



criterion for class certification.” Defendant’s Opposition at 1. First, the relevance of the documents in question is established by the fact that they are part of the loan files that defendant offered to produce in lieu of responding fully to plaintiffs’ pending class discovery requests. It was defendant who suggested that plaintiffs be required to use the loan files to demonstrate commonality among the named plaintiffs. See April 29, 2003 Status Hearing, Tr. at 12-13. The court ultimately adopted that proposal. July 15, 2003 Status Hearing, Tr. at 22-23.

Second, defendant’s assertions to the contrary notwithstanding, plaintiffs set forth both the relevance of and need for the documents requested in their memorandum in support of their motion to compel. As plaintiffs previously stated,

it must be emphasized that plaintiffs are alleging both disparate impact and disparate treatment discrimination. An integral component of the disparate treatment claim is that defendant discriminated against plaintiffs not only in loan making but in loan servicing once the loans were made. The discrimination included the refusal to give Hispanic farmers and ranchers the full range of servicing to which they were entitled and to force them into foreclosure and liquidation while their white male counterparts received such servicing when they encountered financial difficulties, and thus fewer foreclosures. Thus, it is not surprising that most of defendant’s highly dubious privilege claims arise in the context of loan servicing issues and bankruptcy and foreclosure proceedings because full and fair discovery in this area is likely to lead to probative evidence hurtful to defendant.

Plaintiffs’ Memorandum at 20.

It is well settled that disparate treatment cases require direct or circumstantial proof of discriminatory motive, while disparate impact cases require no such proof of motive. See, e.g., International Brotherhood of Teamsters. v. United States, 431 U.S. 324, 335 n.15 (1977). Clearly, the reasons for denying loans, denying loan servicing, accelerating loan accounts, or foreclosing upon Hispanic farmers, if they can be ascertained, are relevant to the issue of establishing commonality under a disparate treatment theory. For example, documents produced to date indicate that FSA officials were eager to find any excuse to foreclose on Hispanic farmers or to force them to liquidate their holdings. Such documents evidence an anti Hispanic animus

that plaintiffs believe infected the administration of the United States Department of Agriculture (“USDA”) farm credit and non credit benefit programs and was part of a pattern and practice of discrimination.<sup>2</sup>

Perhaps the best example of defendant’s efforts at misdirection is the current procedural posture in which plaintiffs find themselves. Indeed, the only reason plaintiffs are seeking to compel production of certain documents is that defendant has steadfastly refused to follow the procedure outlined in the May 8, 2003 Protective Order – a protective order drafted in large part by defendant. See May 8, 2003 Protective Order at ¶ 3. As discussed in Plaintiffs’ Memorandum at 3, the obvious “problems with [defendant’s] privilege log were so extensive that they called into question the validity of all of defendant’s privilege claims.” Consequently, plaintiffs invoked the procedure set forth in the Protective Order. See, e.g., Exhibit 3 to Plaintiffs’ Memorandum. Only after defendant refused to comply with the Protective Order did plaintiffs file the motion to compel.

## ARGUMENT

### **I. DEFENDANT HAS UTTERLY FAILED TO SUPPORT HER PRIVILEGE CLAIMS.**

#### **A. Defendant’s Deliberative Process Privilege Claims Fail As A Matter Of Law.**

The gravamen of defendant’s argument with respect to the deliberative process is that plaintiffs have allegedly failed to show any need that would outweigh the alleged adverse effects of disclosure of documents withheld pursuant to the deliberative process privilege.<sup>3</sup> Defendant’s

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<sup>2</sup> It will also be important for plaintiffs to have access to similar documents when they are given access to the loan files of comparable white farmers to determine if FSA officials showed the same eagerness and zeal to force the foreclosure and liquidation of white farmers facing similar financial difficulties. Such evidence is the very hallmark of disparate treatment.

