Case No. _____

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re PENSION BENEFIT GUARANTY CORPORATION
Petitioner-Defendant

_____

PETITION FOR WRIT OF MANDAMUS OF PENSION BENEFIT GUARANTY CORPORATION

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FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION
Case no. 2:09-cv-13616

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I. RELIEF SOUGHT

Pursuant to Fed. R. App. P. 21 and 28 U.S.C. § 1651, Pension Benefit Guaranty Corporation ("PBGC") petitions this Court to issue a Writ of Mandamus striking an order by the United States District Court for the Eastern District of Michigan, Southern Division ("District Court") holding that PBGC waived all privilege claims with respect to its discoverable documents and requiring PBGC to immediately produce over 10,000 documents withheld on the basis of one or more privileges to the plaintiffs. Because PBGC has fully complied with all orders of the District Court regarding discovery deadlines, including a series of five joint stipulated orders negotiated with plaintiffs detailing the document production schedule, the District Court's finding that PBGC cannot claim privilege is an unwarranted and improper sanction.

The protections of the attorney-client, work product and deliberative process privileges are fundamental to our legal system. The District Court erroneously applied the applicable rules and standards by ordering PBGC to disclose privileged documents, thereby forfeiting PBGC's right to claim privileges. If PBGC is forced to turn over its privileged documents, it will be permanently harmed in a way that an appeal after final judgment cannot cure. Because this case remains in the

discovery phase, this petition for mandamus is PBGC's only means to protect its right to assert these privileges.

II. ISSUES PRESENTED

(1) Under Sixth Circuit law, mandamus relief is appropriate if (i) there are no alternative means available for the petitioner to obtain relief; (ii) the petitioner will suffer irreparable harm; (iii) the District Court's order is clearly erroneous as a matter of law; (iv) the District Court's order contains an oft-repeated error or manifests persistent disregard of the federal rules; and/or (v) the District Court's order raises new and important problems, or legal issues of first impression. The District Court has not granted an interlocutory appeal on the order; PBGC will suffer irreparable harm if forced to produce privileged documents; the District Court's order is clearly erroneous as a matter of law; and the order raises new and important problems or legal issues of first impression regarding waiver of privilege. Is mandamus relief appropriate in this case?

(2) Denying a party the right to claim privilege is a severe sanction generally found only in cases of unjustified delay, inexcusable conduct, and bad faith. Here, the District Court imposed this sanction upon PBGC despite PBGC's good faith compliance with all discovery orders, including the joint

stipulated orders agreed to by the parties. Is the District Court's order clearly erroneous as a matter of law?

III. FACTUAL AND PROCEDURAL BACKGROUND RELATED TO THIS PETITION

PBGC is the only remaining defendant in *Dennis Black, et al. v. PBGC*, Case No. 2:09-cv-13616, pending before the District Court since 2009. PBGC is a wholly-owned United States government corporation, and the agency of the United States that administers the pension insurance program under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"). Plaintiffs are former salaried employees of the Delphi Corporation ("Delphi") who challenge PBGC's termination and trusteeship of the Delphi Retirement Program for Salaried Employees ("Pension Plan") in which they participated, following Delphi's liquidation in bankruptcy.[1] The sole issue raised by plaintiffs' Second Amended Complaint is whether PBGC was legally permitted to terminate the Pension Plan by agreement with Delphi, the plan sponsor, in accordance with ERISA.[2] PBGC petitions this Court for mandamus relief from the District Court's discovery order dated July 21, 2014 ("July 2014 Order") finding that PBGC had waived its rights to claim privilege due to the untimeliness of the production of its privilege log, and

[1] Plaintiffs' Second Amended Complaint, filed August 26, 2010, Dkt. No. 145.

[2] *Id.* 29 U.S.C. § 1342(c).

requiring PBGC to immediately produce all documents withheld on privilege grounds.[3]

In September 2011 and October 2011, plaintiffs served PBGC with document requests demanding that PBGC produce every document it possessed that referred, in any way, to Delphi.[4] PBGC responded to these document requests within the 30-day period prescribed in Fed. R. Civ. P. 34(b)(2)(A) by producing the only documents outside of PBGC's Administrative Record that were relevant to the actual claims asserted in plaintiffs' amended complaint.[5] PBGC submitted detailed objections to requests that exceeded those limitations. Finally, PBGC expressly and clearly preserved its rights to protect privileged material in the event

[3] Order Overruling Defendant's Objections to Magistrate Judge's Order of August 21, 2013 [234] and Mooting Plaintiffs' Motion Requesting the Magistrate Judge Dissolve the Partial Stay of the August 21, 2013 Order [245], entered July 21, 2014, Dkt. No. 257.

[4] For example, in Plaintiffs' First Request for Documents dated September 23, 2011, Dkt 197-1, plaintiffs' Request No. 2 demands "All documents and things received, produced or reviewed by the PBGC between January 1, 2006 and December 31, 2009 (including, but not limited to, documents received from Delphi) related to Delphi or the Delphi Pension Plans."

