a)(5)(A), Rule 37(a)(5)(C) is discretionary, and 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. As both parties have noted, however, some courts considered the exceptions contained in Rule 37(a)(5)(A)(ii)-(iii), which preclude an award when a party's position is "substantially justified" or other circumstances "would make an award unjust." *See Carlson v. City of Spokane*, No. 13-CV-0320, 2014 WL 11513082, at *4 (E.D. Wash. Aug. 14, 2014); *Charter Practices Int'l, LLC v. Robb*, No. 12 CV 1768, 2014 WL 273855, at *5 (D. Conn. Jan. 23, 2014) ("Rule 37(a)(5)(C) effectively incorporates the substantive standards of Rule 37(a)(5)(A)").

I. The Government's Opposition To Plaintiffs' Motion To Compel Was Substantially Justified

When a party does not prevail (in whole or in part) on a discovery motion, its position is nevertheless substantially justified when it reflects "a 'genuine dispute' or if 'reasonable people could differ' as to the appropriateness" of a litigant's position. *Cobell v. United States*, 213 F.R.D. 1, 14 (D.D.C. 2003) (quoting *Alexander v. FBI*, 186 F.R.D. 144, 147 (D.D.C. 1999)). In particular, when a discovery motion seeks to compel or protect documents over which the Government has asserted governmental privileges, courts have construed the substantial-justification standard broadly. *See Wood v. Brier*, 66 F.R.D. 8, 14 (E.D. Wis. 1975) (police chief's resistance to documents protected by executive privilege was substantially justified because the privilege implicated important policy interests); *Cobell*, 213 F.R.D. at 14 (declining to award fees when the Court had issued no prior, case-specific rulings concerning the application of the deliberative process privilege). As we demonstrated in our prior brief, the Government was substantially justified in contesting plaintiffs' motion to compel when reasonable disagreements existed regarding the scope of governmental privileges, and where high-level Government officials had determined that the production of the individual documents at issue would harm governmental decision-making.

A. Plaintiffs Erroneously Conflate Their Success With The Government's Alleged "Lack Of Substantial Justification"

Because plaintiffs do not contest that our opposition to the motion to compel was supported by legal arguments that this Court and the Federal Circuit largely accepted, the Court should decline to apportion expenses. A non-prevailing party's position is substantially justified "[w]hen [the] dispute involves differing interpretations of the governing law," or judicial resolution is necessary to clarify genuine disputes between the parties. *See Bowne of New York*

City v. Ambase Corp., 161 F.R.D. 258, 265 (S.D.N.Y. 1995); *Maddow v. Procter & Gamble Co*., 107 F.3d 846, 853 (11th Cir. 1997) (opposition to discovery motion was substantially justified when no controlling Circuit precedent exists or few authorities have considered the precise issue in dispute). Moreover, when resolution of a motion to compel is necessary to clarify legitimate discovery disputes between the parties, the non-prevailing party's position is substantially justified. *See Doe v. Dist. of Columbia*, 230 F.R.D. 47, 56 (D.D.C. 2005) (court declined to apportion expenses because "certain issues were clarified only because of the filing of [the District of Columbia's] motion").

The history of this discovery dispute clearly passes that test. In this case, plaintiffs acknowledge that their motion to compel presented genuine disputes concerning "multiple complex privilege issues," which required plaintiffs to "draft[] nearly 60 pages of briefing in this court, which discussed 50 cases." Pls. Br. at 21. The Government's briefing was no less thorough. *See* Def. Resp. to Pls. Mot. to Compel, Jan. 21, 2016, ECF No. 284. In the motion to compel, plaintiffs advised the Court that they brought the motion after "months of discussions regarding [the Government's] privilege claims," revealed that "guidance from the Court [was] needed" about a "variety of significant" privilege issues. *See* Pls. Mot. to Compel at 1, Nov. 23, 2015, ECF No. 270. The Court should conclude that the Government's opposition to the motion to compel was substantially justified for these reasons alone.

Moreover, this Court's March 7, 2017 order demonstrates that plaintiffs' motion was necessary to clarify certain, global privilege disputes. That order requires the Government to review its privilege log "based on the court's September 20, 2016 ruling on plaintiffs' motion to compel as well as the Federal Circuit's ruling on defendant's petition for a writ of mandamus." *See* March 7, 2017 order at 2. Absent these case-specific rulings, the Government could not be

expected to know the Court's position regarding the right of the Federal Housing Finance Authority (FHFA) to assert the deliberative process and bank examination privileges; the applicability of the deliberative process privilege to documents containing financial information; or the applicability of the deliberative process privilege to post-decisional documents reflecting pre-decisional deliberations.

Although plaintiffs concede the existence of genuine, good-faith disputes regarding the scope of governmental privileges, they contend that those disputes are "irrelevant" to the substantial justification of the Government's opposition because the Government did not "actually prevail[] in preventing the discovery" of all documents at issue in plaintiffs' motion. Pls. Br. at 15-16. In this regard, plaintiffs incorrectly equate (1) their "win ratio" in obtaining documents, with (2) the Government's substantial justification for opposing disclosure in the first place. But they are not synonymous. The substantial justification exception contained in Rule 37(a)(5) protects a party from paying expenses when, as in this case, its opposition reflected genuine disputes. Indeed, that this Court and the Federal Circuit accepted most of our legal arguments with respect to those disputes demonstrates that our opposition was substantially justified. Accordingly, no apportionment of expenses is warranted.

B. The Declarations Submitted By The Government Demonstrate That Its Position Was Substantially Justified

In addition to providing valid legal arguments, we supported our opposition to plaintiffs' motion to compel with declarations from Nicholas McQuaid (then-Deputy White House Counsel), 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 presidential communications, deliberative process, and bank examination privileges. These uncontested declarations further

show the substantial justification for our opposition. *See Cullins v. Heckler*, 108 F.R.D. 172, 175 (S.D.N.Y. 1985) (Government's opposition to plaintiffs' motion to compel was found to be substantially justified due, in part, to its having provided a responsive affidavit explaining the factual basis for its resistance to plaintiffs' discovery). *See also Citibank, N.A. v. Pietranico*, 11-CV-1802, 2012 WL 12883526, at *4 (N.D. Ga. Aug. 17, 2012) (declining to award expenses where discovery motion presented "factual complexities" and the party opposing discovery "articulated reasons for not providing the discovery").

