IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES DEPARTMENT OF TREASURY Petitioner, v. PENSION BENEFIT GUARANTY CORPORATION, Interested Party, v. DENNIS BLACK, *et al.*, Respondents.	)	No. 1:12-mc-00100-EGS

PLAINTIFFS' OPPOSITION TO TREASURY'S MOTION TO EXTEND ITS TIME TO RESPOND TO PLAINTIFFS' MOTION TO COMPEL WITHHELD AND REDACTED DOCUMENTS OR FOR *IN CAMERA* REVIEW AND REPLY IN FURTHER SUPPORT OF THE MOTION TO COMPEL

Dennis Black, Charles Cunningham, Ken Hollis, and the Delphi Salaried Retirees Association (collectively, "Plaintiffs") last week filed a motion to compel the U.S. Department of the Treasury (the "Treasury") to produce roughly 1,000 documents responsive to a 2012 subpoena *duces tecum* (the "Document Subpoena") that they believe the Treasury has improperly withheld on the basis of unsubstantiated privileges (the "Motion to Compel") (DE 30). Plaintiffs separately moved the Court to enter an expedited briefing schedule for the Motion to Compel, noting, *inter alia*, the Treasury's delays in responding to the Document Subpoena, the upcoming discovery deadlines in the underlying litigation, *Black v. PBGC*, Case No. 2:09-cv-13616 (the "Michigan case"), and the extraordinary amount of time that has already been available to the Treasury to substantiate its privilege assertions. *See* DE 31. The Treasury has now filed a brief

in opposition to Plaintiffs' motion to expedite, and cross-moved to *extend* its time to respond to the Motion to Compel, seeking to have its opposition due on the day that discovery in the Michigan case is set to close. The Treasury's motion should be denied, and Plaintiffs' motion for an expedited briefing schedule granted.

The Treasury's opposition to the motion to expedite, and its most recent demand for additional delay, is audacious when viewed in the context of what has occurred previously, both in this Court, and in the Michigan case. The Michigan case was initiated in September 2009 in the United States District Court for the Eastern District of Michigan (the "Michigan Court"), when Plaintiffs sued the Pension Benefit Guaranty Corporation ("PBGC") to challenge what they believe to be the unlawful termination of their pension plan in July 2009 by the PBGC (at the behest of the Treasury). The government – both the PBGC and (eventually) the Treasury – then proceeded to stonewall all discovery for almost three years, with the PBGC often being in violation of court orders and normal procedures (so much so that the Michigan Court ordered the PBGC to produce all of its allegedly privileged documents for failure adequately to preserve, and for cavalierly asserting, privilege claims). Despite this obstructionism, Plaintiffs have persevered, obtaining orders directing the government to provide discovery numerous times from numerous courts, including not only this Court and the Michigan Court, but also the Sixth Circuit (after the PBGC filed a mandamus petition that was summarily denied). Six years into the process, discovery is almost completed, at great expense of time, energy, and resources by Plaintiffs.

After this Court ordered the parties "to work together in good faith to promptly comply with the Court's order" that had denied the Treasury's renewed motion to quash (*United States Department of Treasury v. Black v. PBGC*, 301 F.R.D. 20, 30 n.7 (D.D.C. 2014)), Plaintiffs

agreed to allow the Treasury to utilize a narrow set of search criteria in determining the universe of electronic documents responsive to the Document Subpoena. DE 29 ¶ 2. Because of this narrowing, the Treasury only needed to review electronic documents for privilege (as all documents meeting the agreed upon criteria were, *per se*, responsive), and that privilege review was limited to a universe of less than 5,000 documents. *See* DE 32-1 at 3 (noting that approximately 3,500 documents were produced without redaction, and 1,273 documents or portions of documents were withheld pursuant to claims of privilege). Plaintiffs, reluctantly, also agreed to allow the Treasury more than four months (from the Court's entry of the Stipulated Order) to complete this review and production, and to allow the Treasury an additional two months beyond that to finalize its privilege log. DE 29 ¶¶ 4, 7.

On September 8, 2014, the Treasury informed Plaintiffs that it would begin the agreed-upon review promptly, and on June 10, 2015, the Treasury sent Plaintiffs the second and last part of its privilege log, meaning that the Treasury had been allowed more than *nine months* in total to document its 1,273 assertions of privilege. Plaintiffs immediately wrote to the Treasury to note the log's failure to support the withholdings at issue, particularly in regard to the deliberative process and presidential communications privileges. *See* June 12, 2015 Letter from M. Khalil to D. Glass at 3 (attached hereto as Ex. A) (complaining about the Treasury's failure to include a declaration or affidavit of the responsible agency official supporting the privilege assertions, and noting specifically that "the Treasury has failed to explain in any instance what decision was being made, when the decision was made, and whether each document purportedly protected by the deliberative process privilege actually related to the process by which policies are formulated"). Plaintiffs requested that, because of the existing timing concerns, the Treasury provide any supplements to its privilege log no later than June 19, 2015, and informed the

Treasury that, absent such supplementation, "Plaintiffs will be forced to move to compel production of all the documents on the privilege log, and in light of the upcoming depositions and deadlines, will seek expedited review before Judge Sullivan." *Id*. at 6. The Treasury's counsel did not respond in writing, only by voicemail on June 15, 2015, to the effect that Treasury intended only at the time of any litigation on a motion to compel to place in the record the Executive Branch declarations necessary to support the privilege assertions.

Plaintiffs, troubled by this response, replied that "in order to assess the propriety of the [deliberative process] privilege, the Treasury needs to identify what 'decision' was supposedly being considered, whether the document actually preceded the unspecified final decision, or how the document related to the deliberative process in question. These are the sorts of questions that agency declarations are supposed to answer, which is why we are surprised and disappointed that you do not intend to produce such a declaration to us unless we initiate litigation. Respectfully, our view is that such an approach defeats the purpose of a declaration, and that a declaration submitted after litigation would be too late to cure this deficiency." June 16, 2015 Email from M. Khalil to D. Glass at 1 (attached hereto as Ex. B). The Treasury responded, again not in writing but only in voicemail, by stating that the Treasury was not going to make any kind of supplemental filing, but that it would be willing to provide answers to the questions raised in Plaintiffs' correspondence. However, no answers were then provided in writing, with the Treasury's counsel stating (again in a voicemail) that he did not have the time to write Plaintiffs letters regarding Plaintiffs' questions.

