Case No. 14-2072

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re PENSION BENEFIT GUARANTY CORPORATION
Petitioner-Defendant

On Petition for Writ of Mandamus from the United States District Court Eastern District of Michigan, Southern Division (Judge Arthur J. Tarnow) Case No. 2:09-cv-13616

OPPOSITION TO PETITIONER'S EMERGENCY MOTION FOR STAY OF PROCEEDINGS IN DISTRICT COURT

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I. INTRODUCTION

The mandamus petition of Petitioner Pension Benefit Guaranty Corporation ("PBGC") arises out of a routine discovery dispute, involving the sort of fact-bound issues that Magistrate Judges deal with every day, but appellate courts properly encounter only in appeals from final judgments (if then). Here, the Magistrate Judge acted well within her discretion when she granted the motion to compel filed by Plaintiffs (Respondents here), applying well settled law to an extensive history of discovery obstructionism. The District Judge also acted well within his authority when he upheld the Magistrate Judge's order.

The matter should have ended there, since run-of-the-mill discovery matters like this do not come close to presenting the extraordinary circumstances necessary to justify the granting of mandamus; nor do they come close to justifying the emergency stay the PBGC seeks here. Why, then, would the PBGC go to such lengths as to file a mandamus petition and emergency stay motion? The answer stems from the troubling procedural history of the case below, in which the PBGC has, at every stage, imprudently decided to play chicken with the Federal Rules of Civil Procedure. This lawsuit was filed in 2009. Respondents here are current and former salaried employees of the Delphi Corporation, and are challenging the termination of their pension plan ("Plan") by the PBGC. Respondents allege that the PBGC relented in its efforts to ensure the Plan's continued viability, and

acquiesced in the Plan's termination, not because of anything related to its statutory role under the Employee Retirement Income Security Act ("ERISA"), but as a result of pressure imposed by the Treasury Department and the related Auto Task Force to support those entities' efforts to restructure General Motors. In connection with their lawsuit, Respondents have served discovery on the PBGC seeking information that the lower courts have repeatedly found to be relevant to their claims, including their claim that the PBGC's termination of their Plan was not justified under the statutory criteria set forth in ERISA, 29 U.S.C. § 1342(c).

From the start, the PBGC has been a defiant participant in the discovery process. Initially, the PBGC pretended that the district court had not ordered discovery when the court unequivocally had, thus inflicting a year's worth of delay while Respondents were forced to obtain yet another order compelling the discovery. After that, the PBGC took many months to produce a fraction of what it told the Magistrate Judge it could provide in 90 days. Even then, for almost *two years*, the PBGC gambled that it could, with impunity, indefinitely withhold 29,000 relevant documents without identifying a single document, or providing Respondents with the ostensible basis for a privilege. Respondents have suffered significant harm as a result of this obstructionism, having had to conduct discovery in the dark, incurring unnecessary legal expenses litigating these discovery issues, and being forced to withstand substantial delay in the action's overall progress.

On this record, the PBGC has not come close to justifying the entry of a stay – emergency or otherwise – of the district court's order compelling production of the privileged documents. The PBGC has no likelihood of success, as there is no conceivable basis for granting mandamus. The PBGC has no "clear" or "indisputable" right to the relief it seeks (a requirement for mandamus, *see infra* pp. 8-11) because the discovery order it seeks to challenge was amply justified under well-settled legal principles. The PBGC also cannot demonstrate any irreparable harm from the order below, even assuming *arguendo* that it was erroneous, because the Supreme Court and this Court have both recently held that an appeal from a final judgment serves as an adequate remedy for an erroneous privilege ruling. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 109 (2009); *Holt-Orsted v. City of Dickson*, 641 F.3d 230, 240 (6th Cir. 2011). By contrast, Respondents have been significantly injured by the PBGC's extended discovery delays, and the public interest will be served by requiring immediate disclosure. The Court should deny the PBGC's stay motion, and allow the district court discovery proceedings to move forward.

II. STATEMENT OF RELEVANT FACTS

Respondents' lawsuit was filed approximately five years ago. In that time, the district court has denied two dispositive motions filed by the PBGC, expressly on the grounds that discovery was necessary for the resolution of Respondents'

claims against the PBGC. For over a year, the PBGC insisted that the district court had not ordered discovery when it unequivocally had, culminating in the district court's September 2, 2011 Order clarifying that Respondents were indeed entitled to obtain full discovery under the Federal Rules of Civil Procedure. *See* D. Ct. Dkt. No. 193. Respondents subsequently issued two sets of document requests to the PBGC. The PBGC's responses to these requests contained nothing more than a "boilerplate" objection that stated: "PBGC also objects to the Requests to the extent they seek documents that: (i) are subject to the attorney-client privilege; (ii) constitute attorney work product; or (iii) are otherwise privileged or protected from discovery under state or federal law." Ex. C to D. Ct. Dkt. No. 218 at 5; Ex. D to D. Ct. Dkt. No. 218 at 2. No specific documents were cited, and no privilege log accompanied the responses.

In December 2011, Respondents filed their Second Motion to Compel Discovery from the PBGC ("Second Motion to Compel"), in which they argued, *inter alia*, that:

> [t]he PBGC has not voiced any of its boilerplate objections with the specificity necessary, and the Court should deem those objections waived. To the extent the PBGC had any legitimate objections to the Discovery Requests, it was obligated to state them in their responses, on pain of waiver, so as to avoid the dangers and costs associated with piecemeal litigation.

D. Ct. Dkt. No. 197 at 13.

On March 9, 2012 Magistrate Judge Mona K. Majzoub overruled the PBGC's objections and ordered the PBGC to provide "full and complete" responses to Respondents' discovery requests within 90 days. D. Ct. Dkt. No. 204 ("March 2012 Order") at 2. Throughout the remainder of 2012, the parties entered into stipulated agreements to extend the discovery period because of delays by the PBGC in meeting its deadlines under the March 2012 Order. During this time, Respondents were steadfast in their position that the PBGC had waived its right to assert privileges by failing to object with the timeliness and specificity required under the Federal Rules of Civil Procedure, and the PBGC never asked or obtained any agreement from Respondents or order from the district court to forgive this lapse or otherwise to extend the time period to raise any specific privilege objections. Ex. F. to D. Ct. Dkt. No. 218 at 2-3. On December 20, 2012, the PBGC made what it described as its final production of documents. No privilege log accompanied the production.

In January 2013, counsel for the parties held a conference call, during which the PBGC indicated it had identified approximately 29,000 responsive documents that it was withholding on grounds of privilege or work product, and that it planned to produce a privilege log describing these documents by the middle of April 2013. *Id.* at 1-5. On February 20, 2013, Respondents filed a motion pursuant to Fed. R. Civ. P. 37 ("Rule 37 Motion"), in which they asked the district court to order the

PBGC to produce these 29,000 responsive documents that it had unjustifiably withheld on the basis of unspecified privileges. D. Ct. Dkt. No. 218. Both parties noted that the PBGC still had produced no privilege log as of the completion of the briefing on Respondents' Rule 37 Motion.

On August 21, 2013, Magistrate Judge Majzoub held that the PBGC waived its right to assert privileges with respect to the documents requested in Respondents' First and Second Requests for Documents by failing to produce a privilege log as of the briefing of the Rule 37 Motion. *See* D. Ct. Dkt. No. 231 (the "Waiver Order"). In fact, the PBGC had still produced no privilege log by the time of Magistrate Judge Mazjoub's ruling. The Magistrate Judge's ruling made clear that waiver was appropriate even assuming, *arguendo*, that the PBGC was correct in asserting that it need not have begun logging its privileges until after her March 2012 Order, given that more than a year had passed since that time and the PBGC still had failed to produce a privilege log.[1] *Id.* at 7.