[5] PBGC had previously produced to plaintiffs' the complete Administrative Record supporting the decision to terminate the Plan. The additional documents PBGC produced in response to plaintiffs' discovery requests were the agreements between Delphi and PBGC effectuating termination and trusteeship of Delphi's six pension plans, including the Salaried Plan.

that PBGC was ultimately ordered to provide broader responses that included privileged information.[6]

Following plaintiffs' motion to compel, the Magistrate Judge overruled PBGC's relevance objections in an order issued on March 9, 2012 (the "March 2012 Order").[7] Notably, the Magistrate Judge did not consider the nature and extent of each individual request, as reflected by the brevity of her bench ruling at the hearing: "I am not limiting the discovery, because frankly, I wouldn't know where to start based on the law of this case."[8] The Magistrate Judge did not overrule PBGC's assertion of the right to claim privilege, or otherwise address any issues of privilege at this hearing or in her March 2012 Order.[9] The Magistrate Judge, nevertheless, ordered PBGC to comply with plaintiffs' document requests, without limitation, by June 7, 2012.[10]

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[6] *See* PBGC's Response to Plaintiffs' First Request for Production of Documents Pursuant to The Court's September 1, 2011 Scheduling Order and PBGC's Response to Plaintiffs' Second Request for Production of Documents Pursuant to The Court's September 1, 2011 Scheduling Order, Exhibits C and D to Dkt. 197.

[7] *See* Order Granting Motion to Compel, entered March 9, 2012, Dkt. No. 204.

[8] Transcript of Motion to Compel Discovery Hearing, March 6, 2012, Dkt 205, at 16:23-25.

[9] *Id.* Order Granting Motion to Compel, entered March 9, 2012, Dkt. No. 204.

[10] PBGC filed objections to the March 2012 Order, which were fully briefed on April 19, 2012, and remained pending until May 27, 2014, when they were denied

Therefore, beginning shortly after the March 2012 Order and continuing through the ultimate production of the privilege log, PBGC and plaintiffs engaged in continuous discussions about the scope of discovery and the deadlines for PBGC's production.[11] Within weeks, PBGC discovered hundreds of thousands of pages of responsive documents, making compliance with the District Court's June 7, 2012 deadline unrealistic. After negotiation, the parties ultimately agreed to extend the deadlines and signed a joint stipulation documenting the modifications. Pursuant to this joint stipulation, PBGC agreed to provide a rolling production of documents to plaintiffs, with an effort to search for and produce certain categories of documents to plaintiffs by June 7, 2012, and continuing production through September 30, 2012. The parties' stated goal, as memorialized in the joint stipulation, was to "work together to mutually ensure that this search and production are accomplished in as efficient a manner as possible." The joint stipulation, including the changes to the Magistrate's deadline, was approved by the District Court on April 20, 2012.[12] The District Court neither expressed any

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as moot because PBGC had fully complied with March 2012 Order. *See* Order entered May 27, 2014, Dkt. No. 255.

[11] *See* Exhibit A to PBGC's Reply in Support of its Objections to Magistrate Judge's Order of August 21, 2013, filed October 3, 2013, Dkt. No. 242-1.

[12] *See* Stipulation and Order Amending Scheduling Order, entered April 20, 2012, Dkt. No. 212.

dissatisfaction with the pace of PBGC's production nor suggested that PBGC faced sanctions for not moving faster.

In May 2012, PBGC and plaintiffs continued discussions about how to proceed with discovery in the most efficient manner, including PBGC's document collection efforts.[13] On June 7, 2012, PBGC produced 62,059 pages of data to plaintiffs in accordance with the parties' discussions and the terms of the April 2012 Joint Stipulated Order.[14] On June 15, 2012, and July 3, 2012, PBGC made additional productions of 109,303 pages of data and 94,274 pages of data to plaintiffs, respectively.[15] Throughout this time, PBGC continued to confer with plaintiffs about the pace of its collection and production efforts, and on July 9, 2012, PBGC gave plaintiffs a chart detailing those efforts, including the sources of documents and document formats.[16]

On July 23, 2012, PBGC informed plaintiffs that because PBGC had collected over 1,000,000 pages of data, representing substantially all of the documents requested by plaintiffs, it would be prohibitively time-consuming for

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[13] *See* Exhibit A to PBGC's Reply, Dkt. No. 242-1.

[14] *See id*.

[15] *See id.*

[16] *See id*.

PBGC to handle the review in-house.[17] Therefore, after consultation with plaintiffs, PBGC ultimately hired a document review firm ("Document Review Firm") to which PBGC turned over all electronic and hard copy data to begin review by their team of 50 contract lawyers.

PBGC and plaintiffs then drafted a joint stipulated report to the District Court and a second stipulated order, which the District Court approved on August 20, 2012.[18] In this Joint Stipulated Order, the parties noted that PBGC had retained the Document Review Firm, which had begun reviewing the over 1,000,000 pages of data that PBGC compiled. The Order further noted that PBGC would be unable to state when the production would be completed until it could assess the quality of the work done by the Document Review Firm. Finally, the Order specified that PBGC would provide its privilege log at the conclusion of its production:

> The PBGC has withheld an unspecified number of otherwise responsive documents on privilege grounds. PBGC has not produced a privilege log identifying the document withheld or the privileges asserted, though it intends to produce such a log at the conclusion of its production of Non-Archived Documents. Plaintiffs and PBGC

[17] *See id*. For example, even if the four attorneys in PBGC's Chief Counsel's office assigned to the Delphi case devoted all of their time to reviewing documents, and were able to conduct that review at a rate of 500 pages a day, their review would have taken more than two years.