Plaintiffs then expressed further concern to the Treasury that its refusal to commit its positions to writing threatened to "delay the resolution of this discovery dispute." *See* June 22, 2015 Email from M. Khalil to D. Glass at 1 (attached hereto as Ex. C). Nevertheless, on June

23, 2015, the parties held a conference call to discuss the Treasury's clarifications. Plaintiffs documented the information provided by the Treasury on the call (attached hereto as Ex. D), but the Treasury refused to verify the substance of the letter, stating only that some things in the letter were correct, and some were incorrect. With the Treasury unwilling to commit its positions to writing, Plaintiffs believed that the meet- and-confer process was, regrettably, unproductive, forcing Plaintiffs to return to this Court to seek to compel the improperly withheld documents.[1] Plaintiffs also sought to expedite consideration of the Motion to Compel, given the lengthy amount of time that Treasury had already had to document any valid grounds it might have had for withholding the documents, and the looming (August 14, 2015) discovery cut-off in the Michigan case.

The Treasury opposes the motion to expedite and is seeking to *extend* its time to respond, up to the current discovery cut-off in the Michigan case. According to the Treasury, it needs this extension because the Treasury supposedly has not yet had sufficient time to document its assertions of privilege in the manner it deserves. But there is a simple response to this assertion: the Treasury *has already had* more than ample time to document its privilege claims; indeed, the Treasury had 60 days built into the Stipulated Order to do just that (not to mention the previous five months when it was conducting its privilege review), and then had additional time during the meet-confer process, after Plaintiffs specifically complained about the lack of the affidavit the

[1] In fact, while more than 900 of the Treasury's privilege assertions seek to invoke the deliberative process and presidential communications privileges, it appears that as of July 12, 2015 (more than ten months after the Treasury supposedly began its privilege review), not a single one of those assertions might have been reviewed by an agency official to determine if such privileges should be asserted. *See* DE 32-1 at 4 (stating that the Treasury needs an additional month to generate declarations from the Treasury and the Executive Branch which the Treasury "anticipates" will be filed in support of its withholdings). This begs two questions: First, if this was the case, how was the Treasury able to determine in the first instance that those privileges should be invoked? Second, how was the Treasury able to confer in good faith about the propriety of its withholdings if no agency review was conducted?

Treasury now wants more time to produce. The fact of the matter is that, given the vast amount of time that the Treasury has had to provide supporting declarations prior to the filing of the Motion to Compel, any declaration filed now should be rejected by the Court as coming too late. Otherwise, Plaintiffs' reliance on the Treasury's privilege log, their participation in the meet-and-confer process, and their preparation of the Motion to Compel based on the Treasury's prior representations, would all be rendered meaningless. Having failed to document properly its privilege assertions in the time allowed under the Stipulated Order, and having now squandered an additional 30 days after receiving notice of its privilege log deficiencies, the Treasury should not be heard to complain about the need for additional time to complete a declaration whose production at this late date should in any event be rejected.[2]

The Treasury's second ground for opposing the motion to expedite is that Plaintiffs have extended the Michigan discovery schedule in the past, and so they can just extend the schedule

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[2] *See, e.g., Martin v. New York City Transit Auth.*, 148 F.R.D. 56, 60 (E.D.N.Y. 1993) (holding that "[t]he person asserting the privilege must have personally reviewed the purported privileged matter. In addition, the subordinate with high authority must provide specific reasons for the assertion of the deliberative process privilege with an affidavit *contemporaneous with the assertion of such privilege.*") (citing *Resolution Trust Corp. v. Diamond*, 137 F.R.D. 634, 641 (S.D.N.Y. 1991), and *King v. Conde*, 121 F.R.D. 180, 189 (E.D.N.Y. 1988)); *see also Burch v. Regents of Univ. of Cal.*, No. 04-0038, 2005 U.S. Dist. LEXIS 46998, at *3 (E.D. Cal. Aug. 30, 2005) (rejecting late-filed declarations, and holding that, in order for an agency to meet the burden for asserting the deliberative process privilege, they agency's privilege log "must also contain supporting affidavits or other competent evidence to prove the applicability of asserted privileges"); *P&G Co. v. United States*, Case 1:08-cv-608, 2009 U.S. Dist. LEXIS 124049, at *24 (S.D. Ohio Dec. 31, 2009) ("ordinarily, the assertion of the deliberative process privilege calls for support by an affidavit from the agency head at the time the privilege is first asserted") (citing *Alpha I, L.P. v. United States*, 83 Fed. Cl. 279, 290 (Fed. Cl. 2008)) and *EEOC v. Tex. Hydraulics, Inc.*, 246 F.R.D. 548, 551-52 (E.D. Tenn. 2007)); *Confidential Informant 59-05071 v. United States*, 108 Fed. Cl. 121, 135-36 (Fed. Cl. 2012) (finding that government's production of affidavit in support of privilege assertions after litigation commenced was "not proper"). "When a party withholds information otherwise discoverable by claiming that the information is privileged . . . the party must . . . describe the nature of the documents, communications, or tangible things not produced or disclosed – and do so in a manner that, without revealing information itself protected, *will enable other parties to assess the claim*." Fed. R. Civ. P. 26(b)(5)(A)(ii) (emphasis added).

again. This argument takes chutzpah, given that the reason Plaintiffs have needed to get extensions in the past has been because of the stonewalling on discovery by both the PBGC and the Treasury. Plaintiffs want their claims heard, and it does them no good to have their lawsuit pending without resolution for more than six years, with critical evidence still unproduced. But the Treasury, having now managed to delay the litigation for months and months, comes before the Court and essentially says "What's the problem with another delay?" The Court, respectfully, should not lend assistance to the Treasury's delay tactics. And in any event, getting additional time may not be as easy as the Treasury claims. When the Treasury delayed production of its privilege log for 10 days, Plaintiffs sought a corresponding extension of the Michigan case's discovery schedule, but the PBGC initially stated it would oppose the request. *See* June 3, 2015 Email from J. Menke to M. Khalil (attached hereto as Ex. E). Although the PBGC ultimately changed its mind, it is far from clear whether the PBGC would oppose the sort of additional extension of the discovery period that Treasury is proposing here, and also unclear whether the Michigan Court would grant such an extension over any PBGC opposition.

