**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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

**RESPONDENTS' MOTION TO LIFT STAY**
**AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**

Respondents respectfully move to lift the stay of these proceedings entered on May 17, 2012. In the interest of judicial economy, they also propose a modification to the subpoena at issue. The grounds for Respondents' motion are set forth in the accompanying memorandum. After consultation with counsel for the Petitioner, counsel for the Petitioner advises that he opposes the relief that Respondents hereby seek.

Date: August 13, 2013

Respectfully submitted,

/s/ Anthony F. Shelley

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| Exhibit A | Pension Benefit Guaranty Corporation's Response to Plaintiffs' Rule 37 Motion to Enforce This Court's Order Granting Plaintiffs' Second Motion to Compel Discovery (E.D. Mich. Dkt. No. 223, Mar. 13, 2013) |
| Exhibit B | Written Testimony of the Honorable Christy Romero, Special Inspector General for the Troubled Asset Relief Program Before the U.S. House Committee on Oversight and Government Reform, Subcommittee on TARP, Financial Services, and Bailout of the Public and Private Programs (July 10, 2012) |
| Exhibit C | Plaintiffs' Brief in Opposition to Defendant PBGC's Motion to Dismiss (E.D. Mich. Dkt. No. 36, Dec. 18, 2009) |
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| Exhibit O | August 9, 2013 Press Release by US House Oversight and Government Reform Committee on Subpoena issued to Treasury for Documents on Delphi Pension Deal |

## INTRODUCTION

On February 17, 2012, Petitioner the United States Department of Treasury ("Treasury") moved to quash a subpoena (the "Subpoena") served upon it by Respondents, plaintiffs in *Black, et. al v. PBGC*, Case No. 09-13616 ("*Black*") (DE 1), currently pending in the United States District Court for the Eastern District of Michigan before Senior Judge Arthur Tarnow (the "Michigan Court"). The Subpoena is narrow in its scope, seeking documents received, produced or reviewed by just three former Treasury officials that are directly relevant to Respondents' claims in *Black*. The basis of the Treasury's motion is that the discovery Respondents seek is supposedly unreasonably cumulative, duplicative, and burdensome in light of the documents' potential benefits to Respondents.

On March 5, 2012 Respondents filed their opposition (DE 6) to the Treasury's motion, in which they detailed at length why the Subpoena is appropriate and indeed necessary to their claims in light of a September 1, 2011 Order issued by Judge Tarnow (Ex. H to Memorandum in Opposition to the Motion of U.S. Treasury to Quash ("Opp'n Br.")). The September 1, 2011 Order authorized discovery on all of plaintiffs' claims, and specifically noted that the Michigan Court would focus on discovery related to Count Four of plaintiffs' complaint and the question of whether it would have been appropriate for the court to have granted a decree terminating plaintiffs' pension plan pursuant to 29 U.S.C. § 1342(c). The Michigan Court noted that its resolution of Count Four might allow it to avoid reaching difficult constitutional and statutory questions raised by the complaint's other claims. Respondents also described in their opposition why the Treasury's unsubstantiated arguments alleging that the Subpoena was unduly cumulative, duplicative or burdensome were of no moment.

On April 2, 2012 the Treasury filed a reply in support of its motion to quash (DE 10), where it suggested, for the first time, that this Court grant it truly extraordinary relief by

disregarding the law of the case as stated in Judge Tarnow's September 1, 2011 Order. Specifically, the Treasury argued that this Court should disregard the scope of discovery as stated in Judge Tarnow's September 1, 2011 Order and, moreover, that it reject Judge Tarnow's decision to exercise judicial restraint and instead tackle the merits of Count's One through Three of the complaint, a decision which would undermine the last four years of rulings by the Michigan Court.

The Treasury noted in its reply that on March 9, 2012 (DE 10 at 4), the Defendant in *Black*, the Pension Benefit Guaranty Corporation ("PBGC"), had been ordered by Magistrate Judge Majzoub of the Michigan Court to "'produce full and complete responses'" to Respondents' document requests, and that the PBGC had filed objections to that order to Judge Tarnow. (citation omitted).

On May 17, 2012 this Court entered a minute order stating that:

> Upon review of the motion to quash, the response, and the reply thereto, it appears to the Court that a threshold issue in this matter is whether the court in the underlying action has permitted discovery regarding the factors enunciated in 29 U.S.C. 1342(c). In light of the fact that this precise issue is ripe for resolution before Judge Tarnow, the judge in the underlying action, the Court hereby STAYS this matter pending Judge Tarnow's resolution of PBGC's Objections to Magistrate Judge's Order of March 9, 2012 Granting Plaintiffs' Motion to Compel Discovery, Case 09-13616 (E.D. Mich.), Doc. No. 209. Plaintiffs are directed to notify this Court of Judge Tarnow's decision within five calendar days after it issues. This Order is subject to reconsideration for good cause shown. Any motion for reconsideration shall be filed by no later than May 31, 2012.

