

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’ MOTION TO EXPEDITE BRIEFING SCHEDULE ON
THEIR MOTION TO COMPEL WITHHELD AND REDACTED DOCUMENTS
OR FOR *IN CAMERA* REVIEW**

Dennis Black, Charles Cunningham, Ken Hollis, and the Delphi Salaried Retirees Association (collectively, “Plaintiffs”) hereby request that the Court order an expedited briefing schedule to consider their Motion to Compel Withheld and Redacted Documents or for *In Camera* Review (“Motion to Compel”), filed yesterday. The grounds for this motion are set forth in the accompanying memorandum. Counsel for the U.S. Department of the Treasury advises that he opposes the relief sought here.

Respectfully submitted,

July 10, 2015

/s/ Anthony F. Shelley
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**PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO EXPEDITE
BRIEFING SCHEDULE FOR THEIR MOTION TO COMPEL WITHHELD AND
REDACTED DOCUMENTS OR FOR *IN CAMERA* REVIEW**

In their Motion to Compel Withheld and Redacted Documents or for *In Camera* Review (“Motion to Compel”), filed yesterday (July 9, 2015), Dennis Black, Charles Cunningham, Ken Hollis, and the Delphi Salaried Retirees Association (collectively, “Plaintiffs”) have asked the Court to order the U.S. Department of the Treasury (the “Treasury”) to produce hundreds of documents responsive to a January 2012 subpoena *duces tecum* (the “Document Subpoena”) that the Treasury has withheld or redacted on the basis of unsubstantiated privileges, or in the alternative to require the Treasury to provide those documents to the Court for *in camera* review.

Plaintiffs now also request that the Court expedite the briefing schedule for the Motion to Compel. The Treasury’s dilatory approach in responding to the Document Subpoena, coupled with its failure to explain adequately and support its privilege assertions, has caused undue delay. Unless addressed quickly, the Treasury’s conduct will adversely affect the discovery schedule in Plaintiffs’ underlying lawsuit, *Black v. PBGC*, Case No. 2:09-cv-13616 (the “Michigan case”), which is pending in the Eastern District of Michigan (the “Michigan Court”). The Michigan case involves a challenge by retirees to the termination of their pension plan and efforts by them to obtain pensions equitably due to them. The case commenced in 2009, has already been subject to years of delay due to government attempts to thwart discovery (all of which the Michigan Court or this Court previously have rejected), and is now – finally – scheduled for a discovery close of August 14 and summary judgment briefing soon thereafter. Due to the continuing prejudice to Plaintiffs that the current withholding of documents by the Treasury causes, Plaintiffs respectfully request that the Court set an expedited briefing scheduling to decide the Motion to Compel, as reflected in the attached Proposed Order.

BACKGROUND

The basic facts of the Michigan case and the procedural history relating to the Document Subpoena are described in the “Background” section of Plaintiffs’ Motion to Compel, which Plaintiffs incorporate here by reference. Below, Plaintiffs provide the Court with additional information concerning the Treasury’s conduct in the instant matter, as well as Plaintiffs’ good-faith efforts to meet and confer with counsel for the Treasury. *See* Local Civ. R. 7(m).

In January 2012, Plaintiffs served the Document Subpoena, which the Treasury moved (twice) to quash. On June 19, 2014, this Court denied the Treasury’s motions. The Treasury then effectively took eight months to negotiate and produce a relatively small universe of documents (roughly 5,000). Despite agreeing to produce documents on a rolling basis, the Treasury waited until the end of March to produce the vast majority (approximately 4,200) of those documents. Then, in a late-night email sent on the day the Treasury’s privilege log was due (June 1, 2015), the Treasury informed Plaintiffs that, due to a “processing error,” only about half of the log would be produced that day (covering 768 documents), and that it would take another ten days to log the remaining entries (covering 505 documents). Because of the Treasury’s delays, Plaintiffs were forced to seek a further extension of the discovery schedule in the Michigan Court, which had previously been set based on the deadlines established in this Court’s November 6, 2014 Stipulated Order, DE 29.

On June 10, 2015, the Treasury produced the second portion of its log. Even after the log was “complete,” it remained inadequate, suggesting that the Treasury had improperly withheld the majority of documents described in the log. Thereafter, Plaintiffs attempted on multiple occasions to provide the Treasury with opportunities to address the privilege log’s deficiencies. Over the course of the next two weeks, Plaintiffs conferred with the Treasury by phone and

email on numerous occasions in the hopes of avoiding litigation, pointing out the multitude of problems with the Treasury's privilege assertions. While the Treasury indicated that it would provide answers about some of the log's deficiencies, it refused to commit any of its new assertions to writing, making further discussions pointless.

