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

RESPONDENTS' OPPOSITION TO PETITIONER'S RENEWED MOTION FOR STAY

Respondents respectfully file this opposition to the motion to stay the Court's June 7, 2017 Order pending appeal, filed by Petitioner U.S. Department of the Treasury (the "Treasury").

Introduction

On April 13, 2017, the Court ordered the Treasury to produce to Respondents the 63 documents[1] over which the Treasury had asserted the presidential communications privilege, *see* ECF No. 44 at 1, on the grounds that Respondents had "made at least a preliminary showing of necessity for [the] information" in that the information "is not merely demonstrably relevant but indeed substantially material to their case." ECF No. 45 at 11 (internal quotation marks omitted). The Treasury subsequently moved for reconsideration, ECF No. 50, and on June 7,

[1] "Through its *in camera* review, the Court has determined that only 21 of the 63 documents are 'unique' – the remaining 42 documents are either duplicate copies or drafts of those 21 documents." ECF No. 53 at 2 n.1.

2017, the Court granted the Treasury's reconsideration motion, modifying the April 13, 2017 Order to hold that the Treasury need produce only "those portions of the documents that relate to General Motors, Delphi Corporation, or the Pension Benefit Guaranty Corporation," and further Ordering the Treasury to "produce the redacted versions of those 63 documents to respondents by no later than June 30, 2017." ECF No. 53 at 3.

The Treasury now moves for a stay of the June 7, 2017 Order pending appeal. ECF No. 58. Because the Treasury's motion fails to demonstrate that it is entitled to the "extraordinary remedy" of a stay under the traditional four-factor test, *Cuomo v. United States NRC*, 772 F.2d 972, 978 (D.C. Cir. 1985), the Treasury's motion should be denied.

First, as the Supreme Court made clear in *Mohawk Industries, Inc. v. Carpenter*, the harm the Treasury complains of here is not "irreparable." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 109 (2009). Second, the Treasury has not demonstrated a likelihood of success on the merits, especially given that privilege determinations like the ones at issue in the Court's Order are subject to deference and "unlikely to be reversed on appeal." *Id.* at 110. Third, a stay would subject Respondents to substantial harm, as it would further delay the resolution of the underlying litigation (which is nearly in its eighth year), while the production of these documents will allow that action to recommence and move quickly to summary judgment. Finally, the public interest does not favor a stay.

Background

Respondents, current and former salaried employees of the Delphi Corporation ("Delphi"), are also plaintiffs in a lawsuit filed in the Eastern District of Michigan (the "Michigan Court"), *Black v. PBGC*, Case No. 2:09-cv-13616, which challenges the 2009 termination of their pension plan (the "Salaried Plan" or the "Plan") by the Pension Benefit

Guaranty Corporation ("PBGC").[2] The PBGC purported to accomplish that termination via an agreement with the Plan's administrator, Delphi, in connection with a broad settlement reached among Delphi, General Motors ("GM"), and the PBGC. Respondents allege in Count One of *Black* that this agreement itself was unlawful because ERISA requires the PBGC to apply for a termination decree from a United States district court, and that such a decree may issue only upon a finding by the court that a plan "must" be terminated in order to "protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the [PBGC insurance] fund." 29 U.S.C. § 1342(c)(1). Counts Two and Three of Respondents' complaint allege additional procedural infirmities with the PBGC's termination-by-agreement.[3] Respondents further allege in Count Four of *Black* that the PBGC could not have satisfied ERISA's statutory requirements for termination had it actually sought court approval because the PBGC could not have carried its burden to show that the Salaried Plan needed to be terminated for any of the statutorily permissible reasons. *See Black v. PBGC*, ECF No. 145 ¶ 56.

Black was filed over seven years ago in the Michigan Court. In that time, the Michigan Court has denied two dispositive motions filed by the PBGC, expressly on the grounds that discovery was necessary for the resolution of Respondents' claims against the PBGC.

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[2] References to the underlying litigation, *Black v. PBGC*, Case No. 2:09-cv-13616 (E.D. Mich.), are cited herein as *Black*, and references to filings in that court are styled as *Black v. PBGC*, ECF No. ___.

[3] In Count Two, Respondents allege that, even if ERISA allows a termination-by-agreement with a plan administrator, the law is well-settled that any actions undertaken by a plan administrator in connection with a plan termination are fiduciary in nature, and therefore may only be valid if done in accordance with ERISA's duties of loyalty and prudence. *See Black v. PBGC*, ECF No. 145, ¶ 43, citing 29 U.S.C. §§ 1002(21)(A),1104(a). In Count Three, Respondents allege that even if ERISA allows for a termination-by-agreement with a conflicted fiduciary, the Constitution does not. *See id*. ¶ 52.