Judge Tarnow has not ruled on the objections. Thus, the proceedings before this Court have been stayed for the last fourteen months to await a ruling by Judge Tarnow that has not transpired. However, notwithstanding the PBGC's objections to Judge Majzoub's March 9, 2012 Order, it did not seek a stay of her Order, and it has now informed the Michigan Court that it has "produced all documents sought by the plaintiffs except those protected by law or privilege" and that it has done "everything reasonably within its power to comply with the March

9 Order." PBGC Response to Plaintiffs' Rule 37 Motion to Enforce at 5-6 (attached hereto as Exhibit A). Given these representations, it seems likely that the PBGC's objections to Judge Tarnow are now moot, or waived, or both. Regardless, this Court's May 17, 2012 Stay Order was based on the premise that a threshold issue (*i.e.*, the scope of discovery authorized in this case) was ripe for resolution before Judge Tarnow. Given the fact that the PBGC's objections are for all effects and purposes moot, Respondents no longer believe that a decision by Judge Tarnow on that threshold issue is imminent. Moreover, the law of the case on the scope of discovery is already well-settled. Accordingly, Respondents respectfully ask the Court to lift the stay and resolve the Treasury's motion to quash.

Additionally, while Respondents do not believe that the Treasury has come close to meeting the burden necessary to justify quashing the Subpoena, Respondents nevertheless here propose a modification to the Subpoena that addresses the concerns raised by the Treasury in its motion to quash. Specifically, in July 2012, the Special Inspector General for the Troubled Asset Relief Program ("SIGTARP"), Christy Romero, testified before a House Subcommittee that the Treasury has produced to SIGTARP documents and email correspondence relevant to the Delphi pension issues, and that this information has "led SIGTARP to determine that other members of the Auto Team including Harry Wilson and Matt Feldman were closely involved in the Delphi pension issues and their testimony to SIGTARP is critical to determine the nature of their involvement." Written Testimony of Christy Romero, Before the U.S. House Committee on Oversight and Government Reform Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs at 5 (July 10, 2012) (attached hereto as Exhibit B).[1] SIGTARP's

[1]The SIGTARP testimony was prompted by the refusal of Auto Task Force officials Matt Feldman, Harry Wilson and Ron Bloom to meet with SIGTARP or to respond to questions related to their involvement in the Delphi pension plans. Ex. B at 5-7.

testimony suggests that the Treasury has already assembled and produced documents and emails to SIGTARP in its audit of the Delphi pension issues, and if so, Respondents believe that these documents could likely be directly relevant to the *Black* litigation. One of Respondents' counsel has contacted Treasury in an attempt to confirm whether this document production to SIGTARP took place, but was informed by Treasury's counsel that it was "none of [his] business."

Still, assuming that such a production has been made to SIGTARP, the burden to Treasury of re-producing documents to Respondents that it has already assembled would be negligible, and Treasury would have no basis to object to the modified Subpoena beyond its relevance objection -- an objection which cannot stand under the law of the case.[2] Moreover, the discovery that Respondents have gained from other sources since the stay was entered has proved further that the Treasury's documents will be highly relevant to Respondents' claims. As summarized herein, every major decision leading to the termination of the Salaried Plan was a direct result of Treasury actions.

For all these reasons, the stay should be lifted, the Treasury's motion to quash should be denied, and the Treasury should be ordered to comply with Respondents' subpoena (modified or not).

[2] Respondents strongly emphasize, however, that such modification would be without prejudice to Respondents' right to seek additional information from Treasury if circumstances warrant.

## ARGUMENT

### I. A CONTINUED STAY OF THESE PROCEEDINGS IS NO LONGER REASONABLE

It is well settled that "[t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). Such discretion must be exercised by "weigh[ing] competing interests and maintain[ing] an even balance." *Id*. at 255. While there are no hard and fast rules, a court must be mindful to release the fetters of a stay where the stay reaches beyond reasonable limits. *Id*. at 256.

When this Court stayed these proceedings on May 17, 2012, the PBGC's objections with Judge Tarnow had been fully briefed for less than a month, and the PBGC had not yet produced a single document. It was thus entirely reasonable to expect that the Michigan Court would issue a ruling in short order on the objections, if for no other reason than to ensure that discovery was able to progress. However, Judge Tarnow did not rule on the objections, and given that the Magistrate's Order was immediately effective and the PBGC had not sought a stay of the Order, the PBGC began producing responsive documents on June 7, 2013. Ex. A at 7. The PBGC made several more productions, with the final production occurring on December 20, 2012.[3] *Id*. As noted above the PBGC now claims to have "produced all documents sought by the plaintiffs except those protected by law or privilege," though a motion to compel those allegedly privileged documents remains pending before Judge Majzoub. *Id*. at 5. Consequently, because the resolution of Respondents' remaining discovery disputes with the PBGC will turn on the Magistrate's decisions as to issues of privilege, Judge Tarnow may have determined that the

[3] The PBGC made an additional production of documents on July 29, 2013 consisting of documents which it had previously withheld on privilege grounds.

PBGC's relevancy objections are now moot, and he might not resolve them in the near future, or ever.

The continued stay of these proceedings is working an extreme hardship upon Respondents. First and most obviously, it has hampered their ability to obtain documents necessary to the prosecution of their lawsuit. This is especially frustrating given the history of obstructionism employed by the various agencies of the government in this case. Again, despite the Michigan Court's authorization of discovery in September 2010, the PBGC withheld discovery responses until June 2012. Treasury, of course, has refused to produce any discovery.

