

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

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U.S. DEPARTMENT OF THE)	
TREASURY,)	
)	
Petitioner,)	
)	No. 1:12-mc-00100-EGS
v.)	
)	
PENSION BENEFIT GUARANTY)	
CORPORATION,)	
)	
Interested Party,)	
)	
v.)	
)	
DENNIS BLACK, et al.,)	
)	
Respondents.)	
<hr/>)	

REPLY IN SUPPORT OF PETITIONER’S MOTION FOR RECONSIDERATION

INTRODUCTION

Arguing that respondents Dennis Black, Charles Cunningham Kenneth Hollis, and Delphi Salaried Retiree Associations have failed to make a showing of need sufficient to overcome the applicability of the presidential communications to the 63 documents to which the privilege has been held to apply, petitioner U.S. Department of the Treasury (Treasury) has filed a motion for reconsideration of the order dated April 13, 2017. Treasury asks in its motion that the order be vacated insofar as it requires Treasury to produce the 63 documents, ECF No. 50-1 at 7-11, and asks in the alternative that the order be modified insofar as it requires Treasury to produce any material from the 63 documents other than material showing that the agreement between the Pension Benefit Guaranty Corporation (PBGC) and Delphi Corporation (Delphi) to terminate the Delphi Retirement Program for Salaried Employees (Delphi Salaried Plan) was the product of

pressure exerted upon PBGC by Treasury or the White House for impermissible or political reasons.¹ *Id.* at 11-12.

Respondents have filed an opposition to Treasury's motion in which they attempt to show, but fail to show, that they have a need sufficient to overcome the applicability of the presidential communications privilege to the 63 documents. They likewise fail to show that they have a need for any material in the documents that does not show that Treasury or the White House exerted pressure on PBGC to terminate the Delphi Salaried Plan for impermissible or political reasons. Treasury's motion for reconsideration should therefore be granted.²

ARGUMENT

I. RESPONDENTS HAVE FAILED TO MAKE A SHOWING OF NEED SUFFICIENT TO OVERCOME THE APPLICABILITY OF THE PRESIDENTIAL COMMUNICATIONS PRIVILEGE TO THE 63 DOCUMENTS.

Dellums v. Powell, 561 F.2d 242 (D.C. Cir. 1977), provided the basis for this Court's holding that respondents had made a showing of need sufficient to overcome the applicability of the presidential communications privilege to the 63 documents. ECF No. 45 at 11. *Dellums* is not a model for this case, however. *Dellums* was a case in which the evidentiary record made it reasonably clear that the plaintiffs were entitled to relief on the merits of their claim. 561 F.2d at 248-49. This case is different because, as Treasury has shown, respondents will not be entitled to relief in *Black v. PBGC*, No. 2:09-cv-13616-AJT-MKM (E.D. Mich.), even if they can show

¹ The 63 documents are responsive to a third-party subpoena, ECF No. 1, Ex. J, that respondents issued to Treasury in 2012. Respondents describe the subpoena as "narrow," *e.g.*, ECF No. 51 at 6, but ignore the fact that the subpoena has required Treasury to produce more than 6,000 documents comprising more than 70,000 pages. ECF No. 50-4 ¶ 2.

² Respondents criticize Treasury for "not identify[ing] the procedural vehicle it believes authorizes its motion for reconsideration." ECF No. 51 at 10. Respondents acknowledge, however, that the procedural vehicle for Treasury's motion is the minute order dated May 17, 2017. *Id.* at 1-2, 9-10. Respondents do not question the authority of the Court to issue that order.

that the decision of PBGC to enter into the agreement to terminate the Delphi Salaried Plan resulted from pressure exerted upon PBGC by Treasury or the White House for impermissible or political reasons. ECF No. 50-1 at 8-9.

This case is also different from *Dellums* because the degree of protection afforded by the presidential communications privilege was lower in *Dellums* than it is here. The privilege was asserted in *Dellums* by a president who had left office. 561 F.2d at 243-44. His assertion of the privilege was not supported by the Government. *Id.* at 245. Neither of those things is true here.

