IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' MOTION TO COMPEL WITHHELD AND REDACTED DOCUMENTS, OR FOR *IN CAMERA* REVIEW

Pursuant to Federal Rule of Civil Procedure 37(a), Dennis Black, Charles Cunningham, Ken Hollis, and the Delphi Salaried Retirees Association (collectively, "Plaintiffs") move for an order compelling the U.S. Department of the Treasury (the "Treasury") to produce those documents responsive to a January 2012 subpoena *duces tecum* that the Treasury has withheld or redacted on the basis of unsubstantiated privileges, or in the alternative requiring the Treasury to provide those documents to the Court for *in camera* review. The grounds for this motion are set forth in the accompanying memorandum. Counsel for the Treasury advises that he opposes the relief sought here.

Respectfully submitted,

July 9, 2015

/s/ Anthony F. Shelley
Anthony F. Shelley (D.C. Bar No. 420043)
Timothy P. O'Toole (D.C. Bar No. 469800)
Michael N. Khalil (D.C. Bar No. 497566)
Miller & Chevalier Chartered
655 15th St. NW, Suite 900
Washington, DC 20005
Telephone: 202-626-5800
Facsimile: 202-626-5801
E-mail: ashelley@milchev.com
totoole@milchev.com
mkhalil@milchev.com

Attorneys for Plaintiffs

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PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO COMPEL WITHHELD AND REDACTED DOCUMENTS, OR FOR *IN CAMERA* REVIEW

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Pursuant to Federal Rule of Civil Procedure 37(a), Dennis Black, Charles Cunningham, Ken Hollis, and the Delphi Salaried Retirees Association (collectively, "Plaintiffs") move for an order compelling the U.S. Department of the Treasury (the "Treasury") to produce those documents responsive to a January 2012 subpoena *duces tecum* (the "Document Subpoena") that the Treasury has withheld or redacted on the basis of unsubstantiated privileges, or in the alternative requiring the Treasury to provide those documents to the Court for *in camera* review. Following this memorandum at Exhibit 1 is a list of the documents the Court should order the Treasury to disclose.

INTRODUCTION

Approximately one year ago, this Court denied the Treasury's motion to quash the Document Subpoena, directing the parties "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." *United States Department of Treasury v. Black v. PBGC*, 301 F.R.D. 20, 30 n.7 (D.D.C. 2014). In keeping with the spirit of this Order, Plaintiffs negotiated at length with the Treasury, agreeing to numerous Treasury requests to narrow the Document Subpoena's scope in various ways. After more than four months of negotiations, the Treasury insisted it needed an additional four months to review and produce the documents in question, and then two months beyond that to finalize its privilege log. While this timetable seemed far too long to Plaintiffs, they ultimately acquiesced in the hopes that they could avoid burdening the Court with additional discovery disputes. The parties entered into a Stipulated Order memorializing their agreement. DE 29.

Unfortunately, despite these compromises, Plaintiffs find themselves back before the Court, more than a year after the Court ordered the parties to promptly comply with its Order,

with the Treasury having withheld or redacted roughly one thousand responsive documents potentially critical to Plaintiffs' case, and having refused to substantiate those withholdings in any meaningful way. According to the Treasury's privilege log, which is attached as Exhibit 2, it has either withheld or redacted more than 1,200 documents. The bulk of the documents – more than 900 of them, including those most relevant to Plaintiffs' case – have been hidden behind unsubstantiated assertions of the deliberative process and presidential communications privileges. However, the Treasury's assertion of these executive privileges suffers from at least five fatal deficiencies.

First, the privileges cannot apply because the Treasury has consistently denied it played any role in decisions related to Plaintiffs' case, *i.e.*, decisions related to the termination of Plaintiffs' pension plan (the "Salaried Plan," the "Plan," or the "Delphi Plan"), or investments that General Motors ("GM") was considering making in connection with the Plan. The Treasury has long insisted that the Pension Benefit Guaranty Corporation (the "PBGC"), which is the defendant in Plaintiffs' underlying suit, decided to terminate the Plan on its own, and similarly that GM's decisions regarding the Delphi Plan were made entirely by GM. Yet, the Treasury has withheld or redacted roughly one-fifth of the responsive documents in its possession on the grounds that they implicate the very decision-making the Treasury has previously disavowed. The Treasury can't have it both ways. If the Treasury did not make these decisions, as it claims, then the documents (or at least the portions of the documents relating to the Delphi Plan) cannot possibly be protected by the deliberative process or presidential communications privileges.

Second, even if the Treasury was involved in decisions relevant to the termination of the Delphi Plan, the privileges do not protect documents reflecting that ultimate decision and steps

taken after any such decision was made. Indeed, these are the very documents that Plaintiffs seek.

Third, to the extent that the Treasury had any privileges regarding these issues, the Treasury waived them when it allowed its former employee, Matthew Feldman, to publicly disclose government dialogues about the Delphi pension plans. His public disclosures have undermined any interest the Treasury may have had in withholding the challenged documents.

Fourth, Plaintiffs, on the other hand, have a substantial need for the materials, in order to support a key claim in their underlying lawsuit, *Black v. PBGC*, Case No. 2:09-cv-13616 (the "Michigan case"), which is pending in the Eastern District of Michigan (the "Michigan Court"). So even if the privileges – both of which are qualified – apply, Plaintiffs' need overcomes them.

Fifth, the Treasury has failed to make the necessary substantive showings. The case law leaves no doubt that the government must present a declaration from a competent agency official in order to adequately assert the deliberative process and presidential communications privileges. The Treasury has failed to do so here and has, in fact, steadfastly refused Plaintiffs' repeated requests that it justify its withholdings, through a declaration or otherwise. Indeed, the one and only attempt the Treasury has made to cure these deficiencies was to "clarify" for Plaintiffs that all of the more than nine hundred withheld or redacted documents relate to a single amorphous governmental "decision," namely, "what do we do about GM"? The law is clear that this explanation falls far short of meeting the Treasury's burden.

Finally, the Treasury has also invoked the protections of the attorney-client privilege and work product doctrine for a substantial number of documents.[1] While Plaintiffs do not challenge

[1] The privilege log also identifies five documents that have been redacted or withheld with no privilege invoked at all. *See* Privilege Log at Item Nos. 205, 443, 662, 1090, 1151. Because the Treasury has not identified any basis for their withholding, Plaintiffs likewise seek the production of these documents.

the majority of these assertions, a small number have significant deficiencies. With regard to the claims of attorney-client privilege, in some cases the Treasury has withheld or redacted documents that do not appear to involve an attorney at all. In other cases, the Treasury has withheld communications involving Mr. Feldman – who provided both legal and non-legal advice to the Treasury – without any showing that the advice involved was of a legal nature. As for the work product withholdings, the Treasury's privilege log makes it impossible to determine whether any of the relevant documents conceivably contain the mental impressions of counsel because it is again impossible to ascertain who counsel might have been. Additionally, for many of these withholdings, the log suggests that the materials were created in the ordinary course of business and not in anticipation of litigation. Regardless, Plaintiffs' need once again trumps any work product protection that might apply.

BACKGROUND

While this Court has already recited much of the relevant background in its June 19, 2014 Memorandum Opinion denying the Treasury's Motion to Quash, *United States Department of Treasury v. Black v. PBGC*, 301 F.R.D. 20 (D.D.C. 2014) ("*D.C. Black*"), Plaintiffs offer a brief summary below for the Court's convenience.

In the Michigan case, Plaintiffs challenge the PBGC's 2009 termination of the Delphi Plan. The lawsuit alleges that the Plan's termination was procedurally and substantively infirm under the statutory criteria set forth in the Employee Retirement Income Security Act of 1974 ("ERISA"). Plaintiffs allege that the termination failed to comply with ERISA's requirement that a court adjudicate whether the Plan must be terminated under the statutory criteria, and that the PBGC's termination of their Plan was not justified under that statutory criteria, but was instead the "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." *Id.* 301 F.R.D. at 23 (quoting Plaintiffs' Opp'n to Renewed Mot. to Quash, DE 19 at 3-4). Notably, the PBGC and the Treasury deny that the Treasury exercised any influence over the PBGC's termination of the Salaried Plan.

In January 2012, Plaintiffs served the Document Subpoena, seeking information relevant to their claim that the Treasury and/or the Auto Task Force (the "Auto Team") improperly influenced the termination of the Salaried Plan. The Treasury refused Plaintiffs' offers to discuss a modification of the Document Subpoena and immediately moved to quash, on the grounds that the subpoena was supposedly unreasonably cumulative, duplicative, and burdensome in light of the documents' potential benefits to Plaintiffs. DE 1 (the "First Motion to Quash"). This Court later entered a minute order staying resolution of the First Motion to Quash until the Michigan Court had a chance to resolve a related issue pending before that court. *See* May 17, 2012 Minute Order.

In August 2013, Plaintiffs moved this Court to lift the stay (DE 11), and shortly thereafter, Plaintiffs served the Treasury with a second subpoena (the "Deposition Subpoena"), asking the Treasury to produce one or more deponents competent to testify about the communications between Matthew Feldman and Harry Wilson (former members of the Auto Task Force), and the PBGC, GM, the Delphi DIP Lenders, Federal Mogul, Platinum Equity, the National Economic Council, and the Executive Office of the President concerning the GM-Delphi relationship, the Delphi pension plans, and the release, waiver, or discharge by the PBGC of its liens and claims relating to the Delphi pension plans. *See* DE 13-4.