[18] *See* Joint Discovery Report and Stipulated Order, entered August 20, 2012, Dkt. No. 215.

> reserve the right to litigate issues of privilege if necessary when a privilege log is in fact produced.[19]

In approving that August 2012 Joint Stipulated Order, the District Court again did not express any concerns about the pace of PBGC's document review and production, nor did the District Court disagree with PBGC's plan to focus on the review and production of documents before preparing the privilege log. At no time did the District Court suggest that PBGC would be sanctioned with the loss of its legal privileges if it complied with the production sequence described in the August 2012 Joint Stipulated Order.

From late August 2012 to late December 2012, the Document Review Firm's 50 contract attorneys reviewed documents on PBGC's behalf, spending hundreds of hours of attorney time and nearly $2 million in contractor costs to comply with plaintiffs' discovery requests. Through these efforts, PBGC was able to provide plaintiffs with multiple, large productions through December 2012:[20]

Date Produced	Pages
August 17, 2012	48,806
September 7, 2012	310,112
September 14, 2012	228,574
October 26, 2012	175,897

[19] *Id*.

[20] *See* Exhibit A to PBGC's Reply, Dkt. No. 242-1.

December 3, 2012	22,242
December 20, 2012	32,385

Through the late summer and fall of 2012, PBGC spoke with plaintiffs regularly about PBGC's progress, and in October 2012, PBGC and plaintiffs drafted another Joint Stipulated Order reflecting their agreement to modify the discovery deadlines; that Order was approved by the District Court without comment on October 5, 2012.[21] By the end of December 2012, PBGC had produced all documents that its Document Review Firm had identified as being responsive and not subject to a privilege. The total number of pages PBGC had produced at that point totaled 1,034,852.[22]

From January to September 2013, with the production of non-privileged documents completed, PBGC attorneys reviewed the 30,000 documents the Document Review Firm had identified as potentially subject to the attorney-client, work product, and deliberative process privileges.[23] During that time, up to 10 of the 60 attorneys in PBGC's Office of the Chief Counsel reviewed and cataloged each privileged document to weigh the appropriateness of PBGC's privilege

[21] *See* Stipulation and Order Regarding Discovery Deadlines, entered October 5, 2012, Dkt. No. 217.

[22] *See* Exhibit A to PBGC's Reply, Dkt. No. 242-1.

[23] *See id*.

claims. In compliance with Fed. R. Civ. P. 26(b)(5), PBGC attorneys recorded each document on the privilege log, describing with specificity the nature of the document without revealing privileged information. Further, PBGC's General Counsel conducted a review of documents for which PBGC claimed the deliberative process privilege. Through that detailed review, and due to additional limitations requested by plaintiffs, PBGC reduced the number of privileged documents by two-thirds, to about 10,000 documents.[24] On July 29, 2013, PBGC produced an additional 13,657 pages of data that had been culled from the documents flagged by the Document Review Firm as potentially being subject to privilege.[25]

As PBGC compiled its privilege log, the agency remained in continuous communication with plaintiffs, advising them of the status of its efforts. PBGC and plaintiffs worked together to draft two additional joint stipulated orders further extending the discovery deadlines, each of which the District Court approved on

[24] On January 30, 2013, plaintiffs told PBGC that it could exclude from the privilege log correspondence between PBGC counsel only and documents dated prior to August 2008. Exhibit F to Plaintiffs' Rule 37 Motion to Enforce This Court's Order Granting Plaintiffs' Second Motion to Compel Discovery from Defendant PBGC, Dkt 218-7. As PBGC contractors had already completed the initial sort of privileged items, this concession did not significantly reduce PBGC's review time.

[25] *See* Exhibit A to PBGC's Reply, Dkt. No. 242-1.

March 13, 2013[26] and June 18, 2013.[27] In approving these later orders, at no time did the District Court express dissatisfaction with the revised schedules or advise PBGC that it risked the sanction of privilege waiver if it did not move faster.

On August 23, 2013, PBGC gave the first tranche of its privilege log to plaintiffs, covering about 3,500 of those documents.[28] On September 26, 2013, PBGC produced the second and final tranche of its privilege log to plaintiffs, and all remaining responsive documents, thus completing its document production obligations.[29]

On February 20, 2013, while PBGC was in the midst of efforts to review and produce more than a million pages of documents, and prepare a complex, 1,000-page privilege log in full compliance with the District Court's Orders, plaintiffs filed a Rule 37 Motion to Enforce the Court's March 2012 Order, asserting that PBGC had waived its right to claim privileges because it did not produce its privilege log within the 30 days after the plaintiffs' requests were first served. This

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[26] *See* Stipulated Order Extending Deadlines, entered March 13, 2013, Dkt. No. 222.

[27] *See* Stipulated Order Regarding Discovery Deadlines, entered June 18, 2013, Dkt. No. 229.

[28] *See* Exhibit A to PBGC's Reply, Dkt. No. 242-1.