Plaintiffs will, of course, seek an extension of the discovery period if that becomes necessary, as they are determined to get to the bottom of what the government did with their pensions and have a due process right to litigate their claims. But they should not be forced to do so by a government that has no good reason for delay and has sought (and achieved) delay at every turn. The Court should reject the government's latest attempt to delay discovery and should therefore grant the motion to expedite and deny the cross-motion for additional delay in the briefing schedule.

Respectfully submitted,

July 14, 2015

/s/ Anthony F. Shelley
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CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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/s/ Anthony F. Shelley

Exhibit A

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June 12, 2015

VIA EMAIL

David M. Glass
Senior Trial Counsel
U.S. Department of Justice, Civil Division
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Re: ***U.S. Dep't of Treasury v. PBGC v. Black et al.*, No. 1:12-mc-00100 (D.D.C.)**

Dear David:

I am writing to discuss a number of deficiencies contained within the privilege log produced to Plaintiffs by the U.S. Department of Treasury (the "Treasury") in connection with Plaintiffs' January 4, 2012 document subpoena[1], as well as to respond to your suggestion that the deposition subpoenas issued yesterday to Mr. Wilson and Mr. Feldman are "insufficient."

I. Privilege Log Deficiencies

As you will recall, Plaintiffs served their document subpoena on the Treasury more than three years ago. The Treasury moved twice to quash the subpoena. The Court denied the Treasury's second motion approximately one year ago, directing the parties "to work together in good faith to promptly comply with the Court's order." *United States Dep't of the Treasury v. PBGC v. Black*, 301 F.R.D. 20, 30 n.7 (D.D.C. 2014). For more than four months, Plaintiffs negotiated the scope of the subpoena with the Treasury, which Plaintiffs did for the Treasury's convenience, even though Plaintiffs were under no obligation to do so. *Id.* at 29 n.5. Pursuant to a stipulation entered into between the Plaintiffs, the Treasury, and the Pension Benefit Guaranty Corporation ("PBGC"), the Treasury was then allowed four additional months to complete its production under the narrowed terms, and then two more months to produce a privilege log justifying any assertions of privilege. *See* D.D.C. ECF No. 29 (the "Stipulated Order"). Even then, the Treasury failed to complete its privilege log under the time required by the Court's Order, and took an additional ten days to complete its production of that log. In sum, the Treasury has taken more than three years to produce any documents in response to

[1] The Treasury provided Plaintiffs with two separate privilege logs — one on June 1, 2015, and another on June 10, 2015. This letter refers to them collectively as a singular privilege log.

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Plaintiffs' document subpoena, and has had more than seven months since the entry of the Stipulated Order to begin preparing its privilege log, making the log's deficiencies all the more problematic.

According to the Treasury's privilege log, it has either withheld or redacted more than 1,200 documents on four grounds: (1) the deliberative process privilege; (2) the presidential communications privilege; (3) the attorney-client privilege; and (4) the work product doctrine. The privilege log provided by the Treasury is, however, wholly inadequate to meet the Treasury's burden of establishing that any of the asserted privileges or protections apply.

As with any civil case, when an agency withholds materials based on an assertion of privilege or work product, the agency must follow the procedures set forth in Federal Rule of Civil Procedure 26(b)(5). This rule requires the agency to supply enough information to allow the other parties to assess whether the asserted privileges or protections are applicable. At a minimum this includes, on a document-by-document basis: (1) a brief description or summary of the content of the document; (2) the date the document was prepared; (3) the name(s) of the person(s) who prepared the document; (4) the person to whom the document was directed or for whom it was prepared; (5) the purpose for preparing the document; (6) the privilege or protection asserted; and (7) how the document satisfies the asserted privilege or protection.

In light of these requirements, the Treasury's privilege log is inadequate on its face for at least the following reasons:

- There are hundreds of instances in which the Treasury has omitted the author and/or recipient of a document — even for email messages and other correspondence that presumably had both a sender and recipient(s), as well as for reports and briefs that presumably had authors and recipients;

- Even where the Treasury has associated the names of individuals with a given document, it has failed to provide any information as to who among the various individuals are attorneys or otherwise what their titles or roles are;

- The log fails to identify whether emails have attachments, and fails to identify what attachments are associated with particular emails;

- The log refers to numerous withheld documents that the Treasury has failed to Bates-label. *See, e.g.*, Privilege Log at Item Nos. 592-768. No explanation has been provided for this discrepancy; and

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- There is no indication whether any of the purportedly privileged materials were forwarded, and therefore no way to know whether the privilege was waived at any point.

Given these deficiencies, it is impossible for us to assess the validity of the Treasury's invocation of the various privileges and protections cited in the privilege log. In addition to these global deficiencies, there are other specific problems with the privilege log.

The Deliberative Process Privilege

For example, the deliberative process privilege will not attach unless several substantive and procedural requirements are met. First, the Treasury must show that a document is substantively both "predecisional" and "deliberative." A document is "predecisional" when it is prepared to assist the agency decision-maker in arriving at a decision,[2] and it is "deliberative" if it is actually related to the process by which policies are formulated. Second, three procedural requirements must also be satisfied: (1) the head of the agency who has control over the materials in question must make a formal claim of the privilege, after actual personal consideration of the materials by the official; (2) the responsible agency official must state with particularity the information subject to the privilege; and (3) the agency must provide precise and certain reasons for shielding the materials from disclosure. These three procedural requirements are usually addressed by a declaration or an affidavit of the responsible agency official. Failure to provide such a sworn statement can constitute grounds for deeming the privilege waived.