In September 2013, the Treasury filed a renewed motion to quash (the "Renewed Motion to Quash") (DE 15), asking the Court to quash both the Document Subpoena and the Deposition

Subpoena (collectively, the "Subpoenas"). In its Renewed Motion to Quash, the Treasury asserted the same grounds as in the First Motion to Quash, and tacked on an argument that Plaintiffs lacked standing to pursue their claims against the PBGC in *Black v. PBGC*.

On June 19, 2014, this Court issued a Memorandum Opinion denying the Treasury's motions, rejecting the Treasury's contentions regarding Plaintiffs' standing to assert their claims in *Black v. PBGC*, as well as the Treasury's objections to the Deposition and Document Subpoenas based on relevance, burden, and duplicative/cumulative information, and directing the parties to work together in good faith to promptly comply with the Court's Order.

ARGUMENT

I. THE COURT SHOULD ORDER THE DISCLOSURE OF ALL THE DOCUMENTS THAT THE TREASURY HAS CLAIMED ARE PROTECTED BY THE DELIBERATIVE PROCESS PRIVILEGE

A. The Deliberative Process Privilege Generally

The main issue before the Court in this motion involves the Treasury's unsubstantiated invocation of the deliberative process privilege as a ground for withholding nearly one thousand responsive documents, many of which are potentially critical to Plaintiffs' claims. As we discuss below, the Treasury's reliance on the deliberative process privilege fails.

The deliberative process privilege, which is unique to the government, serves a number of purposes. It helps

> assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action.

Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980). In accordance with these objectives, the deliberative process privilege covers "documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (citation omitted). "Documents which are protected by the privilege are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position." *Coastal States Gas Corp.*, 617 F.2d at 866. The privilege applies only to "inter-agency" or "intra-agency" documents. *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 484 (2d Cir. 1999).

To fall within the scope of the deliberative process privilege, documents must be "both predecisional and deliberative." *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993). A communication is predecisional if "it was generated before the adoption of an agency policy." *Coastal States Gas Corp.*, 617 F.2d at 866. A communication is deliberative if "it reflects the give-and-take of the consultative process." *Id.*

The deliberative process privilege "is to be construed as narrowly 'as consistent with efficient Government operation.'" *Wolfe v. Dep't of Health & Human Servs.*, 839 F.2d 768, 773-74 (D.C. Cir. 1988) (citation omitted). It does not, for example, apply to underlying factual material contained in an otherwise protected document. *See Envtl. Prot. Agency v. Mink*, 410 U.S. 73, 91 (1973) (holding that deliberative process privilege does not protect factual material simply because it was included in a government memorandum containing matters of policy, law, or opinion), *superseded by statute on other grounds*, Freedom of Information Act, 5 U.S.C. § 556(b)(1). And it does not apply to final agency decisions, which are by definition neither "predecisional" nor "deliberative." *See Coastal States Gas Corp.*, 617 F.2d at 866 ("[E]ven if

the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue . . . ."); *Wolfe*, 839 F.2d at 774 ("[T]he Supreme Court and this court require disclosure of documents which explain an agency's final decision but protect documents which are predecisional."). Finally, the privilege does not protect intra- or inter-agency documents that have been publicly disclosed. *Colo. Wild Horse & Burro Coal., Inc. v. Kempthorne*, 571 F. Supp. 2d 71, 75 (D.D.C. 2008) (holding that documents that an agency has used in dealing with the public are not covered by the deliberative process privilege).

B. The Deliberative Process Privilege Does Not Apply

First and foremost, the deliberative process privilege could not possibly apply to the documents Plaintiffs have requested from the Treasury. Although Plaintiffs have consistently taken the position that the Treasury was the real decision-maker with regard to the Delphi pensions,[2] and have accordingly subpoenaed evidence concerning the Treasury's role in the termination of the Delphi Plan, government officials have steadfastly denied that the Treasury played *any* part in the Plan's termination, or in any aspect of the resolution of the Delphi pension issues. For example, in testimony before a House subcommittee on July 10, 2012, Mr. Feldman testified as follows in response to a Congressman's question concerning whether he "played a role" in the Delphi pension decisions:

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[2] *See* DE 19 at 17 ("Emails from GM officials to the Auto Task Force indicate that this solution [to terminate the Delphi Plan] was unilaterally reached by Treasury without GM's involvement."); *id.* at 15 ("While the PBGC had previously been engaged in a 'full court press' to have GM assume the [Delphi] 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 reassumption of the Salaried Plan altogether."); *id.* at 17-18 ("Mr. Rattner [member of the Auto Team] informed GM's CEO, Fritz Henderson, that GM would not be permitted to do anything for the [Delphi] Salaried Plan participants because Mr. Rattner 'thought there was nothing defensible from a commercial standpoint that could be done for the Delphi salaried retirees.'").

> I don't think I agree that I played a role in the pension decisions. . . . *I was not a decision maker*. . . . *I was the facilitator*, coordinator of issues between General Motors and the PBGC, among other roles, regarding the Delphi pension issues. . . . Let me be very clear. I urged the PBGC to come to decisions in a rapid manner because it had the potential to hold up General Motors' emergence. But I did not advocate for positions vis-à-vis the PBGC; I played the role of a facilitator or meditator, if you will, between the PBGC and General Motors.

Ex. 3 at 80-81 (emphasis added). Mr. Feldman testified similarly in a deposition in 2009, stating: "I acted as sort of a facilitator and intermediary between the PBGC and General Motors regarding Delphi's pensions." Ex. 4 at 155:23-25. Throughout that deposition, Mr. Feldman repeatedly denied that the Treasury played any decision-making role with regard to Delphi's pensions. *Id*. at 32:19-33:9 (describing the Treasury's role as "assist[ing] General Motors in their thinking and actions in connection with the Delphi bankruptcy"); *id*. at 161:12-14 (the Treasury had no "position" on termination of plans; "we were trying to facilitate a resolution").

Similarly, Ron Bloom (who was one of Mr. Feldman's superiors within the Auto Task Force) testified before the House Oversight and Government Reform Committee on June 22, 2011, that the Treasury was uninvolved in the "decision-making process" regarding how General Motors would deal with the pension benefits of Delphi's hourly and salaried employees, and that these decisions were independently made by General Motors. Ex. 5 at 59. "General Motors came forward with a plan about how they thought best to reorganize themselves." *Id*. "[T]he distinction I was trying to make, Congressman, was that ***as the employees of the administration, we did not make these decisions***." *Id*. at 60 (emphasis added).

There is of course no "facilitator" privilege, and the Treasury cannot claim the protections of a privilege that guards the government's decision-making process, while simultaneously claiming it was never involved in that process. *See Judicial Watch, Inc. v. U.S. Dep't of Treasury*, 796 F. Supp. 2d 13, 25 (D.D.C. 2011) ("The deliberative process privilege is

intended to protect '***the decision making processes*** of government agencies.'") (emphasis added and citation omitted); *see also Sears, Roebuck & Co.*, 421 U.S. at 150 (similar). Moreover, even if the Treasury had been involved in the Plan's termination, only those materials revealing the Treasury's *predecisional* deliberations would be protected. Plaintiffs would still be entitled to any non-predecisional documents, including documents reflecting the Treasury's final decision and any implementation efforts, which are not (and never have been) covered by the deliberative process privilege. *See id.* at 151 (addressing the deliberative process privilege and holding that "it is difficult to see how the quality of a decision will be affected by communications with respect to the decision occurring after the decision is finally reached; and therefore equally difficult to see how the quality of the decision will be affected by forced disclosure of such communications"); *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 575 F.2d 932, 935-36 (D.C. Cir 1978) (holding that final agency decisions are not protected by the deliberative process privilege and must be disclosed).

C. The Treasury Has Waived the Privilege With Respect to Any Deliberations in Which It Was Involved Concerning the Delphi Plan

In numerous statements, including to Congress, Mr. Feldman has commented in detail about the decision-making process concerning the Plan's termination. *See* Oral and Written Statement of Matthew Feldman, *Oversight of the SIGTARP Report on Treasury's Role in the Delphi Pension Bailout: Hearing Before the H. Subcommittee on Government Operations of the Committee on Oversight and Government Reform*, 95-101 (Sept. 11, 2013) (attached as Exhibit 6); Testimony, Oral and Written Statement of Matthew Feldman, *The Administration's Auto Bailouts and the Delphi Pension Decisions: Who Picked the Winners and Losers?: Hearing Before the H. Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs of the Committee on Oversight and Government Reform*, 33-37, *and generally* 71-108

(July 10, 2012) (attached as Exhibit 3); Deposition of Matthew Feldman, July 21, 2009, *In re Delphi Corporation*, No. 04-44481 (Bankr. S.D.N.Y.) [hereinafter "Feldman Deposition"] (attached as Exhibit 4).