Plaintiffs offer no meaningful response to our argument that our opposition was substantially justified by Messrs. McQuaid's, Pearl's, and Dickerson's declarations. Instead, plaintiffs erroneously argue that a comment in our brief—"we believed we satisfied the requirements for invoking these privileges"— is insufficient to show substantial justification because courts measure substantial justification "according to an objective standard of reasonableness." *Compare* Pls. Br. at 18 *with* Def. Resp. at 10. The point of our comment was that the declarations submitted by Messrs. McQuaid, Pear,l and Dickerson demonstrate the objective reasonableness of our position because they were consistent with declarations accepted by this Court in other cases in response to motions to compel documents protected by governmental privileges. *See, e.g., Dairyland Power Coop. v. United States*, No. 04-106C, 2008 WL 8776547, at *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). In any event, both this Court and the Federal Circuit have already rejected plaintiffs' argument that our declarations did not satisfy the procedural requirements for invoking the governmental privileges at issue in their motion. *See In re United States*, No. 2017-104,

2017 WL 406243, at *5-9 (Fed. Cir. Jan. 30, 2017) (crediting Messrs. McQuaid's, Pearl's, and Dickerson's declarations when granting mandamus relief). *See also* Opinion and Order, Sept. 20, 2016, ECF No. 335 (September 2016 Decision) at 23 (explaining that Mr. Dickerson satisfied procedural requirements to invoke governmental privileges on behalf of FHFA); *id*. at 44-45 (explaining that Mr. Pearl satisfied procedural requirements to invoke governmental privileges on behalf of Treasury).

Indeed, the cases cited by plaintiffs involved scenarios in which a governmental entity failed to follow procedural requirements for invoking the deliberative process privilege. *See Grant v. Sullivan*, 134 F.R.D. 107, 114 (M.D. Pa. 1990) (apportioning expenses where agency failed to provide "any factual basis" for opposing disclosure of documents on deliberative process grounds when agency produced the same documents in another case); *DL v. Dist. of Columbia*, 251 F.R.D. 38, 45 (D.D.C. 2008) (awarding expenses where District of Columbia failed to provide plaintiff with a log identifying the documents withheld and the specific privilege asserted); *Coleman v. Schwarzenegger*, No. Civ. S-90-0520, 2008 WL 4415324, at *4 (E.D. Cal. Sept. 25, 2008) (state-government defendants failed to provide sufficient privilege logs in support of their deliberative process assertions when the logs reflected deficiencies previously identified by the magistrate judge).[2]

By contrast, both this Court and the Federal Circuit agreed that the Government's declarations sufficiently invoked the governmental privileges. Accordingly, the Court should

[2] Plaintiffs also cite *Precision Pine & Timber, Inc. v. United States*, No. 98-720 C, 2001 WL 1819224, at *4 (Fed. Cl. Mar. 6, 2001). In *Precision Pine & Timber*, the Court noted that the Government asserted deliberative process as a grounds for withholding documents; however, the court ultimately determined that the Government's opposition to plaintiff's motion to compel was not substantially justified because the Government neither responded to the motion nor provided a factual basis for its lack of diligence with respect to document production in general. *Id.* at *2, *4.

decline to apportion expenses because our opposition to plaintiffs' motion was substantially justified.

C. The Court Should Reject The Plaintiffs' Assorted, Other Efforts To Show Lack Of Substantial Justification

i. Plaintiffs' Arguments Regarding "Need" Highlight The Substantial Justification For The Government's Opposition

Having implicitly conceded the validity of our legal and factual arguments, plaintiffs erroneously contend that our opposition was nevertheless unjustified because plaintiffs' established an "acute evidentiary need" for documents protected by governmental privileges. Pls. Br. at 15. Accordingly, plaintiffs make a leap of logic that "[a]ny 'threat' posed by their production thus cannot possibly be given weight in Rule 37(a)'s calculus." Pls. Br. at 11. Case law, however, reflects the opposite proposition. Specifically, when resolution of a motion to compel requires a Court to balance (1) the Government's interest in protecting documents from disclosure, against (2) a litigant's alleged need for those documents, courts consistently find that the Government's resistance to disclosure was substantially justified. *See Amster v. Lucey*, 904 F.2d 78, at *1 (D.C. Cir. 1990) (table) (reversing district court's award of expenses pursuant to Rule 37(a) as an abuse of discretion where dispute required the court to "'weigh[] the detrimental effects of disclosure against the necessity for production'") (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena*, 40 F.R.D. 318, 327 (D.D.C. 1966) (alteration in original)); *Wood*, 66 F.R.D. at 14 (police chief's resistance to disclosure was "substantially justified" because resolution of the motion seeking to compel documents withheld on basis of executive privilege required "a case by case ad hoc balancing of public policies and the material which is sought to be discovered"); *Coal. for a Sustainable Delta v. Koch*, No. 1:08-CV-00397-OWW-GSA, 2009 WL 3378974, at *11 (E.D. Cal. Oct. 15, 2009) (although state defendants were ordered to produce certain

documents withheld on basis of government privilege, the court's determination reflected its "balancing of the parties' and public's interest, and [did] not undermine Defendant's right to assert the privilege as to all 39 documents in the first instance"). *See also Gucci Am., Inc. v. Li*, No. 10 Civ. 4974, 2011 WL 6156936, at *12 (S.D.N.Y. Aug. 23, 2011), *vacated on other grounds*, 768 F.3d 122 (2d Cir. 2014) (denying request for expenses pursuant to Rule 37(a)(5) when resolution of the discovery dispute involved a "highly fact-specific inquiry and the application of a multi-pronged balancing test" concerning China's interest in enforcing bank secrecy laws and the United States' interest in protecting trademarks).

In this case, this Court applied (and the Federal Circuit reviewed) a multi-factor balancing test to determine whether plaintiffs' need for the contested documents outweighed the Government's interest in protecting them from disclosure. This Court—not the parties—is uniquely situated to balance the parties' competing interests. *See* September 2016 Decision at 20 (explaining that "the *court* must now determine . . . whether plaintiffs have demonstrated sufficient need to overcome those [governmental] privileges") (emphasis added). *See also In re United States*, 2017 WL 406243, at *5-9. Plaintiffs cite no authority for the proposition that the Government should be expected to determine when its own interests in protecting privileged documents are subordinate to its adversary's purported "need" for any documents.

ii. <u>The Government Did Not "Forfeit" Any Of Its Privilege Assertions</u>

Plaintiffs also make an incorrect inference from our mandamus petition that we "foreit[ed] . . . any argument" that certain documents that this Court ordered us to disclose "could be withheld." Pls. Br. at 17. Because the mandamus petition did not address all fifty-six documents in detail, plaintiffs ask the Court to assume that our opposition to the initial motion to compel was not substantially justified. No such forfeiture was made or should be inferred.

