ORAL ARGUMENT NOT YET SCHEDULED

No. 17-5142 (consolidated with No. 17-5164)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES DEPARTMENT OF THE TREASURY,

Petitioner-Appellant,

v.

DENNIS BLACK, CHARLES CUNNINGHAM, KENNETH HOLLIS, AND DELPHI SALARIED RETIREES ASSOCIATION,

Respondents-Appellees.

On Appeal from the United States District Court
for the District of Columbia (Judge Emmet G. Sullivan)

APPELLEES' MOTION TO DISMISS THE CONSOLIDATED APPEALS, FOR SUMMARY AFFIRMANCE IN ANY APPEAL, OR FOR DENIAL OF ANY MANDAMUS PETITION INSOFAR AS THE COURT CONSTRUES ANY APPEAL AS A MANDAMUS PETITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Petitioner-Appellant U.S. Department of Treasury ("Treasury") has noticed two appeals, consolidated in this Court, in connection with the decisions of the District Court (Sullivan, J.) granting discovery to Respondents-Appellees in a third-party subpoena proceeding. The Court lacks jurisdiction over the appeals because there is no final order under 28 U.S.C. § 1291. Nor do the appeals fit the collateral-order doctrine. Accordingly, the Court should dismiss the appeals. If the Court finds that it has appellate jurisdiction, it should summarily affirm the relevant District Court orders. Finally, if the Court construes the notices of appeal as mandamus petitions, the Court should – also summarily – deny the petitions.

BACKGROUND

Respondents-Appellees are: (1) three retirees participating in a now-terminated pension plan sponsored by their former employer Delphi Corporation ("Delphi"), which was and remains a parts supplier to General Motors ("GM"), and (2) an association of such retirees (hereinafter collectively "the retirees"). In 2009, the retirees filed a lawsuit in the Eastern District of Michigan to challenge the then-recent termination of their pension plan. In the Michigan litigation, the defendant is the Pension Benefit Guaranty Corporation ("PBGC"), which is the government-entity that insures pension plans and that terminated the plan.

In brief, in the Michigan litigation, the retirees maintain that the termination both was procedurally defective because it could only have been accomplished via a court adjudication (and here the termination instead occurred by agreement between the PBGC and the plan's administrator) and substantively defective because a termination even in a court adjudication can occur only when strict statutory criteria are satisfied (with those criteria being absent here). TA91-96. On the substantive challenge, the retirees allege that, rather than satisfying the strict statutory criteria for termination, the PBGC impermissibly terminated the plan in subservience to the Treasury Department's *ad hoc* Auto Task Force then in existence. TA95-96.[1]

In connection with prosecuting the Michigan litigation, the retirees, in January 2012, served Treasury in this District with what the District Court termed a "narrow" third-party subpoena *duces tecum* seeking "documents created, received or reviewed by three Treasury officials [associated with the Auto Task Force], over a single calendar year, relating only to Delphi." TA70. Treasury soon moved to quash the subpoena, again in this District, on three grounds: that the

[1] References to "TA" are to the Addendum of record materials Treasury filed in this Court accompanying its motion for a stay pending appeal (C.A.D.C. Doc. #1684493 (July 17, 2017)). References to "RA" are to the Addendum of record materials filed in this Court accompanying the retirees' opposition to Treasury's stay motion (C.A.D.C. Doc. #1685279 (July 21, 2017)). In addition, references simply to "District Court" are to the District Court below, while references to the Michigan case will include the modifier of "Michigan."

subpoena sought irrelevant material, created an undue burden on Treasury, and sought cumulative or duplicative information. Because Treasury's relevance objection had also been raised by the PBGC in a pending, separate discovery dispute in Michigan and was "ripe for resolution" before the Michigan federal court, Judge Sullivan stayed proceedings on the Treasury's motion to quash pending the Michigan Court's resolution of the PBGC's relevance objection. TA5 (May 17, 2012 Minute Order).

The Michigan court ruled on the PBGC's relevance objection (denying it) in July 2013. After the retirees then sought to lift Judge Sullivan's stay order and had served additional subpoenas for depositions of Auto Task Force officials, Treasury filed a renewed motion to quash in the District Court, encompassing all of the subpoenas aimed at the Auto Task Force.