Respondents have not shown, moreover, that they have a need sufficient to overcome the applicability of the presidential communications privilege to the 63 documents even assuming, *arguendo*, that *Dellums* provides reliable guidance for this case. Respondents make two arguments to try to show that they have such a need. Neither argument is persuasive. Nor do respondents make any showing that anything contained in the documents is likely to substantiate either of those arguments.

Respondents argue first that the agreement terminating the Delphi Salaried Plan cannot be held valid if an alternative to the termination of the plan existed; that General Motors (GM) could have provided an alternative to the termination of the plan by assuming liability for the plan; and that Treasury could have compelled GM to assume liability for the plan when it worked to develop a plan in 2009 for the restructuring of GM. *E.g.*, ECF No. 51 at 3-5, 17, 23. Respondents have no basis for alleging, however, that the validity of the agreement terminating the Delphi Salaried Plan hinges on the absence of an alternative to termination. The validity of the agreement hinges instead, as respondents acknowledge, on whether PBGC can show that the termination of the plan was necessary “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 [PBGC insurance] fund.” *Id.* at 3 (quoting 29 U.S.C. § 1342(c)(1)). PBGC determined before entering into the agreement to terminate the Delphi Salaried Plan that “the [p]lan must be terminated in order to avoid any unreasonable increase in the liability of the PBGC insurance fund.” ECF No. 15-2. PBGC had no obligation in view of that determination to refrain from terminating the plan even assuming, *arguendo*, that an alternative to termination existed.

Respondents concede, moreover, that Treasury did nothing improper by refraining from taking any action to compel GM to assume liability for the Delphi Salaried Plan. Quoting the report of the Special Inspector General for the Troubled Asset Relief Program, respondents say that “GM came to the Auto Team because GM wanted to do something for the [Delphi] Salaried retirees” but that Steven L. Rattner of the Auto Team “informed GM’s CEO, Fritz Henderson, that GM would not be permitted to do anything for the Salaried Plan participants because Mr. Rattner thought there was nothing defensible from a commercial standpoint that could be done for the Delphi salaried retirees.” ECF No. 51 at 21. “[T]he business judgment rule allows . . . great leeway.” *U.S. News & World Report v. Foltz*, 865 F.2d 364, 372 (D.C. Cir. 1989). Treasury was trying to determine in 2009 whether to invest billions of taxpayer dollars in an insolvent company and was properly concerned with whether such an investment would result in a company that could survive. GM was never an eleemosynary institution and was never intended to become one. Treasury can hardly be faulted under these circumstances for relying on the business judgment of Mr. Rattner and his colleagues on the Auto Team when it refrained from compelling GM to assume liability for the Delphi Salaried Plan.³

³ Respondents refer to the possibility of GM’s assuming liability for the Delphi Salaried Plan as a “reassumption” of liability. *E.g.*, ECF No. 51 at 4. Respondents acknowledge, however, that

The second argument that respondents make to try to show that they have a need sufficient to overcome the applicability of the presidential communications privilege to the 63 documents involves certain liens that PBGC placed on Delphi's assets and certain claims that it asserted against those assets because of Delphi's underfunding of the Delphi Salaried Plan. Respondents argue that PBGC could have compelled GM to assume liability for the plan in exchange for the release of the liens and claims; that PBGC succumbed instead to "pressure imposed by the Treasury and the related Auto Task Force to support their efforts to restructure the auto industry in general and GM in particular"; and that PBGC therefore acted improperly by entering into the agreement to terminate the Delphi Salaried Plan. ECF No. 51 at 4; *see id.* at 17-19, 26.

This argument is unpersuasive because the efforts of "Treasury and the related Auto Task Force" to "restructure the auto industry and GM in particular" were not illegitimate in any way. President Obama made precisely that point when he said the following in the speech about the American automotive industry that he delivered on March 30, 2009:

One of the challenges we've confronted from the beginning of this administration is what to do with the state of the struggling auto industry

We cannot, and must not, and will not let our auto industry simply vanish. This industry is like no other – it's an emblem of the American spirit; a once and future symbol of America's success. It's what helped build the middle class and sustained it throughout the 20th century. It's a source of deep pride for the generations of American workers whose hard work and imagination led to some of the finest cars the world has ever known. It's a pillar of our economy that has held up the dreams of millions of our people.

Ex. A hereto at 1.