To the best of Plaintiffs' knowledge, the government has taken no steps to repudiate these disclosures. *See Starr Int'l Co. v. United States*, No. 11-779C, DE 182, Discovery Order No. 6 at 10 (Fed. Cl. Nov. 6, 2013) (attached as Exhibit 7) (holding that, in order to claim deliberative process privilege over Treasury documents publicly disclosed by former Treasury Secretary Timothy Geithner, government must have taken "reasonable steps to protect the privilege"). In fact, in a deposition taken during the Delphi Bankruptcy, government lawyers were present and did not object when Mr. Feldman discussed in great detail the government's deliberations relating to Delphi's pension plans. *See*, *e.g.*, Ex. 4 at 155:20-25 (discussing the Treasury role in facilitating discussions on Delphi pension); *id.* at 158:14-160:9 (discussing the Treasury role as of April-May 2009 in "facilitat[ing] an agreement where the salaried plan would get terminated and taken over by PBGC and General Motors would assume liability for the hourly plans"); *id.* at 160:25-163:15 (discussing internal Treasury thinking as of May 13, 2009 with regard to termination of Delphi pensions); *id.* at 179:16-21 (discussing internal Treasury thinking as to Delphi pensions as of May 20, 2009). The Treasury, in fact, introduced Mr. Feldman's deposition testimony into the public domain in the Michigan litigation and in this litigation. *See Black v. PBGC*, No. 09-13616, DE 124-2, Notice of Filing, July 21, 2009 Deposition of Matthew Feldman as Exhibit D to Motion of Defendants U.S. Department of the Treasury, Presidential Task Force on the Auto Industry, Timothy F. Geithner, Steven L. Rattner, and Ron A. Bloom to Dismiss or, in the Alternative, for Summary Judgment (E.D Mich. Mar. 1, 2010); DE 15-9, Exhibit Z to Treasury's Renewed Motion to Quash. Similarly, as the Treasury itself has noted,

another of the Auto Task Force's leaders, Steven Rattner, has "published a 336-page book entitled *Overhaul*: *An Insider's Account of the Obama Administration's Emergency Rescue of the Auto Industry*. In that book, Mr. Rattner gives his account of the activities of the Auto Team, including those involving Delphi." DE 15 at 11.

Thus, any protections have been waived. *See Coastal States Gas Corp.*, 617 F.2d at 866 (holding that a document can lose its privileged status if it is "used by the agency in its dealings with the public").[3]

D. Regardless, Plaintiffs' Need for the Information Outweighs the Treasury's Purported Interest in Preventing Disclosure

As a qualified protection, the deliberative process privilege may be overcome by a sufficient showing of need. *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). A five-factor balancing test applies to determine whether a party's need outweighs application of the deliberative process privilege. In conducting this test, the court must consider (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence, (iii) the 'seriousness' of the litigation, (iv) the role of the government in the litigation, and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable. *Cobell v. Norton*, 213 F.R.D. 1, 5 (D.D.C. 2003) (citing *Schreiber v. Soc'y for Sav. Bancorp, Inc.*, 11 F.3d 217 (D.C. Cir. 1993)). The Court makes these determinations flexibly and on a case-by-case basis. *In re Sealed Case*, 121 F.3d at 737.

[3] The Treasury has previously relied on these and other public statements by Auto Team members on Delphi issues to argue that the Document and Deposition Subpoenas sought information that was unreasonably cumulative. *See* DE 15 at 24. But, as this Court noted in denying the Treasury's Renewed Motion to Quash, limiting the discovery available in this case to those statements would deny Plaintiffs "'the opportunity to probe the veracity and contours of their statements . . .'" *D.C. Black,* 301 F.R.D. at 30 (quoting *Alexander v. FBI*, 186 F.R.D. 113, 121 (D.D.C. 1998)). Put another way, the Treasury has waived the ability to keep any purported deliberations about Delphi pension matters confidential by repeatedly putting forward selective and self-serving statements about those issues, and now Plaintiffs should have the opportunity to test the veracity and completeness of those statements, in part by determining whether the underlying documents contradict them.

Here, Plaintiffs' need is significant. The question before the Michigan Court is, if the PBGC had gone to a court in July 2009 seeking a decree that the Salaried Plan must be terminated in order to avoid an increase to the liability of the PBGC's insurance fund, would such a decree have been appropriate. If Plaintiffs can show that the PBGC's actions were the result of improper influence by the Treasury (or other executive officials), a decree would plainly be unwarranted. And, even barring overt misconduct, as Plaintiffs noted in opposing the Treasury's motion to quash, one of the first questions that the court would have asked is whether a GM reassumption of the Salaried Plan was a viable possibility. As Plaintiffs have previously described, the PBGC and Delphi both believed GM reassumption was a viable possibility, and the PBGC possessed significant leverage, in the form of its liens and claims, to make such reassumption commercially reasonable. Moreover, as the Special Inspector General for the Troubled Asset Relief Program (SIGTARP) noted in its 2013 report (DE 13-2), GM management was in favor of making financial arrangements on the Salaried Plan's behalf, and the only impediment to GM reassumption (or some other action by GM on the Salaried Plan's behalf) was the Auto Team's insistence that such action would not satisfy its ad-hoc definition of what was "defensible from a commercial standpoint." *See* DE 13-2 at 28-29. Similarly relevant to the termination inquiry would be information related to whether other potential acquirers of Delphi (and its assets) would have been amenable to assuming the Delphi pensions under the right circumstances.

Even with the obscure descriptions included in the Treasury's privilege log, it is clear that much of the withheld information relates directly to these questions. *See*, *e.g.*, Privilege Log at Item Nos. 105-106 (discussing draft Delphi and/or pension funding projections and the plan for GM bankruptcy); *id*. at Item No. 30 (internal communications regarding potential inheritance of

pension/PBGC liability); *id.* at Item Nos. 215, 839 (presentation regarding the Delphi bankruptcy and possible effect on GM); *id.* at Item Nos. 737, 738 (communications regarding plan for Delphi bankruptcy); *id.* at Item No. 25 (communications regarding plan for GM, Delphi, and Chrysler bankruptcies, and possible PBGC involvement); *id.* at Item No. 211 (communications regarding strategy and scheduling for Delphi discussions); *id*. at Item No. 691 (communications regarding auto parts supplier analysis); *id*. at Item No. 20 (internal communications regarding information request of GM analysis of Delphi pension plans); *id*. at Item No. 237 (communications regarding Delphi production issues and GM analysis of same); *id*. at Item No. 240 (internal communications regarding strategic planning for Delphi, GM and Chrysler bankruptcy); *id*. at Item No. 270 (communications regarding plan for Delphi reorganization); *id*. at Item Nos. 788, 789, 799-806 (internal communications regarding plan for Delphi bankruptcy); *id*. at Item No. 122 (communications regarding strategy on public comments regarding Delphi funding); *id*. at Item No. 247 (internal communication regarding plans for upcoming meeting with GM and Delphi financial metrics); *id*. at Item No. 619 (weekly report to White House from Department of Treasury including update from Auto Task Force Group on Delphi Bankruptcy); *id*. at Item No. 249 (communication regarding Delphi Plant Data projections and assumptions regarding valuations for all facilities); *id*. at Item No. 254 (internal communications regarding Delphi diligence materials); *id*. at Item No. 256 (communications regarding plan for foreign subsidiaries in Delphi bankruptcy); *id*. at Item Nos. 257-58 (communications regarding plan for Delphi reorganization and sites); *id*. at Item No. 27 (draft slide presentation regarding Delphi capital needs, valuation analysis, and business overview); *id*. at Item No. 265 (internal communications regarding upcoming discussion with Delphi regarding bankruptcy materials); *id*. at Item No. 267 (internal communication regarding Delphi status requests from outside counsel);

id. at Item No. 268 (communications regarding plan for Delphi reorganization and sites); *id*. at Item No. 835 (communications regarding plan for upcoming meetings related to Delphi); *id*. at Item No. 269 (communications regarding internal views on presentation dealing with GM/Delphi customer/supplier relationship); *id*. at Item No. 137(the redacted portion of this email chain contains information regarding confidential information received with respect to the termination of the Delphi pension plan); *id*. at Item No. 880 (communications regarding draft PBGC memorandum regarding potential auto industry pension plan terminations); *id*. at Item Nos. 886-87 (internal communications regarding draft timeline on potential Delphi/Federal Mogul transaction); *id*. at Item No. 287 (communications regarding finances and funding plan for Delphi bankruptcy); *id*. at Item Nos. 7, 8, 977 (internal communications regarding congressional communications regarding PBGC Oversight Testimony); *id*. at Item No. 42 (internal communication providing status update regarding status conference with bankruptcy judge discussing negotiations between Delphi and PBGC.); *id*. at Item No. 46 (internal communication regarding expectation of foreign lien amount and explanation of Delphi/GM summary reports regarding pension funding projections); *id*. at Item No. 45 (internal communications regarding plan for Delphi bankruptcy and GM cash flows).

This information is critical to Plaintiffs' claims, and is unavailable from any other source. Indeed, as SIGTARP discovered in conducting its investigation, many of the Auto Team members now claim not to have a recollection of the events in question, making the documentary evidence of those events all the more important. *See, e.g.*, DE 13-2 at 7 n.13 ("[a]n internal Treasury briefing agenda for a July 7, 2009, meeting with Dr. Summers and Secretary Geithner says 'PBGC/pension,' but Mr. Rattner did not recall the briefing. Secretary Geithner told SIGTARP he did not recall any discussion or briefings related to Delphi pensions."); *id*. at 28

("Although Mr. Rattner could not remember the specifics of the conversation, he told SIGTARP that he thought there was nothing defensible from a commercial standpoint that could be done for the Delphi salaried retirees."). Moreover, it is hard to see what harm will result to the Treasury if these documents are disclosed. Mr. Feldman has given ample public testimony about the decision-making process relating to Delphi's reorganization, including termination of the Delphi Plan, without any attempt by the government to cure those disclosures. Any confusion caused to the public by "dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action" has already happened. *Coastal States Gas Corp.*, 617 F.2d at 866.