The next week, on August 30, 2013, the PBGC filed a motion for reconsideration with Magistrate Judge Majzoub. D. Ct. Dkt. No. 232. On September 4, 2013 the PBGC filed objections to the Waiver Order pursuant to Fed. R. Civ. P. 72 raising precisely the same arguments presented in its motion for

[1] Two days later, on August 23, 2013, the PBGC produced the "first half" of its privilege log, ostensibly beginning to identify the documents for which it wishes to assert the attorney-client or work-product privilege.

reconsideration. D. Ct. Dkt. No. 234. Five days later, on September 5, 2013, Judge Majzoub denied the PBGC's motion for reconsideration, addressing each of the PBGC's fact-bound arguments in a thorough order and memorandum. D. Ct. Dkt. No. 237. On July 21, 2014, Judge Arthur J. Tarnow issued an order overruling the PBGC's objections to the Waiver Order, holding that "[t]he Magistrate Judge's conclusion that PBGC waived the right to claim privilege here was based on well-settled law and the Court will not disturb it." Dkt. No. 257 at 5.

On July 23, 2014, the PBGC filed a motion to certify that ruling for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). D. Ct. Dkt. No. 258. In conjunction with this filing, the PBGC also asked the district court to stay enforcement of the discovery order pending its interlocutory appeal to this Court. *Id.* at 5-8. Respondents have opposed the motion to certify, arguing that the fact-based discovery order does not meet the standards for certification, and that it is also based on well-settled law. D. Ct. Dkt. No. 259. The motion for certification was fully briefed as of August 19, 2014 (*i.e.*, 2 days before the PBGC filed its Petition for Mandamus and Emergency Stay Motion here), and remains pending.

III. ARGUMENT

The standard for resolving the PBGC's stay motion is a familiar one. In considering whether to grant a stay pending appeal, this Court asks: (1) whether the moving party has a strong or substantial likelihood of success on the merits; (2)

whether the moving party will suffer irreparable harm if the lower court order is not stayed; (3) whether staying the lower court order will substantially injure other interested parties; and (4) where the public interest lies. *Family Trust Found. of Ky., Inc. v. Ky. Judicial Conduct Comm'n*, 388 F.3d 224, 227 (6th Cir. 2004). While the manner in which the Court draws the balance among these factors can vary from case to case, ultimately the real question for this Court is whether the PBGC can demonstrate serious questions going to the merits and irreparable harm that decidedly outweighs the harm that will be inflicted on others if a stay is granted. *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153-54 (6th Cir. 1991) (citing *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985)). The PBGC's motion fails under the applicable standard, as it can establish none of the four stay factors here.

A. The PBGC Cannot Show a Likelihood of Success on Its Mandamus Petition

The first factor for this Court to consider in deciding whether to grant a stay is whether the moving party has a strong or substantial likelihood of success on the merits. *Family Trust Found.*, 388 F.3d at 227. The answer to this question is a resounding "no," as the PBGC has not come close to meeting the demanding standards necessary for the issuance of the writ.

As the Supreme Court has explained, the writ of mandamus is a drastic remedy "reserved for really extraordinary causes." *Ex parte Fahey*, 332 U.S. 258,

259-60 (1947). In other words, "only exceptional circumstances amounting to a judicial 'usurpation of power,'" *Will v. United States*, 389 U.S. 90, 95 (1967), or a "clear abuse of discretion," *Bankers Life & Cas. Co. v. Holland*, 346 U. S. 379, 383 (1953), will justify issuance of the writ. In particular, a party seeking mandamus must establish the existence of three conditions: (1) no other adequate means exist to attain the relief the party seeks; (2) its "'right to issuance of the writ is clear and indisputable'"; and (3) "the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Cheney v. U.S. D. Ct. for the District of Columbia*, 542 U.S. 367, 380-81 (2004) (citation omitted). The PBGC cannot establish the existence of any of these conditions here.

1. *Adequate Means Exist to Attain the Relief the PBGC Seeks*

The PBGC cannot satisfy the first mandamus factor because it has another avenue of relief potentially available to it. As discussed more fully below (*see infra* pp. 15-16), both this Court and the Supreme Court have recently held that appellate review from a final judgment will generally serve as an adequate remedy for an erroneous privilege ruling, since upon reversal the trial court can hold new proceedings "in which the protected material and its fruits are excluded from evidence." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 109 (2009); *accord Holt-Orsted v. City of Dickson*, 641 F.3d 230, 240 (6th Cir. 2011). This is

precisely the sort of run-of-the-mill discovery dispute in which *Mohawk* indicates that an appeal from a final judgment will adequately protect the party claiming privilege from harm if the ruling is ultimately found to be erroneous.[2] When a final judgment is entered below, the PBGC can seek review at that time of all of the issues presented in the mandamus petition. As both this Court and the Supreme Court have held, that is the proper and only available remedy for the sort of discovery ruling challenged here.

2. *The PBGC's Right To Mandamus Is Not Clear And Indisputable*

The PBGC also cannot demonstrate that its right to mandamus is "clear and indisputable." As one court has recently explained, "[a]n erroneous district court ruling on an attorney-client privilege issue by itself does not justify mandamus. The error has to be clear. As a result, appellate courts will often deny interlocutory

[2] To be sure, *Mohawk* notes that a writ of mandamus might be appropriate in "extraordinary circumstances" but it also made clear such "mechanisms do not provide relief in every case." 558 U.S. at 111. The fact-based discovery orders challenged here cannot possibly be what the Supreme Court had in mind when it mentioned "extraordinary circumstances." In addition, the Supreme Court in *Mohawk* noted that in some cases the certification procedure of 28 U.S.C. § 1292(b) may be available to review privilege orders that present disputed questions of law whose resolution could materially aid resolution of the matter as a whole. *Id.* And in fact, the PBGC has sought to avail itself of that remedy below. But, as the PBGC likely realizes, the orders below cannot satisfy the standards of 28 U.S.C. § 1292(b). This may explain why the PBGC failed to provide the district court with any meaningful opportunity to consider its certification motion, seeking mandamus only two days after briefing on its certification motion was completed.

mandamus petitions advancing claims of error by the district court on attorney-client privilege matters." *In re Kellogg Brown & Root, Inc.*, No. 14-5055, 2014 U.S. App. LEXIS 12115, at *19, __ F.3d __ (D.C. Cir. June 27, 2014).[3]

No error occurred here, much less clear error. In its order granting Respondents' motion to compel, Magistrate Judge Majzoub found that the "boilerplate" objections of privilege made by the PBGC in its 2011 discovery responses were "tantamount to filing no objections at all." *See* D. Ct. Dkt. No. 231 at 7. This holding is consistent with the lower courts' rulings dealing with boilerplate objections. *See, e.g.*, *PML N. Am., L.L.C. v. World Wide Personnel Servs. of Va. Inc.*, No. 06-CV-14447, 2008 U.S. Dist. LEXIS 32393, at *5 (E.D. Mich. Apr. 21, 2008); *Cumberland Truck Equip. Co. v. Detroit Diesel Corp.*, Nos. 05-CV-74594, -74930, 2007 U.S. Dist. LEXIS 84854, at *9 (E.D. Mich. Nov. 16, 2007)). In addition, Magistrate Judge Majzoub's determination that a finding of waiver should be imposed because of the PBGC's delay and obstruction, culminating in a continuing failure to produce a privilege log for more than a year,