[29] *See id*.

motion was contrary to the written agreement that had been reached by the parties in July and August 2012, an agreement submitted to the Court, and which the Court had signed and approved on August 20, 2012. Nevertheless, PBGC felt compelled to respond to the motion on its merits so as not to waive any of its legal rights.

On August 21, 2013, the Magistrate Judge granted plaintiffs' Rule 37 Motion in part, finding that PBGC should be sanctioned by waiver of its right to claim privilege for any documents, and ordering PBGC to produce any such documents being withheld by September 30, 2013 ("August 2013 Order").[30] PBGC filed objections to the Order, at which time the Magistrate Judge stayed the August 2013 Order pending resolution of the objections. The District Court denied PBGC's objections on July 21, 2014 ("July 2014 Order").[31]

In its July 2014 Order, the District Court did not issue a deadline for PBGC to produce its privileged documents. Because the August 2013 Order required the documents to be produced by September 30, 2013, PBGC believes the District Court may expect production immediately. Accordingly, on July 23, 2014, PBGC moved the District Court for a stay and to certify the July 2014 Order for

[30] *See* Order Granting in Part Motion to Compel, entered August 21, 2013, Dkt. No. 231.

[31] *See* Order, Dkt. No. 257.

interlocutory appeal,[32] but as of this filing, the District Court has not ruled. This puts PBGC in the untenable position of potentially being in contempt while it awaits a ruling from a Court that has consistently delayed its rulings. Mandamus is therefore justified.

IV. ARGUMENT IN SUPPORT OF PETITIONER-DEFENDANT PBGC'S PETITION FOR WRIT OF MANDAMUS

The attorney-client, work product and deliberative process privileges provide the most fundamental protections in our legal system.[33] A finding that a party has waived those privileges is considered a serious sanction that is generally reserved for cases of unjustified delay, inexcusable conduct, and bad faith. Here, without taking any intermediate steps, the District Court has imposed this most severe sanction upon PBGC – denial of its right to claim any privilege – despite PBGC's good faith compliance with all discovery orders.

Mandamus relief is appropriate in this case because PBGC has no further recourse at this stage of the litigation and will be irreparably harmed if required to produce its privileged documents as required by the July 2014 Order. With the filing of its motion for interlocutory appeal, PBGC has exhausted all potential

[32] *See* Pension Benefit Guaranty Corporation's Motion for Stay and Request to Certify the Order for Appeal, entered July 23, 2014, Dkt. No. 258.

[33] *See, e.g.*, *Hickman v. Taylor*, 329 U.S. 495 (1947); *In re Lott*, 424 F.3d 446, 449 (6th Cir. 2005); *E.E.O.C. v. Burlington N. & Santa Fe Ry. Co.*, 615 F. Supp. 2d 717, 719-20 (W.D. Tenn. 2009).

remedies at the District Court level before petitioning this Court for mandamus relief. If PBGC is forced to produce its privileged documents, its confidentiality will be lost and PBGC's assertion of privilege pertaining to those documents will be irrevocably waived. That outcome could never be corrected on appeal from a final judgment. Absent mandamus relief, the PBGC can be held in contempt if it does not immediately produce the privileged documents at issue.

Further, the District Court's application of the relevant case law and the Federal Rules of Civil Procedure was clearly erroneous. At no point did the District Court express any concern with the parties' jointly filed stipulations detailing their understanding about the document production schedule, including the timing of the privilege log. Each joint stipulation was approved by the District Court. Therefore, the July 2014 Order is clearly erroneous as a matter of law.

A. A Writ of Mandamus Is The Appropriate Means To Challenge A District Court's Erroneous July 2014 Order Ruling That A Party Has Waived Privilege.

A writ of mandamus is appropriate under 28 U.S.C. § 1651 when there is an "extraordinary need for review of an order before final judgment and the District Court has refused to certify the issue pursuant to § 1292(b)."[34] This Court has held that a writ of mandamus is the appropriate avenue to challenge a District Court's

[34] *See Lott*, 424 F.3d at 449.

order directing the disclosure of privileged documents.[35] The Sixth Circuit's test to determine if mandamus is appropriate considers whether the following factors are met:

> (1) The party seeking the writ has no other adequate means, such as direct appeal, to attain the relief desired.
>
> (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal.
>
> (3) The district court's order is clearly erroneous as a matter of law.
>
> (4) The district court's order is an oft-repeated error, or manifests a persistent disregard for the federal rules.
>
> (5) The district court's order raises new and important problems, or issues of law of first impression.[36]

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[35] *John B. v. Goetz*, 531 F.3d 448, 457 (6th Cir. 2008) ("[M]andamus may be used as a means of immediate appellate review of orders compelling the disclosure of documents and information claimed to be protected from disclosure by privilege or other interests in confidentiality") (internal quotes omitted); *Chesher v. Allen*, 122 Fed. App'x 184, 187 (6th Cir. 2005) ("[W]e have said that mandamus is particularly appropriate to review discovery decisions that would not be appealable until final judgment, especially decisions related to privilege"); *See In re Kellogg Brown & Root, Inc.*, No. 14-5055, 2014 WL 2895939, at *5 (D.C. Cir. June 27, 2014) (granting party's petition for writ of mandamus to protect the confidentiality of legal communications made during an internal investigation performed by the party's attorneys); *See also* Order, *In re United States of Am.*, No. 1:11-cv-00477-RJL (D.C. Cir. Jul. 24, 2014) (granting mandamus petition to overturn district court's order permitting deposition of USDA Secretary, finding that petitioner had no other adequate means of obtaining relief), Attachment 1.