Delphi was spun off from GM in 1999, *id.* at 4 n.3, and thus acknowledge that GM had no obligation to the beneficiaries of the Delphi Salaried Plan at the time that GM underwent restructuring in 2009. Respondents are wrong to suggest, therefore, that GM would have been "resassuming" anything by assuming liability for the Delphi Salaried Plan.

Respondents acknowledge, moreover, that PBGC received full value in the restructuring of GM for the liens it had placed on the assets of Delphi and the claims it had asserted against those assets. They acknowledge that fact by acknowledging that “[t]he Auto Team ultimately determined that a settlement involving the release of those liens and claims was of sufficient ‘commercial necessity’ that it agreed to provide the PBGC over \$660 million from GM.” ECF No. 51 at 22. The showing of need for the contents of the 63 documents that respondents try to base on the liens and claims amounts to nothing in view of the \$660 million that PBGC received in exchange for its release of the liens and claims.⁴

Unable otherwise to make a showing of need sufficient to overcome the applicability of the presidential communications privilege to the 63 documents, respondents allege without substantiation that the contents of the documents are “likely . . . [to be] sufficiently relevant to the claims at issue in *Black* to overcome the Treasury’s assertion of the [privilege].” ECF No. 51 at 28. Respondents also allege that they cannot make a showing of need sufficient to overcome the privilege on the public record but can do so on an *ex parte, in camera* basis. *Id.* at 29. No weight should be given to these allegations because the presidential communications privilege “is fundamental to the operation of Government and inextricably rooted in the separation of

⁴ Respondents allege that one of the factors that would have permitted Treasury to exert pressure on PBGC in connection with the restructuring of GM was that Treasury was a member of the PBGC board and thus was “one of three agencies charged with providing oversight and direction to the PBGC.” ECF No. 51 at 18. PBGC has made it clear, however, that “[t]he [PBGC] Board is not involved in day-to-day operations and, specifically, is not involved in decisions on individual cases.” ECF No. 1, Ex. D at 4.

powers under the Constitution.” *United States v. Nixon*, 418 U.S. 683, 708 (1974).

Allegations like these provide no basis for brushing the privilege aside.

II. RESPONDENTS HAVE NOT SHOWN THAT THEY HAVE A NEED FOR ANY MATERIAL IN THE 63 DOCUMENTS THAT DOES NOT SHOW THAT TREASURY OR THE WHITE HOUSE EXERTED PRESSURE ON PBGC TO TERMINATE THE DELPHI SALARIED PLAN FOR IMPERMISSIBLE OR POLITICAL REASONS.

A party who makes a showing of need sufficient to overcome the applicability of the presidential communications privilege to particular documents is entitled even in a criminal case only to those portions of the documents that contain “relevant material.” *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997). Considering themselves to have made a showing of need sufficient to overcome the privilege in this case, respondents argue that they are entitled to any material in the 63 documents “related to the Auto Task Force’s efforts to restructure the automobile industry generally, or its efforts regarding GM, Delphi, and the PBGC specifically . . . regardless of whether they demonstrate undue influence by the Treasury on the PBGC.” ECF No. 51 at 30-31. This argument ignores the gravamen of respondents’ complaint against PBGC, which is that “PBGC’s termination of the [Delphi Salaried] Plan was politically motivated.” ECF No. 1, Ex. E ¶ 56. The narrowness of that claim means that the order dated April 13, 2017, should be modified if respondents are found to have made a showing of need sufficient to overcome the presidential communications privilege by requiring Treasury to produce any material from the 63 documents showing that Treasury or the White House exerted pressure on PBGC to terminate the Delphi Salaried Plan for impermissible or political reasons, but not requiring Treasury to produce anything else from the documents.

CONCLUSION

Treasury's motion for reconsideration should be granted for the foregoing reasons and for the reasons set forth in the memorandum in support of the motion, ECF No. 50-1.

Respectfully Submitted,

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Dated: June 5, 2017

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2017, I served the within memorandum and the exhibit to the memorandum on all counsel of record by filing them with the Court by means of its ECF system.

s/ David M. Glass

*U.S. Dep't of the Treas. v. Pension Benefit
Guar. Corp.*

No. 1:12-mc-00100-EGS

Reply in Support of Petitioner's Motion for
Reconsideration

Ex. A

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For Immediate Release

March 30, 2009

REMARKS BY THE PRESIDENT ON THE AMERICAN AUTOMOTIVE INDUSTRY

Grand Foyer

11:07 A.M. EDT

THE PRESIDENT: Good morning, everybody.