In its mandamus petition, the Government sought relief with respect to all fifty-six documents at issue in the September 2016 Decision, and expressly discussed sixteen exemplars. *Cf. In re United States*, 2017 WL 406243, at *4. That the Federal Circuit declined to address the remaining documents was a function of our briefing and page limitations, not a reflection of the merits of our position or a "concession" that plaintiffs were entitled to obtain the remaining, 40 documents. *Compare id. with* Pls. Br. at 13-14.

In any event, even if we had not sought review of the Court's September 2016 Decision in the Federal Circuit, our position would still be substantially justified on legal and factual bases. Plaintiffs cite no authority for the proposition that a party's position is substantially justified with respect to any given document only if the party seeks appellate review of an order requiring disclosure of that document. Indeed, the Federal Circuit's decision to consider the Government's petition demonstrates the substantial legal and factual justification for the Government's opposition *in its entirety*—not just the documents for which the Federal Circuit granted mandamus relief. *See In re United States*, 2017 WL 406243, at *3 (explaining that the potential threat to the decision-making process of the President and executive agencies demonstrates that this case merited the "extraordinary nature" of mandamus review). Thus, the number of documents the Government addressed in the mandamus petition in the Federal Circuit sheds no light on the underlying justification of the Government's opposition to plaintiffs' motion to compel in this Court.

iii. The Federal Circuit's Decision Not To "Second-Guess" The Court's Rulings With Respect To Eight Documents Does Not Undermine The Substantial Justification Of The Government's Opposition

Plaintiffs also mischaracterize the Federal Circuit's determinations with respect to eight exemplar documents for which the Federal Circuit did not grant mandamus relief. The Federal

Circuit's determination that "extraordinary" mandamus relief was unwarranted with respect to certain documents does not undermine the validity of the Government's opposition to plaintiffs' motion to compel.

With respect to three exemplar documents, the Federal Circuit identified no clear error in this Court's ruling that those documents were not deliberative. *See In re United States*, 2017 WL 406243, at *9.[3] *See also* September 2016 Decision at 52-53, 59-62. Although plaintiffs erroneously assert that the documents were "so far outside the scope of the deliberative process" that the Government's initial assertions were unjustified, neither the Federal Circuit nor this Court reached such a conclusion. *Compare* Pls. Br. at 14 *with* September 2016 Decision at 52-54, 59-62 and *In re United States*, 2017 WL 406243, at *9. The Federal Circuit simply declined to "second-guess" the Court's rulings with respect to the deliberative nature of those three documents. *In re United States*, 2017 WL 406243, at *9.

Second, having determined that the Government satisfied all procedural and substantive requirements for invoking the deliberative-process and bank-examination privileges over eight, exemplar documents, the Federal Circuit reviewed this Court's application of a balancing test with respect to those documents. *See id.* at *5-9. The Federal Circuit granted mandamus relief with respect to three of them and identified no clear error in this Court's ruling with respect to the remaining five. *See id.* at *5-6 (granting mandamus relief with respect to three documents);[4]

[3] *See* UST00492699 (Doc No. 22), UST00478535 (Doc. No. 28), and UST00384501 (Doc. No. 34).

[4] *See* UST00389678 (Doc. No. 13), UST 00490551 (Doc. No. 14), and UST00518402 (Doc. No. 18).

id. at *7-8 (determining that mandamus relief was unwarranted with respect to five documents).[5] As set forth above, courts routinely find that a party's opposition was substantially justified when resolution of a motion requires the court to balance the parties' legitimate, competing interests. *See* Section I.C.i. above. Thus, contrary to plaintiffs' assertions, neither Rule 37(a)(5)(C) nor case law "requires" an apportionment of expenses when the Court determines that a balancing test tips in favor of disclosure. *Cf.* Pls. Br. at 18.

iv. The Government's Disclosure Of Two Documents After Plaintiffs Filed Their Motion To Compel Does Not Undermine The Government's Opposition

Finally, plaintiffs incorrectly argue that the Government "confessed error" and "improperly withheld" two documents that it subsequently produced after plaintiffs filed their motion to compel." *See* Pls. Br. at 3, 13. As we explained in our initial response to plaintiffs' motion, we produced one document (UST00418517)—a large compilation of briefing materials periodically prepared by Treasury staff for the Secretary—in redacted form "pursuant to an agreement between the parties stipulating that non-responsive materials would be redacted and that responsive memoranda would be produced in full." Def. Resp. to Pls. Mot. to Compel at 21 n.8. Further, although UST00061011 reflects pre-decisional deliberations, we produced it in full after we discovered that plaintiffs already possessed a copy of it in connection with plaintiffs' suit in district court. *Id.* Though the Government produced these two documents without judicial intervention, the Government's production neither reflects any "error" in the Government's initial assertions of privilege nor demonstrates that the Government's position was not substantially justified.

[5] *See* FHFA00096631 (Doc. No. 8), FHFA00096634 (Doc. No. 9), FHFA00096636 (Doc. No. 10), FHFA00096638 (Doc. No. 11), and UST00389662 (Doc. No. 29).

II. Apportioning Expenses Would Be Unjust

Even if the Court were to find that our opposition was not substantially justified, an award would be unjust nevertheless because (1) further litigation regarding plaintiffs' expenses—and the Government's potential request for an apportionment of its own expenses—would not further the resolution of this case, and (2) the procedural requirements for invoking governmental privileges already serves the "stop-and-think" rationale underlying Rule 37(a)(5).

A. An Apportionment Of Expenses Would Not Advance Case Resolution

In our prior brief, we demonstrated that courts decline to apportion fees pursuant to Rule 37(a)(5)(C) 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) (declining to apportion fees when doing so would not advance the resolution of the case). Moreover, at least one court has declined to award expenses in connection with jurisdictional discovery given that, should the case proceed, such an award was "likely to increase animosity and inhibit the cooperation among counsel that is essential to facilitate the merits discovery ahead." *See Tile Unlimited, Inc. v. Blanke Corp.*, No. 10 C 8031, 2014 WL 257862, at *3 (N.D. Ill. Jan. 23, 2014).