[36] *Lott*, 424 F.3d at 449.

This is not a rigid test – the factors are used as guidelines that are applied flexibly.[37] Not all of the factors need to be met for the Court to grant mandamus relief. In fact, "[r]arely if ever will a case arise where all the guidelines point in the same direction or even where each guideline is relevant or applicable . . . as such, the mandamus analysis cannot be wholly reduced to a formula."[38]

In this case, PBGC meets at least factors 1, 2, 3, and 5 for establishing entitlement to mandamus relief.

PBGC meets the first factor because the District Court has not ruled on PBGC's motion to certify the July 2014 Order for interlocutory appeal, leaving PBGC to face the possibility of a contempt finding at any time. Unless this Court issues a mandamus, PBGC will be obliged to obey the July 2014 Order and disclose its privileged documents. If PBGC does not comply with the July 2014 Order, the agency risks being held in contempt. This Court has held that parties cannot appeal a civil contempt order.[39] Therefore, PBGC cannot obtain review by withholding the documents and seeking review of a contempt sanction.

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[37] *In re Perrigo Co.*, 128 F.3d 430, 435 (6th Cir. 1997).

[38] *Lott*, 424 F.3d at 449 [citations omitted].

[39] *In re Professionals Direct Ins. Co.*, 578 F.3d 432, 438 (6th Cir. 2009).

PBGC meets the second factor given the irreparable harm to PBGC that would arise if the agency were required to comply. This Court has held repeatedly that "an erroneous forced disclosure of confidential information [cannot] be adequately remedied on direct appeal because a court cannot restore confidentiality to documents after they are disclosed."[40] That is because privilege "operates to prevent the disclosure itself" and "[m]andatory disclosure […] is the exact harm the privilege is meant to guard against."[41]

Furthermore, PBGC meets the fifth factor because the July 2014 Order raises new and important problems, or issues of law of first impression. The Sixth Circuit has not addressed whether imposing the sanction of privilege waiver for failure to produce a privilege log within the 30 day deadline prescribed in Fed. R. Civ. P. 34 is appropriate in the absence of bad faith.[42]

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[40] *Id.*; *see also Perrigo*, 128 F.3d at 437 ("[F]orced disclosure of privileged material may bring about irreparable harm.").

[41] *Lott,* 424 F.3d at 451.

[42] *See Casale v. Nationwide Children's Hosp.*, No. 2:11-cv-1124, 2014 WL 1308748, at *8-9 (S.D. Ohio Mar. 28, 2014) (referencing 9th Circuit case law to determine that party did not waive privilege for failure to produce a privilege log within 30 days); *Berryman v. SuperValu Holdings, Inc.*, No. 05-169, 2008 WL 4934007, at *11 (S.D. Ohio Nov. 18, 2008) ("The Sixth Circuit apparently has not addressed the issue …")*; Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Ct. for the Dist. of Montana*, 408 F.3d 1142, 1148 (9th Cir. 2005) ("No Circuit has explicitly weighed in on the precise content of Rule 26(b)(5)'s notice requirement nor its relationship to Rule 34's deadline.")

B. The District Court's Order Was Clearly Erroneous.

Finally, PBGC meets the third factor because the July 2014 Order was clearly erroneous and not supported by relevant law. In its July 2014 Order, the District Court ruled that PBGC waived any claim to privilege of its documents because PBGC's initial responses and objections to plaintiffs' discovery requests (which included detailed relevance objections and preserved privilege claims), although timely, did not "object on the basis of any particular privilege" and that the "filing of boilerplate objections is tantamount to filing no objections at all." Because the Court treated PBGC's actual objections as nothing, the Court then ruled that PBGC's "failure to object to discovery requests within . . . thirty days . . . constitutes a waiver of any objection."[43]

This ruling is clearly erroneous because (1) the District Court focused solely on PBGC's initial objections, filed long before the parties had consensually agreed to several extensions of the discovery schedule, including an agreement that PBGC would produce a privilege log only after completing its document production, all of which was approved by the District Court, (2) the District Court did not account for the practicalities of creating a privilege log following the review of the over

[43] *See* Order, Dkt. No. 231and Order, Dkt. No. 257.

one million pages of documents, and (3) the severe sanction of denying privilege is unwarranted and robs PBGC of its fundamental right to privilege protection.

1. The District Court's Ruling is Clearly Erroneous Because it Focused Solely on PBGC's Initial Objections and Ignored the Subsequent Modifications to the Discovery Timeline.