E. Because Government Misconduct Is at Issue in This Case, the Privilege Should Not Be Recognized

When a case implicates government misconduct, the deliberative process privilege cannot be used to shield otherwise relevant materials. *See Alexander v. FBI*, 186 F.R.D. 170, 177 (D.D.C. 1999) ("[W]here there is reason to believe that the documents sought may shed light on government misconduct, 'the [deliberative process] privilege is routinely denied', on the grounds that shielding internal deliberations in this context does not serve 'the public's interest in honest, effective government.'") (citation omitted). Government misconduct may include "arbitrariness," "discriminatory motives," or "bad faith." *Texaco P.R., Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995). To invoke the government-misconduct exception, "'the party seeking discovery must provide an adequate factual basis for believing that the requested discovery would shed light upon government misconduct.'" *Am. Petroleum Tankers Parent, LLC v. United States*, 952 F. Supp. 2d 252, 268 (D.D.C. 2013) (citation omitted).

Plaintiffs' lawsuit against the PBGC alleges such governmental misconduct, namely arbitrariness and the compromising of honest, effective government. Plaintiffs challenge the

PBGC's deliberations in relation to the Delphi Plan under 29 U.S.C. § 1342(a) and (c), alleging that those deliberations were improperly influenced, and indeed hijacked, by political pressure form the Treasury and the Auto Task Force. *D.C. Black*, 301 F.R.D. at 27. Plaintiffs allege that, prior to the creation of the Auto Task Force, the PBGC was a staunch advocate for the continuation of the Salaried Plan via any means necessary, including a reassumption of the Plan by GM, and that the PBGC's abandonment of that advocacy was done at the behest of other governmental actors, in contravention of the PBGC's governing statute. Plaintiffs believe that the Treasury intervened in these matters in order to gain political advantage for itself and the administration, by sacrificing the interests of this group of retirees (who were of little political relevance) in order to ensure for GM a quick and profitable emergence from bankruptcy. By meddling in the PBGC's deliberations with respect to the Delphi Plan, the Treasury turned what should have been a fair and equitable process, into one determined by political considerations. *Texaco P.R., Inc.*, 60 F.3d at 880 (the doctrine of bad faith applies "when the claimant's misconduct is directly related to the merits of the controversy between the parties, that is, when the tawdry acts 'in some measure affect the equitable relations between the parties in respect of something brought before the court for adjudication.'") (quoting *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 245 (1933)).

While the Treasury denies that it played any role in the decision-making in connection with the Delphi pension plans, *supra* 8-9, the descriptions provided in the Treasury's privilege log suggest otherwise, *infra* 21-22, such that Plaintiffs have a more than "adequate factual basis for believing that the requested discovery would shed light upon government misconduct.'" *Am. Petroleum Tankers*, 952 F. Supp. 2d at 268 (citation omitted). Because the core of Plaintiffs' allegations is that the PBGC's "decisionmaking process was tainted with misconduct" (by both

the Treasury and the PBGC), the government misconduct exception applies. *In re Subpoena Duces Tecum Served on Comptroller of Currency*, 145 F.3d 1422, 1425 (D.C. Cir. 1998).

F. The Treasury Has Not Made the Requisite Substantive Showings Necessary to Substantiate its Deliberative Process Claims

The proper invocation of the deliberative process privilege requires:

> (1) a formal claim of privilege by the head of the department possessing control over the requested information, (2) an assertion of the privilege based on actual personal consideration by that official, and (3) a detailed specification of the information for which the privilege is claimed, along with an explanation why it properly falls within the scope of the privilege.

Cobell, 213 F.R.D. at 7. "A common practice of agencies seeking to invoke the deliberative process privilege is to establish the privilege through . . . declarations from agency officials explaining what the documents are and how they relate to the [agency] decision." *Ascom Hasler Mailing Sys., Inc. v. U.S. Postal Serv.*, 267 F.R.D. 1, 4 (D.D.C. 2010) (citation and internal quotation marks omitted).

Assuming, *arguendo*, that the deliberative process privilege could apply in the context of this case, the Treasury has failed to make the procedural and substantive showings necessary to meet its burden of demonstrating that the privilege ever attached. It has refused to provide a declaration from an agency official substantiating its privilege claims, or furnish any evidence that an agency official with the requisite authority made a formal claim of privilege after actual personal consideration by that official. Nor is there evidence that this responsibility was delegated to a qualified senior subordinate. Moreover, no responsible agency official has explained why the information sought by Plaintiffs properly falls within the scope of the privilege.

Without competent proof in the form of an affidavit or declaration, the Court is left with the Treasury's bare assertion that the materials sought fall under the scope of the deliberative

process privilege. "This blanket approach to asserting the privilege is unacceptable." *Kaufman v. City of New York*, No. 98-cv-2648, 1999 U.S. Dist. LEXIS 5779, at *12-13 (S.D.N.Y. Apr. 22, 1999). Indeed, the need to assert properly the deliberative process privilege is so fundamental that the failure to do so is tantamount to a waiver of the privilege. *Id*.

Moreover, the agency's privilege log must contain enough information to allow both the court and the opposing party to determine whether withheld documents or redacted materials are "(1) pre-decisional; (2) deliberative; (3) do not 'memorialize or evidence' the agency's final policy; [and] (4) were not shared with the public" *NLRB v. Jackson Hosp. Corp.*, 257 F.R.D. 302, 309 (D.D.C. 2009). At the very least, the Treasury must provide "a framework for understanding how the documents reflect the give and take of the consultative process." *Covington & Burling v. Food & Nutrition Serv.*, 744 F. Supp. 314, 320 (D.D.C. 1990) (internal quotations omitted). To this end, "detailed information about the agency's decision-making process is essential . . . to a fair determination of the agency's deliberative process claims." *Chesapeake Bay Found., Inc., v. U.S. Army Corps of Eng'rs*, 722 F. Supp. 2d 66, 75 (D.D.C. 2010). To assist the court in making this determination, the Treasury must provide "three basic pieces of information": "(1) the nature of the specific deliberative process involved, (2) the function and significance of the document in that process, and (3) the nature of the decisionmaking authority vested in the document's author and recipient." *Nat'l Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 189 (D.D.C. 2013).[4]

[4] The standard for withholding documents is even higher than for redactions. *See Army Times Publ'g Co. v. Dep't of Air Force*, 998 F.2d 1067, 1071 (D.C. Cir. 1993) (under the deliberative process privilege "[n]on-exempt [factual] information must be disclosed if it is 'reasonably segregable' from exempt portions of the record . . . and the agency bears the burden of showing that no such segregable information exists"), *aff'd*, 550 F.3d 32 (D.C. Cir. 2008); *see also Loving v. U.S. Dep't of Def.*, 496 F. Supp. 2d 101, 109 (D.D.C. 2007) (holding, in a FOIA case, that an "agency must provide a 'detailed justification' for its decision to withhold documents in their

Here, the Treasury has not even explained what decision was purportedly being made, when it was made, or by whom. When pressed on this failing during the meet-and-confer process, counsel for the Treasury stated that the decision at issue in all of the more than 900 purportedly protected documents was the same – "what do we do about GM?" In the first place, such a blanket assertion of the relevant "decision" is plainly inadequate. "To avoid waiving privilege, the defendant agency must 'make a detailed argument . . . in support of the privilege' because, 'without a specific articulation of the rationale supporting the privilege,' a court cannot rule on whether the privilege applies.'" *Ascom Hasler*, 267 F.R.D. at 4. As another district court has noted,

> '[t]he Supreme Court has held that materials are not to be withheld on the basis of the deliberative process privilege simply because the agency deems them confidential and would prefer not to disclose them.' *Toney-Dick v. Doar*, 12 Civ. 9162 (KBF), 2013 U.S. Dist. LEXIS 145480, 2013 WL 5549921 at *2 (S.D.N.Y. Oct. 3, 2013) (Forrest, D.J.), citing *Tigue v. U.S. Dep't of Justice*, supra, 312 F.3d at 77. 'The deliberative process privilege does not provide a blanket basis upon which to withhold documents that an agency has created during its decision-making process. . . . Indeed, if that were the case, the deliberative process privilege would provide an exemption from the discovery rules for decision-making agencies generally -- and that, of course, is not the law.' *Toney-Dick v. Doar*, *supra*, 2013 U.S. Dist. LEXIS 145480, 2013 WL 5549921 at *1.

SEC v. Yorkville Advisors, LLC, 300 F.R.D. 152, 160-61 (S.D.N.Y. 2014).

Without this basic information, the Treasury cannot establish that any of the logged documents are predecisional or deliberative. Indeed, the Treasury's privilege log contains little more than vague and general articulations of the "'*type[s]*' of documents at issue," which "do not permit the Court to situate them in the [government's] decisionmaking process." *Chesapeake*

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entirety" instead of segregating and disclosing any factual information they may contain). The Treasury has provided no information, let alone a detailed explanation, for its decision to withhold more than 650 documents in their entirety.

Bay Found., 722 F. Supp. 2d at 77 (emphasis added); *see also Ascom Hasler*, 267 F.R.D. at 5 (holding that "USPS's privilege log does not provide any information concerning the documents withheld on the basis of deliberative process privilege, save the type of document, the author and addressees, and that these documents are pre-decisional"). For example, numerous entries on the privilege log refer to "task lists/work plans," with no explanation of the governmental decision at issue, no indication that the task list predated that decision, and no explanation of how the task list aided in the deliberation of that decision. *See*, *e.g.*, Privilege Log Item Nos. 307, 452, and 459.