Plaintiffs' only response to our argument is that apportioning fees creates a general "deterrent effect" that would, in fact, "advance the resolution of the case." Pls. Br. at 9. But a "deterrent effect" has value only when the Court identifies conduct that warrants deterrence. Nothing in this Court's or the Federal Circuit's decisions indicates that the Government's opposition to plaintiffs' motion constitutes conduct warranting "deterrence."

B. The Procedural Requirements For Formally Invoking Governmental Privileges Already Ensure That Objections To Disclosure Of Documents Protected By Those Privileges Are Well Founded

One rationale of the fee-shifting provision contained in Rule 37(a)(5) is to ensure that parties "stop-and-think," and consider whether "the initial position they have taken is really substantially justified." Wright, et al., *Fed. Practice & Procedure* § 2228 (3d ed. 2016). The procedural requirement for formally invoking governmental privileges—personal consideration by an agency head or her delegate—effectively serves the same "stop-and-think" purpose as Rule 37(a)(5) because that requirement is "designed to 'ensure that the privilege[s are] presented in a deliberate, considered, and reasonably specific manner." *Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000) (quoting *In re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir. 1988)).

Thus, although plaintiffs insist that apportioning expenses would force the Government to "begin to approach its discovery obligations . . . with a bit more circumspection," the procedural requirement for invoking governmental privileges already require such circumspection. *Id*. That neither this Court nor the Federal Circuit questioned the sufficiency of the declarations submitted by Messrs. McQuaid, Pearl, and Dickerson underscores the circumspection with which the declarants approached the formal invocation of the privileges.

Though the Government claims no "exempt[ion]" from Rule 37(a)(5), *see* Pls. Br. at 10, the weight of authorities militates against apportioning expenses when the discovery dispute (1) concerns the invocation of governmental privileges, and (2) the Government's invocation of the privileges satisfied the procedural requirements for invoking them. *See Cobell*, 213 F.R.D. at 14 (declining to award expenses in connection with dispute over the scope of the deliberative process privilege). *See also Lady Liberty Transp. Co. v. Philadelphia Parking Auth.*, No. 05-1322, 2007 WL 707372, at *8 (E.D. Pa. Mar. 1, 2007); *Bernat v. City of California City*, No. 10-

CV-0305, 2010 WL 4008361, at *9 (E.D. Cal. Oct. 12, 2010). *Cf. Coleman*, 2008 WL 4415324, at *2-3 (state defendants' declarations failed to provide particularized reasons for maintaining confidentiality of documents over which they asserted deliberative process privilege).

Accordingly, apportioning expenses in this case is unnecessary to ensure that the Government meaningfully considers its assertions of governmental privileges.

C. Plaintiffs Identify No Discovery Misconduct Warranting "Sanctions"

Although plaintiffs contend that the "deterrent effect" of a "fee award" justifies apportioning expenses, the crux of their argument is that the Government's ongoing evaluation of its privilege assertions during the course of discovery somehow amounts to misconduct. *See* Pls. Br. at 3-4, 6, 13. Plaintiffs acknowledge that the "discovery process often involves some give-and-take as the parties reevaluate their positions around the margins in response to each other's arguments[,]" *id.* at 13, but incorrectly contend that the Government somehow deviated from those practices in this case. Putting aside the inaccuracies of plaintiffs' allegations, the Government's ongoing evaluation of its privilege assertions in response to queries by opposing counsel hardly amounts to "misconduct" or "abuse[]" warranting sanctions. *Id.* at 9. Stripped of hyperbole, the "Background" section to plaintiffs' brief describes a cooperative effort by the parties to resolve privilege disputes without involving the Court. *Id.* at 2-3.

Plaintiffs cite two types of cases in support of the erroneous argument that the Government's ongoing evaluation of its privilege assertions warrants "sanctions." The first group of cases stands for the basic, uncontested, and inapplicable proposition that a court possesses the power to sanction a party for violations of discovery orders pursuant to Rule 37(b)—which is not at issue in this case. *See* Pls. Br. at 7-9 (citing, among others, *Nat'l Hockey League v. Metro. Hockey Club, Inc*., 427 U.S. 639, 643 (1976) (district court possesses power to

dismiss suit in response to violation of discovery order pursuant to Rule 37(b)); *Embassy of Fed. Republic of Nigeria v. Ugwuonye*, 292 F.R.D. 53, 56-59 (D.D.C. 2013) (sanctioning party pursuant to Rule 37(b) for "failure to comply with this Court's order on the motion to compel and failure to appear at his deposition"); *Jumpp v. Jerkins*, No. 08-6268, 2011 WL 5325616, at *2-3, *5 (D.N.J. Nov. 3, 2011) (awarding expenses pursuant to Rule 37(b) when *pro se* litigant repeatedly failed to comply with discovery orders)). *Cf.* Pls. Br. at 8 (citing *Johnson Int'l Co. v. Jackson Nat'l Life Ins. Co.*, 19 F.3d 431, 438 (8th Cir. 1994) (remanding sanctions award granted pursuant to Rule 37(c) for incorrect response to requests for admission)).

The second group involves scenarios in which courts awarded expenses pursuant to Rule 37(a)(5) when those courts previously warned litigants that their discovery conduct was inconsistent with the Federal Rules of Civil Procedure or previous instructions. *See* Pls. Br. at 7, 11, 14, 18 (citing, among others, *SEC v. Yorkville Advisors LLC*, No. 12 Civ 7728, 2015 WL 855796, at *8 (S.D.N.Y. Feb. 27, 2015) (SEC's failure to produce sufficient privilege logs warranted an award of expenses when court previously "advised the SEC that the Privilege Logs appeared deficient"); *Romeo & Juliette Laser Hair Removal, Inc. v. Assara I LLC*, No. 08 Civ. 442, 2013 WL 3322249, at *5 (S.D.N.Y. July 2, 2013) (failure to produce corporate documents pursuant to Rule 34 warranted an award of expenses when court previously directed production of those documents); *Council for Tribal Emp. Rights v. United States*, 110 Fed. Cl. 244, 249-50 (2013) (Government's categorical refusal to produce documents prior to resolution of motion to dismiss warranted an award of expenses when court previously permitted plaintiff to pursue discovery before resolution of motion to dismiss); *Spirit Realty, L.P. v. GH&H Mableton, LLC*, No. 15 Civ. 5304, 2017 WL 36364, at *1 (S.D.N.Y. Jan. 2, 2017) (apportioning expenses relating to refusal to supplement written discovery responses when defendant provided no

argument that any of the exceptions contained in Rule 37(a)(5) were applicable). *See also Coleman*, 2008 WL 4415324, at *2-3 (state defendants' failure to improve quality of privilege logs warranted award of expenses when magistrate previously determined that the logs were deficient pursuant to Rule 26).