In June 2014, the District Court denied the Treasury's motion to quash the subpoenas, except for leaving open the question of whether Treasury could compel former Auto Task Force officials to testify (with the retirees needing to issue new deposition subpoenas to the officials personally, if Treasury could not so compel them). In its 24-page decision, the District Court rejected, one at a time, Treasury's objections to the subpoena *duces tecum* based on relevance, burdensomeness, and duplication. TA67-76.

Subsequently, Treasury produced privilege logs stating that it was withholding roughly 1,270 responsive documents on the basis of various privileges, including the deliberative-process, attorney-client, work-product, and presidential privileges. Believing that the vast majority of the privilege assertions were both procedurally and substantively deficient, and after Treasury refused to address those deficiencies, the retirees moved in July 2015 for an order compelling production of the allegedly privileged materials or, in the alternative, for an *in camera* review. In that motion, on the substance of the assertion of presidential privilege, the retirees asserted, among other things, that the privilege was inapplicable and that the retirees had a "specific need for a narrow universe of highly relevant admissible documents that cannot be obtained elsewhere." D.D.C. ECF No. 30 at 28 (July 9, 2015). The retirees' presentation in its motion to compel was, of course, affected by the limited knowledge they had of the documents from the privilege log (which, again, they believed, was itself deficient).

In June 2016, the District Court ordered Treasury to submit a random sampling of the documents Treasury claimed to be privileged. Then in July 2016, the District Court ruled that Treasury had provided it with "insufficient information to rule on many of Petitioner's claims of privileged and that all documents must be examined in camera." TA10 (Minute Order of July 15, 2016). It, accordingly, required Treasury to submit all of the disputed documents for *in camera* review

and to "submit an ex parte submission clearly articulating why each document, or document portion, is protected by the privilege asserted." *Id.* The District Court warned Treasury against "claims of privilege [that] are frivolous," and threatened sanctions if they were frivolous. *Id.* Thereafter, Treasury withdrew assertions of privilege over roughly 75% of the materials it originally contended were privileged. TA19.

In December 2016, after the full *in camera* review, the District Court, in a 14-page decision,TA36-49, compelled Treasury to produce to Respondents "all of the documents over which it asserted the deliberative process" (TA39), because Treasury had "miserably failed" to substantiate those privilege claims and had "essentially wasted this Court's precious and limited time." TA47. Additionally, the District Court "ordered Treasury to revise its privilege log and submit an updated *in camera* production containing only the documents withheld under the presidential communications privilege" and some documents still at issue involving assertions of attorney-client and work-product privileges. TA48.

On April 13, 2017, in a 17-page decision, the District Court granted in part and denied in part the remaining portion of the retirees' motion to compel. TA17-33. While finding that the presidential privilege applied to all 63 of the documents as to which Treasury invoked the privilege, the Court determined that the retirees had satisfied the "needs showing" outlined in *Dellums v. Powell*, 561 F.2d 242,

249 (D.C. Cir. 1977), and *In re Sealed Case*, 121 F.3d 729, 754 (D.C. Cir. 1997) ("*In re Sealed Case (1997)*"), so as to overcome the privilege. TA26-27. Consequently, it ordered that Treasury disclose the 63 documents to the retirees "forthwith," though it later suspended the timing requirement pending further proceedings. TA33; TA11 (Minute Order of May 17, 2017). The District Court denied the motion to compel as to documents over which Treasury claimed the attorney-client and work-product privileges.

On April 28, 2017, the Treasury moved for a stay pending appeal, and the District Court held a hearing on the motion on May 16, 2017, during which the Court noted that it "has had some very serious concerns about whether the government [has been] proceeding in good faith or not." RA40. At the hearing, Treasury indicated a desire to file a motion for reconsideration of the April 13, 2017 decision requiring disclosure of the documents allegedly covered by the presidential privilege, and the District Court authorized that filing. TA11 (Minute Order of May 17, 2017).