Similarly, and more troubling by far, are the numerous entries that redact or withhold communications that specifically reference Delphi, Delphi pensions, or the PBGC, without giving any insight into the ostensible deliberations at issue. *See*, *e.g.*, Privilege Log at Item Nos. 7 ("[i]nternal communications regarding congressional communications regarding PBGC Oversight Testimony"); 15 ("[i]nternal communications regarding strategy for congressional communications about Delphi pension matters"); 16 ("[d]raft response to Representative Hoekstra regarding Delphi pension plan matters relating to the PBGC"); 20 ("[i]nternal communications regarding information request of GM analysis of Delphi pension plans"); 25 ("[i]nternal communications regarding plan for GM, Delphi, and Chrysler bankruptcies, and possible PBGC involvement"); 30 ("[i]nternal communications regarding potential inheritance of pension/PBGC liability"); 38 ("[i]nternal communication regarding expectation of foreign lien amount and explanation of Delphi/GM summary reports regarding pension funding projections"); 42 ("[i]nternal communication providing status update regarding status conference with bankruptcy judge discussing negotiations between Delphi and PBGC"); 58 ("[i]nternal communication regarding reaction to GM analysis of Delphi pension funding"); 60 ("[i]nternal

communications regarding PBGC's potential percentage of GM's recovery and negotiating with the PBGC"); 97 ("[d]raft timeline and principles for Delphi bankruptcy"); 105 ("[c]ommunications regarding draft Delphi company and/or pension funding projections; [c]ommunications regarding plan for GM bankruptcy."); 111 ("[c]ommunications regarding strategy for congressional communications with Representative Levin regarding Delphi"); 137 ("[t]he redacted portion of this email chain contains information regarding confidential information received with respect to the termination of the Delphi pension plan"); 211 ("[c]ommunications regarding strategy and scheduling for Delphi discussions"); 351 ("[i]nternal communications regarding Delphi bankruptcy mediation staffing concerns and plan for meetings with foreign entities regarding GM"); 398 ("[i]nternal communications regarding draft Delphi company pension funding projections"); 442 ("[i]nternal communications regarding response to inquiries regarding Delphi pension funding matters"); 502 ("[i]nternal communications regarding lenders' response to GM regarding plan for Delphi reorganization"); 529 ("[i]nternal memorandum regarding draft Delphi company PBGC's pending termination of Delphi's pension plans"); 547 ("[i]nternal communications regarding draft GM analysis of Delphi pension funding projections"); 549 ("[c]ommunications re: call with PBGC re: Delphi pension issues"); 566 ("[c]ommunications regarding GM financing of plan for Delphi reorganization and discussion of potential bidders"); 571 ("[i]nternal communications regarding inquiries about proposals for Delphi from lenders"); 589 ("[c]ommunications regarding timing of press releases and PBGC notices"); 659 ("[i]nternal communications regarding discussion of Delphi pension plans with the PBGC"); 665 ("[m]emorandum regarding public comments re: PBGC pending termination of Delphi pension plans"); 679 ("[c]ommunications regarding plans for Delphi bankruptcy and potential discussions with DIP lenders"); 766 ("[d]raft memorandum regarding PGBC's decision

to take over the salaried and hourly pension plans of Delphi"); 858 ("[i]nternal communications on revising memorandum updating Summers on Delphi negotiations").[5] These vague descriptions are especially concerning given that, as noted above, the Treasury has repeatedly stated that it was merely a "facilitator," not a decision-maker, when it came to issues related to Delphi and its pensions, *supra* 8-9, making the Treasury's vague assertions of the deliberative process privilege here all the more problematic.

Still further, the Treasury's privilege log often fails to list authors and/or recipients of documents, making it impossible to assess whether the materials were prepared for the purpose of assisting an agency official in arriving at a governmental policy decision. *See*, *e.g.*, Privilege Log at Item Nos. 1-4, 13, 79, 80, 101, 102, 112, 113, 115, 116, 215, 263, 337, 338, 594, 613, 690, 781, 883, 884, 983. While the specific names of authors and recipients can be withheld, *Cofield v. City of LaGrange*, 913 F. Supp. 608, 616 (D.D.C. 1996), their role or position must be disclosed, in order for a court to determine whether the privilege should apply. *Chesapeake Bay Found.*, 722 F. Supp. 2d at 75; *see Cobell v. Norton*, 213 F.R.D. 1, 5 (D.D.C. 2003) ("intra-agency memoranda from 'subordinate' to 'superior' on an agency ladder are likely to be more 'deliberative' in character than documents emanating from superior to subordinate. . . . Conversely, a memorandum from a superior agency official to a subordinate official is more likely not to be considered 'deliberative.'").

Ironically, some of the Treasury's log entries are sufficiently clear to demonstrate that the deliberative process privilege *does not* apply. The Treasury's log claims, for example, that

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[5] *See also* Privilege Log at Item Nos. 27, 33-34, 45, 46, 61, 62, 98; 106, 108-10, 114; 122, 139, 164, 179, 199, 215, 237, 238, 240, 247, 249, 252-54, 256-58, 265, 267-72, 275-76, 278-81, 287, 291, 295-98, 301-02, 307, 339, 345, 354-55, 400-01, 444-47, 488-90, 494, 519, 523, 527-28, 530-42; 557, 564, 582, 584-85; 619, 664, 666, 677, 682, 689, 690, 737, 738, 786, 788, 789, 799-806, 835, 839, 841, 844-57; 859-63, 865-869, 873-76, 878, 883-87, 889-93, 909-13, 977, 1034-38, 1101-02, 1163, 1177, 1186, 1208-14, 1235-42, 1245-53, 1255-57, 1264-68, 1273.

documents admittedly written by Silver Point Capital[6] and General Motors are privileged. *See* Privilege Log at Item Nos. 65, 89, 95, 112, 113, 115, 320, 394, 471, 830, 875, 951, 1040; Feldman Deposition at 72:14-15 (stating that "there's no privilege between Treasury and General Motors") (attached as Exhibit 4). The Treasury has further claimed protection for numerous "press release[s]." *See* Privilege Log at Item Nos. 31, 56, 65, 66, 75, 78, 81, 132, 378, 380-82, 385, 386, 438, 446, 588, 685-88, 888, 1050, 1052-54, 1207. It has no basis to do so. *See* Exhibit 7, *Starr Int'l Co. v. United States*, No. 11-779C, Discovery Order No. 6 at 9 (Fed. Cl. Nov. 6, 2013) (holding that "edits to garden-variety press releases do not qualify as deliberations because the question of how to communicate the Government's policies is not itself a policy decision").[7]

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[6] Silver Point Capital is a private hedge fund that specializes in investing in distressed companies. It is not part of the federal government, and in fact, was one of the major "debtor in possession" (or "DIP") lenders to Delphi, and ultimately purchased the foreign assets of Delphi in a sale brokered and approved by the Treasury. There is no evidence it had any role in the deliberative process. Indeed, because both Mr. Feldman and Mr. Wilson had financial ties to Delphi's DIP lenders, both were supposed to avoid contact with them in discussing Delphi matters, making the assertion of the deliberative process privilege here particularly puzzling. Equally puzzling is the Treasury's assertion of the deliberative process privilege in withholding an email from a staffer for Senator Schumer to Mr. Rattner, which discusses "[c]ommunications regarding strategy for congressional communications re: lenders to Delphi." Privilege Log at Item No. 620.

[7] Likewise, the Treasury has invoked the deliberative process privilege with respect to communications discussing strategies for handling press inquiries. *See* Privilege Log at Item Nos. 103, 126-28, 130-32, 138, 140, 146, 156, 197-99, 241, 404, 409, 414, 436, 446, 527-528, 530-41, 553, 554, 557, 558, 588, 1048, 1049, 1055, 1069, 1072, 1092, 1108, 1188, 1189, 1273. As with comments to draft press releases, these communications are not entitled to protection, since, again, "the question of how to communicate the Government's policies is not itself a policy decision." Ex. 7, *Starr Int'l Co. v. United States*, No. 11-779C, Discovery Order No. 6 at 9. The same principle holds for those documents withheld by the Treasury, that relate to communications with Congress. *See* Privilege Log at Item Nos. 7, 8, 15, 17, 111, 114, 199, 232, 295-98, 392, 488-90, 527, 528, 530-41, 557, 582, 589, 590, 620, 697, 698-707, 913-15, 1041, 1062-64, 1072, 1073, 1082-84, 1269, 1270-72, and 1273. As the law makes clear, "communications regarding how to present agency policies to Congress . . . 'typically do not relate to the type of substantive policy decisions . . . intended to enhance through frank discussion,'" and do not qualify for the deliberative process privilege. *Id.* (quoting to *Fox News Network, LLC v. U.S. Dep't of Treasury*, 739 F. Supp. 2d 515, 545 (S.D.N.Y. 2010)).

Under the circumstances, it is impossible for the Treasury to establish that the documents on its privilege log are either predecisional or deliberative. Thus, if Mr. Feldman's statements have not waived the deliberate process privilege, then the Treasury's blanket assertion of the privilege certainly has. *See Ascom Hasler*, 267 F.R.D. at 4 ("To avoid waiving privilege, the defendant agency must make a detailed argument, including affidavits from the proper governmental authorities, in support of the privilege because, without a specific articulation of the rationale supporting the privilege, a court cannot rule on whether the privilege applies.") (citation and quotations omitted). The Court should therefore order the Treasury to produce to Plaintiffs all documents it has claimed are protected by the deliberative process privilege. In the alternative, the Court should review the materials *in camera* to determine whether the privilege applies. *NLRB v. Jackson Hosp. Corp.*, 257 F.R.D. 302, 308 (D.D.C. 2009) ("In camera review, because of the burden it places on the Court, should be the exception, and not the norm.").