This case falls into neither category. In their brief, plaintiffs make no allegation that the Government violated an existing discovery order, or that the Government disregarded any prior instructions from the Court. And despite plaintiffs' repeated insistence that the Government's privilege logs themselves are insufficient, the Court made no such findings in either the September 2016 Decision or its March 7, 2017 order.

Accordingly, even if the Court were to conclude that our opposition to plaintiffs' motion to compel was not substantially justified, the circumstances presented by this case would render an apportionment of expenses unjust.

III. Plaintiffs' Motion For An Apportionment Of Expenses Should Be Denied

Plaintiffs erroneously contend that "Rule 37 requires the Court to 'apportion' [its] total expenses, awarding only the amount [the Court] deems related [to] that part of the motion on which Plaintiffs prevailed." Pls. Br. at 18. Plaintiffs' approach is misguided—not only because plaintiffs incorporate the word "requires" when Rule 37(a)(5)(C) uses "may," but also, and more fundamentally, because prevailing (in part) is insufficient to justify apportioning expenses under RCFC 37(a)(5)(C). However, even if the Court chooses to apportion, plaintiffs' demand for $211,556.13—which represents 86 percent of their overall expenses ($245,995.50)—is unreasonable and based on an unacceptable method of apportionment.

A. Plaintiffs' Alleged "Win Ratio" Is An Inappropriate Mechanism To Apportion Expenses

Although the Court possesses discretion to apportion expenses when either party's position was not substantially justified or circumstances would make an award unjust, plaintiffs incorrectly assume ultimate production of a document after an assertion of privilege means that compensation is due. But, eligibility for compensation under RCFC 37(a)(5)(C) depends not on whether production is ultimately compelled but instead on whether the party's invocation of the privilege was substantially justified. In a footnote, plaintiffs concede this point. Pls. Br. at 19 n.3.

Thus, to the extent that the Court concludes that a discretionary apportionment of expenses is warranted, the Court must determine the portions of the motion for which the exceptions contained in Rule 37(a)(5) do not apply. Plaintiffs argue that they are entitled to 86 percent of their expenses because they were successful in obtaining 86 percent of the documents. But even if the Court were to apportion expenses by the number of documents obtained, the proper metric is the substantial justification ratio, which compares the number of issues for which the Government's position was not substantially justified with by the number of issues raised in plaintiffs' motion. *Id.* (citing *Walker v. THI of N.M.*, 275 F.R.D. 332, 338 (D.N.M. 2011) (concluding that the plaintiff was entitled to two-thirds of her expenses because "approximately a third of the Defendants' non-disclosures or responses were substantially justified").

The cases cited by plaintiffs do not support a mechanical apportionment based on the number of documents obtained. In *Flame S.A.*, the district court apportioned expenses based on the number of requests for production for which plaintiffs were awarded relief on the motion to compel, not the number of documents obtained. *See Flame S.A. v. Indus. Carriers, Inc.*, No. 13-

cv-658, 2014 WL 7185199, at *9 (E.D. Va. Dec. 16, 2014). In *Rich Products*, the district court apportioned expenses by categories of documents in dispute, rather than by a raw tally of documents. *See Rich Prods. Corp. v. Bluemke*, No. 13CV30, 2014 WL 860364, at *4 (W.D.N.Y. Mar. 5, 2014). In *Poole ex re. Elliott*, the court apportioned relief based on the number of defendant's responses to requests for admission that were not substantially justified. *See Poole ex re. Elliott v. Textron, Inc.*, 192 F.R.D. 494, 499 (D. Md. 2000). Finally, in *Yorkville Advisors*, after determining that the opposition of the U.S. Securities and Exchange Commission (SEC) was not substantially justified with respect to those portions of defendants' motion to compel that were granted, the district court discounted the fee award by 5 percent to account for the portion of defendants' motion to compel that was denied. *Yorkville Advisors*, 2015 WL 855796, at *20. None of these authorities stand for the proposition that the Court should apportion expenses pursuant to a document-based "win ratio."

To the extent that the Court determines that a discretionary apportionment of expenses is warranted, the appropriate "win ratio" is the percentage of the issues decided in plaintiffs' favor. Indeed, the fundamental purpose of plaintiffs' motion was to resolve "overarching legal questions relating to [the Government's] privilege assertions[.]" Pls. Mot. to Compel at 1. The 58 documents simply were chosen by plaintiffs to illustrate those legal questions. *Id.* Thus, out of the ten issues addressed in plaintiffs' motion, plaintiffs were successful on one—that, in certain circumstances, their need for documents protected by the deliberative process and bank examination privileges may outweigh the Government's interest in shielding those documents from disclosure. Accordingly, to the extent that the Court exercises its discretion to apportion expenses, the Government's position is that a reasonable apportionment of expenses is no more than 10 percent.

B. To The Extent The Court Apportions Expenses Based On Plaintiffs' Alleged "Win Ratio," The Government Is Necessarily Entitled To A Corresponding Apportionment Of Its Own Expenses In Connection With The Portions Of Plaintiffs' Motion On Which The Government Prevailed

Moreover, to the extent that the Court adopts plaintiffs' theory for an apportionment of expenses based on its alleged document-based "win ratio," the Government is entitled to a corresponding apportionment of its own expenses for the portions of plaintiffs' motion to compel on which it prevailed. In a footnote, plaintiffs respond to our contention that, if plaintiffs are entitled to an apportionment of their expenses pursuant to its "win ratio," the Government would be entitled to an apportionment of its own expenses with respect to its documents protected by the presidential communications privilege and certain documents protected by the deliberative process privilege, for which it prevailed. Pls. Br. at 22-23 n.4. Plaintiffs contend that this Court should not apportion any expenses for the portion of the motion that plaintiffs lost because "[p]laintiffs' *belief* that the scales tipped in the other direction was at the least 'substantially justified.'" *Id.* at 22 n.4 (emphasis added). Nevertheless, plaintiffs argue that the Court should disregard the Government's "belief" that its own position was substantially justified. *See id.* at 17. Plaintiffs' belief that their discovery position was substantially justified is no less valid that the Government's.