One of the challenges we've confronted from the beginning of this administration is what to do with the state of the struggling auto industry. In recent months, my Auto Task Force has been reviewing requests by General Motors and Chrysler for additional government assistance, as well as plans developed by each of these companies to restructure, to modernize, and to make themselves more competitive. Our evaluation is now complete. But before I lay out what needs to be done going forward, I want to say a few words about where we are and what led us to this point.

It will come as no surprise that some Americans who have suffered most during this recession have been those in the auto industry and those working for companies that support it. Over the past year, our auto industry has shed over 400,000 jobs, not only at plants that produce cars, but at the businesses that produce the parts that go into them and the dealers that sell and repair them. More than one in 10 Michigan residents is out of work -- the most of any state. And towns and cities across the great Midwest have watched unemployment climb higher than it's been in decades.

The pain being felt in places that rely on our auto industry is not the fault of our workers; they labor tirelessly and desperately want to see their companies succeed. It's not the fault of all the families and communities that supported manufacturing plants throughout the generations. Rather, it's a failure of leadership -- from Washington to Detroit -- that led our auto companies to this point.

Year after year, decade after decade, we've seen problems papered over and tough choices kicked down the road, even as foreign competitors outpaced us. Well, we've reached the end of that road. And we, as a nation, cannot afford to shirk responsibility any longer. Now is the time to confront our problems head-on and do what's necessary to solve them.

We cannot, and must not, and we will not let our auto industry simply vanish. This industry is like no other -- it's an emblem of the American spirit; a once and future symbol of America's success. It's what helped build the middle class and sustained it throughout the 20th century. It's a source of deep pride for the generations of American workers whose hard work and imagination led to some of the finest cars the world has ever known. It's a pillar of our economy that has held up the dreams of millions of our people. And we cannot continue to excuse poor decisions. We cannot make the survival of our auto industry dependent on an unending flow of taxpayer dollars. These companies -- and this industry -- must ultimately stand on their own, not as wards of the state.

And that's why the federal government provided General Motors and Chrysler with emergency loans to prevent their sudden collapse at the end of last year -- only on the condition that they would develop plans to restructure. In keeping with that agreement, each company has submitted a plan to restructure. But after careful analysis, we've determined that neither goes far enough to warrant the substantial new investments that these companies are requesting.

And so today I'm announcing that my administration will offer GM and Chrysler a limited additional period of time to work with creditors, unions, and other stakeholders to fundamentally restructure in a way that would justify an investment of additional taxpayer dollars. During this period they must produce plans that would give the American people confidence in their long-term prospects for success.

Now, what we're asking for is difficult. It will require hard choices by companies. It will require unions and workers who have already made extraordinarily painful concessions to do more. It'll require creditors to recognize that they can't hold out for the prospect of endless government bailouts. It'll have to -- it will require efforts from a whole host

of other stakeholders, including dealers and suppliers. Only then can we ask American taxpayers who have already put up so much of their hard-earned money to once more invest in a revitalized auto industry.

But I'm confident that if each are willing to do their part, if all of us are doing our part, then this restructuring, as painful as it will be in the short term, will mark not an end, but a new beginning for a great American industry -- an auto industry that is once more out-competing the world; a 21st century auto industry that is creating new jobs, unleashing new prosperity, and manufacturing the fuel-efficient cars and trucks that will carry us towards an energy-independent future. I am absolutely committed to working with Congress and the auto companies to meet one goal: The United States of America will lead the world in building the next generation of clean cars.

And no one can deny that our auto industry has made meaningful progress in recent years -- and this doesn't get talked about often enough. Some of the cars made by American workers right now are outperforming the best cars made abroad. In 2008, the North American Car of the Year was a GM. This year, Buick tied for first place as the most reliable car in the world. Our companies are investing in breakthrough technologies that hold the promise of new vehicles that will help America end its addiction to foreign oil.