It must also be noted that Respondents are particularly vulnerable to these delaying tactics because of their age and financial situation. Respondents are a group of retirees living on reduced pensions. Their underlying lawsuit has already been pending for four years as a direct result of the government's response to legitimate discovery requests, and for them, every month the litigation continues is another month of having to make do with a pension far less than that to which they are entitled. Moreover, the passage of time has also seen more instances of death or serious illness. In short, for such a group of plaintiffs, justice delayed is truly justice denied. In these circumstances, Respondents respectfully submit that the continued imposition of the stay is no longer reasonable.

## II. RESPONDENTS' PROPOSED MODIFICATION TO THE SUBPOENA ADDRESSES THE TREASURY'S OBJECTIONS

### A. Producing Documents Already Assembled and Produced to SIGTARP Involves No Burden

Subsequent to the filing of their brief in opposition to Treasury's motion to quash, Respondents suggested to Treasury's counsel their belief that the Treasury might be exaggerating the alleged burden it faced in complying with the Subpoena in light of efforts Treasury may have undertaken in complying with SIGTARP's ongoing audit. While Treasury's counsel stated that

any documents the Treasury has provided to SIGTARP would be "none of [Respondents'] business," Respondents respectfully submit that the question is directly relevant to any alleged burden placed on Treasury.

In an effort to ascertain whether Treasury has actually provided any documents to SIGTARP, and if so, whether those documents might be responsive to the Subpoena at issue here, Respondents' counsel Michael Khalil contacted representatives of SIGTARP to so inquire on April 10, 2012. Unfortunately, Lori Wagner, a senior attorney advisor with SIGTARP, stated that it was against SIGTARP's policy to comment on ongoing audits, and that she could provide no comment on either question. However, since that time and as discussed above, SIGTARP has submitted written testimony to the U.S. House Committee on Oversight and Government Reform Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs. Ex. B. In this testimony, Ms. Romero states that her office has obtained documents and email correspondence relevant to the Delphi pension issues from the Treasury (among others), and that this information has "led SIGTARP to determine that other members of the Auto Team including Harry Wilson and Matt Feldman were closely involved in the Delphi pension issues and their testimony to SIGTARP is critical to determine the nature of their involvement." *Id*. at 5. Thus, Respondents believe it is likely that Treasury has provided documents to SIGTARP that would be responsive to the Subpoena and relevant to their claims, and would suggest that Treasury's responses to SIGTARP's audit could provide a reasonable compromise for a modification of the Subpoena, potentially alleviating the need for additional document discovery.[4]

[4] On August 8, 2013, Respondents asked Treasury's counsel to confirm whether Treasury has in fact produced documents to SIGTARP in connection with the Delphi pensions audit, and if so, to describe the extent of the production. To date Treasury's counsel has still not advised Respondents as to the extent of any SIGTARP productions.

### B. The Treasury's Relevance Objections Are Premised on a Rejection of the Law of the Case

In their brief in opposition to the Treasury's motion to quash, Respondents have noted that the Michigan Court had explicitly authorized discovery on all four Counts of plaintiffs' Complaint, and specified that the focus should be on the termination criteria of 29 U.S.C. § 1342(c). Respondents then detailed how their Subpoena was relevant and necessary to the § 1342(c) termination inquiry. *See* Opp'n Br. at 8-11. In its reply brief, the Treasury does not dispute the relevance of Respondents' Subpoena to the termination criteria of § 1342(c), but instead, in direct contradiction to the September 1, 2011 Order, asserts that "the grounds enumerated in § 1342(c) for the termination of a pension plan by court order have no applicability to *Black*. Instead, [argues the Treasury] the sole matter at issue in *Black* is whether PBGC was justified in determining that the termination of the Delphi Salaried Plan was appropriate under 29 U.S.C. § 1342(a)(1), (a)(2), and (a)(4)." Reply Brief in Support of Petitioner's Motion to Quash ("Reply Br.") at 5 (DE 10). As described below, the Treasury's contention as to the scope of discovery authorized in this case is indefensible both because it would impermissibly diminish the discovery Respondents are entitled to, and because it would be entirely contrary to the law of the case.

The § 1342(a) criteria that the Treasury wishes to focus on governs the PBGC's "authority to *institute* proceedings to terminate a plan." 29 U.S.C. § 1342(a) (emphasis added). The PBGC's determinations under § 1342(a) are not self-effectuating, but are rather the first step in the termination process. Under Title IV of ERISA, if the PBGC determines that any one of the four (a) criteria have been met, it is authorized to initiate termination proceedings by applying to the appropriate United States district court. The district court is then to judge the termination application under the standards of 29 U.S.C. § 1342(c) ("Adjudication That Plan

Must Be Terminated."), in a *de novo* hearing where the PBGC must prove its case for termination by a preponderance of the evidence. *In re UAL Corp.*, 468 F.3d 444, 449-50 (7th Cir. 2006).

Section 1342(a) explicitly states that the "requirement for a court decree under subsection (c)" is a "substantial safeguard[] for the rights of [plan] participants and beneficiaries" that must be maintained. 29 U.S.C. § 1342(a). Nonetheless, the PBGC believes that it may entirely bypass a court adjudication under § 1342(c) in cases where it obtains the agreement of a plan administrator that the plan should be terminated. Respondents disagree, and the first three counts of their complaint against the PBGC articulate why, under ERISA and the U.S. Constitution, the PBGC's termination-by-agreement theory must fail. Count Four of Respondents' complaint argues that the PBGC would have been unable to satisfy the § 1342(c) termination. After denying the PBGC's motion to dismiss Counts One through Three, the Michigan Court authorized discovery on Count Four to determine whether the PBGC could have satisfied the § 1342(c) criteria, reasoning that if the PBGC were able to demonstrate its ability to meet the § 1342(c) criteria, the remainder of Respondents' complaint might become moot, and the Michigan Court might avoid the constitutional and statutory questions raised in the complaint. *See* Sept. 1, 2011 Order at 4.

