IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

SHOREN BROWN and THOMAS QUINN, Movants, vs. PEBBLE LIMITED PARTNERSHIP, Respondent.	)	No. 3:16-mc-0013-HRH

O R D E R

Motions to Quash

Shoren Brown and Thomas Quinn move to quash non-party subpoenas.[1] These motions are opposed.[2] Oral argument was requested[3] but is not deemed necessary.

Background

Respondent Pebble Limited Partnership ("Pebble") is the owner of an undeveloped, but potential world-class, mineral deposit in Southwest Alaska. The Pebble Prospect is located at the headwaters of several salmon spawning streams that flow into Bristol Bay. The Bristol Bay salmon fishery is a world class fishery.

[1]Docket No. 1.

[2]Docket Nos. 9 and 10.

[3]Docket No. 21.

By letter of February 28, 2014, the EPA informed Pebble that the agency was going to begin proceedings pursuant to Section 404(c) of the Clean Water Act which could lead to a decision prohibiting development of the Pebble Prospect. On September 3, 2014, Pebble initiated proceedings pursuant to Section 702 of the APA in which Pebble contends that the EPA violated the Federal Advisory Committee Act (FACA), 5 U.S.C. app. II, §§ 2-16, in the course of administrative proceedings that might lead to a Section 404(c) decision.[4] On November 25, 2014, the court entered a preliminary injunction, restraining EPA Region 10 from issuing any recommendation to the Administrator of the EPA regarding the Pebble Prospect.[5] By stipulation,[6] Pebble filed a second amended complaint[7] in which Pebble repeated its allegations that the EPA had violated FACA.

Although discovery is generally not permitted in APA cases, because Pebble had asserted claims that the EPA violated FACA, the parties were permitted to conduct discovery in Pebble's FACA case. At the time it filed its response to the instant motions, Pebble had served on the EPA two sets of requests for productions, a set of interrogatories, and a set of requests for admissions. Pebble had also noticed twenty-one depositions of current or former

[4]Docket No. 1 in Pebble Ltd. P'Ship v. EPA, No. 3:14-cv-0171.

[5]Docket No. 90 in Pebble Ltd. P'Ship v. EPA, No. 3:14-cv-0171.

[6]Docket No. 132 in Pebble Ltd. P'Ship v. EPA, No. 3:14-cv-0171.

[7]Docket No. 133 in Pebble Ltd. P'Ship v. EPA, No. 3:14-cv-0171.

EPA officials and actually taken fourteen depositions. In addition, Pebble has received documents in response to its FOIA requests. Discovery in this case is still ongoing.

On July 22, 2015, Pebble served a subpoena on movant Shoren Brown for documents and a deposition.[8] Brown was with Trout Unlimited but is now "the Director of Bristol Bay United."[9] The subpoena requested the production of a broad range of documents for an 11-year period related to Brown's communications with the EPA and his communications with other non-parties. Around the same time, Pebble served identical or similar subpoenas on over fifty other non-parties.

On November 18, 2015, this court granted a motion to quash brought by four of the non-parties.[10] The court found that "[t]o the extent that non-parties ... communicated with the EPA, those communications are available to [Pebble] from the EPA...."[11] The court explained that "[d]iscovery from the EPA will be more convenient, less burdensome, and less expensive than discovery from" the non-parties.[12] The court recognized that Pebble was concerned that some EPA officials may have used their personal emails for some of their

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[8]Exhibit B, Declaration of Joshua A. Levy [etc.], appended to Movants Shoren Brown's and Thomas Quinn's Motions to Quash [etc.], Docket No. 1.

[9]Declaration of Shoren Brown [etc.] at 2, ¶ 3, appended to Movants Shoren Brown's and Thomas Quinn's Motions to Quash [etc.], Docket No. 1.

[10]Docket No. 200 in Pebble Ltd. P'ship v. EPA, No. 3:14-cv-0171.

[11]Id. at 8.