But our auto industry is not moving in the right direction fast enough to succeed in a very tough environment. So let me discuss what measures need to be taken by each of the auto companies requesting taxpayer assistance, and I'll start with General Motors.

GM has made a good faith effort to restructure over the past several months -- but the plan that they've put forward is, in its current form, not strong enough. However, after broad consultation with a range of industry experts and financial advisors, I'm absolutely confident that GM can rise again, providing that it undergoes a fundamental restructuring. As an initial step, GM is announcing today that Rick Wagoner is stepping aside as Chairman and CEO. This is not meant as a condemnation of Mr. Wagoner, who's devoted his life to this company and has had a distinguished career; rather, it's a recognition that will take new vision and new direction to create the GM of the future.

In this context, my administration will offer General Motors adequate working capital over the next 60 days. And during this time, my team will be working closely with GM to produce a better business plan. They must ask themselves: Have they consolidated enough unprofitable brands? Have they cleaned up their balance sheets, or are they still saddled with so much debt that they can't make future investments? Above all, have they created a credible model for how not only to survive, but to succeed in this competitive global market?

Let me be clear: The United States government has no interest in running GM. We have no intention of running GM. What we are interested in is giving GM an opportunity to finally make those much-needed changes that will let them emerge from this crisis a stronger and more competitive company.

The situation at Chrysler is more challenging. It's with deep reluctance but also a clear-eyed recognition of the facts that we've determined, after careful review, that Chrysler needs a partner to remain viable. Recently, Chrysler reached out and found what could be a potential partner -- the international car company Fiat, where the current management team has executed an impressive turnaround. Fiat is prepared to transfer its cutting-edge technology to Chrysler and, after working closely with my team, has committed to build -- building new fuel-efficient cars and engines right here in the United States. We've also secured an agreement that will ensure that Chrysler repays taxpayers for any new investments that are made before Fiat is allowed to take a majority ownership stake in Chrysler.

Still, such a deal would require an additional investment of taxpayer dollars, and there are a number of hurdles that must be overcome to make it work. I'm committed to doing all I can to see if a deal can be struck in a way that upholds the interests of American taxpayers. And that's why we'll give Chrysler and Fiat 60 days to overcome these hurdles and reach a final agreement -- and we will provide Chrysler with adequate capital to continue operating during that time. If they are able to come to a sound agreement that protects American taxpayers, we will consider lending up to \$6 billion to help their plan succeed. But if they and their stakeholders are unable to reach such an agreement, and in the absence of any other viable partnership, we will not be able to justify investing additional tax dollars to keep Chrysler in business.

Now, while Chrysler and GM are very different companies with very different paths forward, both need a fresh start to implement the restructuring plan they develop. That may mean using our bankruptcy code as a mechanism to help them restructure quickly and emerge stronger. Now, I want everybody to be clear about this. I know that when people hear the word "bankruptcy" it can be unsettling, so let me explain exactly what I mean. What I'm talking about is using our existing legal structure as a tool that, with the backing of the U.S. government, can make it easier for General Motors and Chrysler to quickly clear away old debts that are weighing them down so that they can get back on their feet and onto a path to success; a tool that we can use, even as workers staying on the job building cars that are being sold.

What I'm not talking about is a process where a company is simply broken up, sold off, and no longer exists. We're not talking about that. And what I'm not talking about is a company that's stuck in court for years, unable to get out.

So it's my hope that the steps I'm announcing today will have a salutary effect -- will go a long way forward towards answering many of the questions that people have about the future of GM and Chrysler.

But just in case there's still nagging doubts, let me say it as plainly as I can: If you buy a car from Chrysler or General Motors, you will be able to get your car serviced and repaired, just like always. Your warranty will be safe.

In fact, it will be safer than it's ever been, because starting today, the United States government will stand behind your warranty.

But we must also recognize that the difficulties facing this industry are due in no small part to the weaknesses in our economy as a whole. And therefore, to support demand for auto sales during this period, I'm directing my team to take several steps.

First, we will ensure that Recovery Act funds to purchase government cars get out as quickly as possible and work through the budget process to accelerate other federal fleet purchases, as well.

Second, we'll accelerate our efforts through the Treasury Department's Consumer and Business Lending Initiative. And we are working intensively with the auto finance companies to increase the flow of credit to both consumers and dealers.