The Treasury has not demonstrated — procedurally or substantively — that a single document or redaction on their privilege log is protected by the deliberative process privilege. The Treasury has altogether failed to meet the three procedural requirements described above. Moreover, it has failed to meet the substantive requirements. Most glaringly, the Treasury has failed to explain in any instance what decision was being made, when the decision was made, and whether each document purportedly protected by the deliberative process privilege actually related to the process by which policies are formulated. Without knowing these facts, it is impossible to know whether a document is predecisional or deliberative. And in some instances on the privilege log, the document's author is unknown, making it impossible to assess whether the document's author (whether known or otherwise) prepared a given document for the purpose of assisting an agency official in arriving at a decision. *See*, *e.g.*, Privilege Log at Item Nos.

[2] Purely factual materials that do not reflect deliberative process or documents reflecting an agency's final policy decision do not fall within the scope of the privilege.

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255, 563, and 690. This is especially problematic in light of the fact that this privilege has been asserted numerous times for documents identified as having been authored by non-governmental actors. *See*, *e.g.*, Privilege Log at Item Nos. 112 and 113.

The Presidential Communications Privilege

There are at least two substantive requirements that must be met for the presidential communications privilege to apply. First, the document in question must reflect presidential decisionmaking. Indeed, the presidential communications privilege can never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the President. And second, the document must be authored or solicited and received by the President or his immediate or key advisors (and their staff) in the White House. The privilege is so narrowly circumscribed that even staffers in the Executive Office of the President are not considered "immediate or key advisers" — that distinction is reserved only for those advisors in the Office of the President and their staff. The privilege certainly does not apply to staff outside the White House in executive branch agencies.

First and foremost, the privilege log again fails to reflect what decision the President purportedly made that would shield the documents allegedly protected by the presidential communications privilege. If the President was not making a decision, the privilege cannot apply. The Treasury has also failed to explain how the official positions of any of the recipients or authors of the documents permits the invocation of the presidential communications privilege. It is impossible to know whether any of them qualify as immediate or key advisors in the Office of the President. For example, in many instances, the author or recipient of a designated document is referred to in the log simply as "Team Auto," with no description of the identities of those persons who are subsumed under that moniker. *See*, *e.g.*, *id.* at Item No. 633. In other instances, no author or recipient is identified at all. *See*, *e.g.*, *id.* at Item No. 275.

The Attorney-Client Privilege

A party asserting the attorney-client privilege must prove: (1) that it made a confidential communication; (2) to a lawyer or the lawyer's subordinate; (3) for the primary purpose of securing either a legal opinion or legal services, or assistance in some legal proceeding. In the agency setting, the privilege does not apply when a communication is made for the purpose of obtaining or providing advice on policy. And disclosure of any significant portion of a confidential communication waives the privilege as to the whole.

Here, it is impossible to tell who is engaged in an attorney-client relationship. For example, there are communications that purport to be between attorneys at Cadwalader,

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Wickersham & Taft (*e.g.*, Oren Haker, John Rapisardi, and Joseph Zujkowski), Treasury employees (*e.g.*, Paul Nathanson), members of the Auto Task Force (*e.g.*, Matthew Feldman and Harry Wilson), and employees of the U.S. Department of Justice (*e.g.*, Matthew Schwartz, Joseph Cordaro). *See id.* at Item No. 12. But the log fails to identify which of these persons are the attorneys, and which are the clients. Without knowing who is in the attorney-client relationship, it is impossible to assess whether the primary purpose of any purportedly privileged communication was to secure advice. Moreover, in many instances the privilege log does not reflect whether the advice sought or rendered was legal advice as opposed to advice on policy. *See*, *e.g.*, *id.* at Item No. 349 (referencing staffing concerns). There is also no way of knowing whether a given communication was confidential, or whether it remained confidential, *see*, *e.g.*, *id.* at Item No. 320 (authored by Silver Point Capital), as nothing indicates whether any of the documents, or any portion of a document, was forwarded outside the attorney-client relationship.

The Work-Product Doctrine

The work-product doctrine shields from discovery only those materials prepared by or for an attorney in preparation for litigation. Accordingly, the doctrine protects neither materials assembled in the ordinary course of business, nor the underlying facts relevant to the litigation.

Here, there is no evidence that any of the withheld materials were prepared in anticipation of litigation. And for several of the documents purportedly protected by the work product doctrine, there is no author or recipient listed at all, making it impossible to assess whether the documents were prepared by or for an attorney. *See*, *e.g.*, *id.* at Item Nos. 201, 202, 203, 207, 215, 220.

Plaintiffs' Requests

It is the Treasury's burden to produce preliminary facts showing that information is eligible for protection. The Treasury has altogether failed to do so, and its claims of privilege are subject to waiver as a result. Under the circumstances, Plaintiffs request that, no later than Friday, June 19, 2015, the Treasury supplement its privilege log or otherwise provide the Plaintiffs with additional information sufficient to allow Plaintiffs and the court to determine whether the asserted privileges are applicable. This would include, at a minimum, the categories of information discussed above. Similarly, Plaintiffs request that the Treasury provide a declaration or an affidavit from an agency official, with the requisite authority, to establish the procedural elements of the deliberative process privilege, and from the White House, formally invoking the presidential communications privilege by that date, or else produce those documents that have been withheld or redacted on such grounds at that time.

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Given the amount of time the Treasury took to produce the responsive documents and to provide the privilege log, and in light of the upcoming depositions of Mr. Feldman and Mr. Wilson, as well as the approaching discovery deadlines in the Michigan case, it is necessary that the Treasury provide the information necessary to analyze the Treasury's claims of privilege no later than June 19, 2015. Otherwise, Plaintiffs will be forced to move to compel production of all the documents on the privilege log, and in light of the upcoming depositions and deadlines, will seek expedited review before Judge Sullivan.