While the Treasury never actually comes out and says it, the implications of the Treasury's assertion that "the grounds enumerated in § 1342(c) for the termination of a pension plan by court order have no applicability to *Black*" is clear; the Treasury is asking this Court to take the remarkable step of disregarding the law of the case and undermine the last four years of litigation before Judge Tarnow.

### C. Coordinate Courts Should Only Disregard the Law of the Case in Extraordinary Circumstances

In even the most routine case, "[t]he quashing of a subpoena is an extraordinary measure, and is usually inappropriate absent extraordinary circumstances." *Flanagan v. Wyndham Int'l*, 231 F.R.D. 98, 102 (D.D.C. 2005) (citations omitted). It falls upon the moving party to bear the "heavy burden of showing extraordinary circumstances based on specific facts that would justify such an order." *Alexander v. FBI*, 186 F.R.D. 71, 75 (D.D.C. 1998) (internal quotation and citation omitted).

The burden on the movant is even greater "[w]here, as here, a subpoena was served in this district with respect to an action pending in another district," and "'[the] court . . . should hence be cautious in determining relevance of evidence, and in case of doubt should err on the side of permissive discovery[,]' . . . since the court with jurisdiction of the discovery dispute 'generally has limited exposure to and understanding of the primary action.'" *Hesco Bastion Ltd. v. Greenberg Traurig LLP*, No. 09-0357, 2009 U.S. Dist. LEXIS 124079, at *10-12 (D.D.C. Dec. 23, 2009) (quoting *Flanagan*, 231 F.R.D. at 103).

The burden on the moving party is even greater still where the court overseeing the action has already addressed the question of relevance in a discovery order, with that order then being the "law of the case." *Flanagan*, 231 F.R.D. at 103-04. "The doctrine [of the law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. This rule of practice promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.'" *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16 (1988) (alteration in original, citations omitted). While courts have the power to revisit such prior decisions of coordinate courts, "as a rule courts should be loathe to do so in the absence of extraordinary circumstances

such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Id*. at 817 (quoting *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983) (citation omitted).

Thus, Treasury's burden here is truly substantial if it is to prevail on its relevance argument, in that it must convince this Court to rule that, as a matter of law, Judge Tarnow's September 1, 2011 Order was so "clearly erroneous" that this Court should substitute its own determinations for that of Judge Tarnow (on both the scope of discovery and the underlying merits of Plaintiffs' claims), keeping in mind that the case (which has over two hundred docket entries) has been before Judge Tarnow for almost four years and that "[t]o be clearly erroneous, a decision must strike [the court] as more than just maybe or probably wrong; it must, . . . strike [the court] as wrong with the force of a five-week-old, unrefrigerated dead fish." *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988).

### D. Treasury Has Not Shown That Judge Tarnow's Rulings, Premised on an Exercise of Judicial Restraint, Are Clearly Erroneous

As described in Respondents' Opposition Brief, Respondents' lawsuit challenges the August 2009 involuntary termination of their defined benefit pension plan, the Delphi Retirement Program for Salaried Employees (the "Salaried Plan" or the "Plan"), by the PBGC. Counts One through Three of the Second Amended Complaint challenge the *way* in which the Plan was terminated, arguing that either the extrajudicial termination of Respondents' vested pension rights violated the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, or, if the termination was statutorily permitted, it violated the Due Process Clause of the Fifth Amendment to the U.S. Constitution.[5] Count Four, on the other hand, raises

[5] Count One alleges that the PBGC's termination of the Salaried Plan violated the requirement of 29 U.S.C. § 1342 that it obtain a court decree adjudicating the Plan's termination; ERISA prohibits the termination of vested property interests outside the judicial process, particularly when it is accomplished by an agreement that excludes any consideration of the participants' best interests. Count Two alleges that because any ability to enter agreements under ERISA is expressly given to a "plan administrator," to

a substantive challenge to the ability of the PBGC to meet the statutory standards set forth for termination in ERISA, and further alleges that the termination was done for impermissible reasons of political expediency, by an agency that was placed under extreme pressure by officials in the Treasury Department.