Nonetheless, the PBGC (and the Treasury) resisted any discovery for approximately one year. Respondents accordingly moved to compel, which was effectively granted by order of the Michigan Court on September 1, 2011 (the "September 1, 2011 Order"). *Black v. PBGC*, ECF No. 193. In the September 1, 2011 Order, Judge Tarnow defined the scope of discovery in *Black v. PBGC*, stating that:

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

Id. at 3-4.

In entering this Order, the Michigan Court determined that the most efficient way to proceed was to permit Respondents to take discovery on their substantive claim (Count Four) alleging that the PBGC could not meet the statutory criteria for termination (the "Termination Inquiry"), and then to address the remaining statutory and constitutional questions posed by Counts One through Three, if necessary, after discovery.

More than five years ago, in January 2012, Respondents served the Treasury with what this Court has described as a "narrow" subpoena *duces tecum,* seeking "documents created, received or reviewed by three Treasury officials, over a single calendar year, relating only to Delphi." ECF No. 27 at 17. In February 2012, the Treasury moved to quash the subpoena on three grounds: relevance, undue burden, and cumulative/duplicative information. *See* ECF No. 1. Because the Treasury's relevance objection had also been raised by the PBGC in a separate discovery dispute and was "ripe for resolution" before the Michigan Court, this Court stayed

proceedings on the Treasury's motion to quash pending the Michigan Court's resolution of the PBGC's relevance objection. May 17, 2012, Minute Order.[4]

This Court denied the Treasury's motion to quash the subpoena *duces tecum* in June 2014, issuing a 24 page memorandum opinion in which the Court directed 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." ECF No. 27 at 23 n.7. Regarding the Treasury's relevance objection, the Court noted that "two judges in the underlying action evaluated the question of relevance for very similar materials, sought for very similar reasons, and found them relevant." *Id.* at 16. Accordingly, the Court held that the "law of the case" doctrine supported "this Court's decision to rely on the relevance analysis performed by the Eastern District of Michigan." *Id*.

Mindful of the Court's direction, Respondents agreed to enter into a stipulation and protective order with the Treasury, *see* ECF No. 28, that among other things, allowed the Treasury until March 2015 to complete a rolling production of responsive non-privileged documents, an additional sixty days to document its privileges in a privilege log, and the opportunity to designate documents as "confidential" under the terms of the protective order. *Id*. ¶¶ 4, 7, 8. Further, in the stipulation and protective order, Respondents agreed to shrink the scope of the already-narrow subpoena *duces tecum*, such that the Treasury could utilize a narrow set of search terms to determine responsiveness for electronic records. *Id*. ¶ 2. Additionally, the Treasury would be deemed to have satisfied its obligations under the subpoena if it conducted a manual search of documents it had previously produced to the Special Inspector General for the

[4] In 2013, the Treasury filed in this Court a renewed motion to quash the subpoena *duces tecum*, asserting, in addition to the three objections previously raised, a "standing" objection. *See* ECF No. 27 at 7.

Troubled Asset Relief Program ("SIGTARP"), and identified as responsive "documents relating to Delphi, the Delphi Pension Plans, or the release and discharge by PBGC of liens and clams relating to the Delphi Pension Plans." *Id*.

In June 2015, the Treasury produced two privilege logs to Respondents stating that the Treasury was withholding roughly 1,270 responsive documents on the basis of various privileges, the bulk of which were assertions of the deliberative process privilege, along with assertion of the presidential communications privilege, the attorney-client privilege, and the work-product doctrine. Respondents believed the vast majority of the privilege assertions were both procedurally and substantively deficient. After the Treasury refused to address those deficiencies, Respondents moved for an order compelling their production, or in the alternative for an *in camera* review. ECF No. 30. In that motion, Respondents argued that, with regard to the documents over which the Treasury had asserted the presidential communications privilege, not only was the privilege inapplicable, but also that Respondents had a "specific need for a narrow universe of highly relevant admissible documents that cannot be obtained elsewhere." *Id.* at 28.

In July 2016, the Court determined, after reviewing a random sampling of documents submitted to chambers for *in camera* review, that the Treasury had failed to provide sufficient information to support many of its privilege claims, and allowed the Treasury the opportunity to further supplement its privilege assertions through an *ex parte* submission clearly articulating why each document, or document portion, was protected by the privilege asserted. July 15, 2016, Minute Order.