[3] Although *In re Kellogg Brown & Root* correctly notes that mandamus is not available in most discovery disputes involving privilege, it also suggests that a litigant generally suffers irreparable harm as the result of an erroneous privilege ruling. Respondents submit that that portion of the D.C. Circuit's decision is irreconcilable with both the Supreme Court's decision in *Mohawk* and this Court's decision in *Holt-Orsted*. *See Mohawk*, 558 U.S. at 109 (rejecting notion that litigant suffers irreparable harm because of disclosure of privileged information); *accord Holt-Orsted v. City of Dickson*, 641 F.3d 230, 240 (6th Cir. 2011) (citing *Mohawk*, 558 U.S. at 103) (same).

is also well in keeping with applicable law. *See, e.g.*, *Carfagno v. Jackson Nat'l Life Ins. Co.*, No. 5:99 cv 118, 2001 U.S. Dist. LEXIS 1768, at *4 (W.D. Mich. Feb. 13, 2001) ("[I]f the time limits set forth in the discovery rules are to have any meaning, waiver is a necessary consequence of dilatory action in most cases. 'Any other result would . . . completely frustrate the time limits contained in the Federal Rules and give a license to litigants to ignore the time limits for discovery without any adverse consequences.'") (quoting *Krewson v. City of Quincy*, 120 F.R.D. 6, 7 (D. Mass. 1988)).[4]

[4] *Accord Burlington N. & Santa Fe Ry. Co. v. U.S. D. Ct. for D. of Mont.,* 408 F.3d 1142, 1149 (9th Cir. 2005) (finding of waiver was not an abuse of discretion where privilege log was filed five months after the Rule 34(b) response); *Horace Mann Ins. Co. v. Nationwide Mut. Ins. Co.*, 238 F.R.D. 536, 538 (D. Conn. 2006) (holding that discovery responses that were twenty-two days late and did not contain a privilege log, waived the privilege claim); *Pham v. Hartford Fire Ins. Co.*, 193 F.R.D. 659, 662 (D. Colo. 2000) ("[B]oilerplate objection" filed seventy-one days late that did not comply with Rule 26(b)(5) waived attorney-client privilege); *Smith v. Conway Org.*, 154 F.R.D. 73, 76 (S.D.N.Y. 1994) ("[F]our-month delay in responding to the Document Requests . . . waived the protection of the attorney work-product rule."); *Land Ocean Logistics, Inc. v. Aqua Gulf Corp.*, 181 F.R.D. 229, 237-38 (W.D.N.Y. 1998) (discovery responses file 3.5 months late that did not comply with Rule 26(b)(5) waived asserted privileges); *Allen v. Sears, Roebuck & Co.*, No. 07-CV-11706, 2008 U.S. Dist. LEXIS 45048, at *4-5 (E.D. Mich. June 10, 2008) (Majzoub, Mag. J.) (citing *Carfagno* in enforcing waiver where the plaintiffs failed to file a timely privilege log as required by Fed. R. Civ. P. 26(b)(5)(A) and failed to demonstrate prejudice from the waiver's enforcement); *Cozzens v. City of Lincoln Park*, No. 08-11778, 2009 U.S. Dist. LEXIS 4063, at *9 (E.D. Mich. Jan. 21, 2009) (plaintiffs waived privilege where they did not file a privilege log in response to defendant's motion to compel, did not provide information about the allegedly privileged documents at a hearing a month later, and did not file a motion for a protective order pursuant to Rule 26(c)); *GMC LLC v. Lewis Bros., L.L.C.*, 10-CV-00725S(F), 2012 U.S. Dist. LEXIS 107039, at *21

Nor is there any merit to the PBGC's suggestion the parties entered into a "mutual understanding" that relieved it of its obligations under the Federal Rules of Civil Procedure. Faced with this same fact-bound argument below, the Magistrate Judge carefully considered and rejected it, explaining that "[c]ontrary to Defendant PBGC's argument [that there was a mutual understanding], it was Plaintiffs who moved to enforce a court order and compel production of documents withheld on the basis of unspecified privileges precisely because Defendant failed to assert proper privilege objections or produce a privilege log." D. Ct. Dkt. No. 237 at 2. The remainder of Judge Majzoub's order makes clear that, when she made this finding, she had a keen understanding of the Parties' briefs, arguments, and "efforts to extend discovery dates, assert objections, produce the requested documents, and comply with court orders." *Id*. at 3. Nothing in the PBGC's

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(W.D.N.Y. July 31, 2012) (privilege waived after failure to produce privilege log for 13 months); *Witmer v. Acument Global Techs., Inc.*, No. 2:08-CV-12795, 2010 U.S. Dist. LEXIS 100663, at *13-17 (E.D. Mich. Sept. 23, 2010) (granting motion to compel where defendants failed to file timely written objections and a privilege log and later filed privilege logs that were untimely, defective and conclusory); *Bowling v. Scott Cnty.*, No. 3:04-CV-554, 2006 U.S. Dist. LEXIS 56079, at *7-9 (E.D. Tenn. Aug. 10, 2006) (finding waiver of privilege where defendants failed to provide the court with a privilege log or sufficient information in any form to evaluate the applicability of privilege); *Sonnino v. Univ. of Kan. Hosp. Auth.*, 221 F.R.D. 661, 669 (D. Kan. 2004) ("'The applicability of the privilege turns on the adequacy and timeliness of the showing as well as on the nature of the document.'") (quoting *Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540, 542 (10th Cir. 1984)).

mandamus petition comes close to demonstrating that this finding was clearly erroneous, much less worthy of mandamus.

In short, Magistrate Judge Mazjoub's discovery order was clearly correct, and the PBGC cannot show that Judge Tarnow abused his discretion in upholding it. In no sense is the PBGC "clearly" and "indisputably" entitled to relief.

3. *Entry of a Writ Is Inappropriate in This Routine Discovery Dispute*

Even if the PBGC could otherwise satisfy the first two mandamus factors (which it cannot), granting of the writ here would still be inappropriate. The Supreme Court has held that "interlocutory appellate review is unavailable, through mandamus or otherwise" for "ordinary discovery orders." *Cheney*, 542 U.S. at 381. The D.C. Circuit recently noted that the same rule applies to discovery privilege rulings, explaining that mandamus should generally be reserved for – at most – "novel" attorney-client privilege rulings that have potentially "broad and destabilizing effects." *In re Kellogg Brown & Root*, 2014 U.S. App. LEXIS, at *22-23.

The fact-bound ruling here does not fit within such a category. It plows no new legal ground and is tailored to the PBGC's uniquely obstructive discovery conduct. The Magistrate Judge based her ruling, then upheld by Judge Tarnow, on a fact-finding that the PBGC had engaged in plainly deleterious behavior, and then applied that fact-finding to well-settled law as to the consequence of that type of

behavior (namely, a waiver of unasserted or late-asserted privileges). Even if the PBGC could otherwise satisfy the mandamus factors, this is simply not the sort of case in which this Court should exercise its discretionary mandamus jurisdiction.

B. The PBGC Cannot Demonstrate Irreparable Harm in the Absence of a Stay

The PBGC also cannot demonstrate the second stay factor – irreparable harm in the absence of a stay. In its stay papers, the PBGC simply asserts without citation that its potential disclosure of privileged documents "constitutes irreparable harm to PBGC." Emer. Mot. at 5-6. No authority is cited for this proposition because the controlling law is to the contrary.