The District Court's ruling suggested that PBGC waived its privilege claims based solely on the content of PBGC's initial responses and objections to plaintiffs' discovery requests. To support its finding, the District Court relied on cases holding that filing boilerplate objections is tantamount to filing no objections at all.[44] But in each of those cases parties made no effort whatsoever to ever develop or produce a privilege log. In stark contrast, PBGC communicated extensively with plaintiffs about its document production process, agreed to a series of joint stipulations memorializing that process, including the timing of its privilege log, and obtained the District Court's approval of each stipulation. Over 10 months have passed since PBGC produced its privilege log to plaintiffs, who have had no comments on any specific log entries.

[44] *See Powerhouse Licensing, LLC v. CheckFree Servs. Corp.*, No. 12-cv-13534, 2013 WL 1209971, at *3 (E.D. Mich. Mar. 25, 2013); *Cozzens v. City of Lincoln Park*, No. 08-11778, 2009 WL 152138, at *2-3 (E.D. Mich. Jan. 21, 2009); *PML N. Am., LLC v. World Wide Personnel Servs. of Virginia, Inc.*, No. 06-14447, 2008 WL 1809133, at *1 (E.D. Mich. April 21, 2008); *Cumberland Truck Equip. Co. v. Detroit Diesel Corp.*, Nos. 05-74594 and 05-74930, 2007 WL 4098727, at *1 (E.D. Mich. Nov. 16, 2007).

The District Court's reference to PBGC's initial responses as "boilerplate objections" and its subsequent statement that "failure to object to discovery requests within the thirty days provided by Rules 33 and 34 constitutes a waiver or any objection" means that to protect its privileged documents, the Court would require PBGC to create and produce its document-by-document privilege log within the 30-day period after plaintiffs' requests were served.[45] As demonstrated by the many joint stipulations, plaintiffs acknowledged and agreed that PBGC could not log privileged documents before they were found, much less collect and review hundreds of thousands of pages and log the privileged documents in 30 days. The rule that the District Court and plaintiffs seek to impose on PBGC is tantamount to denying the right to assert privilege to any party that must produce more than a few documents, while ignoring the established record of the parties' joint agreements and the Court Orders extending discovery deadlines.

Further, it would not be reasonable to require PBGC to begin the labor-intensive task of reviewing and logging privileged documents while its objections to the breadth of those requests were still pending before the District Court.[46] Fed.

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[45] See Order at p. 4, Dkt. No. 257.

[46] *See Wilkinson v. Greater Dayton Reg'l Transit Auth.*, No. 11-00247, 2012 WL 3527871, at *12 (S.D. Ohio Aug. 14, 2012) ("A review of Defendants' discovery responses does not reveal that Defendants are refusing to disclose discoverable information or documents by relying on its general objections. Instead,

R. Civ. P. 26(b)(5)(A) specifically states that when a party "withholds information *otherwise discoverable* (emphasis added)" by claiming privilege, it must "expressly make the claims" and "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 privileged or protected, will enable other parties to assess the claim." As confirmed by the 1993 Advisory Committee Notes to Fed. R. Civ. P. 26(b)(5), this requirement only applies to items that are "otherwise discoverable." Rule 26(b)(1) states that information is discoverable by a party if it is nonprivileged and relevant to its claim or defense. Thus, if a broad discovery request is made and the responding party objects to the breadth of the request based on the lack of relevance, the party need not log the allegedly privileged documents that fall within the scope of its objection until the court rules on the relevancy objection.[47]

Defendants' general objections when read together with their discovery responses indicates a more prosaic approach, one that attempts to avoid a waiver of one or more potentially valid reasons for declining to produce discovery, while otherwise responding to Plaintiffs' discovery requests as permitted by Rules 33 and 34.").

[47] *See* 1993 Advisory Committee Notes to Fed. R. Civ. P. 26(b)(5); *United States v. Philip Morris, Inc*., 347 F.3d 951, 954 (D.C. Cir. 2003) (party is required to note its privilege objection and to describe document only when document is "otherwise discoverable"); 6-26 MOORE'S FEDERAL PRACTICE - CIVIL § 26.47[1][b] (3d ed. 2014).

Here, PBGC repeatedly objected to the breadth of plaintiffs' discovery requests because the materials in question were irrelevant to the case under Rule 26(b)(1). Accordingly, PBGC was not required to begin logging its privileged documents that it asserted were "not otherwise discoverable" because they were irrelevant *at a minimum* until after the Magistrate Judge ruled on PBGC's relevance objections. Following that ruling, and recognizing the vast scope of the documents demanded by plaintiffs, PBGC did the only reasonable thing it could – confer with plaintiffs on the document production timeline. The parties routinely agreed to reasonable extensions of the discovery deadlines, which the District Court approved, and PBGC continued to keep plaintiffs apprised of expected production dates. PBGC even asked plaintiffs whether they would prefer that PBGC review and produce documents as quickly as possible, or periodically stop production to prepare and produce interim privilege logs. Plaintiffs chose the first alternative – faster production of the non-privileged documents first, privilege log last. The District Court was so informed, and explicitly approved PBGC's intention to compile a privilege log following completion of the document production.[48] For these reasons, the District Court's finding that PBGC waived its

[48] *See* Exhibit A to PBGC's Reply, Dkt. No. 242-1.

rights to claim privilege based solely on its initial discovery responses is clearly erroneous.

2. The District Court's Ruling is Clearly Erroneous Because it Ignored the Practicalities of Creating a Privilege Log in this Case.