Thereafter, the District Court denied the motion for reconsideration, except that the District Court clarified that Treasury could redact from the documents to be disclosed any material not relating to GM, Delphi, or the PBGC. TA16. In the meantime, Treasury had filed its first notice of appeal on June 12, 2017. Treasury then renewed its motion to stay disclosure pending appeal, which the District Court

denied, setting July 21, 2017 as the date by which Treasury needed to produce the disputed materials. In the order denying the stay request, the District Court indicated the parties should negotiate a "protective order" to ensure confidentiality pending appeal of any materials the Treasury claims to be privileged (TA13 (Minute Order of July 12, 2017)), but Treasury declined to enter negotiations while it sought a stay from this Court pending appeal. *See* RA65. Treasury then filed a second notice of appeal on July 13, 2017, and this Court has since entered an administrative stay of the disclosure date, while it resolves a currently-pending motion presented to it to stay disclosure pending appeal.

ARGUMENT

I. THE COURT SHOULD DISMISS TREASURY'S APPEALS FOR LACK OF JURISDICTION

The Court lacks appellate jurisdiction and therefore should dismiss Treasury's appeals. Treasury noticed two appeals, one within 60 days after Judge Sullivan ordered the production of the 63 documents over which Treasury claimed the presidential privilege, and another after Judge Sullivan denied a stay of the order requiring production pending appeal. Nonetheless, there is no final order to sustain appellate jurisdiction in either instance under 28 U.S.C. § 1291. To be sure, in the context of third-party subpoenas, "a pretrial discovery order may constitute a final appealable order when issued by a district court in an ancillary proceeding, and said district court is not within the jurisdiction of the circuit court

having appellate jurisdiction to review the final adjudication of the main action." *Sik Gaek, Inc. v. Harris*, 789 F.3d 797, 799-800 (7th Cir. 2015). This rule applies, however, "only to ancillary district court decisions *denying* discovery." *Hooker v. Continental Life Ins. Co.*, 965 F.2d 903, 904 n.1 (10th Cir. 1992) (emphasis added). "[A] non-party who wishes to appeal from an order *granting* discovery should resist [the discovery] order, be cited for contempt, and then challenge the propriety of the discovery order in the course of appealing the contempt citation." *Chevron Corp. v. Page (In re Naranjo)*, 768 F.3d 332, 343 (4th Cir. 2014) (internal quotation marks omitted); *Hooker*, 965 F.2d at 904 n.1; *United States v. Columbia Broad. Sys., Inc.*, 666 F.2d 364, 367 n.2 (9th Cir. 1982).

Here, Treasury's proceeding to quash the third-party proceeding does fit the mold of an ancillary proceeding outside of the Circuit in which the main case sits. Yet, Judge Sullivan's order *grants* discovery, rather than *denies* it. As a result, there is no final, appealable order unless and until Treasury "violate[s] the order and incur[s] contempt sanctions." *Id.* Indisputably, it so far has not incurred contempt sanctions; therefore, it has no final order from which to appeal under § 1291.

For another reason too, the District Court's earlier orders requiring production from Treasury and denying a stay pending appeal are not final orders: they did not "end[] the litigation on the merits and leave[] nothing for the court to

do but execute the judgment." *Dhiab v. Obama*, 787 F.3d 563, 566 (D.C. Cir. 2015) (internal quotation marks omitted). From the order requiring the production of the 63 documents purportedly covered by the presidential privilege, the District Court contemplated there may be disputes over Treasury's yet-to-be-done redactions of irrelevant material, such that the District Court expressly noted it was keeping a full set of the un-redacted materials in its possession. TA16. As to the order denying the stay, the District Court anticipated the parties bringing before it a protective order for approval prior to disclosure, which has not occurred due to Treasury's decision not to negotiate one pending its stay request to this Court. RA65.

Nor does the Court have collateral-order appellate jurisdiction. To qualify for the collateral-order interlocutory review, an order must, among other things, be "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). In this instance, Treasury "can gain the right of appeal from the discovery order by defying it, being held in contempt, and then appealing from the contempt order, which would be a final judgment as to [it]." *Corporacion Insular de Seguros v. Garcia*, 876 F.2d 254, 257 (1st Cir. 1989). In such circumstances, it would not have divulged the allegedly privileged material, would have a final contempt order, and could take an appeal from that final order,

meaning, in turn, that it has no need for special relief now under the collateral-order doctrine.