In December 2016, after reviewing the withheld documents *in camera*, the Court concluded that, despite having "had ample opportunities to provide sufficient detail to enable the

Court to assess its deliberative process privilege claims," the Treasury had "miserably failed to do so," and had "essentially wasted this Court's precious and limited time, notwithstanding the Court's stern warning in its Minute Order dated July 15, 2016." ECF No. 42 at 12. The Court accordingly ordered the Treasury "to produce to Respondents all of the documents over which it asserted the deliberative process in isolation." ECF No. 45 at 2-3. "Noting that Treasury had withdrawn nearly 75% of its privilege assertions when first ordered to make an *in camera* submission, the 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, the attorney-client privilege, or the work product doctrine." *Id*. at 3.

On January 10, 2017, the Treasury provided to Respondents a revised privilege log "consist[ing] of redacted versions of the justification sheets provided to the Court for inspection *in camera*." *See* ECF No. 43 at 1; ECF No. 51-2 (redacted privilege log provided to Respondents).

On April 13, 2017, the Court granted in part and denied in part the remaining portion of Respondents' motion. ECF No. 44. While finding that the presidential communications privilege applied to the 63 documents at issue here, the Court applied the "needs analysis" outlined in *In re Sealed Case*, 121 F.3d 729, 754 (D.C. Cir. 1997), and *Dellums v. Powell*, 561 F.2d 242, 249 (D.C. Cir. 1977), to the 63 documents at issue. ECF No. 45 at 10-11. Noting that the Treasury failed to "substantively engage" in that analysis and did not "attempt to distinguish the cases upon which Respondents rely," the Court found that, "for substantially the same reasons advanced by Respondents," Respondents had made "a 'preliminary showing of necessity for information that is not merely demonstrably relevant but indeed substantially material to their case.'" *Id*. at 11 (quoting *Dellums*, 561 F.2d at 249).

On April 28, 2017, the Treasury moved for a stay pending appeal, in order to allow the Treasury additional time "to consider[] whether to appeal" the Court's April 13, 2017 Order. ECF No. 46-1 at 1. The Court held a hearing on Treasury's motion to stay 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." ECF No. 51-1 at 4:10-11. The Treasury thereafter indicated a desire to file a motion for reconsideration, and on May 17, 2017, the Court issued a Minute Order establishing a briefing schedule for the Treasury's motion for reconsideration, noting that the parties should address, *inter alia*, "(1) whether respondents have adequately made a 'showing of need' for documents otherwise protected under the presidential-communications privilege; and (2) the standard by which the Court should determine, during an in camera inspection, whether the documents at issue are 'relevant' to respondents' case." May 17, 2017, Minute Order. The Minute Order also vacated the portion of the April 13, 2017 Order requiring the documents at issue to be "forthwith produced." *Id*.

On June 7, 2017, the Court granted the Treasury's reconsideration motion, modifying the April 13, 2017 Order to hold that the Treasury need produce to Respondents only "those portions of the documents that relate to General Motors, Delphi Corporation, or the Pension Benefit Guaranty Corporation," and further Ordering the Treasury to "produce the redacted versions of those 63 documents to respondents by no later than June 30, 2017." ECF No. 53 at 3.

On June 12, 2017, the Treasury filed a notice of appeal with the Court, *see* ECF No. 54, indicating its intention to appeal, *inter alia*, the Court's Orders of April 13, 2017 and June 7, 2017. On June 19, 2017, the Treasury moved for a stay of the Court's June 7, 2017 Order, pending the adjudication of the appeal, styled as a renewed motion for stay. ECF No. 58.

Argument

"[G]ranting a stay pending appeal is 'always an extraordinary remedy,' and the moving party carries a heavy burden to demonstrate that the stay is warranted." *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 988, 990 (D.D.C. 2006) (quoting *Bhd. of Ry. & S.S. Clerks, etc. v. Nat'l Mediation Bd.*, 374 F.2d 269, 275 (1966), and citing *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985)). A motion for a stay pending appeal is evaluated pursuant to the same four factors typically considered in preliminary-injunction proceedings:

> (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.

Judicial Watch v. Nat'l Energy Policy Dev. Grp., 230 F. Supp. 2d 12, 14 (D.D.C. 2002) (Sullivan, J.) (quoting *Cuomo*, 772 F.2d at 974). "Although these factors are considered on a sliding scale, such that a strong showing of one factor may offset a relatively weaker showing on another, '[t]he first two factors . . . are the most critical.'" *Mann v. Wash. Metro. Area Transit Auth.*, 185 F. Supp. 3d 189, 194 (D.D.C. 2016) (quoting *Nken v. Holder*, 556 U.S. 418, 427 (2009)). Here, none of the four factors favors the imposition of a stay.