Although the Government takes the position that no apportionment of expenses is warranted in favor of either party, to the extent that the Court accepts plaintiffs' position that it should apportion expenses according to document-based "win ratio," the Government reserves

its right to seek a corresponding apportionment of its expenses based on its own 14 percent "win ratio."[6]

C. Plaintiffs' Requested Apportionment Of Expenses Far Exceeds Other Awards Granted Pursuant To Rule 37(a)(5)

Putting aside that expenses are unwarranted and plaintiffs' proposed method for apportionment is inappropriate, the actual quantum of fees sought by plaintiffs ($211,556.13) is excessive. With one extreme outlier,[7] a survey of the recent authorities cited by plaintiffs reveals the majority of awards are well under $10,000:

- *Romeo & Juliette Laser Hair Removal, Inc.*, 2013 WL 3322249, at *5 (S.D.N.Y. July 2, 2013) (awarding $6,945 in expenses);
- *Council for Tribal Emp. Rights*, 110 Fed. Cl. at 249-50 (awarding $4,689 in expenses);
- *Flame S.A.*, 2014 WL 7185199, at *9-10 (awarding $8,400 in expenses);
- *Walker v. THI of N.M.*, No. 09-cv-60, stipulation at 1 (D.N.M. July 14, 2011) (ECF No. 354) (stipulating to $7,600 in expenses);
- *Rich Prods. Corp.*, 2014 WL 860364, at *5 (awarding $2,791 in expenses).

Of the cases cited by plaintiffs, the highest award was $21,619.63, which was issued in connection with a privilege dispute involving the SEC. *See Yorkville Advisors LLC*, 2015 WL 855796, at *8. In *Yorkville Advisors*, the defendants sought recovery of $95,736.50 in attorney fees and $454.45 in costs in connection with a motion to compel documents withheld by the SEC

[6] Should the Court provide the Government with an apportionment, we will submit an itemization of the Government's estimated expenses.

[7] In *Chevron USA, Inc. v. United States*, 116 Fed. Cl. 202, 232 (2014), the Court awarded plaintiffs $904,483 in sanctions, which represented 42 percent of plaintiffs' entire discovery expenses in connection with the Government's alleged bad faith conduct during years of discovery. The Government "did not object to the legal expenses claimed by Chevron, but reserved its right to appeal." *Id.*

on the basis of various privileges. *Id*. After concluding that the exceptions contained in Rule 37(a)(5)(A) were inapplicable, the district court determined that defendants were entitled to recover their expenses, but ruled that their request was unreasonable. *Id.* at *7-9. Specifically, the district court reduced defendants' claim by over 75 percent after determining that (1) the hours claimed were excessive, (2) the billing entries were "excessive, duplicative and vague," and (3) the hourly rates were unreasonable.

Plaintiffs' claim for expenses in this case suffer from the same infirmities as the defendants' claim in *Yorkville Advisors*: excessive hours, redundant and vague billing entries, and unreasonable hourly rates. To the extent that the Court entertains plaintiffs' claim for an apportionment of expenses, the Court should reduce the expenses accordingly.

D. The Court Should Decline To Apportion Expenses Relating To Proceedings In The Federal Circuit When The Federal Circuit Ruled That The Parties Must Bear Their Own Costs

Plaintiffs motion to compel was fully briefed when they filed their reply on February 1, 2016; thus, any expenses incurred after that date were not incurred "for the motion," and are not recoverable under Rule 37(a)(5). Specifically, plaintiffs' expenses incurred in connection with the Government's mandamus petition are not recoverable. The Federal Circuit, in ruling on that petition, expressly stated that "[e]ach side shall bear its own costs." *In re United States*, 2017 WL 406243, at *9.[8] Plaintiffs cite no case where an appeals court expressly stated that "each side shall bear its own costs" on an appeal of a discovery order, but a trial court later proceeded

[8] Plaintiffs' alleged expenses from November 1, 2015 through February 1, 2016 total $82,324.00—which represents about one-third of the overall sum of $245,995.50 that plaintiffs claim they "incurred in securing discovery of the 50 documents the Government was ultimately forced to produce because of the filing of the motion to compel." Pls. Br. at 18. The bulk of the remaining expenses were incurred in connection with proceedings in the Federal Circuit. *See* Thompson Decl., Ex. A at 6-13.

to award or apportion expenses for the appellate proceedings. Accordingly, the Court should decline to apportion expenses incurred after plaintiffs' briefing on the motion to compel was complete. None of the cases plaintiffs cite supports an award of expenses where a circuit court explicitly stated that each side shall bear its own costs.

E. Plaintiffs' Supporting Declaration Is Insufficient To Support Their Claim For Apportionment Of Expenses

Plaintiffs' demand for $211,556.13 in expenses would make their motion to compel one of the most expensive discovery disputes in recent memory, and the Declaration of David Thompson and supporting materials submitted in support of this exorbitant sum is insufficient to justify it. *See* Declaration of David Thompson (Thompson Decl.), Mar. 17, 2017, ECF No. 362-1.

For instance, Mr. Thompson assures the Court that he has "stricken all entries plainly related to the presidential communications privilege, given the Government's success on that issue in the Federal Circuit," but no means exist for the Court or the Government to determine what qualified as "plainly related" to the presidential communications privilege documents in Mr. Thompson's analysis or to evaluate whether the removal of those entries constitutes an adequate adjustment. *See* Thompson Decl. ¶ 7. Of course, plaintiffs could have struck all of the entries that did not "plainly relate[]" to a privilege on which it prevailed; however, given that only a handful of the billing entries specifically identify any particular privilege, such an effort would have likely reduced the claim enormously. Thus, to the extent plaintiffs simply removed entries containing the words "presidential communications privilege," plaintiffs provide no meaningful confirmation that their billing entries do not seek to recover expenses to litigate privilege issues that they lost. Vague entries such as "analyze issues," without identifying the nature of those issues, gives little comfort that plaintiffs are not seeking to recover expenses for

"issues" over which they lost. Ultimately, plaintiffs' failure to keep sufficiently accurate records to allow the requested apportionment should not work to plaintiffs' financial advantage. Certainly, the Court should exclude plaintiffs' claim for $13,950 in expenses in connection with one attorney's (Howard Nielson) analysis of unspecified "issues."