[12]Id. at 11.

communications, but the court was "unpersuaded that any such communications will escape discovery from EPA officials."[13] The court also found that the "great bulk" of communications between the non-parties and the EPA would be irrelevant to Pebble's FACA claims and that the same was true of the communications between non-parties.[14] Finally, the court found that Pebble's subpoenas infringed on the First Amendment rights of the non-parties.[15]

On November 20, 2015, plaintiff advised Brown that it was withdrawing the July 22, 2015 subpoena.[16]

On March 18, 2016, Pebble served another subpoena for testimony and documents on Brown.[17] On March 21, 2016, Pebble served an identical subpoena[18] on movant Thomas Quinn, who is "a professor at the University of Washington School of Aquatic and Fishery Sciences."[19] Pebble contends that movants were key members of one or more of the de facto advisory committees. Pebble contends that Brown

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[13]Id.

[14]Id. at 12.

[15]Id. at 13.

[16]Exhibit F, Levy Declaration, appended to Movants Shoren Brown's and Thomas Quinn's Motions to Quash [etc.], Docket No. 1.

[17]Exhibit G, Levy Declaration, appended to Movants Shoren Brown's and Thomas Quinn's Motions to Quash [etc.], Docket No. 1.

[18]Id.

[19]Declaration of Thomas Peter Quinn [etc.] at 2, ¶ 3, appended to Movants Shoren Brown's and Thomas Quinn's Motions to Quash [etc.], Docket No. 1.

> directly consulted with EPA on scores upon scores of occasions; coordinated with other nonparties to meet with EPA; provided strategy and scientific recommendations and memos; emailed regularly with EPA personnel primarily responsible for the Bristol Bay Watershed Assessment [BBWA]; and personally attended virtually every key meeting held by the off-the-books federal advisory committees.[20]

As for Quinn, Pebble contends that he was utilized by the EPA as a contributor to the BBWA and that he "provided multiple briefings at de facto committee meetings arranged by EPA regarding the application of Section 404(c) to the Pebble Mine Project, and about the mining scenarios that would be used by EPA in the BBWA."[21]

Pebble seeks, for the time period January 1, 2009 through November 24, 2014,[22] the following documents:

> 1. Documents that reflect whether EPA or any of its Contractors or Subcontractors requested or otherwise solicited advice, recommendations, data or other information, or Work Product of any kind from You in connection with the Bristol Bay Watershed Assessment, the Pebble Mine Project, or the Proposed Determination. This request excludes emails sent to or received from an Official EPA Email Account.
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> 2. Documents that contain or reflect advice, recommendations, data or other information, or Work Product of any kind that You provided in response to any request or solicitation by EPA or any of its Contractors or Subcontractors in connection

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[20]Redacted Version of Pebble Limited Partnership's Opposition to Shoren Brown's and Thomas Quinn's Motions to Quash Subpoenas at 9, Docket No. 9.

[21]Id. at 10.

[22]Schedule A at 2, ¶ 5, Brown Subpoena, Exhibit G, Levy Declaration, appended to Movants Shoren Brown's and Thomas Quinn's Motions to Quash [etc.], Docket No. 1.

with the Bristol Bay Watershed Assessment, the Pebble Mine Project, or the Proposed Determination and any documents specifically referencing such requests or solicitations. This request excludes emails sent or received from an Official EPA Email Account.

3. Documents that contain or reflect communications that You had with any Person or group of Persons, excluding EPA, but not excluding any of its Contractors or Subcontractors, regarding requests or solicitations by EPA or any of its Contractors or Subcontractors for advice, recommendations, data or other information, or Work Product of any kind in connection with the Bristol Bay Watershed Assessment, the Pebble Mine Project, or the Proposed Determination.

4. Documents that contain or reflect communications that You had with any Person or group of Persons, excluding EPA, but not excluding any of its Contractors or Subcontractors, regarding Your response to requests or solicitations by EPA or any of its Contractors or Subcontractors for advice, recommendations, data or other information, or Work Product of any kind in connection with the Bristol Bay Watershed Assessment, the Pebble Mine Project, or the Proposed Determination.