<sup>3</sup> Defendant asserts that “[t]o a substantial degree, plaintiffs’ motion rests on an entirely manufactured dispute.” Defendant’s Opposition at 2. See also id. at 3. Defendant did in fact offer to waive the privilege with respect to the named plaintiffs whose files she claimed to be able to find, provided that such selective “disclosures would not waive or otherwise undermine defendant’s assertion of the deliberative process privilege as to any future discovery responses.” See Exhibit 1 to Defendant’s Opposition. Plaintiffs did not reject that offer because they wished to

argument is, however, fatally flawed for at least two reasons. First, as the foregoing makes clear, plaintiffs have demonstrated both the relevance and need for the documents being withheld. Second, defendant has utterly failed to demonstrate any adverse effects from disclosure and has still failed procedurally to invoke the privilege properly.

“The deliberative process privilege has . . . been called ‘discretionary,’ as a balancing of interests must occur to determine whether to apply it in the first instance, not just whether it has been overcome.” In re Grand Jury Subpoena, 218 F. Supp. 2d 544, 553 (S.D.N.Y. 2002), aff’d, 318 F.3d 379 (2d Cir. 2002). Moreover,

it is clear that “‘where the documents sought may shed light on alleged government malfeasance,’ the privilege is routinely denied.” . . . When alleged misconduct is at issue, the analysis shifts, and “the real public interest under such circumstances is not the agency’s interest in its administration but the citizen’s interest in due process.”

Id. (quoting Texaco P.R. v. Dept. of Consumer Affairs, 60 F.3d 867, 885 (1st Cir. 1995) (quoting Bank of Dearborn v. Saxon, 244 F. Supp. 394, 401-03 (E.D. Mich. 1965)). In the instant case, plaintiffs are alleging, inter alia, government malfeasance in the form of disparate treatment discrimination in the administration of USDA farm credit programs, including both loan making and loan servicing.

Against that interest must be balanced the alleged adverse effects of disclosing the documents subject to the deliberative process claim. Defendant seeks to demonstrate the

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create a discovery dispute. To the contrary, plaintiffs rejected the offer because defendant’s cannot selectively waive the privilege. As plaintiffs point out, supra, at 2, the reasons for denying loans, denying loan servicing, accelerating loan accounts or foreclosing upon Hispanic farmers, if they can be ascertained, are relevant to the issue of establishing commonality under a disparate treatment theory. Given that it would be important for plaintiffs to have access to similar information when they are given access to the loan files of comparable white farmers or the loan files of additional Hispanic farmers, plaintiffs declined to agree to an arrangement that would in effect allow defendant to waive the deliberative process privilege with respect to the loan files of certain selected Hispanic farmers without waiving the privilege with respect to other Hispanic farmers or comparable white farmers in subsequent discovery responses in this case.

Furthermore, as discussed more fully infra, because demonstrating the adverse effects of disclosure is a critical requirement of the deliberative process privilege defendant’s willingness to disclose the documents to plaintiffs albeit selectively in effect meant that she could not satisfy the requirements of the privilege as to those documents insofar as demonstrating the adverse affect of producing those documents to plaintiffs.

requisite adverse impact of disclosure by the Declaration of James Little (“Little Declaration”). However, the conclusory allegations of adverse impact parroted by Mr. Little on the basis of allegedly having “reviewed a representative sample of the documents withheld” are wholly inadequate<sup>4</sup> and, in any event, completely undercut by defendant’s repeated offers to produce the documents under certain conditions.<sup>5</sup> Simply put, defendant cannot satisfy the burden of demonstrating that disclosing certain documents to plaintiffs will adversely impact the deliberative processes of USDA while at the same time offering to disclose the very same documents to plaintiffs.