Third, the IRS is launching a campaign to alert consumers of a new tax benefit for auto purchases made between February 16th and the end of this year -- if you buy a car anytime this year, you may be able to deduct the cost of any sales and excise taxes. And this provision could save families hundreds of dollars and lead to as many as 100,000 new car sales.

Finally, several members of Congress have proposed an even more ambitious incentive program to increase car sales while modernizing our auto fleet. And such fleet modernization programs, which provide a generous credit to consumers who turn in old, less fuel-efficient cars and purchase cleaner cars, have been successful in boosting auto sales in a number of European countries. I want to work with Congress to identify parts of the Recovery Act that could be trimmed to fund such a program, and make it retroactive starting today.

Now, let there be no doubt, it will take an unprecedented effort on all our parts -- from the halls of Congress to the boardroom, from the union hall to the factory floor -- to see the auto industry through these difficult times. And I want every American to know that the path I'm laying out today is our best chance to make sure that the cars of the future are built where they've always been built -- in Detroit and across the Midwest -- to make America's auto industry in the 21st century what it was in the 20th century -- unsurpassed around the world. The path has been chosen after consulting with other governments that are facing this crisis. We've worked closely with the government of Canada on GM and Chrysler, as both those companies have extensive operations there. The Canadian government has indicated its support for our approach and will be announcing their specific commitments later today.

While the steps I'm taking will have an impact on all Americans, some of our fellow citizens will be affected more than others. So I'd like to speak directly to all those men and women who work in the auto industry or live in countless communities that depend on it. Many of you have been going through tough times for longer than you care to remember. And I won't pretend that the tough times are over. I can't promise you there isn't more difficulty to come.

But what I can promise you is this: I will fight for you. You're the reason I'm here today. I got my start fighting for working families in the shadows of a shuttered steel plant. I wake up every single day asking myself what can I do to give you and working people all across this country a fair shot at the American Dream.

When a community is struck by a natural disaster, the nation responds to put it back on its feet. While the storm that has hit our auto towns is not a tornado or a hurricane, the damage is clear, and we must likewise respond. And that's why today I'm designating a new Director of Recovery for Auto Communities and Workers to cut through the red tape and ensure that the full resources of our federal government are leveraged to assist the workers, communities, and regions that rely on our auto industry. Edward Montgomery, a former Deputy Labor Secretary, has agreed to serve in this role.

And together with Labor Secretary Solis and my Auto Task Force, Ed will help provide support to auto workers and their families, and open up opportunity to manufacturing communities in Michigan and Ohio and Indiana and every other state that relies on the auto industry.

They will have a strong advocate in Ed. He will direct a comprehensive effort that will help lift up the hardest-hit areas by using the unprecedented levels of funding available in our Recovery Act and throughout our government to create new manufacturing jobs and new businesses where they're needed most -- in your communities. And he will also lead an effort to identify new initiatives we may need to help support your communities going forward.

These efforts, as essential as they are, are not going to make everything better overnight. There are jobs that won't be saved. There are plants that may not reopen. There's little I can say that can subdue the anger or ease the frustration of all whose livelihoods hang in the balance because of failures that weren't theirs.

But there's something I want everybody to remember. Remember that it is precisely in times like these -- in moments of trial and moments of hardship -- that Americans rediscover the ingenuity and resilience that makes us who we are; that made the auto industry what it once was and what it will be again; that sent those first mass-produced cars rolling off the assembly lines; that built an arsenal of democracy that propelled America to victory in the Second World War; and that powered our economic prowess in the first American century.

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Because I know that if we can tap into that same ingenuity and resilience right now, if we can carry one another through this difficult time and do what must be done, then we will look back and say that this was the moment when the American auto industry shed its old ways, marched into the future, remade itself, and once more became an engine of opportunity and prosperity not only in Detroit, not only in our Midwest, but all across America.

I'm confident we can make that happen, but we've got a lot of work to do. Thank you. Thank you, everybody.

END 11:25 A.M

Additional materials regarding today's announcement:

[Warranty Commitment Program](#)

[Chrysler Viability Assessment](#)

[GM Viability Assessment](#)

[Fact Sheet of GM and Chrysler](#)

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