More specifically, Respondents argue that termination of the Plan did not satisfy the termination criteria set forth in 29 U.S.C. § 1342(c), which lays out the three criteria a court must look to in deciding whether a plan needs to be terminated. Respondents contend that the PBGC had before it any number of tools to seek to preserve the Salaried Plan, with the most obvious being the utilization of its liens and claims related to the Delphi plans as leverage to force GM to re-assume the Salaried Plan or otherwise provide financial assistance to avoid an underfunded termination. While such a re-assumption would have made complete business sense for GM in light of its dependence upon Delphi supply, it was not, in Treasury's estimation, a politically palatable result. Already having to deal with critics who objected to the use of TARP funds in the auto industry, the Treasury was looking for ways to make their massive political and financial investment in GM as risk-free as possible. Respondents assert that, upon the creation of the Auto Task Force, the PBGC abandoned its statutory mandate to advocate for the continuation of the Salaried Plan, and essentially rolled over, acquiescing to a result dictated by

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the extent the law permits the plan administrator to agree with the PBGC on how to terminate a plan, the decision whether to enter into such an agreement is a fiduciary function that must be made in the best interests of the participants, which the decision here clearly was not. Count Three alleges that, if 29 U.S.C. § 1342(c) permits a pension plan to be terminated by agreement with a plan administrator who can summarily agree to the destruction of vested property interests without taking the interests of the plan participants into account, then 29 U.S.C. § 1342(c) violates the Due Process Clause.

the Treasury and its Auto Task Force. The result was a termination that was politically expedient but violative of § 1342(c).[6]

The PBGC sought to dispose of these claims through a motion to dismiss Counts One through Three (the "Motion to Dismiss"), and a motion for summary judgment on Count Four (the "Summary Judgment Motion"). On September 24, 2010, the Michigan Court held a hearing on the PBGC's two dispositive motions. Notably, the exact same arguments raised by Treasury in its reply here (about the ability of the PBGC to terminate a pension plan by agreement) were briefed and argued before Judge Tarnow in connection with the PBGC's Motion to Dismiss. In response to the PBGC's argument that the "plain language" of § 1342(c) allowed for termination by agreement, Respondents noted, *inter alia*, that the plain language of § 1342(c) states that the *only* consequence of an agreement between the PBGC and the plan administrator is that "without proceeding in accordance with the requirements of this subsection (other than this sentence) *the*

[6] It bears mentioning that termination of the Delphi pension plans (both the Salaried and Hourly Plans) by the PBGC was politically more palatable for the Treasury than funding a GM re-assumption of those plans. While the PBGC is a federal agency, the "insurance" benefit payments it makes are not federal funds, but instead come from regular employer premiums paid over the years; thus, the limited insurance benefits the PBGC would pay upon termination would not require or implicate Congressional appropriations or TARP funds. In contrast, were the Treasury to have funded a GM re-assumption, TARP funds would have been involved, potentially triggering more political criticism over the use of TARP funds for non-banks. Moreover, by persuading the PBGC to relent on its efforts to save the Hourly and Salaried Plans and therefore send those Plans to the PBGC's balance sheet, the Treasury created more room for itself politically to maneuver to authorize GM to fund top-up payments for Delphi's Hourly UAW workers and thereby allow the UAW retirees to avoid the financial consequences of the PBGC cuts suffered by everyone else participating in the terminated plans. Because the financing needed for the top-ups would be far less than outright re-assumption by GM of the Hourly and Salaried Plans, the approach of relegating Delphi's pensioners to the PBGC with only limited amounts then required for a segment of top-ups, the Treasury (in Respondents' view) could limit the political fallout to the greatest possible degree. But the Treasury's too-cute-by-half approach later came back to bite it, when two other labor unions covered under the Hourly Plan, the IUE and the USW (both substantial backers of the current Administration) complained mightily that termination of their plan would cost its members benefits. As a result, the Treasury backtracked, and those unions too soon found themselves recipients of GM top-up payments, so that they too would not feel the consequence of their pension plan's termination. The Salaried Plan's participants thus became the only "road kill" from the Treasury's political machinations, because the Salaried Plan's participants were left with just the fractions the PBGC pays.

*trustee shall have the power described in subsection (d)(1)* and . . . is *subject to the duties described in subsection (d)(3)*."[7] 29 U.S.C. § 1342(c) (emphasis added). The plain statutory language therefore says nothing about permitting the PBGC and the plan administrator to agree to bypass an "adjudication" entirely whenever the plan administrator determines that it is in the plan administrator's best interest to do so, but addresses only the powers of a trustee when there is agreement between the PBGC and the plan administrator.

Respondents also noted that the PBGC's arguments were at odds with the legislative history of § 1342, in which Congress stated its intention that the court decree be a safeguard not to be sacrificed for expediency's sake even in the case of "small plans" and unambiguously expressed its views on the limits of what a plan administrator and the PBGC could agree upon:

> In the case of small plans, the corporation may prescribe a simplified procedure and may pool assets of small plans *so long as the rights of the participants and employers* (*including the right to a court decree of termination*) are preserved. Furthermore, the corporation may agree with any plan administrator to designate a trustee who, without court appointment, is to have the usual powers of trustees appointed by the court.

H.R. Rep. No. 93-1280, at 373 (1974) (Conf. Rep.) (emphasis added).[8]

By Order dated September 27, 2010, both of the PBGC's dispositive motions were denied, without prejudice. In denying the PBGC's motion to dismiss Count One, Judge Tarnow

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[7] Plaintiffs Opposition to the PBGC's motion to dismiss is attached hereto as Ex C. Arguments related to Count I appear at pages 3-8.