In *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 109 (2009), the Supreme Court had before it a party who had been ordered to disclose purportedly privileged documents and sought an immediate interlocutory appeal, arguing that the right to maintain attorney-client confidences is "'irreparably destroyed absent immediate appeal' of adverse privilege rulings." *Id.* at 108 (citation omitted). The Supreme Court rejected the argument, finding that:

> [P]ostjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege. Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence.

Id. at 109.

The Supreme Court has thus rejected the foundation on which the PBGC's irreparable harm argument rests – that immediate disclosure would reveal the PBGC's purportedly privileged material. Emer. Mot. at 5-6. Not surprisingly, this Court has done likewise, relying on *Mohawk*.[5] In *Holt-Orsted v. City of Dickson*, 641 F.3d 230, 240 (6th Cir. 2011), the trial court ordered a party's former counsel to testify in a deposition, rejecting the party's claim of attorney-client privilege. The plaintiffs in *Holt-Orsted*, like the PBGC here, asserted irreparable injury from such a ruling, but this Court disagreed. Relying on *Mohawk*, this Court explained that the plaintiffs there would have a remedy even if they disclosed the purportedly privileged information, since they "ultimately can avail themselves of a post-judgment appeal which, under *Mohawk*, suffices 'to protect the rights of the

[5] In holding that any harm from an order to disclose purportedly privileged materials can be fully remedied through pursuit of a successful appeal after disclosure, the Supreme Court expressly rejected decisions like *United States v. Philip Morris Inc.*, 314 F.3d 612, 617-21 (D.C. Cir. 2003), and *Kelly v. Ford (In re Ford Motor Co.)*, 110 F.3d 954, 957-64 (3d Cir. 1997). *Mohawk*, 558 U.S. at 105 n.1. Those lower court decisions had erroneously held that such disclosure orders create unique and irreparable harms that can only be remedied through an immediate appeal. Relying on *Philip Morris* and *In re Ford Motor Co.*, this Court ruled, in an unpublished decision pre-dating *Mohawk*, that an order requiring disclosure of privileged materials creates irreparable harm. *See In re Lott*, 139 F. App'x 658, 662 (6th Cir. 2005). But *Mohawk's* holding that such harms are in fact reparable (through an appeal from a final judgment) clearly supersedes and overrules decisions like *Lott*, as this Court's later decision in *Holt-Orstead* makes clear. *See Holt-Orsted*, 641 F.3d at 238 (noting that "the *Mohawk* decision has altered the legal landscape related to collateral appeals of discovery orders adverse to the attorney-client privilege and narrowed the category of cases that qualify for interlocutory review").

litigants and preserve the vitality of the attorney-client privilege.'" *Id.* at 240 (quoting *Mohawk*, 558 U.S. at 103).

These authorities demonstrate that irreparable harm will not occur in the absence of a stay. The PBGC's blanket assertion of such harm is refuted by controlling authority from the Supreme Court and this Court, likely explaining the absence of any authority in the PBGC Stay Motion.[6] This essential factor is thus lacking from the PBGC's Stay Motion, which is another reason to deny a stay.

C. The Granting of a Stay, with All the Continued Discovery Delay It Will Entail, Will Injure Respondents

The third factor – injury to other parties as a result of entry of a stay – also strongly cuts in Respondents' favor. With virtually no discussion, the PBGC asserts in its motion that Respondents "will not be substantially injured by a stay pending resolution of PBGC's Petition for Writ of Mandamus because [P]laintiffs would not have otherwise been entitled to receive PBGC's privileged documents absent the District Court's ruling." Emer. Stay Motion at 6. The PBGC also argues that no injury will come to Respondents as a result of a stay because the Treasury Department has also delayed discovery in a related proceeding in the

[6] The PBGC's failure to discuss either *Mohawk* or *Holt-Orsted* in its papers is puzzling, as both cases were extensively relied on below by Respondents in their opposition to various PBGC stay motions. While such an apparent lack of candor is troubling generally, it is especially so in an emergency stay motion, where the PBGC is requesting that the Court act without the normal period of deliberation that usually accompanies the adversary process.

District of Columbia.[7] Emer. Stay Motion at 6. But these arguments cannot withstand scrutiny; indeed, the PBGC's same callous disregard for Respondents' right to a prompt and deliberate resolution of its claims is what earned the PBGC the waiver finding made by the Magistrate Judge below. This Court should be no more sympathetic to the PBGC's stalling tactics.

The PBGC's (and Treasury Department's) many and varied delays in this five-year old action have already denied Respondents their right to expeditious and orderly litigation. Respondents, a group of retirees living on fixed pensions, are particularly vulnerable to these delaying tactics because of their age and financial situation. For Respondents, every month the litigation continues is another month of having to make due with pensions far less than those to which they believe they are entitled. Moreover, the passage of time has also seen more instances of death or serious illness. In sum, for such a group of Respondents, justice delayed is truly justice denied.

Additionally, Respondents' right to accurate discovery has been impeded by these delays. In depositions, the PBGC's own witnesses have repeatedly claimed a diminished level of recollection when asked about the events that occurred in

[7] Despite referencing the related District of Columbia proceeding, the PBGC fails to note that Respondents prevailed in that discovery dispute and should be receiving discovery from that proceeding forthwith. A copy of the district court order granting discovery in that proceeding is attached here as Exhibit A.

connection with the termination of Respondents' pensions. Allowing the PBGC to impose additional delays while it pursues a groundless mandamus proceeding will only compound the damage. To be sure, Respondents have also been harmed by the delay caused by the Treasury Department's refusal to honor deposition and document subpoenas (a refusal now corrected by the District of Columbia district court). But a government agency that has engaged in substantial foot-dragging in discovery to the Respondents' detriment – as Magistrate Judge Majzoub correctly found the PBGC did – cannot fairly point to similar delays by a related government agency (the Treasury Department sits on the PBGC's Board of Directors) as evidence that its own delays are harmless. Both the PBGC's delays and the Treasury Department's delays have harmed Respondents. Of course, this Court can only put a stop to the PBGC's delays here, as the district court in the District of Columbia has already done there with respect to the Treasury's Department's delay. *See* Exhibit A. In these circumstances, Respondents respectfully submit that the imposition of a stay would result in substantial injury to them.

D. The Public Interest Will Be Furthered By Requiring Immediate Disclosure and Moving This Litigation Forward

The public interest will also be furthered by allowing this discovery to move forward. While the PBGC points to the supposed importance of the privilege issues raised by its appeal, those issues are entirely fact-bound, as they related to the unique and extraordinary foot-dragging engaged in by the PBGC. Such fact-

bound (and meritless) issues are dwarfed in relation to the public interest in moving this litigation forward.

Indeed, the issues related to the termination of Respondents' pensions have generated substantial public interest, and have been the subject of multiple Congressional hearings. At the most recent hearing, the Special Inspector General of the Troubled Asset Relief Program chastised government officials for a lack of transparency with regard to the Delphi Corporation's pension issues. Ex. A to D. Ct. Dkt. No. 240 at 7-8. As the Inspector General made clear, the public has a right to know what its government officials did with regard to these pension issues, so that it can determine for itself whether it approves or disapproves of those governmental actions. Denial of a stay would further this public interest in transparency, allowing this litigation to move forward.

CONCLUSION

The Court should deny the motion for emergency stay.