A. The Treasury Cannot Show Irreparable Harm

The Treasury's motion fails at the outset because it does not make the necessary showing of irreparable harm. *See, e.g., FTC v. Boehringer Ingelheim Pharms., Inc.*, No. 09-mc-564, 2017 U.S. Dist. LEXIS 36816, at *11 (D.D.C. Mar. 15, 2017) (in evaluating motions for stay pending appeal, "'[a] showing of irreparable harm is crucial'") (quoting *FTC v. Church & Dwight Co.,* , 756 F. Supp. 2d 81, 83 (D.D.C. 2010)). In order to "establish irreparable harm, '[a] party moving for a stay is required to demonstrate that the injury claimed is both certain and great.'"

In re Special Proceedings, 840 F. Supp. 2d 370, 374 (D.D.C. 2012) (Sullivan, J.) (quoting *Cuomo,* 772 F.2d at 974).

The Treasury asserts that it will suffer irreparable harm absent a stay because, where "an order directs an agency to produce privileged documents," compliance with that Order supposedly """let[s] the cat out of the bag, without any effective way of recapturing it if the district court's directive [is] ultimately found to be erroneous."""" ECF No. 58 at 3 (quoting *Judicial Watch, Inc., v. Dep't of Justice*, 432 F.3d 366, 369 (D.C. Cir. 2005), quoting *Irons v. FBI*, 811 F.2d 681, 683 (1st Cir. 1987)). However, the authority that the Treasury relies upon predates the Supreme Court's decision in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), where the Court held that "postjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality of . . . privilege[s]." *Id.* at 109.

Mohawk is particularly instructive because the Supreme Court there essentially rejected the very argument that the Treasury here asserts. *See id*. at 108 (noting petitioner's argument that a party's right to maintain attorney-client confidences would be "irreparably destroyed absent immediate appeal of adverse privilege rulings") (quotation marks omitted). Contrary to the Treasury's assertions here, *Mohawk* instructs that "Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence." *Id.* at 109.

It is telling that the Treasury's authorities all predate the Supreme Court's 2009 *Mohawk* decision. *See* ECF No. 58 at 3 (citing cases from 1979-2005). Not surprisingly, following the Supreme Court's decision in *Mohawk*, most courts in this Circuit have found that the production of purportedly privileged documents prior to appellate review does not constitute irreparable

harm because there will be sufficient remedies available post-appeal. *See, e.g., Boehringer*, 2017 U.S. Dist. LEXIS 36816, at *14-15 ("Boehringer will have an adequate remedy in the unlikely event its appeal succeeds – an order vacating this Court's decision and directing that the FTC destroy the documents in question and make no use of them in its investigation"); *United States ex rel. Barko v. Halliburton Co.*, 4 F. Supp. 3d 162, 169 (D.D.C. 2014) ("as the Supreme Court stated in *Mohawk*, any subsequent review that somehow finds the documents protected could be easily remedied. The Court of Appeals could simply vacate and remand for a new trial where the protected material and its fruits are excluded from evidence").

Respondents note that the D. C. Circuit has, in one post-*Mohawk* case, suggested that the harm associated with the erroneous disclosure of documents covered by the attorney-client privilege could be sufficiently irreparable to justify mandamus relief, *if* there is a case of "clear error" involving a "consequential attorney-client privilege" issue. *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014) (quoting *Mohawk*, 558 U.S. at 110-12). The situation in *Kellogg*, however, was materially different from this case in that: (1) it came to the Court of Appeals via a mandamus petition, in which the potential harm of disclosure was only assessed *after* the petitioner had already proven clear error *and* an entitlement to relief; and (2) it involved the potential disclosure of documents covered by the attorney-client privilege, which is absolute. In contrast, the Treasury here is not seeking to correct a "clear error" in a consequential attorney-client privilege ruling, but rather asks the court to grant it a stay pending an appeal of an adverse relevancy ruling on a *qualified* executive privilege. That difference is significant. As one court very recently noted in denying a stay pending an appeal of an adverse ruling on the work-product doctrine (which, like the presidential communications privilege, is also qualified), "[s]urely, if a post-judgment remedy is sufficient to address a challenge to a trial court's improper disclosure of

documents protected by attorney-client privilege, it is adequate to correct Boehringer's claimed violation of work-product protection in the off chance its appeal succeeds here." *Boehringer*, 2017 U.S. Dist. LEXIS 36816, at *17 (citing *Church of Scientology of California v. United States*, 506 U.S. 9, 16 n.9 (1992)).[5]