II. The Treasury's Assertion that Its *Touhy* Regulations Apply to Plaintiffs' Deposition Subpoenas

We are, to say the least, surprised by the Treasury's new-found assertion that the PBGC is not the United States. We note the following:

- The PBGC is a federal agency, governed by a three-person board made up of the Secretaries of Labor, Treasury, and Commerce. *PBGC v. LTV Corp.*, 496 U.S. 633, 637 (1990).

- The Treasury has provided Plaintiffs with a privilege log seeking to withhold numerous communications between the Treasury and the PBGC on the grounds of the deliberative process privilege, which may only be invoked if, *inter alia*, the Treasury believes that these were inter-agency communications that were "part of a process by which governmental decision and policies are formulated" *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975).

- The PBGC is represented in the underlying litigation by the U.S. Attorney for the Eastern District of Michigan. It is the responsibility of the U.S. Attorney's office to, *inter alia*, "prosecute or defend, *for the Government*, all civil actions, suits or proceedings in which *the United States* is concerned." 28 U.S.C. § 547(2) (emphasis added).

Additionally, we note that the Treasury has, through its previous litigation conduct, suggested a contrary view:

- In the Treasury's renewed motion to quash, the Treasury argued that the Plaintiffs lacked standing to bring their underlying suit against the PBGC in part because of sovereign immunity concerns. *See* Treasury's Renewed Motion to Quash at 15 ("'Congress has always reserved to itself the power to address claims of the very type presented by respondent[s], those founded not on any

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statutory authority, but upon the claim that the equities and circumstances of a case create a moral obligation on the part of the Government to extend relief to an individual.'") (quoting *OPM v. Richmond*, 496, U.S. 414, 431 (1990)).

- The Treasury did not assert that its *Touhy* Regulations applied to Plaintiffs' first deposition subpoena to Treasury in its Renewed Motion to Quash.

You also suggested that because the Federal Rules of Civil Procedure distinguish between service of process on "the United States" and a "United States agency or corporation" that the Treasury's *Touhy* regulations might make a similar distinction. We note that, contrary to your suggestion, courts do not find a distinction between the United States and one of its agencies for purposes of determining whether an agency's *Touhy* regulations apply. *See, e.g.*, *Houston Bus. Journal v. Office of the Comptroller of the Currency, United States Dep't of Treasury*, 86 F.3d 1208 (D.C. Cir. 1996); *Alexander v. FBI*, 186 F.R.D. 66, (D.D.C. 1998).

In short, we find your suggestion that Plaintiffs need to comply with the Treasury's *Touhy* regulations in a suit against the PBGC ridiculous. If we are forced to litigate the issue, Plaintiffs will ask the Court to award them their legal fees. In this regard, we note the Court's caution to the Treasury to "carefully consider this Opinion before filing [a future motion to quash]." *Treasury v. PBGC*, 301 F.R.D. at 29 n.6.

We would like to discuss these issues with you as soon as possible. Please suggest some times on Monday or Tuesday of next week when it would be convenient for us to speak.

Best regards,

Michael N. Khalil

cc: Michael S. Schacter
John A. Menke

Exhibit B

From: Khalil, Michael
Sent: Tuesday, June 16, 2015 2:27 PM
To: Glass, David (CIV) (David.Glass@usdoj.gov)
Cc: Shelley, Anthony; O'Toole, Timothy
Subject: RE: Black: Privilege Log & Depositions

David,

Thanks for your voicemail yesterday. First, I wanted to respond to your suggestion that the ball is "in our court" as far as whether this dispute needs to proceed to litigation. I respectfully disagree. The ball is in the Treasury's court, in that the Treasury is the only party to this disagreement with access to the information necessary to understand whether its decision to withhold more than 1,200 documents as privileged or protected is actually justified. At this point, despite the ample time the Treasury has had to complete its log, we lack that information, and if the Treasury is unwilling to provide it in short order, then we will have no choice but to litigate. However, if I understood your message correctly, the Treasury is working on responses to the issues raised in our letter, and if those responses meaningfully address our concerns, then I'm confident that we can avoid the need for litigation. But to be clear, the responses must actually address our concerns such that we can assess whether the privileges apply.

The problems are most glaring with regard to the deliberative process privilege, which the Treasury invokes more than 900 times on its log, yet in not one of those instances can we tell what "decision" was supposedly being considered, whether the document actually preceded the unspecified decision, or how the document related to the deliberative process in question. For example, Log Entry 112, Bates UST-BL-017768, is identified as an attachment to an email, yet there is no way to tell to what email it is attached. The log identifies the author of the document as Silver Point Capital, which as you know is not a governmental agency, but instead was one of the Tranche C DIP lenders to Delphi. The log does not identify a recipient of the document, and describes the document as " Task list/Work plan discussing thoughts on potential next steps in GM bankruptcy." In short, the log entry is devoid of any information necessary to support a claim that the deliberative process privilege applied. While some of the deliberative process entries at least provide more information about the individuals involved in the communications, they all share a common global failing in that the reader cannot answer all three dispositive questions (*i.e.*, what "decision" was supposedly being considered in the document, whether the document actually preceded the unspecified decision, and how the document related to the deliberative process of that decision) on the basis of the log entry. To take another example, Log entry 215, Bates UST-BL-035751, is an attachment to an email. The log does not identify any author or recipient, and describes the document as "Draft Slide Presentation regarding Delphi bankruptcy and possible effect on GM." Again, in order to assess the propriety of the privilege, the Treasury needs to identify what "decision" was supposedly being considered, whether the document actually preceded the unspecified final decision, or how the document related to the deliberative process in question. These are the sorts of questions that agency declarations are supposed to answer, which is why we are surprised and disappointed that you do not intend to produce such a declaration to us unless we initiate litigation. Respectfully, our view is that such an approach defeats the purpose of a declaration, and that a declaration submitted after litigation would be too late to cure this deficiency.