Dated: August 28, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2014, 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:

C. Wayne Owen
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Exhibit A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

U.S. DEPARTMENT OF THE TREASURY, Petitioner, v. PENSION BENEFIT GUARANTY CORPORATION, Interested Party, v. DENNIS BLACK, et al., Respondents.	Case No. 12-mc-100 (EGS)

ORDER

For the reasons set forth in the memorandum opinion issued this day, it is hereby

ORDERED that [15] Treasury's Renewed Motion to Quash the subpoena *duces tecum* is **DENIED**; and it is

FURTHER ORDERED that the parties shall confer and determine, within 30 days of the date of this Order, whether Treasury can compel Mr. Feldman and Mr. Wilson to testify in response to the deposition subpoena. In the event that Treasury can compel their testimony, the [15] Motion to Quash the

Deposition Subpoena is **DENIED**. In the event that it cannot compel these two individuals to testify, it is

FURTHER ORDERED that Respondents shall withdraw the deposition subpoena.

SO ORDERED.

SIGNED: Emmet G. Sullivan
United States District Judge
June 19, 2014.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

U.S. DEPARTMENT OF THE TREASURY, Petitioner, v. PENSION BENEFIT GUARANTY CORPORATION, Interested Party, v. DENNIS BLACK, et al., Respondents.	Case No. 12-mc-100 (EGS)

MEMORANDUM OPINION

Pending before the Court is petitioner U.S. Department of the Treasury's ("Treasury") renewed motion to quash a subpoena *duces tecum* and motion to quash a deposition subpoena served upon it by Dennis Black, Charles Cunningham, Kenneth Hollis, and the Delphi Salaried Retirees Association (hereinafter "Respondents"). Upon consideration of the motions, responses and replies thereto, the relevant caselaw, and the entire record, and for the reasons set forth below, the motions are **DENIED**.

I. BACKGROUND

Respondents in this miscellaneous action are plaintiffs in *Black v. PBGC*, Case No. 09-13616, a civil action pending in the United States District Court for the Eastern District of Michigan (hereinafter "civil action" or "Michigan action"). Respondents are current and former salaried workers at Delphi Corporation ("Delphi"), an automotive supply company. In the civil action, Respondents allege that in July 2009, the Pension Benefit Guaranty Corporation ("PBGC") improperly terminated Delphi's pension plan for its salaried workers ("Plan") via an agreement with Delphi and General Motors ("GM"). Treasury is not a party to the civil action.

The civil action contains four counts. Count One alleges that the termination violated the Employee Retirement Income Security Act ("ERISA") because no court made findings that the Plan was unsustainable. Plaintiffs argue that such findings are a condition prerequisite to a valid termination under ERISA. *Black v. PBGC*, ECF #145 ¶ 39. Counts Two and Three allege additional procedural infirmities with the termination-by-agreement. *Id.* ¶¶ 44, 52. Finally, and most relevant to this miscellaneous action, Count Four alleges that the PBGC could not have satisfied ERISA's statutory requirements for termination had it actually sought court approval, pursuant to 29 U.S.C. §

1342(c). *Id.* ¶ 56. Essentially, plaintiffs' theory of the case in the civil action, and specifically Count Four, is that PBGC terminated the Plan "not because of anything related to its statutory role under ERISA, but as a result of pressure imposed by the Treasury and the related U.S. Auto Task Force to support their efforts to restructure the auto industry in general and GM in particular." Resp'ts Opp'n to Renewed Mot. to Quash, ECF #19 at 3-4.

In September 2011, Judge Tarnow, who is presiding over the civil action, ordered discovery to move forward. He instructed the parties to focus first on Count Four, specifically:

> [W]hether 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."

Black v. PBGC, ECF #193 at 3-4. Judge Tarnow explained that he was proceeding in this fashion because:

> A finding by the Court in PBGC's favor on Count 4 after [discovery under the Federal Rules] would render moot the remainder of the complaint pertaining to the PBGC. In the event that the Court finds that termination of the plan was not supported by the factors set forth in 28 U.S.C. § 1342(c), the Court will consider the remaining issues raised in the complaint.

Id. at 5-6.

The PBGC unsuccessfully moved for reconsideration of Judge Tarnow's order. Shortly thereafter, plaintiffs served the PBGC with discovery requests which, they argue, are highly relevant to § 1342(c). One of the requests directs PBGC to produce "all documents and things you received from . . . the Treasury Department, the Auto Task Force, the Labor Department, and the Executive Office of the President, or produced to the Federal Executive Branch, since January 1, 2009, related to Delphi . . . including but not limited to, documents related to the termination of the Delphi Pension Plans." Pet'r's Mot to Quash, ECF #1, Ex. H at 8-9. The PBGC refused to produce the documents, the plaintiffs moved to compel, and Magistrate Judge Majzoub ordered the PBGC to produce full and complete responses. *Black v. PBGC*, ECF #209 at 1. The PBGC filed objections to that order with Judge Tarnow.

Meanwhile, in January 2012, Respondents served Treasury with a subpoena seeking:

> All documents and things (including e-mails or other correspondence, spreadsheets, reports, analyses, snapshots, funding estimates, proposals or offers) received, produced, or reviewed by Matthew Feldman, [Harry Wilson, or Steven Rattner] between January 1, 2009 and December 31, 2009 related to: (1) Delphi; (2) the Delphi Pension Plans; or (3) the release and discharge by the [PBGC] of liens and claims relating to the Delphi Pension Plans.

Pet'r's Mot. to Quash, ECF #1, Ex. J at 5-6. Respondents allege that Feldman, Wilson and Rattner were the three principal Treasury employees who negotiated with the PBGC to terminate the Delphi Plan. Resp'ts Opp'n to Mot. to Quash, ECF #6 at 4, 10.[1] The Treasury filed this miscellaneous action to quash the subpoena in February 2012. Treasury made the same argument to this Court that the PBGC asserted in unsuccessfully opposing the motion to compel before Judge Majzoub and in its objections which were then pending before Judge Tarnow: the requested discovery is irrelevant because it relates to § 1342(c), and § 1342(c) is irrelevant to the Michigan action. *See, e.g.*, Pet'r's Reply in Support of Mot. to Quash, ECF #10 at 4-12. Accordingly, in May 2012, this Court entered a minute order stating, in relevant part:

> [I]t 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.

Minute Order, May 17, 2012.

[1] All three left Treasury and returned to the private sector at some point during the summer of 2009. Pet'r's Renewed Mot. to Quash, ECF #15 at 10.

On August 13, 2013, Respondents moved to lift the stay. They noted that although Judge Tarnow had not yet ruled on the objections, in the interim, the PBGC "produced all documents sought by plaintiffs" which were responsive to Judge Majzoub's order. Resp'ts Mot. to Lift Stay, ECF #11 at 2. Accordingly, "it seems likely that the PBGC's objections to Judge Tarnow are now moot, or waived, or both." *Id*. at 3.[2] Respondents also proposed a modification to their subpoena *duces tecum*. *Id.* at 6. Respondents believe that Treasury has already produced certain documents and email correspondence relevant to the Delphi Pension issues to the Special Inspector General for the Troubled Asset Relief Program (SIGTARP). *Id.* at 7. They suggest it would be "a reasonable compromise" to modify the subpoena to request only those documents. *Id.* In proposing the modification, Respondents tried to address Treasury's argument that the subpoena imposes an undue burden; "producing documents already assembled and produced to SIGTARP involves no burden." *Id.* at 6.