[8] The conference report plainly states that the only intended purpose of the sentence relied upon by the PBGC (and now Treasury) is to provide for a way to have a trustee *appointed by agreement* who would nevertheless have the powers of a court appointed trustee. By inserting this sentence, Congress provided for situations where it would be best to have a mutually-agreed upon trustee in place that could begin to act to conserve plan assets, while the necessary (and potentially lengthy) process of adjudicating the plan's termination takes place. Absent this sentence, the only way that a trustee could have the powers under 29 U.S.C. § 1342(d)(1)(B) is through proceeding in accordance with the requirements of subsection (c) -- *i.e.*, by court appointment *after* a termination decree has already been entered.

stated on the record that, while "I'm not ready to rule who is going to win, [] I am ready to rule that I'm not going to agree with the Defendant that as a matter of law they are correct. But rather at this early stage I'm going to deny the Motion to Dismiss without prejudice to bringing it back later in the proceedings if the facts don't bear out the claims of the Plaintiffs." Sept. 24, 2010 Hr'g Tr. at 31:23-32:4 (attached hereto at Exhibit D). As the hearing transcript makes clear, Judge Tarnow found that a ruling on any of the four Counts, without discovery, would be premature.

As previously noted, the PBGC refused to acknowledge that the Michigan Court had, in its September 2010 Order, authorized any discovery, and almost a full year after actually ordering the case proceed to discovery, the Michigan Court had to issue its September 1, 2011 Order (Ex. H to Opp'n Br.), in which the Court gave the parties explicit instructions as to what the scope of this discovery would entail:

> In terms of addressing the scope of discovery for purposes of entering a scheduling order -- **The Court's initial focus, keeping the above case law in mind, is on Count 4 and whether termination of the Salaried Plan would have been appropriate in July 2009 if, as Plaintiffs contend, Defendants were required under 29 U.S.C. § 1342(c) to file before this court "for a decree adjudicating that the plan must be terminated** in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund."

Sept. 1, 2011 Order at 3-4 (quoting 29 U.S.C. § 1342(c) (emphasis added)). Judge Tarnow reiterated that he was not yet prepared to rule on the merits of any of the four Counts, and that, by focusing on the question articulated above (*i.e.*, whether termination of the Salaried Plan would have been appropriate under the § 1342(c) termination criteria), the court might be able "to avoid constitutional and statutory questions raised within [Counts I-III of] the Second Amended Complaint in an exercise of judicial restraint." *Id*. at 4. This is so because "[s]uch a finding by the Court that termination was proper under 29 U.S.C. § 1342(c) would moot the

remainder of the complaint pertaining to the PBGC, as it would be irrelevant whether ERISA and the Due Process Clause require that a hearing be held . . . before termination of a plan (since with or without a hearing, termination would have been proper.) Certainly, this matter . . . 'bear[s] on' the case issues." *Id*. (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)).

Again, the Treasury's relevance argument is that "the grounds enumerated in § 1342(c) for the termination of a pension plan by court order have no applicability to *Black*." Pet.'s Reply Br. at 5. But, given the fact that the Michigan Court explicitly authorized discovery on the § 1342(c) criteria in its Sept. 1, 2011 Order, the only way that can be true is if this Court decides that Judge Tarnow's decisions (both to allow discovery on Count Four and to withhold judgment on Counts One through Three) were "clearly erroneous." The Treasury has not come close to satisfying this burden.

First, as noted above, the Treasury's proposed reading of the fourth sentence of § 1342(c) is at odds with its actual language, its legislative history, and its underlying purpose. Second, Treasury offers no arguments about Counts Two or Three, which raise additional statutory and constitutional problems with the PBGC's termination of the Salaried Plan by agreement. Treasury would be asking this Court to find that, despite these serious questions, Judge Tarnow's decision to allow discovery on Count Four (in an exercise of judicial restraint) was so "clearly erroneous [that it] would work a manifest injustice." *Christianson*, 486 U.S. at 816 (internal quotations and citation omitted). Because the Treasury has not (and could not) make such a showing, this Court should respect the law of the case and compel discovery on the 29 U.S.C. § 1342(c) termination criteria.

## III. DISCOVERY CONDUCTED THUS FAR HAS CONFIRMED THAT THE TREASURY DOCUMENTS ARE OF EXTRAORDINARY RELEVANCE TO THE CASE

Again, in order to resolve Respondents' complaint, the Michigan Court has asked for evidence to determine whether a termination decree would have been appropriate in July 2009 under 29 U.S.C. § 1342(c). Put another way, had an Article III court held a *de novo* hearing in July 2009, would it have found that termination of the Salaried Plan was unavoidable? As Respondents noted in their opposition brief, the relevance of the Treasury documents to this determination cannot be overstated. *See* Opp'n Br. at 2-5, 8-11. Moreover, discovery that Respondents have conducted via the PBGC since 2012 has confirmed how critical the Treasury's information will be to this determination.

Respondents have previously noted that, in the months prior to termination, Delphi had described a GM re-assumption of the Salaried Plan as a "preferred" and "likely outcome." *See* Opp'n Br. at 3; Ex. D to Opp'n Br. at 9. While the PBGC and the Treasury have done their best to suggest that Delphi was exaggerating the likelihood of GM re-assumption, discovery has shown that, at least prior to the creation of the Auto Task Force, the PBGC itself was engaged in a "full court press to convince GM and Government officials that the 414(L) transfer [of Delphi pensions back to GM] is in everyone's best interest [as] GM doesn't need two classes of employees and should provide pensions to all retirees." Feb. 13, 2009 Memo from Compass Advisers to PBGC, attached as Ex. 12 to D. Cann Dep. (attached hereto as Exhibit E).[9] Indeed, the PBGC states that it was "cheerleading for the transfer, . . . utilizing [the PBGC's] liens overseas as potential leverage to get it done." D. Cann Dep. Tr. at 67:6-14 (attached hereto as Exhibit F).