Relying on Bigelow, 122 F.R.D. at 115, defendant argues that “the government ‘should not be penalized because of its cooperation in resolving litigation discovery disputes.’” Defendant’s Opposition at 4. Bigelow, however, provides little comfort for defendant. As defendant correctly notes, the court in Bigelow, “rejected the argument that the government had waived a claim of privilege by voluntarily providing much of the information sought during discovery.” Id. at 3-4. (Emphasis added.) See Bigelow, 122 F.R.D. at 114 (“the intervenor [sic] raised the issue of waiver since the Government voluntarily provided much of the information sought during discovery”). In Bigelow, unlike the instant case, the issue before the court was the right of a local television station intervener, WUSA-Channel 9, (“Channel 9”) to obtain access to documents supposedly protected by the deliberative process and law enforcement privileges. Channel 9 argued that because defendant had agreed to produce the documents to plaintiffs pursuant to a stipulation that restricted the use of the documents to the pending litigation that defendant had waived the applicable privileges. The court noted that,

[i]n many instances, a party’s need to know in order to successfully litigate his case outweighs competing public interest in nondisclosure

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<sup>4</sup> See, e.g., Bigelow v. District of Columbia, 122 F.R.D. 111, 113 (D.D.C. 1988) (“conclusory views, without the benefit of any analysis or discussion by the department head[,] are of little help to the court ... [and such an affidavit is] insufficient in and of itself to disclose the specifics necessary to support the need for confidentiality.”)

<sup>5</sup> Indeed, defendant repeats the offer in her opposition. Defendant’s Opposition at 2 n.1.

whereas an intervenor's [sic] generalized interest may not. Such is the case at issue.

Id. at 114. (Emphasis added.) The court concluded that the fact that the government agreed to produce documents to the plaintiffs should not inure to the detriment of the government in the sense that the documents could now be disseminated as far as the intervenor's broadcast transmissions could carry them. See id. at 115. The instant case is clearly distinguishable because defendant cannot reasonably contend that disclosing the documents to plaintiffs for use in this litigation will adversely affect USDA's deliberative process while at the same time offering to produce the same documents to plaintiffs for use in this litigation. Certainly, plaintiffs would be willing to receive such documents under the existing May 8, 2003 Protective Order, which would limit the use of the documents to the current litigation. However, defendant should not be permitted to waive selectively the deliberative process privilege in connection with ongoing discovery in this case. See n.3, supra.

Wholly apart from the fact that defendant's deliberative process privilege claim is undercut by her repeated offers to disclose the documents, defendant has utterly failed to invoke properly the privilege claim. The case law could not be clearer that in order to invoke the privilege, defendant had to have the head of the agency review each of the documents subject to the privilege claim and state with precision how the disclosure of each document would adversely affect USDA. As Mr. Little makes clear, he has not examined all of the documents subject to the privilege claim. See, e.g., Little Declaration ¶¶ 4 and 8. As a matter of law, such a declaration is deficient. As the D.C. Circuit has explained,

[t]h[e] formal claim must include a description of the documents involved, a statement by the department head that she has reviewed the documents involved, and an assessment of the consequences of disclosure of the information.

Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 405 n.11 (D.C. Cir. 1984) (emphasis added); accord Cobell v. Norton, 213 F.R.D. 1, 7 (D.D.C. 2003); Landry v. FDIC, 204 F.3d 1125, 1135 (D.C. Cir. 2000) ("built into the requirement is the need for actual personal

consideration by the asserting official”) cert. denied, 531 U.S. 924 (2000); Wainwright v. Washington Metropolitan Area Transit Authority, 163 F.R.D. 391, 396 (D.D.C. 1995) (“to qualify for the privilege, documents must be reviewed by the agency head, who must file a formal declaration of privilege describing the withheld materials, and the likely consequence if they were to be disclosed”); Founding Church of Scientology of Washington, D.C., Inc. v. Director, FBI 104 F.R.D. 459, 464 (D.D.C. 1985).

Even if contrary to settled authority defendant could invoke the privilege without having Mr. Little review all of the documents at issue, defendant’s current effort is inadequate. While Mr. Little asserts that he has “reviewed a representative sample of the documents withheld,” he offers no clue as to the actual number of documents reviewed or the process by which the so-called representative samples were determined and selected. All that can be determined from the Little Declaration is that Mr. Little allegedly looked at 17 of 886 withheld documents.<sup>6</sup> Of the aforementioned 17 documents, Mr. Little describes only seven that he allegedly reviewed in connection with defendant’s deliberative process privilege claims. See Little Declaration ¶¶ 11, 14, 17, 20 and 23. Having failed to comply with the specific procedures for asserting the deliberative process privilege, defendant’s privilege claims cannot “even be considered.” Williams v. District of Columbia, No. 96-0200-LFO, 1997 U.S. Dist. LEXIS 23711, at \*4 (D.D.C. Apr. 25, 1997) (emphasis added).