5. Any documents in whole or in part relating to or memorializing any of the meetings listed in Appendix A.[23] This request includes, but is not limited to, all Documents prepared in preparation for such meeting(s) as well as notes, minutes, memoranda, correspondence or other documents prepared during or after such meeting(s) relating to the discussions that took place. This request excludes any formal meeting requests

[23] Appendix A lists 53 meetings. Exhibit G, Levy Declaration, appended to Movants Shoren Brown's and Thomas Quinn's Motions to Quash [etc.], Docket No. 1. Pebble later offered to reduce the number of meetings listed in Appendix A. Exhibit O, Levy Declaration, appended to Movants Shoren Brown's and Thomas Quinn's Motions to Quash [etc.], Docket No. 1.

> sent to the EPA and any emails or email attachments sent to or received from an Official EPA Email Account.[24]

Pebble contends that these non-party subpoenas[25] are necessary because EPA witnesses cannot remember what occurred at various de facto advisory committee meetings and because the non-parties possess documents that are relevant to Pebble's FACA claims that are not in EPA's possession.

Movants objected to the subpoenas and on April 1, 2016, their counsel met with Pebble's counsel to try to resolve their differences. This attempt failed, resulting in the instant motions to quash.[26]

Discussion

"Federal Rule of Civil Procedure 45 governs discovery of nonparties by subpoena." ATS Products, Inc. v. Champion Fiberglass, Inc., 309 F.R.D. 527, 530 (N.D. Cal. 2015). "Rule 45 provides that 'on timely motion, the court for the district where compliance is required must quash or modify a subpoena that ... subjects a person to undue burden.'" Id. at 531 (quoting Fed. R. Civ. P. 45(c)(3)(A)(iv)). "'[A] court determining the propriety of a subpoena balances the relevance of the discovery sought, the requesting party's need, and the

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[24]Brown Subpoena at 6-7, Exhibit G, Levy Declaration, appended to Movants Shoren Brown's and Thomas Quinn's Motions to Quash [etc.], Docket No. 1.

[25]In addition to Brown and Quinn, plaintiff served subpoenas on seven other non-parties, including Carol Ann Woody, who has also moved to quash the subpoena. See Docket No. 221 in Pebble Ltd. P'ship v. EPA, No. 3:14-cv-0171.

[26]The motions to quash were filed in the Western District of Washington and subsequently transferred to this court.

potential hardship to the party subject to the subpoena.'" Id. (quoting Gonzales v. Google, Inc., 234 F.R.D. 674, 680 (N.D. Cal. 2006)). "'Relevancy, for the purposes of discovery, is defined broadly, although it is not without ultimate and necessary boundaries.'" Id. (quoting Gonzales, 234 F.R.D. at 679–80). The court may "limit the frequency or extent of discovery" that is "unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive[.]" Fed. R. Civ. P. 26(b)(2)(C)(i). The "party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." Fed. Rule Civ. Proc. 45(d)(1). "The party who moves to quash a subpoena bears the 'burden of persuasion' under Rule 45(c)(3)." ATS Products, 309 F.R.D. at 531 (quoting Moon v. SCP Pool Corp., 232 F.R.D. 633, 637 (C.D. Cal. 2005)). This "burden is a heavy one." In re Yassai, 225 B.R. 478, 484 (Bankr. C.D. Cal. 1998).

Movants first argue that the subpoenas should be quashed because the discovery that Pebble seeks can be obtained from the EPA, which is a more convenient source, and because much of the discovery that Pebble seeks here is irrelevant to its FACA claims. Movants argue that requiring them to respond to such discovery requests would be unduly burdensome.

In Requests 1 and 2, Pebble seeks movants' communications with EPA officials on their non-.gov email accounts. Pebble contends that it has requested discovery from key EPA officials' personal email accounts but that the EPA's response to these requests has been

inadequate, in part because EPA employees "have admitted to deleting emails conducting agency business from their personal accounts" without forwarding the emails to their EPA accounts.[27] Pebble cites to one example that suggests that Administrator Jackson might have deleted one personal email without forwarding it to her EPA account and also to Phil North's use of his personal email account. Thus, Pebble argues that it has no alternative but to seek these emails from nonparties.

Absent evidence of spoliation of EPA records by EPA employees who used personal email accounts, the court perceives no good reason to burden non-parties with the far-reaching discovery sought by the instant subpoenas. Laying aside Brown or Quinn's direct communications with EPA employees, Pebble in substance seeks the entire work product of Brown and Quinn in connection with the subject proceedings before the EPA.