In its stay papers, Treasury argues that it has "never been thought" that the government must submit to the same contempt procedures as a private litigant in order to perfect an appeal and that it would somehow violate the "separation of powers" for the courts to so require. *See* C.A.D.C. Doc. #1685655 at 6, 5 (July 25, 2017) (internal quotation marks omitted) [hereinafter "Treas. Stay Reply"]. To the contrary, this Court and most others have entertained and accepted such a thought, for they have roundly rejected, even where "executive privileges" are at issue, the notion that the government deserves special dispensation from the necessity for obtaining a contempt sanction in order to appeal an otherwise non-final discovery order. *Corporacion Insular de Seguros*, 876 F.2d at 257; *accord In re Kessler*, 100 F.3d 1015, 1016-17 (D.C. Cir. 1996); *Newton v. Nat'l Broad. Co.*, 726 F.2d 591, 593-94 (9th Cir. 1984); *Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 591 F.2d 174, 177 (2d Cir. 1979); *see generally In re Sealed Case*, 151 F.3d 1059, 1064 (D.C. Cir. 1998) ("*In re Sealed Case (1998)*") (distinguishing between, on the one hand, civil and criminal contempt orders requiring *non-parties* to provide discovery for another proceeding, with both types of orders being immediately appealable, and, on the other hand, civil and criminal contempt orders against

parties to the proceeding, only the latter of which is appealable); *see also generally infra* p. 21.

As to the notion that it the separation of powers forbids the judiciary from exercising the contempt power over the executive branch so as to achieve a final order – an argument Treasury seemingly derives from *United States v. Nixon,* 418 U.S. 683 (1974), *see* Treas. Stay Reply at 5 – this Court in *In re Kessler* noted the limits of *Nixon*'s holding. In effect, *Nixon* allows immediate appeals where the President himself is a party to the case and otherwise would need to be held in contempt, an issue that would engender "protracted litigation over whether such an order could even issue against the President." *In re Kessler*, 100 F.3d at 1017. But "the President stands in an entirely different position than other members of the executive branch," and "[c]ontempt orders have been levied against executive branch officials and agencies without even so much as a hint that such orders offend separation of powers." *Id.* Here, no President is a party, in large measure because Treasury alone, not a President, chose to petition the District Court to quash the subpoenas and commenced the lower-court proceeding from which the appeals are attempted. Treasury, its officials, and its attorneys are not, unlike the President, potentially immune from the contempt process that can result in a final, appealable order.

II. IF THE COURT HAS APPELLATE JURISDICTION, IT SHOULD SUMMARILY AFFIRM THE DISTRICT COURT'S ORDERS REQUIRING PRODUCTION OF THE ALLEGEDLY PRIVILEGED DOCUMENTS

Alternatively, if the Court finds that it has jurisdiction to entertain the appeals, it should summarily affirm the relevant District Court orders requiring production of the 63 documents over which Treasury has claimed the presidential privilege. Summary affirmance is appropriate where "the merits of the appeal are so clear that expedited review is warranted." *Billman v. Comm'r*, 847 F.2d 887, 888 (D.C. Cir. 1988) (*per curiam*) (citing *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (*per curiam*)). Moreover, summary affirmance should be granted where "no benefit will be gained from further briefing and argument of the issues presented." *Taxpayers Watchdog, Inc.*, 819 F.2d at 298.

In this instance, the review standards are so deferential to the District Court, and the District Court's examination of the legal issues and facts so detailed and thorough that summary appellate procedures are appropriate. Further, as a result of Treasury's stay motion filed in this Court and the proceedings on the retirees' current motion, the parties will already have presented to this Court the merits of the appeal on two occasions by the time briefing on this motion is complete, making additional, plenary briefing unnecessary. *Cf.* Cir. R. 8(b) (setting forth procedures for disposing of appeal in its entirety upon the filing of a stay motion). Finally, still another reason to dispose of the appeals summarily is the already

lengthy delay the retirees have suffered in this overall litigation, at the hands of both Treasury and its sister government entity the PBGC – delay that the District Court emphasized when denying a stay pending appeal. *See* TA13 (Minute Order of July 12, 2017); *see generally* C.A.D.C. Doc. #1685279 at 1-8 (July 21, 2017) (Appellees' Opp'n to Mot. to Stay).

The issue on the merits is whether the District Court abused its discretion in ordering Treasury to produce the 63 document allegedly subject to the presidential privilege. On such discovery orders, the District Court's discretion is at its apex: "Most district court rulings on [privilege] matters involve the routine application of settled legal principles," and they "are unlikely to be reversed on appeal, particularly when they rest on factual determinations for which appellate deference is the norm." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 110 (2009).

