

In the United States Court of Federal Claims

No. 11-779C

(Filed: January 6, 2015)

STARR INTERNATIONAL COMPANY,
INC., on its behalf and on behalf of a class
of others similarly situated,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

ORDER

On December 8, 2014, counsel for the Plaintiff filed a motion to supplement the evidentiary record with 133 documents produced to Plaintiff during trial following the Government’s voluntary waiver of the attorney-client privilege.¹ See Pl.’s Mot. at 1, Dkt. No. 404. In its response, the Government objected to the admission of all but four documents on the grounds that they are “irrelevant, previously available, and/or cumulative.” Def.’s Resp. at 3, Dkt. No. 415. The Government also sought to admit four documents for the sake of completeness should the Court grant Plaintiff’s motion. See id. at 24-26.

Plaintiff’s motion is the product of the Government’s deliberate waiver of the attorney-client privilege during the sixth week of trial. The Department of Treasury and the Federal Reserve Bank of New York (“FRBNY”) retained Davis Polk & Wardwell LLP (“Davis Polk”) as outside counsel to provide them with legal advice on the various

¹ The 133 documents include the 84 documents Plaintiff sought to introduce on the last day of trial, Tr. 8692, as well as 45 other documents that were previously un-reviewed documents produced to Plaintiff during the final days of the trial. Pl.’s Mot. at 1. It also includes 4 documents (PTX 98-U, PTX 191, PTX 1630, and PTX 3125) relied upon by Plaintiff’s experts, Professor Zingales and Dr. Cragg. Id. at 21. In its response, the Government does not object to the admission of these four documents.

events at issue in this lawsuit. At trial, the Government purposefully disclosed privileged information when it was beneficial to its case during the testimony of Mr. Marshall Huebner and Mr. John Brandow, two Davis Polk attorneys. This disclosure was so broad and covered so many topics that the Court found a waiver with respect to “any communication involving the law firm of [Davis Polk] relating to AIG.” Tr. 6249. To remedy the fact that these privileged documents were not previously disclosed to Plaintiff, the Court ordered the immediate production of documents on the privilege logs of the Department of Treasury, the Federal Reserve Board of Governors and the FRBNY. Tr. 6654-6656 (including documents that previously were partially redacted). The Court also ordered the production of internal Davis Polk communications relating to AIG from seven custodians over four specified time periods. See Tr. 7224-41. During the last two weeks of trial, more than 30,000 documents were produced to Plaintiff and the majority of the production was not completed until November 21, 2014, just three days before the last day of trial and Plaintiff’s one-day rebuttal case on November 24, 2014. Pl.’s Mot. at 3. As such, counsel for the Plaintiff did not have a fair opportunity to review many of the documents until after the completion of trial. Id. at 1, 3.

On the last day of trial, Plaintiff sought to admit 84 documents now included in its motion to supplement the evidentiary record. Tr. 8692; Pl.’s Mot. at 1. The Government objected to the admission of these documents because they did not have the chance to review all the documents and because some of the documents were internal Davis Polk communications. Tr. 8789-8791 (Mr. Dintzer: “we didn’t go through them all, and I didn’t get a chance to see any of them” . . . “[i]nternal communications between two Davis Polk attorneys that never were sent to anybody in the Government can’t really be adopted by anybody in the Government”). The Court closed the evidentiary record on the last day of trial without admitting these documents, but also allowed Plaintiff the opportunity to file a motion to supplement the evidentiary record with any of the newly produced documents Plaintiff had yet to review, as well as any of the documents that Plaintiff sought to introduce on the last day of trial, and issued an order to that effect. Tr. 8792; Post-Trial Order at 1, Dkt. No. 392.

Under Rule 59(a)(2) of the Rules of the Court of Federal Claims, on motion, the Court may “take additional testimony,” including documentary evidence. Wisc. Elec. Power Co. v. United States, 90 Fed. Cl. 714, 769 (2009). Whether additional testimony and documentary evidence should supplement the evidentiary record is within the discretion of the trial court. See id. Under the circumstances here, it would be unfair to Plaintiff to preclude it from supplementing the evidentiary record when it was the Government’s decision to use the attorney-client privilege as both a sword and a shield and to prevent Plaintiff from obtaining these documents during discovery. Had the Government produced these documents to Plaintiff earlier, Plaintiff would have had every opportunity to examine these documents and to offer them at trial. It was the

Government's own actions regarding the use of the attorney-client privilege that denied Plaintiff the opportunity to confront witnesses contemporaneously with these documents. In particular, Plaintiff could not effectively cross-examine Mr. Huebner and Mr. Brandow, whose testimony resulted in the Government's waiver of the privilege. By shielding these documents in discovery, the Government prevented Plaintiff from questioning the Davis Polk attorneys about the statements in the documents, including the internal Davis Polk communications.

Accordingly, the Court GRANTS Plaintiff's motion. The following exhibits are hereby admitted into the evidentiary record: PTX 98-U; PTX 191; PTX 1630; PTX 3118; PTX 3119; PTX 3125; PTX 3128; PTX 3131; PTX 3132; PTX 3132-A; PTX 3152; PTX 3153; PTX 3156; PTX 3159; PTX 3160; PTX 3163-PTX 3167; PTX 3212-PTX 3219; PTX 3221-PTX 3227; PTX 3229; PTX 3230; PTX 3231; PTX 3233-PTX 3237; PTX 3239; PTX 3241-PTX 3244; PTX 3246; PTX 3249; PTX 3251-PTX 3256; PTX 3260; PTX 3263-PTX 3265; PTX 3267; PTX 3271-PTX 3288; PTX 3291; PTX 3295; PTX 3298; PTX 3300; PTX 3302-PTX 3305; PTX 3307; PTX 3308; PTX 3312; PTX 3315; PTX 3316; PTX 3322; PTX 3324; PTX 3326-PTX 3328; PTX 3330; PTX 3331; PTX 3333-PTX 3337; PTX 3339-PTX 3353; and PTX 3355-PTX 3368.

The Court also GRANTS the Government's motion to supplement the evidentiary record with the four documents it identified in its response for the sake of completeness under Federal Rule of Evidence 106. As such, the Court admits the following exhibits: DX 3101; DX 3102; DX 3103; and DX 3104.

As the record of admitted exhibits is now complete following this order, the Court requests the parties to submit one hard copy and one electronic copy of all the admitted exhibits to the Court as soon as possible.

IT IS SO ORDERED.

s/ Thomas C. Wheeler
THOMAS C. WHEELER
Judge