[9] Compass Advisers is a financial advisor hired by the PBGC at the onset of the Delphi bankruptcy. *See* D. Cann Dep. Tr. at 51:13-18.

The PBGC was forced to shift its negotiating efforts to the Treasury once the Auto Task Force was created. As the PBGC's then-acting Director Vince Snowbarger recently testified, "Treasury also at this point in time becomes a major creditor in all of these negotiations. And because we are at that point in time a creditor -- an unsecured creditor in Delphi -- as we know now, we became an unsecured creditor, at least for a short period of time, in the General Motors bankruptcy that came later -- it was important for us to coordinate with what, in essence, was a future lender to those players." V. Snowbarger Dep. Tr.at 62:16-63:2 (attached hereto as Exhibit G).

However, the shift in negotiating partner was problematic for the PBGC, as the Treasury was wearing "at least" three conflicting hats: (1) through its auto task force, it was the agency charged with restructuring the auto industry; (2) as a PBGC board member, it was one of three agencies charged with providing oversight and direction to the PBGC; and (3) as a major competing creditor in the Delphi bankruptcies that, as the chief lender to GM, would ultimately decide whether GM would be permitted to fund a re-assumption of the Delphi pension plans. *See, e.g.*, *id.* at 39:6-12, 62:16-63:2.

The PBGC eventually pinned all its hopes for keeping the Delphi plans ongoing to the Treasury, concluding that the Treasury was the only source of realistic funding for the Salaried Plan. "PBGC was having to make a decision about whether to proceed with the termination of the hourly plan and the salary plan. And if someone was going to intervene, GM, then we needed to know that someone was going to intervene." V. Snowbarger Dep. Tr. at 116:16-21. "Treasury was the source of money for GM at that point." *Id.* at 117:1-2; *see also* D. Cann Dep. Tr. (the PBGC's 30(b)(6) deponent on interactions with the Auto Task Force) at 191:18-19 ("If anybody was going to fund it, it was going to be Treasury.").

The communication between the Auto Task Force and the PBGC on Delphi issues took place almost exclusively through two individuals, Matt Feldman and Joe House. *See, e.g.*, V. Snowbarger Dep. Tr. at 47:18-19; Dep. Tr. of J. House at 118:4-19 (attached hereto as Exhibt H). As Respondents have previously noted, Mr. Feldman has stated that he began these discussions with a clear agenda -- "to reach an agreement where the salaried Delphi plans would be terminated and General Motors would assume the hourly pension plans." Ex. E to Opp'n Br. at 158:24-159:4. And while the PBGC had previously been engaged in a "full court press" to have GM assume the Salaried Plan, once the Treasury took over negotiating for GM, the PBGC took on a much more submissive role in those negotiations, eventually abandoning its advocacy of a GM re-assumption of the Salaried Plan altogether. And notwithstanding the PBGC's earlier enthusiasm for GM re-assumption, its statutory mandate to try to preserve pension plans, the significant leverage it wielded over GM via its liens and claims, and its realization that Treasury held the key to securing financing for the Salaried Plan, the PBGC, apparently, stopped treating its interactions with Treasury as a negotiation. As the PBGC's negotiator admitted, "the word 'negotiation' doesn't really describe the nature of the liasing. It was much more of a -- a coordination exercise." J. House Dep. Tr. at 12:4-7. When asked specifically about the PBGC's efforts to persuade the Treasury to fund the Delphi plans, Mr. House was clear that such advocacy was not a part of his mandate. *See id.* at 45:6-8 ("I don't have a recollection of trying to persuade Treasury of anything.").

What led to this change of heart? It's impossible to say for sure, as the PBGC has not produced any documents that would shed light on the substance of Mr. House's interactions with

Mr. Feldman, and Mr. House claims to have no memory of the majority of those conversations.[10] However, the only obvious change is that instead of being able to negotiate with GM, the PBGC was forced to "coordinate" with a superior agency on a matter of extreme political importance to the new administration. For this reason alone, the Treasury documents are extremely relevant.

The importance of the Treasury documents also becomes apparent as one looks through the available evidence between May and July 2009, during which major decisions regarding the Delphi pension plans were made by the Treasury and the PBGC.

On May 26-27, 2009, a mediation of Delphi's bankruptcy issues was conducted under the auspices of the Delphi bankruptcy court; Delphi, the PBGC, GM, the Auto Task Force, and Delphi's debtor-in-possession ("DIP") lenders were among the attendees. A few days after the mediation concluded, Delphi announced its belief that the PBGC would terminate the Salaried Plan. Respondents believe that the Treasury played the determinative role in shaping this outcome. Indeed, shortly before the mediation took place, Delphi officials stated their understanding that the PBGC and Treasury had reached an agreement in principle about how Delphi's pensions should be handled. *See* Ex. 16 to J. House Dep. (attached hereto as Exhibit I). When asked about this email, Mr. House admitted his memory of these events was poor, and also acknowledged that he and Mr. Feldman were engaged in conversations at the same time frame (May 12-13), the substance of which he could not recall. J. House Dep. Tr. at 139:18-140:20. Moreover, on May 22, 2009 (the Friday just prior to the start of the mediation), Mr. Feldman emailed Mr. House to request another one of their off-the-record phone conversations, this time to discuss the upcoming mediation in light of a conversation that Mr. Feldman had just had with

[10] There are approximately 60 instances in Mr. House's deposition transcript where he states an inability to recall events related to the Delphi plans.

the Delphi mediator. *See* Ex. 18 to J. House Dep. (attached hereto as Exhibit J). Mr. House could not recall the substance of this conversation either. *See* J. House Dep. Tr. at 141:17-19.