In addition to those basic questions, we hope that your response will address our other questions (*e.g.*, who, exactly, constitutes "the auto team"; who, exactly, did Cadwalader (or other attorneys) represent, and what was the extent of that representation; which documents were forwarded outside of Treasury [*e.g.*, to SIGTARP or Congress]; why were some documents not Bates labeled; what is the Treasury's basis for invoking the

Presidential Communications Privilege [at a minimum, where the authors/recipients (when listed) fall within the Office of the President in terms of hierarchy, and what decision the President was making]). And for those documents where the Treasury cannot identify an author or recipient, how has it determined that the particular privilege(s) or protection(s) applied?

I wonder whether we might be better served to plan to talk next Monday, after we review the supplemental materials you provide on Friday. At that point, we can have a meaningful discussion about whether any disagreements remain, and at the very least, the issues will hopefully be narrowed.

You also raised the issue of the depositions, and the fact that the Treasury was concerned about holding the depositions on the dates we've scheduled in light of this potential discovery dispute. Given the fact that it took three weeks of negotiations to come up with these dates, we are not willing to postpone them further. As I noted in last Friday's letter, should there be a need to litigate those privilege issues, we will ask the Court to expedite the briefing of those issues. But we also remain hopeful that you will provide us sufficient detail regarding the Treasury's privilege assertions such that litigation will be unnecessary. Again, we can discuss next Monday.

Finally, we are unclear as to whether the Treasury is still taking the position that it's *Touhy* regulations apply to this case in light of the points and authorities raised in last Friday's letter. Could you please clarify the Treasury's position on that issue?

Best,
Mike

Michael Khalil
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mkhalil@milchev.com
202-626-5937
* * *

Exhibit C

From: Khalil, Michael
Sent: Monday, June 22, 2015 4:02 PM
To: Glass, David (CIV) (David.Glass@usdoj.gov)
Cc: O'Toole, Timothy; Murphy-Johnson, Dawn; Shelley, Anthony
Subject: RE: Message

Dear David,

As I noted in last week's emails, we are concerned that the Treasury's refusal to forward its responses to our questions in writing will delay the resolution of this discovery dispute. Again, the Treasury's refusal to state its position in writing makes it impossible for us to accurately or efficiently evaluate the Treasury's privilege assertions. At this point, the Treasury has claimed privilege for approximately 1,200 documents and accordingly has the burden for demonstrating that privilege and to do so in writing. That justification was due with the privilege log on May 31, 2015. It is now June 22, 2015, we have already had to ask the Michigan Court to modify the discovery deadlines in the case because of the Treasury's failure to serve the privilege log on time, and we still have not seen (or heard) any sufficient justification for the vast majority of the Treasury's privilege assertions.

The only rationale you have offered for not providing written responses is your statement on Friday's voicemail that you don't have the time to write us letters regarding those responses. Yet, more than three weeks have now passed since the Treasury's written justification of privilege was due, and it seems to us that it will take significantly more time (both yours and ours) to discuss those response item by item, and for us to thereafter take your responses and use them to supplement the Treasury's facially deficient log. At best, the Treasury has answers to support its claims of privilege, but it is seeking to shift the burden of documenting those justifications to us. At worst, the Treasury has no good justifications for many of its privilege assertions, and is seeking to forestall judicial resolution of the dispute by engaging in telephone conversations that address our concerns with piece mail bits of information. Because of the impending discovery deadlines in the underlying case, which, as you are aware, the PBGC has resisted extending any further, a prolonged parsing out of supplementary justifications is simply unacceptable to us.

Nevertheless, because you have represented that you have answers that will address all the concerns we have raised with you about the log's glaring deficiencies, and because we are loathe to file a motion to compel if there is a substantial chance that a good faith discussion can avoid the need for litigation, we are willing to try and have a call with you tomorrow without the benefit of written responses ahead of time. We are available for such a call at the following times tomorrow:

11:00 am
11:30 am
12:00 pm
12:30 pm

We look forward to the discussion. After our call, we will review the Treasury's privilege log with the supplemental information you provide to us tomorrow to make a final determination as to the sufficiency of the Treasury's privilege assertions.

Best,
Mike

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mkhalil@milchev.com
202-626-5937
* * *

From: Khalil, Michael
Sent: Friday, June 19, 2015 11:27 AM
To: Glass, David (CIV) (David.Glass@usdoj.gov)
Cc: Timothy P. O'Toole (totoole@milchev.com); Murphy-Johnson, Dawn (dmurphyjohnson@milchev.com); Anthony F. Shelley, Esq. (ashelley@milchev.com)
Subject: RE: Message

David,

I think we are having a disconnect, so I'm sending this email to try and bridge the gap. Last Friday we sent you a letter laying out what we perceive as critical deficiencies in the Treasury's privilege log, deficiencies which lead us to believe that the Treasury has no justification for withholding most of the roughly 1,200 documents listed on the log. In our letter we asked that, to the extent you have any additional information you would like us to be aware of in connection with the Treasury's privilege assertions, that you send that information to us no later than today.

On Tuesday, following an exchange of voicemails, we had a rather unproductive call to discuss the issues raised in our letter. In one of your voicemails, you stated that the Treasury would not be providing us with any supplemental filings or responses, though you did also state that you were working to get answers to at least some of the questions raised in our letter. During our call, you confirmed that you believed that the log you had provided was perfectly adequate, and that you did not intend to supplement it. You also informed us that, in evaluating the Treasury's assertions of the deliberative process and presidential communications privileges, we should understand that the governmental decision involved in all cases was "what do we do about GM." You also told us that every time "Team Auto" was mentioned on the privilege log, we should understand that all of the following individuals, in all cases, made up Team Auto:

Ron A. Bloom
Clay Calhoon
Brian Dees
Diana Farrell
Matthew Feldman
Robert Fraser
Sadiq Malik
David Markowitz

Paul Nathanson
Brian Osias
Steven Rattner
Brian Stern
Haley Stevens
Harry Wilson

The information you relayed to us on this call did nothing to allay our concerns that the Treasury has improperly withheld documents under the guise of privilege, and the tenor of our phone conversation did nothing to suggest to us that continuing these conversations would be a productive use of anyone's time. Your voice mail from yesterday said that the Treasury has provided you with answers to all of the questions and concerns raised in last Friday's letter. If that is the case, then I would urge you to forward those responses to us as soon as possible, are at least those parts that you wish to share with us.