II. THE COURT SHOULD ORDER THE DISCLOSURE OF ALL THE DOCUMENTS THAT THE TREASURY HAS CLAIMED ARE PROTECTED BY THE PRESIDENTIAL COMMUNICATIONS PRIVILEGE

The presidential communications privilege is "rarely . . . invoked." *In re Sealed Case*, 121 F.3d at 738, 744 (D.C. Cir. 1997). The President may draw upon it "when asked to produce documents or other materials that reflect presidential decisionmaking and deliberations and that the President believes should remain confidential." *Id*. at 744-45. It may also apply to "communications authored or solicited and received by those members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given the president on the particular matter to which the communications relate." *Id*. at 752.

First, as with the deliberative process privilege, the Treasury is required to submit an affidavit or declaration formally invoking the privilege on behalf of the President that identifies

the basis on which the presidential communications privilege is being invoked. *See Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1114 (D.C. Cir. 2004) (noting an affidavit by White House Counsel invoking the privilege in *In re Sealed Case* and the White House Counsel's declaration in *Judicial Watch*). Though counsel for the parties have engaged in several meet-and-confer sessions regarding these issues, the Treasury has refused to submit such an affidavit and has therefore waived its right to assert the presidential communications privilege. On this basis alone, the Court should order the disclosure of all materials withheld pursuant to the privilege.

Second, at least two substantive requirements must also be met. Each purportedly privileged document must: (1) "reflect presidential decisionmaking," and (2) be authored or solicited and received by the President or his immediate advisors (and their staff) in the White House. Courts have cautioned that the privilege "should be construed as narrowly as is consistent with ensuring that the confidentiality of the President's decisionmaking process is adequately protected." *In re Sealed Case*, 121 F.3d at 752.

A. The Presidential Communications Privilege Does Not Apply if the President Was Not Involved in the Decision at Issue, and Does Not Apply in Any Case to Internal Treasury Department Documents

The D.C. Circuit has cautioned that the "[t]he presidential communications privilege should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct *decisionmaking by the President*." *Id*. (emphasis added). In other words, Executive Branch deliberations that do not implicate presidential decisionmaking are not covered by the presidential communications privilege. *See Judicial Watch*, 365 F.3d at 1113-14 ("Unlike the deliberative process privilege, which is a general privilege that applies to all executive branch officials, the presidential communications privilege is specific to the President."). The intent of the presidential communications privilege is to preserve the

"President's access to honest and informed advice and his ability to explore possible policy options privately," as these are "critical elements in presidential decisionmaking." *In re Sealed Case*, 121 F.3d at 751. Disclosure of Executive Branch documents unrelated to the "President's personal decision-making process" cannot plausibly "impair the quality of his deliberations" and therefore are not covered by the presidential communications privilege. *Judicial Watch*, 365 F.3d at 1118.

For this reason and to protect against the risk "of expanding to a large swath of the executive branch a privilege that is bottomed on a recognition of the unique role of the President," the D.C. Circuit has refused to extend the privilege "to staff outside the White House in executive branch agencies." *In re Sealed Case*, 121 F.3d at 752. In fact, the D.C. Circuit has so narrowly circumscribed the privilege that even staffers in the Executive Office of the President are not considered "immediate or key advisers" for purposes of the privilege; that distinction is reserved only for those advisors in the Office of the President and their staff. *Judicial Watch*, 365 F.3d at 1110 n.1. As a result of these strictures, documents that are not authored or solicited and received by the President or his immediate advisors (and their staff) in the Office of the President are not subject to the presidential communications privilege. This includes internal executive agency documents that may be part of the advisory process, but "never make their way to the Office of the President." *Id*. at 1123.

The Treasury has not met its burden of showing that any of the documents on its privilege log are protected by the presidential communications privilege. As with the deliberative process privilege, the Treasury has failed to provide any explanation of what decision the President purportedly made. In fact, if, as government officials have repeatedly stated, the Treasury and the President had no role in Delphi pension issues, then the presidential communications

privilege cannot apply to any of the sixty-six documents purportedly protected by the privilege (at least not to the portions dealing with pension issues). And even if the President or his immediate advisors were involved in the pension decisions, only those documents authored or solicited and received by them are covered by the privilege. Yet the vast majority of the documents on Treasury's privilege log designated as falling under the presidential communication privilege appear to be internal Treasury materials.

The Treasury has also failed to identify any recipients or authors of the documents whose status permits the invocation of the privilege. *See Judicial Watch*, 364 F.3d at 1110 n.1 (including staffers in the Office of the President but excluding all executive agency staff as well as staff within the Executive Office of the Presidency (EOP)). Treasury itself appears confused about this principle because many email communications from Brian Deese, a staffer in the EOP, are not designated as protected by the presidential communications privilege, even though the attachments to those documents, oddly enough, are. *See*, *e.g.*, Privilege Log at Item Nos. 943-44, 947-48, 1093-94, 1151-52, 1216-17, 1218-19, 1220-21, and 1222-23.

B. Plaintiffs' Specific Need For a Narrow Universe of Highly Relevant Admissible Documents That Cannot Be Obtained Elsewhere Trumps Treasury's Invocation of the Presidential Communications Privilege

The presidential communications privilege "is [a] qualified, not absolute" privilege. *In re Sealed Case*, 121 F.3d at 745. That is, even those documents covered by the privilege may be subject to disclosure if the party seeking them makes "an adequate showing of need." *Id*. "If a court believes an adequate showing of need has been demonstrated, it should then proceed to review the documents *in camera* to excise non-relevant material." *Id*.

In *Cheney v. U.S. District Court for District of Columbia*, 542 U.S. 367 (2004), the Supreme Court established a heightened "needs" test in the civil context. *See Am. Historical*

Ass'n v. Nat'l Archives & Records Admin., 402 F. Supp. 2d 171, 183 (D.D.C. 2005). Since then, several courts have filled in the details of what this requires.

Dairyland Power Cooperative v. United States, 79 Fed. Cl. 659 (2007), involved a breach of contract dispute between nuclear utilities and the government in which the utilities moved to compel the production of five documents the government had withheld pursuant to the presidential communications privilege. The government insisted that the utilities could not meet the "needs" set forth in *Cheney*, which, according to the government, required parties to "satisfy exacting standards of (1) relevancy; (2) admissibility; [and] (3) specificity." *Id*. at 662 (quoting *Cheney*, 542 U.S. at 386) (internal quotation marks omitted). The court noted that this so-called *Cheney* test was the Supreme Court's interpretation of Fed. R. Crim. P. 17(c) as articulated in the criminal setting in *United States v. Nixon*, 418 U.S. 683, 700 (1974). *See Dairyland*, 79 Fed. Cl. at 662. The *Dairyland* court further noted that the D.C. Circuit's two-part "needs" test in *In re Sealed Case* was intended to be a more exacting test than Rule 17(c). *Id*. at 666-67 (citing *In re Sealed Case*, 121 F.3d 729, 754-55 (D.C. Cir. 1997)). The court found it anomalous that the government was insisting on a less exacting "needs" test in a context that called for a heightened one.

After comparing the so-called *Cheney/Nixon* "needs" test with that of the D.C. Circuit in *In re Sealed Case*, the court in *Dairyland* concluded that if all of their elements were combined, such a test would be sufficient to meet the "more exacting standard" required to overcome the presidential communications privilege in the civil context. *Id*. at 664, 667. In particular, the court concluded that an exacting specificity prong "substitutes for the elusive and 'even stricter' civil test envisioned, but not articulated by *Cheney*." *Id*. at 667. Because the plaintiffs in *Dairyland* sought only five documents, which were (1) "narrow and specific," (2) "highly

relevant," (3) "admissible," and (4) "'not obtainable elsewhere,'" *id*. at 667-68, the court concluded that *in camera* review was warranted. *Id*. at 669. *Dairyland*'s four-part test and subsequent ruling is consistent with other civil cases in which the President's invocation of the presidential communications privilege has been overcome.

For example, in *Sun Oil Co. v. United States*, 514 F.2d 1020 (Ct. Cl. 1975), the government denied oil companies the right to install a certain drilling platform essential to their operations in an area they had paid the government $38 million to lease. The oil companies sued the government under breach of contract and taking theories and sought – very much like the case at hand – "to ascertain through the discovery process who made the decision to deny their application . . . and why it was denied." *Id*. at 1021. The government sought to protect only four documents on presidential communications privilege grounds – essentially "briefing papers and memoranda prepared for the President for his use in meetings and in decision making regarding whether to allow drilling." *Id*. at 1022. Despite the "constitutional overtones" inherent in ordering disclosure of presidential communications, the court concluded that the plaintiffs had the right to develop facts to support their theory that "the President or someone on his White House staff turned their application down and did so for impermissible . . . reasons." *Id*. at 1025.