The District Court also erred in ignoring the work involved in creating a privilege log given the volume of documents the District Court required PBGC to collect and review, which exceeded one million pages of data. In fact, the July 2014 Order does not specify what actions PBGC failed to take to preserve its privilege claims or when its privilege log was required to be produced to plaintiffs. The Order simply states that the time for PBGC to have produced the privilege log had expired.

When privilege review is a "'herculean task' . . . providing such specifics [as required under Fed. R. Civ. P. 26] by the due date for a Rule 34(b) response would be unrealistic."[49] As the parties agreed, PBGC must review a document before it can determine whether a privilege applies. The privilege objection must then contain the detail set out in Fed. R. Civ. P. 26(b)(5)(A).

Courts in this Circuit and other jurisdictions have explicitly "reject[ed] a *per se* waiver rule that deems a privilege waived if a privilege log is not produced"

[49] *See* 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, FEDERAL PRACTICE AND PROCEDURE § 2016.1 (3d ed. 2014).

within Rule 34's 30-day limit.[50] With this in mind, courts have considered several factors in ruling on a privilege waiver, including the magnitude of the document production and whether documents were previously the subject of discovery before making such a determination.[51] Furthermore, a litigant subject to discovery requests may protect its privilege assertions by "secur[ing] an appropriate agreement or stipulation" about the creation of the privilege log before Rule 34's 30-day limit expires.[52]

Here, the record is replete with evidence of agreement between plaintiffs and PBGC about all discovery timing, including PBGC's production of its privilege log. PBGC collected, reviewed and produced over one million pages of documents since the March 2012 Order. Given the volume of documents covered by plaintiffs' demands and PBGC's limited resources, PBGC could not have reviewed and cataloged all of those documents in the time frame contemplated by the District Court's March 2012 Order. Accordingly, the parties began discussing

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[50] *Berryman*, 2008 WL 4934007, at *10; *see Casale*, 2014 WL 1308748, at *8-9; *Coalition for a Sustainable Delta v. Koch*, No. 1:08-cv-00397-OWW-GSA, 2009 WL 3378974, at *3 (E.D. Cal. Oct. 15, 2009); *Carl Zeiss Vision*, 2009 WL 4642388, at *3*; See also Burlington*, 408 F.3d at 1149.

[51] *See, e.g., Koch*, 2009 WL 3378974 at *3; *Carl Zeiss Vision*, 2009 WL 4642388, at *3; *Burlington*, 408 F.3d at 1149.

[52] *Burlington*, 408 F.3d at 1149 n. 3.

modifications to the discovery deadlines on March 28, 2012, well within the 30 days contemplated by Rule 34.

The parties' understandings about the necessary modifications to the document production schedule, including the privilege log, are well documented. Throughout the document production process, the parties negotiated and filed a series of five joint stipulations over a period of months with the District Court memorializing an agreed-upon document collection and production procedure, including the timing of the privilege log. The District Court "so ordered" each of these joint stipulations, without modification. At no time did the District Court express any concern about the pace of PBGC's production. In accordance with those stipulations and orders, PBGC focused its efforts on first collecting, reviewing, and producing all non-privileged documents to plaintiffs, and then turned to compiling a privilege log. After producing over one million pages of non-privileged data, PBGC gave plaintiffs the first tranche of its privilege log on August 23, 2013, and the second tranche on September 26, 2013.

In rejecting PBGC's objections to the Magistrate Judge's August 2013 Order, the District Court stated that PBGC's argument regarding the parties' agreements regarding the pace and order of discovery "is not compelling."[53] As

[53] Order at p. 3, Dkt. No. 257.

the basis for that ruling, the District Court cites the fact that plaintiffs filed motions to compel and opposed PBGC's objections to the August 2013 Order, thus purporting to show that plaintiffs did not agree that "the parties had an understanding regarding PBGC's privilege log."[54] But plaintiffs' denial of an understanding about the sequencing of the privilege log fails, because the agreement was reduced to writing in July and August 2012 and was entered as an order of the District Court. PBGC is entitled to rely on its written agreements with plaintiffs and certainly is entitled to rely upon the District Court orders approving those agreements – agreements that neither the District Court nor the parties questioned, modified, nor withdrew.

Because PBGC was, at all times, in compliance with the operative discovery orders, the District Court's waiver sanction is clearly erroneous.

3. The District Court's Ruling is Clearly Erroneous Because the Severe Sanction of Waiver of Privilege is Unwarranted in this Case.