A week later, on August 20, 2013, Respondents issued a deposition subpoena, which asks Treasury to produce one or more witnesses pursuant to Federal Rule of Civil Procedure 30(b)(6) to testify at deposition about:

[2] Indeed, on May 27, 2014 Judge Tarnow denied as moot the PBGC's Objections to Judge Majzoub's March 9, 2014 order. See Resp'ts Notice of Development in Underlying Case, ECF #25 Ex. A.

> [Matthew Feldman's and Harry Wilson's] communications in 2009 relating to the GM-Delphi relationship; the Delphi Pension Plans; and the release, waiver, or discharge by the PBGC of liens and claims relating to the Delphi Pension Plans. These communications include, but are not limited to, communications with the PBGC, Delphi, GM, the Delphi DIP leaders, Federal Mogul, Platinum Equity, the National Economic Council, and the Executive Office of the President.

Deposition Subpoena, ECF #13-4. Shortly thereafter, Treasury filed a combined Renewed Motion to Quash the 2012 subpoena *duces tecum* and Motion to Quash the 2013 deposition subpoena. ECF #15. In its renewed motion, Treasury makes the same three arguments as its initial motion – relevance, undue burden, and cumulative/duplicative information. *Id.* at 16-23. It also adds a new argument, claiming for the first time that the Respondents lack standing to litigate the Michigan action, and thus may not conduct any discovery, including discovery from Treasury. *Id.* at 13-16. The renewed motion is ripe for review by the Court.

II. STANDARD OF REVIEW

A. Standing

In a civil action, the plaintiff has the burden of establishing that it has Article III standing. *Sierra Club v. Jackson*, 813 F. Supp. 2d 149, 154 (D.D.C. 2011) (citations omitted). To establish standing, plaintiff must show "at an irreducible constitutional minimum": (1) that it has suffered an injury in fact; (2) that the injury is fairly traceable to defendant's conduct; and (3) that a favorable decision on the

merits likely will redress the injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "While the burden of production to establish standing is more relaxed at the pleading stage than at summary judgment, a plaintiff must nonetheless allege 'general factual allegations of injury resulting from the defendant's conduct.'" *Nat'l Ass'n of Home Builders v. E.P.A.*, 667 F.3d 6, 12 (D.C. Cir. 2011). *See also NB ex rel. Peacock v. Dist. of Columbia*, 682 F.3d 77, 82 (D.C. Cir. 2012) (noting that "at the pleadings stage, 'the burden imposed' on plaintiffs to establish standing 'is not 'onerous'").

B. Motion to Quash

A party "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . [or which] appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Limiting discovery and quashing subpoenas pursuant to Rule 26 and/or Rule 45 "goes against courts' general preference for a broad scope of discovery." *North Carolina Right to Life, Inc. v. Leake*, 231 F.R.D. 49, 51 (D.D.C. 2005). "Moreover, the general policy favoring broad discovery is particularly applicable where, as here, the court making the relevance determination has jurisdiction only over the discovery dispute, and hence has less familiarity with the intricacies of the governing substantive law than does the court overseeing the

underlying litigation." *Jewish War Veterans of the United States of Am., Inc. v. Gates*, 506 F. Supp. 2d 30, 42 (D.D.C. 2007) (citing *Flanagan v. Wyndham Int'l, Inc.*, 231 F.R.D. 98, 103 (D.D.C. 2005)).[3]

Discovery must be limited, however, if the "discovery sought is unreasonably cumulative or duplicative." Fed. R. Civ. P. 26(b)(2)(c). In addition, "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *Id.* at 26(c); *see also* Fed. R. Civ. P. 45(d).

"The individual or entity seeking relief from subpoena compliance bears the burden of demonstrating that a subpoena should be modified or quashed." *Sterne Kessler Goldstein & Fox, PLLC v. Eastman Kodak Co.*, 276 F.R.D. 376, 379 (D.D.C. 2011) (citations omitted). "The quashing of a subpoena is an extraordinary measure, and is usually inappropriate absent extraordinary circumstances. A court should be loath to quash a subpoena if other protection of less absolute character is possible. Consequently, the movant's burden is greater for a

[3] Treasury suggests that a more restrictive test of relevancy applies when the subpoena is directed to a non-party, Pet'r's Renewed Mot. at 17, "but it seems that there is no basis for this distinction in the rule's language." 9A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2459 (3d ed.); *see also Flanagan*, 231 F.R.D. at 103 (applying relevance standards to non-party subpoena that is at least as broad as party subpoenas).

motion to quash than if she were seeking more limited protection." *Flanagan*, 231 F.R.D. at 102 (internal citations and quotation marks omitted).

III. DISCUSSION

A. Standing

For the first time in its renewed motion to quash, Treasury, a non-party to the underlying case, argues that respondents have no standing to litigate the Michigan action. Pet'r's Renewed Mot. to Quash at 13-16. Treasury concedes that the parties to the Michigan action have not raised standing issues in the Michigan court. *Id.* at 13-14. Nevertheless, it contends that "this Court is a proper forum in which to challenge the standing of respondents to litigate" the Michigan case, because "third party discovery may be permitted only to the extent it relates to viable claims." *Id.* at 14, n.11. It then makes cursory arguments, in just four pages of its brief, which purport to address standing issues in the highly complex ERISA litigation which has been pending in Michigan for five years.

This Court is deeply skeptical of Treasury's argument that the Court should address Article III standing in a case where the merits are not before it, and indeed, where it "*has jurisdiction only over the discovery dispute*, and hence has less familiarity with the intricacies of the governing substantive

law than does the court overseeing the underlying litigation." *Jewish War Veterans*, 506 F. Supp. 2d at 42 (citations omitted) (emphasis added). It is true, of course, that an "ancillary discovery proceeding is, by its very terms, an extension of the underlying proceeding and the subject matter jurisdiction of the ancillary proceeding is derived from the jurisdiction of the underlying case." *McCook Metals LLC v. Alcoa, Inc.*, 249 F.3d 330, 334 (4th Cir. 2001). However, this does not mean that in resolving the discrete, non-party discovery issue before it, the Court may reach into the merits of the underlying case, ongoing in another court halfway across the country, and determine that court's jurisdiction over those claims. Indeed, Treasury has not provided a single authority where a court exercising ancillary jurisdiction over only a single discovery motion has addressed the subject matter jurisdiction of a sister court presiding over the underlying litigation. Asking this Court to review another court's jurisdiction seems particularly inappropriate because the issue can never be waived: a standing challenge may be raised at any time during the Michigan litigation, either by the parties or *sua sponte* by that court.[4]

[4] If the subpoenas had been issued after December 1, 2013, the Court would have seriously considered transferring the motion to quash to the Michigan court in light of the December 1, 2013 amendments to Rule 45. The Rule, as amended, now requires that subpoenas be issued "from the court where the action is pending," Fed. R. Civ. P. 45(a)(2), and further provides that

Assuming *arguendo* it is appropriate for this court to undertake a standing analysis, and based on the limited record before it, the Court rejects Treasury's arguments. In order to demonstrate standing, a plaintiff must adequately establish an injury-in-fact, causation and redressability. *Lujan*, 504 U.S. at 560–61. At the pleading stage, where the underlying litigation remains, "'the burden imposed' on plaintiffs to establish standing 'is not onerous'." *NB ex. rel. Peacock*, 682 F.3d at 82. Treasury does not dispute that Respondents have been injured through the termination of their pension plan, but denies causation and redressability. Pet'r's Renewed Mot. at 14-16.

On the causation issue, Treasury argues that Respondents cannot show that their injury was fairly traceable to the PBGC.