This case easily fits the norm: Judge Sullivan made no errors on the law, and his assessment of the facts and parties' discovery burdens, motivations, and needs is unassailable, especially given the heavy dose of deference this Court should afford. On the law, there are two controlling precedents. In the first, *Dellums v. Powell*, 561 F.2d 242, 245-46 (D.C. Cir. 1977), the Court rejected the contention "that a formal claim of privilege based on the generalized interest of presidential confidentiality, without more, works an absolute bar to discovery of presidential conversations in civil litigation, regardless of the relevancy or

necessity of the information sought." Instead, the presumption associated with the presidential privilege may be overcome where – in what has come to be known as the "needs showing" – a plaintiff makes "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 and citation omitted).

As then stated in the second controlling decision, *In re Sealed Case (1997)*, "[i]f a court believes that an adequate showing of need has been demonstrated, it should then proceed to review the documents *in camera* to excise non-relevant material. The remaining relevant material should be released." 121 F.3d at 745. "The court's task during its *in camera* review is simply to ensure that privileged materials that would not be of use to the subpoena proponent are not released." *Id*. at 759. At that point, the court should release "any evidence that might reasonably be relevant." *Id*.

The District Court correctly applied these standards. In its 17-page decision from April of this year granting the retirees' motion to compel production of the disputed documents – issued after two rounds of *in camera* inspection of the materials – the District Court first found the retirees to have made the requisite showing that the withheld information was "'substantially material to their case'" in Michigan. TA27 (quoting *Dellums*, 561 F.2d at 249). The District Court then

also accepted the retirees' assertion "that the materials are unavailable through any other means." *Id.* Overall, the District Court determined that, "for substantially the . . . reasons advanced by Respondents," they had "demonstrated a need sufficient to overcome the presidential communications privilege." *Id.* In so determining, the District Court summarized at length the detailed showing the retirees had made, *see* TA21-27 (quoting and citing from the retirees' briefing), while at the same time noting that, "[r]ather than substantively engage in the needs analysis or attempt to distinguish the cases upon which Respondents rely, Treasury argue[d] unconvincingly that Respondents' rationale for the material is 'nothing by rank speculation'" (TA27 (quoting Treasury brief)); and as to the retirees' contention that the evidence was not "'available with due diligence elsewhere,'" Treasury did not even "challenge this assertion in its opposition." TA26-27 (quoting *In re Sealed Case (1997)*, 121 F.3d at 754).

Later, after a motion for reconsideration filed by Treasury, the District Court turned to the second step in the presidential-privilege analysis – *i.e.*, the excising of non-relevant material from the documents whose disclosure it had required. Upon still another *in camera* inspection of the materials, the District Court authorized Treasury to redact non-relevant information, so as to produce only "those portions of the documents that relate to General Motors, Delphi Corporation, or [the PBGC]." TA16. The issue came up on reconsideration because, in its original

opposition to the retirees' motion to compel production of the privileged materials, Treasury had not addressed redaction at all. But the District Court still permitted Treasury to file a motion for reconsideration asserting that non-relevant material must be extracted. *See* TA11 (Minute Order of May 17, 2017).

Hence, the case arrives on appeal to this Court in the following posture: (1) the District Court analyzed the proper precedents on presidential privilege; (2) the District Court reviewed the materials *in camera* on repeated occasions; (3) the retirees presented at length their case for why they needed the materials; (4) Treasury presented, as the District Court saw it, at best conclusory opposition arguments; and (5) the District Court, based on its balancing of the retirees' litigation needs against the Executive Branch's need for confidentiality, ordered the disclosure of the 63 documents claimed to be subject to the presidential privilege, with redactions of irrelevant material. Plus, the District Court held two hearings where the parties likewise presented their points and arguments. *See* TA11-12. Under these circumstances, there are no substantial grounds for Treasury to maintain that this case is anything but the typical one whereby an "'interlocutory appeal[] from discovery orders [should] end in affirmance'" due to "'the district court possess[ing] discretion, and review [being] deferential.'" *Mohawk*, 558 U.S. at 110 (quoting *Reise* v. *Board of Regents*, 957 F.2d 293, 295 (7th Cir. 1992)).