**B. Defendant Has Failed To Establish That The Documents Withheld On The Basis Of The Attorney-Client Privilege Satisfy The Elements Of That Privilege.**

Defendant clearly has the burden of establishing that documents withheld on the basis of the attorney-client privilege satisfy all the elements of that privilege. See, e.g., In Re Lindsey,

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<sup>6</sup> Those documents were in all likelihood cherry-picked by counsel. See n.9 infra. Moreover, even with respect to the 17 documents identified in his declaration, it is not clear that Mr. Little actually reviewed each document. For example, in Paragraph 20 of the declaration, Mr. Little describes Document GVL 001-2770-273 as “a memorandum from James Michael Kelly . . . to a Regional Attorney, Lawrence Jakub.” Little Declaration ¶ 20. By contrast, the Privilege Log dated September 11, 2003 (“Privilege Log”) describes the document as being authored by Lawrence Jakub and written to James Michael Kelly. See Document No. 65, Privilege Log at 9.

158 F.3d 1263, 1270 (D.C. Cir. 1998); In re Sealed Cases, 737 F.2d 94, 98-99 (D.C. Cir. 1984).

While defendant purports to satisfy that requirement with the Little Declaration, the effort falls far short of the mark. First, Mr. Little, by his own admission, has not reviewed all of the documents withheld pursuant to a claim of attorney-client privilege. Indeed, so far as can be determined from his declaration, Mr. Little describes only five documents that he allegedly reviewed in connection with defendant's attorney-client privilege claims. See Little Declaration ¶¶ 32, 33, 36, 39 and 42. Mr. Little provides no support for defendant's attorney-client privilege claims. Indeed, for the most part, Mr. Little describes the documents in very conclusory terms<sup>7</sup> and on the basis of legal conclusions that he is not qualified to make.<sup>8</sup>

As previously noted, not every communication between a lawyer and a client is privileged. See Plaintiffs' Memorandum at 17. The communication not only must seek or provide legal advice, but it must contain or be based upon information that is confidential.<sup>9</sup> See, e.g., Evans v. Atwood, 177 F.R.D. 1, 3 (D.D.C. 1997). In describing the aforementioned five documents, Mr. Little does not once state or even suggest that the documents either contain or are based upon information that is confidential.<sup>10</sup> That failure is fatal to defendant's attorney-client privilege claims. See Evans, 177 F.R.D. at 3; see also id. at 5; Mead Data Central v. United States Department of the Air Force, 566 F.2d. 242, 253 n.3 (D.C. Cir. 1971).

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<sup>7</sup> See, e.g., Little Declaration, ¶ 32 referring to Document No. 9 ("letter to Michael Norton, Esq. And James W. Winchester consisting of a legal opinion and recommended legal strategy"); ¶ 33 referring to Document No. 206 ("correspondence between USDA's in-house counsel and its legal representative"); ¶ 36 referring to Document No. 5 (one-page memorandum . . . requesting legal assistance"); ¶ 39 referring to Document No. 18 ("letter requests the U.S. Attorney's Office's assistance in . . . litigation").

<sup>8</sup> See, e.g., id. at ¶ 33 ("The letter . . . falls squarely within the attorney-client privilege").

<sup>9</sup> Significantly, defendant does not challenge one word of plaintiffs' analysis of the allegedly privileged documents that were inadvertently produced to plaintiffs. See Plaintiffs' Memorandum at 17-20.

<sup>10</sup> Defendant seeks to bolster her attorney-client privilege claims with respect to certain documents with descriptions provided by counsel. See Defendant's Opposition at 10 n.7. However, in a number of instances the description of the document provided in n. 7 does not comport with the description set forth in the Privilege Log. Compare, e.g., the description of Document No. 16 in n.7 to the description in the Privilege Log at 2; the description of Document No. 164 in n.7 to the description in the Privilege Log at 2, the description of Document No. 493 in n.7 to the description in the Privilege Log at 60 and the description of Document No. 659 in n.7 to the description in the Privilege Log at 81.