> [T]he fact that respondents are not receiving the full amount of their pension benefits is attributable to the fact that "Delphi did not have enough money to fund its pensions" . . . . not to the fact PBGC terminated the . . . Plan by agreement with Delphi "to avoid any unreasonable increase in the liability of the PBGC insurance fund."

Id. at 14 (citations omitted). This argument is nothing more than an assertion that the PBGC should win on the merits of the case. In their Second Amended Complaint, plaintiffs have alleged that their Plan was terminated by PBGC for political

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"[w]hen the Court where compliance is required did not issue the subpoena, it may transfer a motion [to quash] to the issuing court if the person subject to the subpoena consents or if the court finds exceptional circumstances." *Id.* 45(f).

reasons and in violation of ERISA, *not* because the Plan was no longer financially viable or because PBGC had statutory authority to terminate. *See, e.g., Black v. PBGC*, Second Amended Complaint, ECF #145 ¶ 56. This is precisely the issue in discovery in the Michigan court. This Court takes no position whether Respondents will prevail on their claims. At the pleading stage, however, it appears that Respondents have alleged a causal link.

Treasury also argues that plaintiffs' injuries are not redressable by the Michigan Court. It claims that Respondents are not entitled to equitable relief from the PBGC because equitable "payments of money from the Federal Treasury are limited to those authorized by statute," *OPM v. Richmond*, 496 U.S. 414, 416 (1990), and "[r]espondents do not point to any statute that would authorize PBGC to pay them more in pension benefits than they now are receiving." Pet'r's Renewed Mot. at 16. This argument fares no better than Treasury's causation claims. Congress has authorized any plan participant "adversely affected by any action of the [PBGC] . . . [to] bring an action against the [PBGC] for appropriate equitable relief in the appropriate court." 29 U.S.C. § 1303(f)(1). Plaintiffs request a variety of forms of equitable relief in their Second Amended Complaint, not limited to an order forcing the PBGC paying higher pensions to the salaried workers and retirees. *See Black*

v. PBGC, Sec. Am. Compl. Prayer for Relief, ECF #145 at 22-23. Again, this Court takes no position on what relief, if any, Respondents will obtain from the PBGC or the other defendants in the case. However, at the pleading stage of the litigation, this Court agrees with Judge Tarnow, who "declin[ed] to accept [the PBGC's] position that Plaintiffs cannot obtain any relief in this lawsuit if the [Michigan] [c]ourt concludes that the PBGC acted improperly." *Black v. PBGC*, Order 2/17/10, ECF #122 at 3.

B. Relevance

Treasury argues that the information Plaintiffs seek is irrelevant because 29 U.S.C. § 1342(c) authorizes the PBGC to initiate a termination of a pension plan "in order to avoid 'any unreasonable increase in the liability of the [PBGC insurance] fund.'" Pet'r's Renewed Mot. at 18. Accordingly, Treasury claims, it is irrelevant whether Treasury encouraged PBGC to do anything; the PBGC acted in accordance with ERISA in seeking termination. *Id.* at 18-19. Respondents counter that § 1342(a) permits the PBGC to *seek* termination on this basis, but does not permit it to actually terminate a Plan without a court's determination that a Plan "must" be terminated under the § 1342(c) criteria: "[I]n 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." *See* Resp'ts Opp'n to Renewed Mot. at 21-22. Respondents argue that a reviewing court would not have made findings that these statutory criteria were met and that the Plan "must" terminate; rather, the PBGC violated the statute and improperly terminated the Plan because it was under political pressure from Treasury. *Id.* They argue that discovery from Treasury is therefore relevant. Respondents prevail.

In Judge Tarnow's September 1, 2011 discovery order, the U.S. District Court for the Eastern District of Michigan made a determination that this information was relevant. Judge Tarnow allowed discovery to move forward on Count 4 of the Complaint, specifically:

> [W]hether 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." . . . . In the event that the Court finds that termination of the plan was not supported by the factors set forth in 28 U.S.C. § 1342(c), the Court will consider the remaining issues raised in the complaint.

Black v. PBGC, ECF #193 at 3-6. Following Judge Tarnow's order, Plaintiffs requested information from the PBGC very similar to that it now requests from Treasury: information designed to reveal whether the PBGC could have satisfied the § 1342(c) factors or whether, instead, it improperly yielded to pressure

from other federal entities, including Treasury. Pet'r's Mot to Quash, ECF #1, Ex. H at 8-9. Judge Majzoub granted Plaintiffs' motion to compel that information. *Black v. PBGC*, ECF #209. Accordingly, two judges in the underlying action evaluated the question of relevance for very similar materials, sought for very similar reasons, and found them relevant. Although the "law of the case" doctrine is not dispositive of Respondents' motion, it does support this Court's decision to rely on the relevance analysis performed by the Eastern District of Michigan. *See Flanagan*, 231 F.R.D. at 103, n.2 ("While the doctrine of the law of the case is no more than a guiding principle and does not diminish this Court's discretion to revisit prior decisions of a coordinate court, it 'expresses the practice of courts generally to refuse to reopen what has been decided.'") (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988)). In the context of Rules 26 and 45, the above considerations establish a sufficient showing of relevance needed to permit the Respondents to obtain documents and other items and to depose a Treasury official in this case.

C. Burden

A trial court may quash or modify a subpoena on the ground that the request is unreasonable or oppressive. Fed. R. Civ. P. 26(c). "What constitutes unreasonableness or oppression is, of

course, a matter to be decided in the light of all the circumstances of the case. . . .” *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 403 (D.C. Cir. 1984) (citation and internal quotation marks omitted). “[T]he burden of proving that a subpoena . . . is oppressive is on the party moving for relief on this ground. . . . The burden is particularly heavy to support a motion to quash as contrasted to some more limited protection,” such as a request for modification. *Id.* at 404 (quoting *Westinghouse Elec. Corp. v. City of Burlington, Vt.*, 351 F.2d 762, 766 (D.C. Cir. 1965)). The moving party may not “simply allege a broad need for a protective order so as to avoid general harm, but must demonstrate specific facts which would justify such an order.” *Flanagan*, 231 F.R.D. at 102 (citations omitted). There are two subpoenas at issue in this case. The Court examines them in turn.

1) Subpoena Duces Tecum

Respondents’ subpoena duces tecum is narrow. It seeks documents created, received or reviewed by three Treasury officials, over a single calendar year, relating only to Delphi. Moreover, Respondents have expressed their willingness to modify the subpoena to encompass only those documents Treasury already produced to SIGTARP and to the House Oversight and Government Reform Committee. *See, e.g.*, Resp’ts Opp’n to Renewed Mot. at 29-30. Nevertheless, Treasury argues that the subpoena, even

with proposed modifications, is oppressive and must be quashed. Treasury provides a declaration from Rachana Desai, Acting Chief Counsel of the Treasury's Office of Financial Stability, which states that in responding to the subpoena *duces tecum*, Treasury "could be" required to search the three officials' email inboxes, review over 15,000 electronic documents and 28 boxes of files, and then review documents for responsiveness and privilege. Desai Decl. ¶ 7, ECF #15-7. Even the modifications offered are unacceptable, Desai asserts, because Treasury "would need to review each responsive document" provided to SIGTARP and the U.S. House Committee for "responsiveness" and "possible assertion of claims of privilege." *Id.* ¶¶ 9-11.