If Treasury's stay papers in this Court are indication, it will principally press two arguments against summary affirmance – one procedural and one substantive, neither of which is persuasive. On the procedural point, Treasury has condemned the District Court for supposedly "provid[ing] virtually no explanation for its decision." Treas. Stay Reply at 8. The criticism is unfounded, in light of the volume and content of the analysis the District Court provided in its April 2017 memorandum opinion and elsewhere. On pages 4-5 of that memorandum opinion, Judge Sullivan began by breaking down the categories of materials within the universe of the 63 documents, after which he said: "[f]or the *following* reasons, the Court concludes that while these documents are covered by the presidential communications privilege, Respondent have demonstrated a need sufficient to overcome the privilege." TA20-21 (emphasis added). For the next seven pages, the District Court explained why these materials were highly relevant to the retirees' case and their need for the materials. And in the course of that exegesis, Judge Sullivan also added, as noted already, that he was persuaded by and incorporated the reasoning and presentation set forth by the retirees in their briefing, not challenged in any detail by Treasury.

On top of that, when Treasury moved for reconsideration of the April 2017 decision, the retirees reiterated in a further lengthy presentation the substantial materiality of the disputed documents and their need from *this source* for them.

See D.D.C. ECF No. 51 at 16-28 (May 31, 2017). After a reply from Treasury, Judge Sullivan denied reconsideration, emphasizing that the "Court has expended considerable judicial resources in evaluating Treasury's various claims of privilege over th[e] documents, conducting an *in camera* review of hundreds of documents across multiple rounds of briefing." TA14. Coupling this further acceptance of the retirees' robust presentation with his earlier April 2017 decision, Judge Sullivan met what Treasury calls the "district court's responsibility to find . . . an 'adequate showing of need.'" Treas. Stay Reply at 10 (quoting *In re Sealed Case (1997)*, 121 F.3d at 757).[2]

As to Treasury's likely substantive challenge to the District Court's decision-making, Treasury has made sharp distinction between situations in which the presidential privilege is asserted by a sitting President and a former one, calling this a circumstance where the sitting President seeks to protect his documents (even though President Obama is no longer in office). *See id.* at 8. But it is not

[2] Treasury has especially chastised the District Court for accepting the retirees' assertions that the material contained in the 63 documents is unavailable from another source, *see* Treas. Stay Reply at 9, even though Treasury never challenged the retirees' showing in the District Court. Treasury says it did not need to raise such a challenge because years earlier when originally moving to quash, "the government argued that respondents failed to make the focused demonstration of need necessary to overcome the privilege." *Id.* at 10 (internal quotation marks and citation omitted). But if those long-ago remarks were adequate to keep the issue alive, then Judge Sullivan's straightforward rejection (TA74-76) of them in finding the subpoena *duces tecum* neither cumulative nor duplicative is a sufficient as to why the materials were not available elsewhere.

clear the current Executive at all seeks to protect the former Executive's documents (or that the documents even can be attributed to President Obama at all).

In any event, the presidential privilege assertions here – whether made by the current President, a former one, or just Executive Branch officials – touch on commercial matters from years ago, as opposed to, for instance, sensitive national security or military secrets. Given that backdrop, the needs showing the retirees have made (on more than one occasion to the District Court) should suffice to overcome the presidential privilege, no matter who is invoking it. *See, e.g., Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 447 (1977) (distinguishing "a President's broad, undifferentiated claim of public interest" in communications "from the more particularized and less qualified privilege relating to the need to protect military, diplomatic, or sensitive national security secrets"); *Ctr. for Effective Gov't v. U.S. Dep't of State*, 7 F. Supp. 3d 16, 25 (D.D.C. 2013) (executive's confidentiality concerns are diminished where communication does not implicate "'a quintessential and nondelegable Presidential power' – such as appointment and removal of Executive Branch officials, where separation of powers concerns are at their highest") (quoting *In re Sealed Case (1997)*, 121 F.3d at 752-53).

III. IF THE COURT CONSTRUES THE NOTICES OF APPEAL AS MANDAMUS PETITIONS, THE COURT SHOULD DENY MANDAMUS

This Court has sometimes construed an impermissible notice of appeal as a mandamus petition, and Treasury in its stay papers has invited the Court here to do so as well, notwithstanding that Treasury has not complied with the procedures for seeking mandamus. *See* Fed. R. App. P. 21(a)(2). If the Court does treat Treasury's notices of appeal as petitions for mandamus, it should deny the petitions.