**C. Defendant Has Failed To Establish That The Document Withheld Pursuant To The Attorney Work product Doctrine Satisfy The Requirements Of That Doctrine.**

As was the case with respect to the attorney-client privilege claims, defendant has the burden of showing that the documents withheld on the basis for the attorney work product doctrine satisfy all the requirements of that doctrine. See, e.g., Alexander v. F.B.I., 192 F.R.D. 42, 46 (D.D.C. 2000). Defendant has utterly failed to sustain that burden. In her failed effort to sustain that burden, defendant again has relied on the Little Declaration. Significantly, Mr. Little identified only five documents that he allegedly reviewed in connection with defendant's attorney work product claims. See Little Declaration ¶¶ 48, 50, 53 and 56. Mr. Little describes the five documents in conclusory terms<sup>11</sup> and in some instances on the basis of legal conclusions that he is not qualified to make.<sup>12</sup>

It is well settled that the work product doctrine or privilege does not extend to every written document generated by an attorney,<sup>13</sup> much less the written documents of non-lawyers and unknown authors. Similarly, the mere fact that a lawsuit is pending does not transform an attorney's notes into material prepared in anticipation of litigation. See Delco Wire & Cable, Inc. v. Weinberger, 109 F.R.D. 680, 690 (E.D. Pa. 1986) (counsel's memoranda regarding steps to be taken to comply with the court's order made during litigation was not material prepared in anticipation of litigation).

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<sup>11</sup> In ¶ 48 referring to undated Document No. 79, Mr. Little describes one of the numerous documents of unknown authorship as "the type that FSA's in-house counsel and legal representatives would prepare in anticipation of litigation." (Emphasis added.) In ¶ 50 referring to Document Nos. 422 and 554, Mr. Little describes the documents as "prepared by USDA pursuant to the present lawsuit. . . ." In ¶ 53, Mr. Little, referring to Document No. 419, describes the document as a memorandum between the State Executive Director of California and the Deputy Administrator for FSA Farm Loan Programs "regarding a response to certain allegations made in the above-captioned lawsuit." In ¶ 56 referring to Document No. 228, Mr. Little describes the document as a "litigation report [that] summarizes the Agency's position on the pertinent facts and its responses to the complaint." Mr. Little also describes the report as containing "legal opinions, including views regarding applicable regulations and laws." Id. The latter assertion is conspicuously missing from the Privilege Log. See Document No. 228, Privilege Log at 29.

<sup>12</sup> See, e.g., ¶ 49, referring to unspecified documents as "satisf[y]ing the elements of the attorney work product doctrine." See also ¶¶ 50 and 52.

<sup>13</sup> See, e.g., Evans v. Atwood, F.R.D. 1, 3 (D.D.C. 1997).

In sustaining the burden of showing that the documents subject to the work product doctrine were prepared in anticipation of litigation, defendant must “show[] that the documents were prepared for the purpose of assisting an attorney in preparing for litigation, and not for some other reason.” Alexander v. FBI, 192 F.R.D. at 46; accord Athridge v. Aetna Casualty & Surety Co., 184 F.R.D. 200, 205 (D.D.C. 1998) (holding that to qualify for the work product privilege, documents must be prepared to “assist an attorney in preparing for a trial or for use at that trial”); Universal Vendors, Inc. v. Candimat Co. of America, 16 Fed. R. Serv. 2d 1329, 1330 (E.D. Pa. 1972) (a document reflecting chronology of the parties’ contractual dealings was not work product material when “there is no indication that the document was requested by or prepared for an attorney or that it otherwise reflects the employment of an attorney’s legal expertise”); Tejada Fashions Corp. v. Yasuda Fire & Marine Ins. Co., No. 83 Civ. 5512 (RO), 1984 WL 500 (S.D.N.Y. June 18, 1993).