A party's entitlement to the preservation of privilege is fundamental to our legal system; waiver of privilege is considered an extraordinary sanction generally reserved for cases of unjustified delay, inexcusable conduct, and bad faith.[55] As

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[54] *Id.*

[55] *See* 6-26 MOORE'S FEDERAL PRACTICE – Civil 26.47[5]; *See also Berryman*, 2008 WL 4934007, at *10-12 (holding that the defendant's failure to produce a

this Court has noted, "[i]f we eat away at the privilege by expanding the fiction of 'waiver' (which normally requires an intelligent and knowing relinquishment), pretty soon there will be little left of the privilege."[56]

The District Court's imposition of the severe sanction of denying PBGC the right to claim privilege is highly improper because PBGC complied with its discovery obligations. The record shows no unjustified delay, inexcusable conduct, or bad faith by PBGC. PBGC was diligent in its efforts to comply with plaintiffs' discovery requests, the Federal Rules of Civil Procedure, and all orders of the District Court. Furthermore, PBGC acted in accordance with the parties' court-ordered agreements, including the ultimate production of a complete privilege log. At no time did the District Court suggest that PBGC acted in bad

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privilege log after generally asserting privilege did not warrant the sanction of waiving privilege); *Koch*, 2009 WL 3378974 at *3-4 (finding that defendants did not waive privilege when it asserted privilege two months after the production of documents was reasonable in a case with a universe of 80,000 documents and thousands of emails); *Carl Zeiss Vision*, 2009 WL 4642388 at *3-4 (finding that privilege was not waived despite a nine-month delay in production of privilege log); *Cf. Burlington*, 408 F.3d at 1149-50 (explicitly rejecting a *per se* waiver rule if a privilege log is not produced within Rule 34's 30-day limit, but ruling that the petitioner failed to act diligently to protect its privilege when many of the documents had been produced in a previous lawsuit, both parties expected that a privilege log would be produced in the first response to the discovery request and there were no other mitigating factors).

[56] *In re Lott*, 424 F.3d 446, 451 (6th Cir. 2005).

faith by complying with the parties' agreement that PBGC would produce the privilege log after it completed the production of the non-privileged documents. To the contrary, the Magistrate Judge recognized that PBGC was making good-faith efforts to produce the documents responsive to plaintiffs' requests.[57] Furthermore, PBGC's production of a complete, detailed privilege log as contemplated by the parties cured any insufficiency.[58]

Given PBGC's compliance with the plaintiffs' discovery requests, the parties' mutual understanding on the timing of the privilege log production, and PBGC's good faith efforts in completing the production of the privilege log, the District Court's sanction of waiver of privilege was clearly erroneous, unwarranted, and inequitable.

V. CONCLUSION

The protections provided by the attorney-client, work product, and deliberative process privileges are among the most fundamental rights of parties in our legal system. The July 2014 Order erroneously denies PBGC the right to this fundamental protection without justification. PBGC has no adequate means to

[57] *See* Order, Dkt. No. 231.

[58] *See Best Buy Stores L.P. v. Manteca Lifestyle Ctr., LLC*, No. 10-cv-0389, 2011 WL 2433655, at *8 (E.D. Cal. June 14, 2011) ("Here, because the parties have agreed to exchange privilege logs sometime in the future, the court declines to find that defendant's delayed production of a privilege log necessarily amounts to a waiver of defendant's privileges in this particular case.")

protect itself from irrevocably waiving its right to assert these privileges in its document production on one hand or risking being held in contempt of court on the other hand, other than by mandamus relief. Should PBGC be made to produce the documents at issue here without an assertion of privilege, a post-judgment appeal is an inadequate remedy.

Accordingly, Petitioner-Defendant PBGC respectfully requests that this Court issue a Writ of Mandamus striking the District Court's ruling that PBGC waived its right to assert privilege and prohibiting the District Court from requiring PBGC to immediately produce its privileged documents to the plaintiffs.

August 21, 2014

Respectfully submitted,

/s/ C. Wayne Owen, Jr.

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Attorneys for the Petitioner/Defendant Pension Benefit Guaranty Corporation

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2014, I served the preceding **PETITION FOR WRIT OF MANDAMUS** on the Office of the Clerk for the United States Court of Appeals for the Sixth Circuit via electronic mail and on the following via electronic mail or Federal Express:

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The Honorable Arthur J. Tarnow
United States District Court for the Eastern District of Michigan, Southern Division
Theodore Levin U.S. Courthouse
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Detroit, MI 48226

/s/ C. Wayne Owen, Jr.
C. WAYNE OWEN, JR.

Attachment 1

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5146 **September Term, 2013**

1:11-cv-00477-RJL

Filed On: July 24, 2014

In re: United States of America,

Petitioner

BEFORE: Brown, Millett, and Pillard, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of mandamus and emergency motion for administrative stay and the appendix, the responses and supplements thereto, and the reply, it is

ORDERED that the petition for a writ of mandamus be granted. The district court is hereby ordered to quash the subpoenas for the deposition of Secretary Vilsack. It is well-established that "top executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions." Simplex Time Recorder Co. v. Secretary of Labor, 766 F.2d 575, 586 (D.C. Cir. 1985); see also Peoples v. USDA, 427 F.2d 561, 567 (D.C. Cir. 1970) ("[S]ubjecting a cabinet officer to oral deposition is not normally countenanced."). As such extraordinary circumstances are not present in this record, the district court abused its discretion by allowing the deposition of Secretary Vilsack at this stage in the proceedings. Accordingly, petitioner has shown a clear and indisputable right to relief. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988). In addition, petitioner has no other adequate means of obtaining relief. See In re Cheney, 544 F.3d 311, 314 (D.C. Cir. 2008). It is

FURTHER ORDERED that the emergency motion for administrative stay be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Timothy A. Ralls
Deputy Clerk