Following *Sun Oil*, the D.C. Circuit came to a similar conclusion in *Dellums v. Powell*, 561 F.2d 242 (D.C. Cir. 1977), which was a class action filed by persons arrested on the grounds of the Capital in 1971 during protests against American military intervention in Southeast Asia. The class claimed that their constitutional rights had been violated at the orders of a civil conspiracy of high-level government officers. In discovery, the class sought President Nixon's "White House tapes." President Nixon moved to quash the requests on presidential communications privilege grounds, but the district court rejected the motion, explaining it could

"scarcely imagine what could be more relevant to the grave allegations in the present case than the actual words of those alleged to have been the conspirators." *Id*. at 248 (quoting the district court opinion) (internal quotation marks omitted). The D.C. Circuit affirmed this part of the district court's reasoning, concluding that "plaintiffs-appellees have certainly made at least a preliminary showing of necessity for information that is not merely demonstrably relevant but indeed substantially material to their case." *Id*. at 249 (internal quotation marks omitted).

According to the court in *Dairyland*, the difference between *Sun Oil* and *Dellums* on the one hand, and *Cheney* on the other, appears to be that the former sought a narrow, specific amount of information that did not require an "unnecessary intrusion into the operation of the Office of the President." *Cheney*, 542 U.S. at 387. In *Cheney*, the Court was particularly fearful of "requir[ing] the Executive Branch to bear the onus of . . . invoking executive privilege with sufficient specificity and of making particularized objections," in the face of document requests "unbounded in scope." *Id*. at 388.

The question here is whether the documents Plaintiffs seek are more like the narrow and specific universe sought in *Sun Oil/Dellums* or the unbounded universe sought in *Cheney*. The Treasury's privilege log makes the case for the Plaintiffs. As previously discussed, of the 1,273 entries on the log, only 66 invoke the presidential communications privilege, and none invoke that privilege alone. Of those 66, at least 11 are not identified as even arguably authored by or addressed to anyone outside the U.S. Treasury Department. *See* Privilege Log at Item Nos. 67, 72, 94, 275, 358, 610, 619, 634, 766, 779 and 1223. Fifty-five documents cannot be considered a burdensome intrusion on the operations of the Office of the President.

Hence, the only question that remains is whether the documents meet the other three elements of the *Dairyland* test – relevance, admissibility, and availability. Plaintiffs allege, *inter*

alia, that the Salaried Plan did not need to be terminated, and that the Treasury or the White House impermissibly pressured the PBGC to terminate the Salaried Plan for unlawful, impermissible, or political reasons. The documents identified on the Treasury's privilege log as withheld on the grounds of the presidential communication privilege are highly relevant to Plaintiffs' theory, including:

- "Weekly report to White House from Department of Treasury including update from Auto Task Force Group on Delphi Bankruptcy" (Item No. 619);
- "Communications regarding plan for Delphi bankruptcy" (Item No. 84);
- "Internal communications regarding strategy for public announcements on GM/Delphi restructuring" (Item No. 621); and
- "Draft memorandum regarding PBGC's decision to take over the salaried and hourly pension plans of Delphi" (Item No. 766).

As with the materials sought in *Dellums*, it is hard to "imagine what could be more relevant to the grave allegations in the present case than the actual words" of those alleged to have acted impermissibly. *Dellums*, 561 F.2d at 248 (quoting the district court opinion) (internal quotation marks omitted). And those are only the facially relevant documents. An *in camera* review by the Court of the remainder is likely to unearth equally relevant material because they appear to involve GM's restructuring plan, which was highly dependent on Delphi's overall health and the fate of its pension plans.

Furthermore, there is no reason to believe that any of these documents are inadmissible. None of them are available through any other means. *See id.* (noting the difficulty the plaintiffs had in arranging depositions and the "inferior[ity of deposition testimony] to the actual contemporaneous record of the planning"). For these reasons, Plaintiffs, just like the plaintiffs in *Dellums* and *Sun Oil*, are entitled to these documents as part of their right to "develop the facts by resort to discovery." *Sun Oil*, 514 F.2d at 1025.

III. THE TREASURY HAS FAILED TO DEMONTRATE THAT THE ATTORNEY-CLIENT PRIVILEGE APPLIES TO A NUMBER OF WITHHELD OR REDACTED DOCUMENTS

The Treasury has withheld or redacted almost 400 documents on the basis of the attorney-client privilege. The vast majority of them involve communications from attorneys at the law firm of Cadwalader, Wickersham & Taft (which served as outside counsel to the Treasury), and Plaintiffs do not dispute the Treasury's invocation of attorney-client privilege for those communications. However, Plaintiffs have identified 27 documents on the Treasury's privilege log that do not involve the Treasury's outside counsel, and for which the Treasury has utterly failed to demonstrate that the attorney client privilege has been properly invoked. In many of these cases, the invocation of the attorney-client protection seems to be a fallback argument in case the Treasury's reliance on the deliberative process privilege fails, but in all cases, Plaintiffs seek the production of these documents.

The attorney-client privilege applies only when

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

In re Sealed Case, 737 F.2d 94, 98–99 (D.C. Cir. 1984) (internal quotation marks omitted). "A party asserting the [attorney-client] privilege has the burden of showing that the communications in question were intended to be kept confidential. A mere showing that the communication was from client to attorney does not suffice, but the circumstances indicating the intention of secrecy must appear." *Neuder v. Battelle Pac. Nw. Nat'l Lab.*, 194 F.R.D. 289, 295 (D.D.C. 2000)

(internal quotation marks and citations omitted); *see United States v. Under Seal (In re Grand Jury Subpoena)*, 341 F.3d 331, 335 (4th Cir. 2003) ("The burden is on the proponent of the attorney-client privilege to demonstrate its applicability. The proponent must establish not only that an attorney-client relationship existed, but also that the particular communications at issue are privileged and that the privilege was not waived.").

The attorney-client privilege is "narrowly construed and is limited to those situations in which its purposes will be served," namely, those communications that are "necessary to obtain informed legal advice which might not have been made absent the privilege." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). The privilege only protects communications made between attorney and client and does not shield facts contained in those conversations. *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981). Importantly, where government attorneys are "in effect . . . making law, they may not properly invoke the protections of the attorney-client privilege. In that context, the communications are made not for the purpose of securing legal advice or services, but rather for the purpose of developing policy." *Gen. Elec. v. Johnson*, No. 00-CV-2855, 2006 WL 2616187, at *15 (D.D.C. Sept. 12, 2006) (internal quotation marks omitted).

Here, the Treasury's privilege log has, in some instances, failed to demonstrate that an attorney was involved in the communication at all. In some instances, the log either omits the names of the authors and/or recipients; in others, the log identifies the individuals involved in the communication, but provides no indication that any of those individuals were part of an attorney-client communication. *See*, *e.g.*, Privilege Log at Item No. 202 (email attachment with no author or recipient identified); *id.* at Item No. 242 (email attachment with no author or recipient identified, described as a "Draft Slide Presentation regarding Delphi bankruptcy and possible

effect on GM," attached to email where no attorneys are identified); *id.* at Item No. 256 (email between David Markowitz and Harry Wilson, neither of whom has been identified as an attorney, withheld on "DPP" and "ACP" grounds, described as "communications regarding plan for foreign subsidiaries in Delphi bankruptcy"); *id.* at Item No. 320 (email attachment, authored by Silver Point Capital, described as "Draft financial spreadsheet regarding potential scenarios for Delphi bankruptcy"); *id.* at Item No. 454 (email from Harry Wilson to *himself*, described as "attorney-client communications regarding proposed amendments to Master Sale & Purchase Agreement for GM bankruptcy"); *id.* at Item Nos. 430, 493 (additional emails from Harry Wilson to himself, withheld on "ACP" grounds); *id.* at Item No. 768 (email attachment authored by "Team Auto", with no recipient identified, described as "Draft memorandum regarding PGBC's decision to take over the salaried and hourly pension plans of Delphi"); *id.* at Item Nos. 1182 and 1184 (emails between Joe House, *of the PBGC*, and Matthew Feldman, of the Auto Task Force, described as being communications regarding draft pleading regarding PBGC and Delphi settlement). Obviously, without evidence that someone in the communication chain is in the attorney-client relationship, it is impossible to conclude that the primary purpose of any purportedly privileged communication was to secure legal advice. *United States v. ISS Marine Servs., Inc.*, 905 F. Supp. 2d 121, 128 (D.D.C. 2012) (holding that the primary purpose of a communication is to seek legal advice if "the communication would not have been made 'but for' the fact that legal advice was sought.").

This is a particularly salient concern when it comes to numerous, supposedly privileged documents listing no attorney, other than Mr. Feldman, as author or recipient. While working at the Treasury, Mr. Feldman provided both legal and non-legal advice. Because the Treasury can invoke the attorney-client privilege only for those communications of Mr. Feldman which were

primarily legal in nature, the Treasury's privilege log needs to demonstrate that, for the communications in question, Mr. Feldman was giving legal advice, as opposed to the policy advice he also frequently provided. Instead of doing this, the Treasury's descriptions of these documents are either conclusory in nature or suggest that no legal advice was, in fact, sought or received. For example, Privilege Log Item No. 25 is an email exchange between Matthew Feldman and Harry Wilson, redacted on both attorney-client and deliberative process grounds. The description of the email is "Internal communications regarding plan for GM, Delphi, and Chrysler bankruptcies, and possible PBGC involvement." Nothing about this description suggests that Mr. Feldman was providing legal advice. Privilege Log Item Nos. 60, 197, 446, 658, 679, 685, 774, 840, 861, 870, 871, and 978 are all similar, in that none of the entries provides any basis for concluding that Mr. Feldman was wearing his "lawyer hat" in making the communication. Moreover, the fact that the descriptions offered by the Treasury's privilege log do not indicate that legal advice was being rendered strongly suggests that the purpose of the communications was policy-oriented, as there are numerous communications listed on the log where the description explicitly avers that the communication at issue is an "attorney-client communication" or the subject of the email makes clear that legal expertise was being sought. *See*, *e.g.*, Privilege Log at Item Nos. 141, 143, 148, 150, 157, 170.