Mandamus is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947). "[I]n keeping with that high standard," "three conditions must be satisfied before a court grants a writ of mandamus: (1) the mandamus petitioner must have 'no other adequate means to attain the relief he desires,' (2) the mandamus petitioner must show that his right to the issuance of the writ is 'clear and indisputable,' and (3) the court, 'in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.'" *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014) (quoting *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380-81 (2004)).

Here, a mandamus request founders at the first criterion because the possibility of a contempt order against Treasury followed by an appeal from that

order constitutes an adequate remedy to obtain review of the District Court's privilege ruling (and without Treasury ever having to disclose the disputed documents). The Court's decision in *In re Kessler*, 100 F.3d 1015 (D.C. Cir. 1996), found that the prospect of a contempt ruling followed by an appeal not only defeats collateral-order appellate jurisdiction, but also negates mandamus relief. *Id.* at 1016-17. While the Court's later decision in *In re Sealed Case (1998)* tempered *Kessler* to some extent, it did so only where the mandamus petition might challenge a discovery ruling against *a party* to the underlying proceeding to which the discovery is relevant, due to the uncertainty as to whether only criminal contempt rulings against a party are immediately appealable. In contrast, *In re Sealed Case (1998)* noted "the different regime for non-parties that allows immediate appeals from orders of either civil *or* criminal contempt." 151 F.3d at 1064 (emphasis added) (citing and discussing, among other authorities, *United States v. Ryan*, 402 U.S. 530 (1971), and *Petroleos Mexicanos v. Crawford Enters., Inc.*, 826 F.2d 392 (5th Cir. 1989), where Supreme Court and Fifth Circuit, respectively, held that appropriate appellate review mechanism was for non-party litigants to appeal from civil or criminal contempt rulings). As a non-party to the Michigan case, Treasury has the adequate remedy of obtaining a contempt sanction and then appealing from that final ruling.

Nor is *In re Kellogg Brown & Root, Inc.* to the contrary. The Court allowed mandamus there because the petitioning litigant was *a party* to the proceeding (pending in this Circuit) in which discovery was sought. Again, because of the uncertainty that an appeal would lie only from a *criminal* contempt ruling against a party – a concern not at issue in the current third-party subpoena proceeding – "forcing a party to go into contempt [was] not an 'adequate' means of relief in th[ose] circumstances." 756 F.3d at 761.

In addition to the first prong of the mandamus test here not being satisfied, the others are not either. As explained earlier, the District Court committed no legal or factual errors at all, let alone the "clear" ones that might engender mandamus relief. *Id.* at 762. And the long history of litigation between the retirees and Treasury – whereby the District Court has criticized Treasury's behavior as nearing bad faith, *e.g.*, TA47, RA40 – makes this matter an unlikely candidate for this Court's discretionary exercise of mandamus jurisdiction to rescue Treasury. *See generally* RA15-16 (Sixth Circuit denying mandamus petition to PBGC in Michigan litigation in similar circumstances involving production of allegedly privileged material).

CONCLUSION

The Court should dismiss the appeals for lack of appellate jurisdiction; alternatively, it should summarily affirm the District Court's orders requiring

disclosure of the 63 disputed documents insofar as this Court has appellate jurisdiction; or alternatively, it should deny mandamus relief if the Court construes the notices of appeals as requests for mandamus.

Dated: July 31, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LENGTH LIMITS

The undersigned hereby certifies that the foregoing motion complies with the length limits of Fed. R. App. P. 27(d)(2) and contains 5,191 words as calculated by Microsoft Word 2010, the word processing system used to prepare this document.

July 31, 2017 /s/ Anthony F. Shelley

CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2017, I electronically filed the foregoing **APPELLEES' MOTION TO DISMISS THE CONSOLIDATED APPEALS, FOR SUMMARY AFFIRMANCE IN ANY APPEAL, OR FOR DENIAL OF ANY MANDAMUS PEITITON INSOFAR AS THE COURT CONSTRUES ANY APPEAL AS A MANDAMUS PETITION** with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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