Pebble has to prove that the EPA established or utilized advisory committees without observing FACA's procedural requirements. Evidence of that allegation is more likely than not to be found within EPA records and EPA employee testimony. Pebble has not identified any particularized, specific gap in EPA records that is (a) relevant and (b) likely to be readily identifiable in Brown or Quinn's email records. Pebble has to establish that the EPA sought group advice. Advice offered to the EPA by individuals such as Brown and Quinn is irrelevant to this case.

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[27]Redacted Version of Pebble Limited Partnership's Opposition to Shoren Brown's and Thomas Quinn's Motions to Quash Subpoenas at 7, Docket No. 9.

In Requests 3 and 4, Pebble seeks to discover documents related to specific tasks or directions given to movants by contractors and subcontractors who worked on the BBWA. Pebble argues that it must seek these documents from movants because the EPA cannot produce communications that were between EPA contractors/subcontractors and non-parties. Pebble argues that such communications are relevant to its FACA claims because they will reflect the EPA's instructions and orders to members of the alleged de facto advisory committees.

If the EPA were giving movants specific tasks to do or specifically requesting advice or recommendations from them that should be reflected in communications that Pebble can obtain from the EPA. Pebbles seems to believe that the EPA may have been having its contractors and subcontractors contact movants, rather than having an EPA official contact them directly. But this is nothing but speculation. Pebble has not offered anything that suggests that the EPA was using its contractors and subcontractors in this manner.

As for Request 5, movants argue that information about the 53 meetings could be obtained from the EPA. Pebble, however, argues that this information cannot be obtained from the EPA because key EPA witnesses are able to recall very little about most of their meetings and interactions with members of the de facto advisory committees. By way of example, Pebble cites to the deposition testimony of Nancy Stoner, EPA's former Acting Assistant Administrator for Water. Stoner testified that she first heard about the Pebble

Prospect from Brown,[28] that she could not recall how many times she met with him in the June/July 2010 time frame,[29] that she could not recall who else attended a specific meeting that Brown attended,[30] and that she did not recall a follow-up telephone call with Brown that was referred to in an email or calendar entry.[31] Pebble also cites to the testimony of Denise Keehner, EPA's Director of the Office of Water, who testified that she did not recall a meeting with Brown in July 2010,[32] that she did not remember a meeting that both Brown and Quinn attended,[33] that she did not remember meeting with Brown after the February 24, 2011 announcement about the BBWA,[34] and that she did not remember if she even attended another meeting that Brown attended.[35] And, Pebble cites to the testimony of Bob Sussman, former Senior Policy Counsel to EPA Administrator Jackson, that he did not specifically

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[28]Videotaped Deposition of Nancy Stoner at 33:1-4, Exhibit 4, Redacted Version of Pebble Limited Partnership's Opposition to Shoren Brown's and Thomas Quinn's Motions to Quash Subpoenas, Docket No. 9.

[29]Id. at 50:15-22.

[30]Id. at 39:10-20.

[31]Id. at 90:15-91:11.

[32]Videotaped Deposition of Denise Keehner at 40:19-21, Exhibit 3, Redacted Version of Pebble Limited Partnership's Opposition to Shoren Brown's and Thomas Quinn's Motions to Quash Subpoenas, Docket No. 9.

[33]Id. at 122:4-123:2.

[34]Id. at 153:14-17.

[35]Id. at 156:1-9.

recall a June 2012 meeting that Brown attended.[36] Pebble argues that movants will be able to fill in these informational gaps and testify about what occurred at these and other meetings.

Pebble also contends that the EPA did not keep notes of these meetings and thus this evidence is not available from the EPA. But even if it were, Pebble argues that it should be allowed to take non-party discovery in order to test the veracity of the EPA's evidence. For example, Pebble argues that the EPA may contend that it followed its own FACA guidelines but that this contention may be contradicted by minutes, notes, summaries, and other documents prepared by the members of the de facto advisory committees.