We ask that you send us these responses in writing (as opposed to going over them in a phone call) in the interest of clarity and efficiency, that is, to reduce the potential that we misunderstand your description of the Treasury's responses, to avoid any confusion between us as to what was and was not covered in the call, and also so that we do not waste each other's time reciting and transcribing information which has already been reduced to written form. That said, if you do produce supplemental responses to us today, we would be happy to arrange a call with you to discuss them, but again, only after we've had a chance to review them.

Best,
Mike

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* * *

From: Khalil, Michael
Sent: Thursday, June 18, 2015 4:52 PM
To: Glass, David (CIV) (David.Glass@usdoj.gov)
Cc: Timothy P. O'Toole (totoole@milchev.com); Murphy-Johnson, Dawn (dmurphyjohnson@milchev.com)
Subject: Message

David,

Sorry I missed your call earlier. I'm happy to have a call with you, but I'd ask you send us the Treasury's letter ahead of the call, so that we can give it some thought prior to our conversation. If that works for you, we will plan on giving you a call tomorrow morning.

Many thanks,
Mike

Michael Khalil
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* * *

Exhibit D

MILLER CHEVALIER

Michael Khalil
Member
(202) 626-5937
mkhalil@milchev.com

June 23, 2015

VIA E-MAIL

David M. Glass
Senior Trial Counsel
U.S. Department of Justice, Civil Division
20 Massachusetts Avenue, N.W., Room 7200
Washington, D.C. 20530-0001

Re: ***U.S. Dep't of Treasury v. PBGC v. Black et al., No. 1:12-mc-00100 (D.D.C.)***

Dear David:

Below please find a summary of this morning's telephone conversation. Please review and let me know if I have accurately and completely captured the conversation. If I do not hear back from you, I will assume that all the representations below are accurate.

I. Global Issues

During our call you advised that we should refer to Steve Rattner's book, Overhaul, to ascertain the roles and titles of individuals listed on the Treasury's Privilege Log. Specifically, you referred us to page x, entitled "Cast of Characters."

You also advised us that, in addition to attorneys at Cadwalader (which served as outside counsel to the Treasury), Paul Nathanson, Bernard Knight, and Shira Minton were acting as attorneys within the Department of Treasury for purposes of the Log. You advised that there may be additional Treasury employees who served as attorneys, but could not identify any additional attorneys at this time.

You advised us that where the Log refers to "Team Auto," there is no formal definition of who was on "Team Auto," but that the Treasury's best guess is that the individuals listed on page ix of Mr. Rattner's book constitute Team Auto.

You advised us that usually the Log lists e-mails and their attachments together, unless either the e-mail or the attachment did not implicate any privileges. You advised that we could ask you to identify matching e-mails or attachments on a one-off basis if we provide you with the specific e-mail or attachment in question.

MILLER CHEVALIER

You advised that the Treasury's practice was only to Bates label a document if either the document or family member were to be produced – where no family member was intended to be produced, the Treasury did not Bates label any of the documents in that family.

Regarding our concern that there is no indication whether any of the purportedly privileged materials were forwarded, and therefore no way to know whether the privilege was waived at any point, you advised that the Treasury reviewed the entire e-mail chain to see if it broke privilege at any time and where it did, the Treasury released the unprivileged part of the e-mail.

II. Comments of Specific Log Entries

- Privilege Log Entries 112 and 113 – You advised that the privilege log mistakenly listed the author of these documents as Silver Point Capital, and that you believe this resulted from metadata within the documents. You now advise that these documents reflect comments and edits by Team Auto.

- Privilege Log Entries 201, 202, and 203 – You advised that the author of these documents was an attorney at Cadwalader, though you are unsure of which attorney.

- Privilege Log Entries 206 and 207 – You advised that the Log mistakenly asserted the wrong privilege for these entries and that the Treasury intended to assert the DPP privilege for both.

- Privilege Log Entry 215 – You identified this document as an attachment to an unspecified e-mail of Rothschild and Harry Wilson and BCG. You believe the author of the document is someone within Rothschild.

- Privilege Log Entry 220 – You identified the author of this document as someone at Rothschild and stated that the Treasury intended to assert the DPP privilege for this document and not the AWP.

- Privilege Log Entry 255 – You stated that author of this document appears to be someone at BCG.

- Privilege Log Entry 320 – You stated that the Treasury intended to assert the DPP for this document and not the ACP.

MILLER CHEVALIER

- Privilege Log Entry 349 – You clarified that the communications in this e-mail concern conflict of interest issues that Mr. Feldman was concerned about with respect to the GM & Delphi bankruptcies.

- Privilege Log Entry 563 – You clarified that this was an e-mail attachment to Bates #065202 (which was released by the Treasury) and that the e-mail reflected Mr. Wilson sending himself draft documents to review over the weekend.

- Privilege Log Entry 690 – You identified that this was an e-mail attachment to Bates #066796 and you clarified that it was Treasury's assumption that these were draft slides created by Rothschild but could also have been authored by Team Auto.

Best regards,

Michael Khalil

Exhibit E

From: Menke John <Menke.John@pbgc.gov>
Sent: Wednesday, June 03, 2015 2:57 PM
To: Khalil, Michael; Michael S. Schachter (mschachter@willkie.com)
Cc: Shelley, Anthony; O'Toole, Timothy; Glass, David (CIV) (David.Glass@usdoj.gov); Morris Karen; Owen Wayne
Subject: RE: Black: Privilege Log & Depositions

Michael:

We do not understand why a minor, 10-day delay in the production of a portion of the Treasury Department's privilege log requires an extension of the time provided for you to complete your discovery against PBGC. The two do not appear to be related in any way. We also note that you have proposed different extensions in the various deadlines, rather than a simple two-week, across-the-board extension. Without some explanation of why these extensions are necessary, we cannot agree to them.