We have no direct testimony of what occurred at the mediation (but we do know that, according to Mr. House, the PBGC attendees passively "sat in a room and read books all day." S*ee id*. at 144:10-11). Yet emails produced in the days after the mediation suggest that the *Auto Task Force* -- not the PBGC -- put forward a detailed proposal at the mediation that would involve the PBGC initiating termination of the Delphi Salaried Plan, the re-assumption by GM of the Delphi Hourly Plan, and a settlement by the PBGC of all its liens and claims. *See, e.g.*, J. House Dep. Tr. at 147:6-165:6; Ex. 21 to J. House Dep. (attached hereto as Exhibit K). Emails from GM officials to the Auto Task Force indicate that this solution was reached without GM's involvement. *See* Ex. 22 to House Dep. (attached hereto as Exhibit L) (GM's Rick Westenberg asks Mr. Feldman whether the deal with the PBGC has been finalized, and whether he could provide an "overview for how the hourly and salaried plans will be treated/addressed? Would it be appropriate/helpful to have GM involved in any discussions?" GM's Walter Borst goes on to note to the Auto Task Force's Harry Wilson that, prior to having any direct contact with the PBGC, he wants to understand where the Treasury has left it with the PBGC and what, from the Treasury's perspective is expected from GM . . . and what isn't.). When asked about this settlement proposal, Mr. House could not remember how the proposal originated, or whether it was entirely a creation of Matt Feldman's. J. House Dep. Tr. at 159:12-160:1.

On June 30, 2009, Mr. House and his PBGC supervisor, Terry Deneen, were summoned to a meeting at the Treasury to be informed that the Treasury had decided not to fund a GM re-assumption of either Delphi pension plan, resulting in the PBGC's determination to initiate termination proceedings. The meeting prompted the PBGC's acting director to note that

"[d]ecisions have been made re Delphi." Ex. 23 to V. Snowbarger Dep. (attached hereto as Exhibit M). Mr. House described the significance of the Treasury's pronouncement in more detail, noting that they had "just returned from a meeting over at [Treasury]. It is now clear that the Delphi Hourly Plan will not be assumed by GM, *and thus we will be terminating/trusteeing that pension plan along with the Salaried and the four small plans*." Ex. 27 to House Dep.) (emphasis added) (attached hereto as Exhibit N). The email makes clear that the decision was one made by the Treasury, with Mr. House noting that up until that point the Treasury's auto team had "consulted/deliberated exclusively amongst itself and [the White House/National Economic Council]." According to the email, Mr. Feldman would only inform GM of the Treasury's decision the next day. *Id*.

In sum, every relevant action by either GM or the PBGC was a direct result of decisions made by the Treasury. Indeed, in the span of a few months, the Treasury persuaded the PBGC to ignore its statutory mandate to save pension plans and abandon its previous negotiating posture with respect to a GM re-assumption of Delphi's pension plans. For these reasons alone, the Treasury documents are critical to the § 1342(c) determination -- *i.e.*, to show that GM re-assumption of the Salaried Plan was a viable possibility, one that the PBGC stopped advocating for only upon the insistence and direction of the Treasury. But, as Respondents noted in their opposition brief, the Treasury's involvement in these issues went beyond interactions with the PBGC and negotiating on behalf of GM. During the time in question, the Treasury was also in direct contact with Delphi, the DIP lenders, the unions, and at least two potential acquirers of Delphi. *See* Opp'n Br. at 10. While GM was perhaps the most obvious source of funding for the Delphi pension plans, it was by no means the only alternative. Understanding what the Treasury was doing behind the scenes with these other players would have been critically relevant to a

July 2009 § 1342(c) determination, as it would have presented a clearer picture of whether there were viable alternatives to a GM-re-assumption or termination.

Finally, Respondents note that their belief that the Treasury has information relevant to the Delphi pension issues is shared by others. As noted above, the SIGTARP investigation has concluded that "members of the Auto Team including Harry Wilson and Matt Feldman were closely involved in the Delphi pension issues and their testimony to SIGTARP is critical to determine the nature of their involvement." Ex. B. Again, the SIGTARP testimony was prompted by the refusal of those Auto Team members to speak with SIGTARP's investigators about their involvement in the Delphi issues. Additionally, on August 9, 2013, the House Oversight and Government Reform Committee served a subpoena upon the Treasury for information related to the Committee's investigation into the Treasury's disparate treatment of various Delphi retirees during the bankruptcy and taxpayer-funded bailout of GM. *See* Ex. O (attached hereto). The Committee's subpoena was issued upon the Treasury's decision to ignore years of information requests by the Committee for this information. *See id*.

## CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court lift the stay, consider whether modification of the Subpoena is appropriate in this case, deny the Treasury's motion to quash, and direct the Treasury to comply with Respondents' Subpoena forthwith.

Date: August 13, 2013

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 13, 2013, 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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