Meanwhile, discovery in the Michigan case must be completed by August 14, 2015, and dispositive motions must be filed by September 22, 2015. Additionally, the deposition of Matthew Feldman, a key witness in the Michigan case, is scheduled for July 27, 2015, and the deposition of Harry Wilson, another key witness, is scheduled for August 7, 2015. The scheduling of these depositions had, in the first instance, been delayed already to the latter part of the already-extended discovery period because the documents produced pursuant to the Document Subpoena are pertinent to these witnesses' testimony and the Treasury had taken so long to produce the documents.

ARGUMENT

Plaintiffs seek an expedited briefing schedule in order to avoid as much as possible further delay in the discovery and summary judgment briefing schedule in the underlying case, a schedule that has been delayed already due to the Treasury's unsuccessful efforts to quash the Document Subpoena and the Pension Benefit Guaranty Corporation's repeated, unsuccessful efforts to prevent discovery in the Michigan case. Plaintiffs will suffer significant prejudice if they ultimately prevail on the Motion to Compel, but are then unable to evaluate the improperly withheld documents prior to the close of discovery, or to incorporate them into their summary judgment filings. But, as noted above, because discovery in the Michigan case is set to close on August 14, 2015, and dispositive motions are due on September 22, 2015, the risk of that prejudice is significant, absent the current discovery dispute's prompt resolution or additional

extension of the discovery closing date and summary judgment briefing date in the Michigan case. While Plaintiffs certainly will seek to extend the Michigan case dates if necessary, they respectfully wish to avoid doing so if at all possible – or at least to as minimal an extent as possible – given the already lengthy time since commencement of that suit and the hardship Plaintiffs endure with the continuing loss of pension benefits.

Additionally, the materials in dispute in the Motion to Compel are potentially critical to the depositions of Mr. Feldman and Mr. Wilson, as they constitute much of the documentary evidence relating to the deponents' communications about the matters at issue in the underlying litigation. Since the Treasury has asserted that virtually every substantive communication by these two individuals referring to Delphi or its pension plans is subject to one or more privileges, Plaintiffs' deposition of Mr. Feldman and Mr. Wilson are compromised if these materials are not made available in time for their examination, potentially necessitating a second deposition of these individuals if it turns out (as Plaintiffs expect) that the Treasury has improperly withheld critical documents.

Further complicating matters, the Treasury has informed Plaintiffs that it will oppose any attempt by Plaintiffs to take a second deposition of Mr. Feldman or Mr. Wilson if they prevail on the Motion to Compel, and has proposed that Plaintiffs simply agree to postpone the depositions until after the resolution of the Motion to Compel. Because the depositions cannot be delayed further under the current discovery schedule (as they already are at the very tail end of the schedule due to the Treasury's efforts to quash the Document Subpoena and its delay in producing documents ordered by the Court to be produced), the Treasury's proposal to delay the depositions is untenable; and given that Plaintiffs have already had to ask the Michigan Court to extend the deadlines in the Michigan case numerous times because of the Treasury's slow

production schedule and late-filed privilege log, Plaintiffs believe that an expedited schedule on the Motion to Compel could help to avoid further litigation regarding the need for additional depositions of Mr. Feldman or Mr. Wilson, if the discovery dispute could be resolved before the depositions conclude. While we recognize that the Court may be unable to resolve the current discovery controversy prior to the start of the depositions, the swift briefing of this matter would allow a decision as soon as practicable, which in turn would allow the parties then to deal with as soon as possible the issues associated with re-opening (if necessary) the depositions of Mr. Feldman and Mr. Wilson.

Finally, given that the Treasury had more than eight months to consider and document its privilege assertions (this after the four months the parties spent negotiating the Treasury's requests to narrow the scope of the Document Subpoena), along with the fact that Plaintiffs engaged in a lengthy meet-and-confer process with the Treasury to discuss Plaintiffs' concerns, an expedited schedule should not create any undue hardship for the Treasury. In light of this fact, as well as the numerous delays Treasury has already created in responding to the Document Subpoena, Plaintiffs respectfully request that this Court expedite briefing on the Motion to Compel, in accordance with the dates laid out in the attached Proposed Order. *See Honeywell Fed. Sys., Inc. v. United States*, No. 88-CV-3320, 1988 WL 123704, at *4 (D.D.C. Nov. 10, 1988) (expediting briefing "in order to minimize the harm, if any," to a party). The proposed schedule would result in the briefing on the Motion to Compel being completed no later than July 21, 2015.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court grant their Motion to Expedite, and impose the briefing schedule set forth in the attached Proposed Order.

July 10, 2015

Respectfully submitted,

/s/ Anthony F. Shelley

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