Treasury has not carried its heavy burden to show that the subpoena *duces tecum* is oppressive. Although Treasury claims it will have to search a significant number of documents to respond to the subpoena, "volume alone is not determinative." *Northrup Corp.*, 751 F.2d at 404 (citation omitted). Moreover, the number of documents could drop significantly if Treasury agreed to Respondents' proposed modifications.[5]

[5] Treasury responded negatively to Respondents' offer to modify the subpoena *duces tecum*, arguing that the modifications would result in an equally heavy burden on the Treasury. *See, e.g.*, Pet'r's Renewed Mot. at 21-22. Accordingly, the Court does not modify the subpoena. The parties are of course free to negotiate modifications to the subpoena without further litigation.

Treasury's remaining claim of burdensomeness is that it will have to make privilege determinations for the documents. This naked assertion is insufficient to quash the subpoena for two reasons. First, Treasury offers no support for its claim that a substantial number of the documents will be privileged. There is no basis for the Court to impose the "extraordinary measure" of quashing a subpoena, *Flanagan*, 231 F.R.D. at 102, based on a "purely speculative" privilege claim. *Northrup*, 751 F.2d at 405. Second, most subpoenas *duces tecum* require the recipient to conduct a privilege review. If the "good cause" requirement for quashing a subpoena could be met by a bare assertion that privilege review constitutes an undue burden, discovery under the Federal Rules would quickly grind to a halt.

2) Deposition Subpoena

Treasury argues that "[n]o one currently working at Treasury has knowledge of the communications referenced in respondents' deposition subpoena to Treasury except insofar as he or she has reviewed the record or read emails to or from Mr. Feldman or Mr. Wilson since the time that [they] left the Auto Team . . . . [A]ny witness designated to testify . . . would need a substantial amount of time to prepare." Desai Decl. ¶ 12, ECF #15-7; see also Pet'r's Reply in Support of Renewed Mot. at 19, ECF #21 (explaining that the Auto Team had twelve Treasury employees, none of whom still works for Treasury).

Respondents counter that Treasury likely has the ability to compel Feldman and Wilson to testify; "[n]evertheless, if it is the Treasury's position that it cannot produce [Mr. Feldman and Mr. Wilson], and further that it is otherwise incompetent to testify about the communications these individuals undertook with respect to the Delphi issues, then Respondents will withdraw the Deposition Subpoena and reissue Rule 45 subpoenas to Messrs. Feldman and Wilson directly." Resp'ts Opp'n to Renewed Mot. to Quash at 31, ECF #19. Treasury responds by insinuating that it would move to quash such subpoenas "if and when they are issued because such subpoenas will seek information belonging to Treasury." Pet'r's Reply in Support of Renewed Mot. at 20.[6]

It appears that Treasury's principal undue burden argument is that no one with institutional knowledge about Mr. Feldman's and Mr. Wilson's role in the termination of the Delphi Plans remains at Treasury; accordingly, someone would have to learn the material as new in order to testify. Respondents effectively concede that this would be burdensome by offering to withdraw their deposition subpoenas if and only if Treasury

[6] Obviously, it would be premature to speculate as to the contents of a future, hypothetical motion to quash. Treasury is cautioned, however, to carefully consider this Opinion before filing any such motion.

cannot compel Mr. Feldman and Mr. Wilson to testify in response to the outstanding subpoena.

The Court agrees with Respondents. Treasury has made no showing that the deposition subpoena would be burdensome except in the event that no one at Treasury (or from whom it has authority to compel testimony) is competent to respond to it. Accordingly, the parties are directed to confer and determine, within 30 days of the date of this Order, whether Treasury can compel Mr. Feldman and Mr. Wilson to testify in response to the subpoena. In the event that it cannot, Respondents shall withdraw the deposition subpoena.

D. Duplicative/Cumulative Information

Finally, Treasury argues the subpoenas should be quashed because they are cumulative. Treasury contends that "[t]he immensity of PBGC's document production and the overlap between" the document requests to PBGC "and respondents' subpoenas to Treasury leave little need for Treasury to respond to [the] subpoena[]." Pet'r's Renewed Mot. at 24. Treasury also argues that Mr. Feldman and Mr. Wilson have testified at depositions in other actions, and at "numerous congressional hearings at which the Delphi Salaried Plan and its termination have been discussed." *Id.* Respondents counter that "at the time the Plan was terminated, the Treasury was directly negotiating the future of Delphi with a number of players besides the PBGC, including

GM, Delphi, Delphi's DIP Lenders, Federal Mogul, Platinum Equity, and various unions. Moreover the Auto Team was deliberating amongst itself and various White House officials as to what to do in relation to the Delphi plans. . . . In short, while it is true that the PBGC has produced some (and hopefully most) of the email correspondence between it and the Treasury, such information is only a part of the relevant responsive documents in the Treasury's possession." Resp'ts Opp'n to Renewed Mot. at 34-35. Respondents also argue that Feldman and Wilson's testimony would not be cumulative because neither of them has been deposed in *Black v. PBGC*. *Id.* at 36.

For the reasons discussed throughout, the motion to quash must be denied. The subpoenas request information that has been adjudicated as relevant to, and discoverable in, the Michigan litigation. Although the documents requested may have some overlap with documents already produced by PBGC, Treasury has failed to show, as it must, that it would be "unreasonably cumulative or duplicative." Fed. R. Civ. P. 26(b)(2)(c)(i). Likewise, Feldman and Wilson have access to information about Treasury's role in the Plan's termination which Respondents are unable to obtain elsewhere. Again, although their depositions will likely overlap somewhat with Feldman and Wilson's testimony in other proceedings, some overlap does not justify foreclosing discovery in this case. As this Circuit has noted,

"[d]epositions . . . rank high in the hierarchy of pre-trial, truth-finding mechanisms." *Founding Church of Scientology v. Webster*, 802 F.2d 1448, 1451 (D.C. Cir. 1986). Without the opportunity to depose Mr. Feldman and Mr. Wilson in this case, Respondents' counsel is denied "the opportunity . . . to probe the veracity and contours of the[ir] statements . . . [and] is denied the opportunity to ask probative follow-up questions." *Alexander v. FBI*, 186 F.R.D. 113, 121 (D.D.C. 1998).

IV. CONCLUSION

For the foregoing reasons, the Court concludes that non-party Department of the Treasury has failed to meet its burden under Federal Rules of Civil Procedure 26 and 45 to quash the subpoena *duces tecum*. Accordingly, the Renewed Motion to Quash is **DENIED** insofar as it relates to the subpoena *duces tecum*.[7]

The Court further concludes that the Department of the Treasury has failed to meet its burden under Federal Rules of Civil Procedure 26 and 45 to quash the deposition subpoena unless Treasury is unable to compel its former employees, Mr. Feldman and Mr. Wilson, to testify in response to the subpoena. The record before the Court is unclear on this point.

[7] Respondents ask that Treasury be given 30 days to comply fully with the subpoena, while Treasury states that it will take "far longer" to comply. Pet'r's Reply in Support of Renewed Mot. at 23. The parties are directed to work together in good faith to promptly comply with the Court's order, and avoid wasting the parties' and the Court's time and resources with unnecessary additional disputes.

Accordingly, it is hereby **ORDERED** that the parties confer and determine, within 30 days of the date of this Order, whether Treasury can compel Mr. Feldman and Mr. Wilson to testify in response to the subpoena. In the event that Treasury can compel their testimony, the Renewed Motion to Quash the Deposition Subpoena is **DENIED**. In the event that it cannot compel these two individuals to testify, it is **FURTHER ORDERED** that Respondents shall withdraw the deposition subpoena.

A separate order accompanies this Memorandum Opinion.

SIGNED: Emmet G. Sullivan
United States District Judge
June 19, 2014.