11/23/15	HN	Analyze issue for motion to compel and discuss with co-counsel; review draft motion to compel and co-counsel's revisions to same; provide comments on same and discuss with co-counsel.	1.30
10/26/16	HN	Mandamus: Read mandamus petition; research and analyze issues raised by same; analyze issues raised by notice of appeal; discuss mandamus/notice of appeal issues with co- counsel.	2.10
10/27/16	HN	Mandamus: Research and analyze issues raised by mandamus petition and discuss with co- counsel; discuss issues raised by notice of appeal with co-counsel.	7.10
10/29/16	HN	Mandamus: Research and analyze issues raised by mandamus petition.	4.10
11/03/16	HN	Mandamus: Read co-counsel's proposed revisions to draft mandamus response and discuss with co-counsel; analyze outstanding issues in draft mandamus response and discuss with co-counsel; read motion for extra pages and government's response to same; read client's comments on mandamus response.	1.50
11/10/16	HN	Mandamus: Read mandamus reply brief and analyze issues raised by same; analyze issues re potential motion to dismiss appeal and discuss with co-counsel.	0.80
12/01/16	HN	Mandamus: Review Government's response to motion to dismiss appeal and analyze issues raised by same.	0.30
01/30/17	HN	Read mandamus decision and analyze issues raised by same; read co-counsel's comments on same; look at filing.	0.80

Id., Ex. A at 7-13.

Moreover, Mr. Thompson states that he has already addressed "block billing" by striking "unrelated portion[s]" of time entries and "reduc[ing] the number of hours listed . . . accordingly." Thompson Decl. ¶ 7. However, by not including the original entries, plaintiffs prevent this Court and the Government from evaluating the sufficiency of such modifications.

Mr. Thompson's assurance regarding block billing is inconsistent with plaintiffs' time records. For instance, Mr. Cooper and Mr. Thompson seek 3.5 hours of attorney time ($3,382.50) relating to "strategy" on January 28, 2016.

01/28/16	CJC	Review draft motion to compel; conference with D. Thompson re case strategy issues.	1.00
01/28/16	DHT	Further work on reply brief in support of motion to compel; conference with C. Cooper re strategy.	2.50

Id., Ex. A at 5.

Although the entries indicate that some portion of that time was spent on the motion to compel, no indication exists regarding what portion of counsel's time was dedicated to the motion as opposed to non-compensable discussions about "strategy."

Another example of plaintiffs' including matters unrelated to the motion to compel is their claim for billings relating to an "executive compensation issue."

11/19/15	PP	Research re executive compensation issue; review edits to motion to compel.	0.70

Id. at 3.

Plaintiffs' motion to compel raised no "executive compensation issues" and the time entry renders impossible any determination regarding what portion of counsel's time was dedicated to such an issue.

F. Plaintiffs' Claimed Expenses For The Motion To Compel Are Duplicative, Vague, And Excessive

i. Excessive Partner Billing On Motion To Compel

Plaintiffs' time records demonstrate that plaintiffs seek recovery for inefficient work. Counsel staffed this motion with five partners (with billable rates up to $1,200 per hour), one associate (billing between $475–$545 per hour), and two paralegals (billing up to $185 per hour). Although the case presents some novel privilege issues, the use of five partners to work on a motion to compel was excessive and resulted in greater fees than the matter required. *See Merck Eprova AG v. Gnosis S.P.A.*, No. 07 Civ. 5898, 2011 WL 1142929, at *11 (S.D.N.Y. Mar. 17,

2011) (noting that the involvement of five different attorneys in connection with a motion to compel seems "excessive").

Mr. Thompson provides no detail regarding the precise roles performed by the six attorneys assigned to plaintiffs' motion to compel; however, the billing records indicate that an associate (Brian Barnes) was the principal author of the motion papers. *See* Thompson Decl., Ex. A at 2-5. All five partners assigned to this matter appear to have "reviewed" Mr. Barnes's work product. *See*, *e.g.*, *id.* at 2-3. However, only two partners (Charles Cooper and David Thompson) appear to have performed any work on the motion papers themselves. *See id*. at 3. The remaining partners (Peter Patterson, Howard Nielson and Vincent Colatriano) appear to have provided little input regarding plaintiffs' motion or its reply brief. *See id*. at 2-5.

1. Howard Nielson

11/05/15	HN	Review draft privilege motion and co-counsel's comments on same.	0.20
11/06/15	HN	Review co-counsel's proposed revisions to and comments on draft privilege motion and co- counsel's implementation of same.	0.30
11/09/15	HN	Review revisions to draft privilege motion.	0.10
11/23/15	HN	Analyze issue for motion to compel and discuss with co-counsel; review draft motion to compel and co-counsel's revisions to same; provide comments on same and discuss with co-counsel.	1.30
01/21/16	HN	Read response to motion to compel.	0.60

2. Peter Patterson

11/06/15	PP	Review draft motion to compel.	2.60
11/09/15	PP	Review edits to motion to compel.	0.30
11/19/15	PP	Research re executive compensation issue; review edits to motion to compel.	0.70
11/20/15	PP	Review draft motion to compel.	0.10
11/23/15	PP	Review edits to motion to compel; conferences re same.	0.20
01/18/16	PP	Review research re motion to compel.	0.10
01/22/16	PP	Review response to motion to compel in CFC.	0.60
01/29/16	PP	Review motion to compel reply.	1.00
01/30/16	PP	Review motion to compel reply.	0.20

3. Vincent Colatriano

11/06/15	VJC	Review of and revisions to draft motion to compel.	0.20
11/09/15	VJC	Further work relating to timing of filing of motion to compel.	0.20
11/16/15	VJC	Further work on various matters relating to proceedings and discovery in CFC action, including matters relating to motion to compel; further review and analysis of DOJ letter responding to our privilege challenges, and work on strategy in light of same.	0.80
11/20/15	VJC	Further review of draft motion to compel.	0.80
11/22/15	VJC	Further work on various matters relating to draft motion to compel.	0.30
11/23/15	VJC	Further review of draft motion to compel and public version of same.	0.50
12/02/15	VJC	Further work on response to DOJ request for extension of briefing schedule on motion to compel.	0.10
01/26/16	VJC	Review DOJ response to motion to compel.	0.80
01/29/16	VJC	Review reply brief.	0.40
01/30/16	VJC	Further review of draft reply in support of motion to compel.	0.70
02/01/16	VJC	Further work on matters relating to draft reply in support of motion to compel.	0.20

Given the limited involvement by Howard Nielson, Peter Patterson and Vincent Colatriano on the motion to compel, the Court should exclude all expenses for their time (totaling $9,256.50).

ii. Redundant Tasks

Plaintiffs' motion to compel also involved an unreasonably expensive cite-checking endeavor. One attorney and two paralegals spent a combined 63.10 hours of time cite-checking plaintiffs' motion papers, and plaintiffs seek to recover $13,922.50 for this task alone.