First of all, Pebble's Request 5 is extremely broad. Pebble requests information about 53 meetings without having made any showing that one or both of movants were at each of these meetings. In quashing the first round of non-party subpoenas, the court observed that Pebble was "'pushing the envelope' as far as its non-party discovery efforts...."[37] Pebble continues to do so here.

Secondly, the court is not convinced that Pebble could only obtain information about these meetings from movants. Even assuming that some EPA officials cannot remember details about meetings, Pebble could have noticed the depositions of other EPA employees

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[36]Videotaped Deposition of Robert M. Sussman at 229:19-230:1, Exhibit 13, Redacted Version of Pebble Limited Partnership's Opposition to Shoren Brown's and Thomas Quinn's Motions to Quash Subpoenas, Docket No. 9.

[37]Order re Motion to Quash; Motion to Compel at 13, Docket No. 200, Pebble Ltd. P'ship v. EPA, No. 3:14-cv-0171.

and it certainly could have noticed EPA depositions sooner. For example, Pebble was permitted to take 35 depositions but apparently only noticed 22 depositions of former and current EPA employees. Instead of taking advantage of the opportunities it had to take discovery from EPA employees, Pebble appears to have focused its discovery efforts on non-parties, which is inappropriate.

Thirdly, what Pebble is seeking to discover here is largely irrelevant to the question of whether the EPA violated FACA. To prevail on a FACA claim, a plaintiff must prove that a federal agency established or utilized an advisory committee without following the procedural requirements set forth in FACA. Town of Marshfield v. F.A.A., 552 F.3d 1, 5-6 (1st Cir. 2008) (quoting 5 U.S.C. app. 2 § 3(2)(C)). "[A]n advisory panel is 'established' by an agency only if it is actually formed by the agency[.]" Byrd v. U.S. E.P.A., 174 F.3d 239, 245 (D.C. Cir. 1999). An advisory committee is "utilized" by an agency if it is under the actual management or control of the agency. Id. at 245-46. "The identities of the meeting attendees and their organizational attachments, their method of selection, the specific advice they provided, and how [the agency] used or will use this advice is irrelevant" to the question of whether the agency violated the FACA. Citizens for Responsibility and Ethics in Washington v. Leavitt, 577 F. Supp. 2d 427, 434 (D.D.C. 2008) (internal citation omitted). Pebble is on a fishing expedition. Much of what Pebble seeks in Request 5 cannot possibly be much relevant to the issue of whether the EPA established or utilized an advisory committee.

In sum, while the instant subpoenas are somewhat less onerous than the initial subpoena issued to Brown, the instant subpoenas are extremely broad and are not focused upon the real issues in this case: creation and use of an advisory committee. And, Pebble continues to seek information that could be obtained from the EPA. Thus, requiring movants to respond to the subpoenas would impose an undue burden on movants. The subpoenas are quashed.[38]

Because the subpoenas are being quashed, movants argue that they are entitled to sanctions in the form of attorney's fees and costs. Pursuant to Rule 45(d)(1), the court may award attorney's fees and costs as a sanction if plaintiff failed to "take reasonable steps to avoid imposing undue burden or expense on" movants. "Merely losing a motion to [quash] does not expose a party to Rule 45 sanctions." Legal Voice v. Stormans Inc., 738 F.3d 1178, 1185 (9th Cir. 2013). "Similarly, while failure [to] narrowly ... tailor a subpoena may be a ground for sanctions, the district court need not impose sanctions every time it finds a subpoena overbroad[.]" Id. "A court may, however, impose sanctions when a party issues a subpoena in bad faith, for an improper purpose, or in a manner inconsistent with existing law." Id.

[38]The court need not reach movants' First Amendment argument because there are sufficient other grounds for quashing the subpoenas.

Movants' request for sanctions is denied. The court is not convinced that Pebble issued the subpoenas "in bad faith, for an improper purpose, or in a manner inconsistent with existing law." Id.

Conclusion

Movants' request for oral argument[39] is denied. Movants' motions to quash[40] are granted. Movants' request for sanctions is denied.

DATED at Anchorage, Alaska, this 22nd day of November, 2016.

/s/ H. Russel Holland
United States District Judge

[39]Docket No. 21.

[40]Docket No. 1.