Even where the description does actually assert that Mr. Feldman might have been offering legal advice, it frequently does so in conclusory fashion. *See*, *e.g.*, Privilege Log at Item No. 936 (email between Matt Feldman and Harry Wilson described as "attorney-client communications regarding plan for Delphi Bankruptcy"); *id*. at Item Nos. 1204 and 1207, ("Attorney-client communications regarding plan for Delphi reorganization"); *id*. at Item No.

1238 ("Attorney-client communications regarding PBGC negotiations in connection with Delphi pension plans").

Plaintiffs, therefore, respectfully request that this Court either order the production of the purportedly privileged documents listed immediately above,[8] or review them *in camera* to determine which, if any, have been properly redacted or withheld. *NRLB v. Jackson Hosp. Corp.*, 257 F.R.D. 302, 313 (D.D.C. 2009) (ordering *in camera* inspection of documents where privilege log did not "provide a sufficiently detailed description of the documents at issue" to determine whether they were properly withheld under the attorney-client privilege).

IV. THE TREASURY HAS IMPROPERLY ASSERTED THE WORK PRODUCT DOCTRINE FOR A NUMBER OF DOCUMENTS

The Treasury has invoked work product protection for 48 documents. Plaintiffs challenge 20 of these designations on the grounds that the Treasury has failed to demonstrate the applicability of the doctrine. *See* Ex. 1. Additionally, like the deliberative process and presidential communications privileges, the work product doctrine offers only qualified protections, and a court may order disclosure "when the requesting party can show a 'substantial need' for the material and an inability to procure equivalent information 'without undue hardship.'" *United States v. Deloitte, LLP*, 610 F.3d 129, 135 (D.C. Cir. 2010) (citing Fed. R. Civ. P. 26(b)(3)(A)(ii)). Accordingly, Plaintiffs seek the production of these documents on the alternative ground that they have a substantial need for them.

"The work-product privilege protects written materials lawyers prepare 'in anticipation of litigation.'" *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998) (quoting Fed. R. Civ. P. 26(b)(3)). "Ordinarily, a party may not discover documents and tangible things that are prepared

[8] These include Privilege Log Item Nos. 25, 60, 197, 202, 242, 256, 320, 430, 446, 454, 493, 658, 679, 685, 768, 774, 840, 861, 870, 871, 936, 978, 1182, 1184, 1204, 1207, and 1238.

in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." Fed. R. Civ. P. 26(b)(3)(A). The doctrine does not apply to every document a lawyer creates or "shield from disclosure everything that a lawyer does." *Shapiro v. U.S. Dep't of Justice*, 969 F. Supp. 2d 18, 29 (D.D.C. 2013). It does not apply to documents created by lawyers in the "ordinary course of business" or for "other nonlitigation purposes." *In re Sealed Case*, 146 F.3d at 887 (internal quotation marks and citation omitted). It also does not apply to underlying facts contained in an otherwise protected document. *FTC v. Boehringer Ingelheim Pharms., Inc.*, 778 F.3d 142, 152 (D.C. Cir. 2015).

The Treasury has claimed work-product protection for a number of documents that fall well beyond the doctrine's reach. For 19 documents, the identity of the author and recipient(s) has not been disclosed, making it impossible to determine whether these documents could conceivably contain "the mental impressions of [counsel]." *Hickman v. Taylor*, 329 U.S. 495, 510 (1947); *see* Privilege Log at Item Nos. 201, 202, 203, 207, 215, 220, 238, 607, 792, 983, 985, 987, 989, 1052, 1068, 1199, 1200, 1240, and 1242. Even if an attorney were involved in the production of the document, the descriptions the Treasury has provided for many of these materials do not support the Treasury's assertion that they were created in anticipation of litigation. *See id.* at Item No. 207 ("Draft response to congressional inquiry on Delphi asset purchases"); *id.* at Item No. 215 ("Draft Slide Presentation regarding Delphi bankruptcy and possible effect on GM"); *id.* at Item No. 220 ("Draft slides regarding auto industry captive finance company analysis"); *id.* at Item No. 238 ("Draft slide presentation regarding GM company funding projections, Delphi bankruptcy and possible effect on GM and auto industry supplier analysis"); *id.* at Item No. 607 ("Revisions to draft talking points for public comments

re: government lending to auto industry"); *id.* at Item No. 792 ("Attorney work product draft memorandum regarding plan for GM reorganization"); *id.* at Item No. 1052 ("Draft press release regarding Delphi bankruptcy mediations and auctioning of assets"); *id.* at Item No. 1240 ("Attorney work product regarding Delphi pension plan analysis").

While other materials on the Treasury's log include author and recipient names, these documents also appear to have been prepared in the ordinary course of Treasury's business without any relationship to pending or anticipated litigation. *See id.* at Item No. 1068 (an email attachment, authored by the US Department of Treasury," described as "Attorney work product regarding plan for Delphi reorganization"); *id.* at Item No. 1168 (email, authored by "Team Auto" for Timothy Geithner and Lawrence Summers, described as "Draft memorandum for presidential advisors regarding GM and Chrysler restructuring plans"). Especially curious is Privilege Log Item 1211, which is an email from Phillip Quinn to Matthew Feldman, described as "Internal communications regarding draft memorandum in connection with Delphi pension plan update." Leaving aside the fact that the description does not suggest an email created in anticipation of litigation, the Secretary of the Treasury is one of three members of the board that governs the PBGC, and the PBGC has previously identified Mr. Quinn as a "senior policy analyst" in the Treasury's Office of Financial Institutions, who served as the Treasury's representative in overseeing the PBGC. Because of the potential for conflict, the "Treasury established a protective barrier between the Treasury officials (beneath the Secretary level) who made policy-related decisions with respect to investments in GM [like Mr. Feldman], and the Treasury officials who were responsible for regulating pensions or overseeing the operations of PBGC [like Mr. Quinn]." *See* United States Government Accountability Office, *Delphi Pensions, Key Events Leading to Plan Terminations* at 17 (GAO-13-854T) (Sept. 11, 2013)

(attached as Exhibit 8). Notwithstanding this "protective barrier," the two individuals were apparently communicating, and the Treasury now seeks to hide this communication behind an unsubstantiated claim of attorney work product.[9]

Accordingly, because the Treasury has failed to assert adequately the work product doctrine for these documents, Plaintiffs again request that the Court order the Treasury to produce the documents forthwith. Additionally, and as noted above, Plaintiffs also believe that, even if the doctrine were to apply to the documents listed above, their need for these documents is significant enough to overcome the protection. *See supra* 12-16, 31-32. If the Court does not order the production of the documents on the grounds cited above, Plaintiffs alternatively request that the Court review the documents *in camera* to determine whether the doctrine applies and, if it does, whether any factual information contained in those materials can be disclosed. *FTC*, 778 F.3d at 152 ("[W]here a document contains both opinion and fact work product, the court must examine whether the factual matter may be disclosed without revealing the attorney's opinions."); *NLRB*, 257 F.R.D. at 311 (ordering *in camera* review of purportedly privileged documents where the court was "unable to determine whether these items are privileged from the log").

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court grant their Motion to Compel, and order the production of all the documents identified in Exhibit 1, attached hereto.

[9] The Treasury has withheld a total of 5 emails between members of the Auto Task Force and Mr. Quinn, the remainder of which were withheld under the deliberative process privilege. *See* Privilege Log at Item Nos. 666, 1208, 1211, and 1214. In addition to all the reasons described above, these documents should be disclosed for the additional reason that the deliberative process privilege cannot apply where the communications are *ultra vires*.

Date: July 9, 2015

Respectfully submitted,

/s/ Anthony F. Shelley

Anthony F. Shelley (D.C. Bar No. 420043)
Timothy P. O'Toole (D.C. Bar No. 469800)
Michael N. Khalil (D.C. Bar No. 497566)
Miller & Chevalier Chartered
655 15th St. NW, Suite 900
Washington, DC 20005
Telephone: 202-626-5800
E-mail: ashelley@milchev.com
totoole@milchev.com
mkhalil@milchev.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2015, 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:

David M. Glass
U.S. Dep't of Justice - Civil Division
20 Massachusetts Avenue, NW
Washington, DC 20530
Email: david.glass@usdoj.gov

John A. Menke
PENSION BENEFIT GUARANTY CORPORATION
Office of the Chief Counsel
1200 K Street, NW
Washington, DC 20005-4026
Email: menke.john@pbgc.gov

/s/ Anthony F. Shelley

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

[PROPOSED] ORDER

THIS MATTER, having come before the Court on the Motion to Compel Withheld and Redacted Documents, or for In Camera Review, filed by Dennis Black, Charles Cunningham, Ken Hollis, and the Delphi Salaried Retirees Association (collectively, "Plaintiffs"), the Opposition by the United States Department of Treasury thereto, and any Reply,

IT IS HEREBY ORDERED that the Motion is GRANTED.

The United States Department of Treasury is hereby ordered to produce all documents identified in Exhibit 1 attached to the Plaintiffs' motion within three days of this Order.

SO ORDERED this ____ day of _____, 2015.

_____
Emmet G. Sullivan
UNITED STATES DISTRICT JUDGE