John M.

From: Khalil, Michael [mailto:mkhalil@milchev.com]
Sent: Wednesday, June 03, 2015 10:38 AM
To: Glass, David (CIV); Menke John; Michael S. Schachter (mschachter@willkie.com)
Cc: Shelley, Anthony; O'Toole, Timothy
Subject: RE: Black: Privilege Log & Depositions

David, John, and Michael:

During the last year, Plaintiffs have gone out of their way to accommodate the Treasury's various requests regarding its compliance with Plaintiffs' document subpoena, agreeing to limit both the sources and search criteria that the Treasury would use to locate responsive documents. Similarly, Plaintiffs agreed to the Treasury's request to extend the time frame in which the Treasury had to produce those documents until March 19, 2015 (nine months after the denial of the Treasury's motion to quash), and the time period that the Treasury had to produce its privilege log until May 18 (more than eleven months after the denial of the motion to quash). Negotiating and accommodating all these requests has, not surprisingly, delayed the progress of the underlying litigation. Plaintiffs have been further frustrated by the pace of the Treasury's production, particularly by the fact that the Treasury did not actually complete its production until March 31, 2015, and despite agreeing to produce documents to Plaintiffs on a rolling basis, waited until the last week of March to produce the vast majority (over 80%) of the responsive documents in its possession.

Against this backdrop of persistent delay, the Treasury's decision to wait until 8:00 pm on the day that its privilege log is due to inform us that it is only producing half of its log because of a "processing error" is simply unacceptable. Given the imminent deadlines in the underlying case, as well as the upcoming depositions of Mr. Feldman and Mr. Wilson, every day that the Treasury delays producing its log to us causes Plaintiffs material prejudice. Moreover, it is plainly in violation of the Stipulated Order entered by the Court on November 6, 2014 and, as a result, the Treasury has arguably waived any right to assert privileges for those documents not included in Monday's privilege log.

That said, the prejudice that Plaintiffs will suffer because of this delay may be mitigated by a stipulated extension of the deadlines in the underlying case. Those deadlines were set based on the presumption that the Treasury would meet its obligations under the November 6, 2014 Stipulated Order. Accordingly, if the PBGC enters into a stipulated order in the Michigan Court implementing the deadlines set forth below, Plaintiffs will agree to the Treasury's proposal to extend its production deadline for the remainder of its privilege log to June 10, 2015. We note that this offer of compromise is entirely conditional; if these deadlines are not extended, then Plaintiffs will be prejudiced by Treasury's violation of the Stipulated Order, and Plaintiffs reserve the right to seek any and all remedies, including a finding that Treasury's violation waived any privileges.

- All discovery related to claims 1-4 shall be served in time to be completed by August 14, 2015.
- The Parties shall provide an updated list of all witnesses, lay and expert, by June 30, 2015.
- All discovery motions related to claims 1-4 shall be served by August 14, 2015.
- All dispositive motions related to claims 1-4 must be filed no later than September 22, 2015.

As for any documents that the Treasury has determined are responsive and not privileged, we cannot see any reason to delay their production, and we expect that the Treasury will produce those documents today.

Regarding the depositions – while not our first choice, Plaintiffs can agree to take Mr. Wilson's deposition on July 23, but do not guarantee that the hours between 9 a.m. to 1 p.m. will constitute the entirety of his deposition. While we believe that such time *should* be sufficient, we reserve the right to use the full seven hours allotted under the Federal Rules if necessary.

As for Mr. Feldman, we cannot conduct his deposition on July 22nd, but would be willing to hold his deposition on any of the following days:

June 25
June 26
July 6-10.

If the PBGC agrees to enter into a stipulated order extending the discovery schedule in the manner described above, we would be willing to consider additional days beyond July 10th.

Please let us know your position on these issues no later than the end of the day tomorrow.

Best,

Mike

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* * *

From: Glass, David (CIV) [mailto:David.Glass@usdoj.gov]
Sent: Monday, June 01, 2015 8:18 PM
To: Khalil, Michael; John A. Menke (menke.john@pbgc.gov); Michael S. Schachter (mschachter@willkie.com)
Subject: Black: Privilege Log & Depositions

Mike/John –

Attached is a privilege log covering 768 of the documents from which Treasury has made withholdings. Because of a processing error, Treasury's contractor is continuing to work on a draft privilege log covering the other documents from which Treasury has made withholdings, which are estimated currently to total approximately 650. We propose to provide you with that log on or before June 10. We also propose to provide you at that time with any material initially marked as privileged that we have determined not to be privileged and are no longer withholding. I apologize for the delay and can give you further information if you wish.

Mike Schachter advises that Matthew Feldman will be available for deposition on July 22 and that Harry Wilson will be available for deposition on July 23 from 9 a.m. to 1 p.m., provided that those four hours constitute the entirety of his deposition. Please let me know if those dates and times and that limitation are acceptable.

Thanks, David

cc: Mike Schachter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES DEPARTMENT OF TREASURY Petitioner, v. PENSION BENEFIT GUARANTY CORPORATION, Interested Party, v. DENNIS BLACK, *et al.*, Respondents.	No. 1:12-mc-00100-EGS

[PROPOSED] ORDER

THIS MATTER, having come before the Court on the Department of Treasury's Cross-Motion for Extension of Time to respond to the Motion to Compel Withheld and Redacted Documents, or for In Camera Review, the Opposition by Dennis Black, Charles Cunningham, Ken Hollis, and the Delphi Salaried Retirees Association, thereto, and any Reply,

IT IS HEREBY ORDERED that the Motion is DENIED.

SO ORDERED this ____ day of _____, 2015.

_____
Emmet G. Sullivan
UNITED STATES DISTRICT JUDGE