Indeed, it is precisely for this reason that non-lawyers preparing documents for use by counsel in connection with anticipated or pending litigation will place on the document legends such as “Attorney Work Product – Prepared For or At The Direction of Counsel.” Significantly, while the presence of such a legend on a document would not be dispositive of its status as attorney work product, Mr. Little has not described any of the documents cited in his declaration as containing such a legend. More importantly, none of the actual document descriptions provide any basis for concluding that the document was actually prepared at the behest of counsel for use in pending or anticipated litigation.<sup>14</sup> See, e.g., Little Declaration ¶ 50 referring to Document Nos. 422 and 554; id. at ¶ 53 referring to Document Nos. 419; and id. at 56 referring to Document No. 228.<sup>15</sup>

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<sup>14</sup> Mr. Little purports to describe general categories of documents that are prepared “often under the direction of FSA’s in house counsel or legal representatives, for the purpose of assisting in the litigation.” See, e.g., Little Declaration ¶¶ 44A and 51. See also id. at ¶¶ 54 and 55

<sup>15</sup> Document No. 228 is, according to the Privilege Log, a litigation report prepared by a lawyer in the Office of General Counsel to the Department of Justice. There is nothing in the description contained in either the privilege log or ¶ 56 that suggests that counsel sought in any way to label or stamp the document as “work product.”

**D. Defendant's Claim That Compelled Disclosure Negates Plaintiffs' Claim Of Waiver Is Specious.**

Defendant's argument with respect to its waiver of the attorney client and work product privileges with respect to documents inadvertently produced to plaintiffs is utterly disingenuous. After initially claiming to be unaware of any rule of law to the effect that inadvertent disclosure of privileged material resulted in a waiver of the privilege,<sup>16</sup> defendant now argues that this well-settled rule of law is inapplicable. According to defendant, because the court directed defendant to produce the proffered loan files to plaintiffs prior to making redactions of information pursuant to the Privacy Act or any applicable privilege or doctrine, this circuit's normal rule applicable to inadvertent disclosure of privileged material should not apply. Defendant's Opposition at 14-15.

First, plaintiffs, as defendant well knows, are not alleging that defendant's privilege waiver arises from having disclosed the documents to plaintiffs during the May 15, 2003 document inspection. To the contrary, the waiver is predicated upon the production of those documents after defendant had at least two months to review the documents for privilege and, in the case of Mr. Davis, the production of documents by the local FSA office in response to Mr. Davis' request for a copy of his loan file. With respect to the documents designated by plaintiffs on May 15, 2003, defendant did not produce the copies of these documents until the morning of July 15, 2003.<sup>17</sup>

Second, the document production at issue in this case does not amount to the type of extraordinary circumstance such as the compelled discovery alluded to in In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989), referring to Transamerica Computer Co. v. IBM Corp., 573 F.2d 646, 651 (9<sup>th</sup> Cir. 1978). In Transamerica, the finding of compelled disclosure turned on the fact

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<sup>16</sup> See Exhibit 1 attached hereto.

<sup>17</sup> Defendant first offered to provide the documents during the April 29, 2003 Status Conference. Plaintiffs do not know how long before that date defendant had assembled the files. In any event, what simply cannot be denied is that defendant had unfettered access to and control of the documents for two months after plaintiffs made their designations on May 15, 2003.

that defendant IBM was ordered to produce 17 million pages in three months. See Wichita Land & Cattle Company v. Americanfederal Bank, 148 F.R.D. 456, 458 (D.D.C. 1992). Defendant's discovery burden in this case does not even begin to approach the task confronting IBM in Transamerica. Indeed, in circumstances much more comparable to the situation confronting defendant, this court rejected the contention of the Steptoe law firm that its screening of forty boxes of documents constituted extraordinary circumstances of the sort contemplated by the D.C. Circuit in In re Sealed Case. In rejecting the contention, the court wrote: "This court agrees with defendants that Steptoe's task of screening forty boxes of documents, however burdensome, does not rise to the level of the 'extraordinary circumstances' contemplated by the D.C. Circuit in In re Sealed Case."<sup>18</sup> Wichita Land & Cattle Company, 148 F.R.D. at 458.