11/05/15	NLS	Cite check Motion to Compel for B. Barnes.	6.40
11/06/15	EPB	Cite check Motion to Compel for B. Barnes.	5.80
11/06/15	NLS	Cite check Motion to Compel for B. Barnes.	5.70
11/09/15	BWB	Oversee cite check of motion to compel on disputed privilege issues.	0.50
11/09/15	NLS	Cite check of Motion to Compel for B. Barnes, transfer edits.	3.80
11/10/15	BWB	Review cite check changes to motion to compel; draft email to opposing counsel at DOJ re timing of motion to compel filing.	0.30
11/10/15	EPB	Cite check Motion to Compel for B. Barnes.	0.20
11/10/15	NLS	Resolve outstanding cite check edits of Motion to Compel for B. Barnes, implement global edits, create cover, edit tables.	2.20
11/20/15	BWB	Oversee preparation of list of documents that are subject of motion to compel; implement D. Thompson's suggested changes to motion to compel; draft proposed questions presented for motion to compel; revise motion to compel to add discussion of recently produced documents; review cite check changes to motion to compel.	4.60
11/20/15	EPB	Cite check Mot. to Compel; prepare exhibits for same.	7.60

11/20/15	NLS	Cite check additional edits to Motion to Compel for B. Barnes; prepare exhibits.	6.50
01/29/16	BWB	Make revisions to motion to compel reply brief in light of comments from V. Colatriano and P. Patterson; oversee cite check of same.	3.10
01/29/16	NLS	Cite check Reply in Support of Motion to Compel for B. Barnes, combine edits re same.	4.00
01/31/16	BWB	Review further cite check changes to motion to compel reply brief.	0.40
02/01/16	BWB	Oversee cite check, preparation of appendix, and other filing mechanics for motion to compel reply brief; make final edits and carefully proofread same.	3.80
02/01/16	EPB	Create appendix for reply in support of motion to compel.; create Exhibit 5; cite check reply; file reply for B. Barnes.	5.60
02/01/16	NLS	Cite check further attorney edits to Motion to Compel Reply for B. Barnes, create and edit components re same, paginate brief, file.	2.60

Cite-checking the authorities cited in plaintiffs' motion papers required no special skill or effort. Because plaintiffs' claim for expenses related to cite-checking alone dwarfs the majority of fee awards granted pursuant to Rule 37(a)(5), the Court should exclude a substantial portion of those expenses.

iii. Client Communications

Plaintiffs' claim also includes $18,872 in expenses relating to client communications and strategy meetings that should be excluded.

10/27/16	BWB	Strategy call with team to discuss mandamus petition; call with B. Berkowitz, D. Schmerin, and D. Thompson to discuss mandamus petition and personal emails issue; discuss mandamus petition with D. Jakus; research standard of review for mandamus petition and develop arguments regarding same.	7.30
10/31/16	DHT	Calls with clients; further work on mandamus opposition.	1.40
11/09/16	DHT	Analyze government reply brief on mandamus; calls with clients.	1.40
12/01/16	BWB	Review Government's response to motion to dismiss Federal Circuit appeal on privilege issues and draft email to D. Schmerin re same.	0.80
12/02/16	DHT	Calls with clients; review Federal Circuit brief.	1.60
12/06/16	DHT	Calls with clients; review Federal Circuit reply brief.	0.70
01/30/17	BWB	Review Federal Circuit privilege opinion and discuss same with D. Schmerin, C. Cooper, D. Thompson, and P. Patterson; prepare document summarizing what is known about documents to be produced; draft email summarizing Federal Circuit decision for clients.	8.40
01/30/17	DHT	Review Federal Circuit decision; calls with clients re same.	2.70
01/30/17	PP	Review order on mandamus petition; conference with client re same; conference re same.	1.00
01/30/17	CJC	Review Federal Circuit decision re government's privilege claims; conferences with D. Schmerin, P. Patterson, B. Barnes re same.	2.00

Id. at 7-13.[9]

Plaintiffs claim for $18,872 for approximately six client conference calls and one draft email is unreasonable.

G. Plaintiffs' Hourly Rates Are Excessive

Plaintiffs seek expenses at hourly rates that are well in excess of other practitioners in the Court of Federal Claims. According to the *Laffey* matrix appended to the Thompson Declaration, a reasonable rate for attorneys with more than 20 years of experience was $797 per hour for the period June 1, 2015 to May 31, 2016. *See* Thompson Decl., Ex. G. Mr. Thompson's hourly rate for 2016 was over 12 percent higher and Mr. Cooper's rate for 2016 was over 43 percent higher than the rates reflected in the *Laffey* matrix. *Id.* Moreover, Mr. Thomspon's and Mr. Cooper's hourly rates were well in excess of the "average partner rates" at Washington, DC firms, as reflected on the chart submitted by plaintiffs. *See id.*, Ex. F.

Mr. Barnes, a 2010 law school graduate, billed at $515 per hour in 2016. The *Laffey* matrix indicates that a reasonable rate for attorneys with 4-7 years of experience was $406 per hour for the period June 1, 2015 to May 31, 2016. *Id.*, Ex. G. Mr. Barnes' rate for 2016 was over 26 percent higher. Indeed, Mr. Barnes' rate exceeded the average associate rate at every firm in Washington, D.C., except for one. *Id.*, Ex. F.

Should the Court determine that apportionment of expenses is warranted, the Court should use rates no higher than those reflected in the *Laffey* matrix submitted by plaintiffs.

[9] "B. Berkowitz" refers to Bruce Berkowitz, the Founder of Fairholme Capital Management, and President and a Director of Fairholme Funds, Inc. *See* http://www.fairholmefunds.com/bruce. "D. Schmerin" refers to Daniel Schmerin, the Director of Investment Research at Fairholme Capital Management. *See* http://www.fairholmecapital.com/daniel-e-schmerin.

CONCLUSION

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

Respectfully submitted,

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