**E. Defendant Has Offered No Sound Basis For Foregoing In Camera Inspection.**

Defendant offers absolutely no reason for opposing plaintiffs' request for in camera inspection other than the burden associated with such an inspection. While plaintiffs clearly recognize and have acknowledge this burden, they are, unfortunately, left with no reasonable alternative. Defendant has steadfastly refused to adhere to the procedures she proposed in the May 8, 2003 Protective Order thereby forcing plaintiffs to file a motion to compel.<sup>19</sup> Defendant has utterly failed to sustain her burden of proof with respect to her privilege claims. Indeed, to offer a declaration that discusses only 17 documents in a conclusory and wholly inadequate fashion clearly demonstrates that defendant has not taken seriously the burden of demonstrating that her privilege claims are well founded. In short, defendant has offered absolutely no reason

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<sup>18</sup> While the court in Wichita Land & Cattle does not specify the actual number of pages of documents contained in the forty boxes, a typical box used by copying services can contain at least 10 reams of paper or 5,000 pages. Forty boxes could easily contain 200,000 pages (40x5,000). Defendant had at least two months to review "approximately 141,997 pages." Defendant's Opposition at 14.

<sup>19</sup> Certainly, one way to avoid the burden in light of defendant's refusal to follow the Protective Order procedures would be to rule that defendant has waived all of her privilege claims as a result of her failure to comply with the Protective Order.

for placing any reliance upon defendant's assertions of privilege.<sup>20</sup> Before more precious time is wasted, the court should "cut to the quick and order production of the document at issue" for in camera inspection. Avery Dennison Corp. v. Four Pillars, 190 F.R.D. 1, 2 (D.D.C. 1999); see also Bigelow, 122 F.R.D. at 113; Northrop Corp., 751 F.2d at 401; Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1344 (D.C. Cir. 1984).

### CONCLUSION

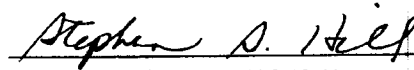
Accordingly, for the foregoing reasons and for the reasons set forth in Plaintiffs' Memorandum In Support of the Motion, plaintiffs request that the court enter an order compelling the production of (1) all documents as to which defendant has asserted a deliberative process privilege claim, (2) all documents whose authors are not named in the privilege log; and (3) all documents that have been withheld from production on the basis of an alleged privilege that have not been included in the privilege log as required by Fed. R. Civ. P. 26 (b)(5), i.e. the documents identified by the following production numbers: GVL001-1217-GVL001-1219, GVL001-1436, GVL002-0129, GVL019-3228 and GVL028-3576. With respect to Document Nos. 221, 299, 300, 313, 317, 437, 532, 540, 622 and 771.1, plaintiffs request that the court enter an order finding that defendant has waived the attorney-client privilege with respect to those documents and all other documents relating to the same subject matters as those documents. In addition, plaintiffs request that defendant be compelled to produce to them Document Nos. 166, 182, 236, 330, 377, 387, 403, 404, 422, 466, 490.1, 554, 755, 758, 795 and 796.1. With respect to the remaining documents listed on defendant's revised privilege log, plaintiffs request that the court compel defendant to produce all such documents for an in camera inspection to determine the validity of defendant's privilege claims. Alternatively, plaintiffs request that the court appoint a magistrate to conduct such a review and to supervise any future discovery disputes,

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<sup>20</sup> In addition to the discrepancies between the document descriptions provided in Defendant's Opposition and the Privilege Log (see n.10 supra), defendant's list of errata is sufficient to cast doubt on the reliability of the Privilege Log. See, e.g., Defendant's Opposition at 9 n.4, citing errors with respect to seven privilege sheets (Plaintiffs' memorandum at 13) and 13 n.9, citing errors with respect to Document Nos. 466, 795, 796.1, 490.1 and 538.

thereby expediting the discovery process and reducing the burden which defendant's conduct creates for the court.

Respectfully submitted,



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