Significantly, while a party waits for appellate review, "protective orders are available to limit the spillover effects of disclosing sensitive information." *Mohawk*, 558 U.S. at 112. Indeed, after the PBGC was ordered by the Michigan Court to produce documents over which it had asserted various privileges, the Sixth Circuit rejected a mandamus petition by the PBGC for just this reason:

> There are ways for [a party] to prevent or minimize the public disclosure of information that it believes to be privileged until post-judgment appeal becomes available. [The party] can move the district court to issue protective orders at the discovery stage upon a showing of "good cause." [The party] could also move the court to place those documents under seal by showing "compelling reasons" that the interests of privacy outweigh the public's right to know.

In re Pension Benefit Guar. Corp., No. 14-2012, 2014 U.S. App. LEXIS 24953, at *2-3 (6th Cir. Sept. 23, 2014) (internal citations omitted). In fact, Respondents subsequently entered into exactly such a protective order with the PBGC (ECF No. 48); and Respondents have on numerous occasions offered to enter into a similar protective order with the Treasury, in which Respondents would agree to maintain the confidentiality of the 63 documents covered by the June 7, 2017 Order until the Treasury's appeal of that Order is adjudicated. The Treasury declined, further undermining its claim of "irreparable harm." *See, e.g., Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 117 (D.D.C. 2003) (Sullivan, J.) (noting that the law is well settled

[5] Boehringer thereafter sought a stay pending appeal from the Court of Appeals, which was also denied because that court found that the "Appellant has not satisfied the stringent requirements for a stay pending appeal." *FTC v. Boehringer*, Case No. 16-5356 (D.C. Cir.) May 17, 2017 Order, Document #1675593 (internal citations omitted).

in the preliminary-injunction context that a "'movant does not satisfy the irreparable harm criterion when the alleged harm is self-inflicted'") (quoting *Lee v. Christian Coalition of Am., Inc.*, 160 F. Supp. 2d 14, 33 (D.D.C. 2001)).[6]

Though the Treasury's renewed stay motion fails to address the Supreme Court's discussion of irreparable harm in *Mohawk* (or even any post-*Mohawk* cases), Respondents note that the Treasury has previously asserted that *Mohawk* is inapposite to the question of whether the Treasury will suffer irreparable harm absent a stay. *See* ECF No. 49 at 2. This is demonstrably incorrect. In fact, while the United States in *Mohawk* urged the Court to allow collateral order appeals where "certain governmental privileges" were implicated, the Court declined the invitation, noting that it "express[ed] no view" on that issue. *Mohawk*, 558 U.S. at 609 n.4. Nor has the Treasury offered a credible explanation as to why a protective order and the other post-appeal remedies discussed in *Mohawk* (which the Supreme Court has held preclude a finding of irreparable harm in the context of absolute privileges) are insufficient to prevent the Treasury from suffering irreparable harm in the context of the presidential communications privilege (which, again, is qualified, and so carries with it the possibility that it might be pierced).

While the Treasury makes vague assertions about "separation of powers" and the "President's unique constitutional role," ECF No. 58 at 3, these musings fall short of the "certain

[6] Notwithstanding the Treasury's rejection of Respondents' offer, Respondents have no objection to the issuance of a temporary protective order to govern the treatment of the relevant portions of these documents "to limit the spillover effects" of compliance with the June 7, 2017 Order pending appellate review. *Mohawk*, 558 U.S. at 112. Nor is the Treasury's consent necessary for such an order. *See, e.g.*, *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 785 (3d Cir. 1994) ("we have no question as to the court's jurisdiction to [enter protective orders] under the inherent 'equitable powers of courts of law over their own process, to prevent abuses, oppression, and injustices'") (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 (1984) (quoting *Int'l Prods. Corp. v. Koons*, 325 F.2d 403, 407-08 (2d Cir. 1963)).

and great" harm necessary to justify a stay. *In re Special Proceedings*, 840 F. Supp. 2d at 374. Indeed, the implication of the Treasury's argument is that a party should always have the right to a stay and immediate interlocutory appeal over all discovery disputes involving the presidential communications privilege. But, given that a party generally will not have such a right even when appealing a ruling on the attorney-client privilege, which is absolute, it cannot be that an appeal involving a qualified executive privilege would require a stay as a matter of course.[7]

Moreover, the Treasury's assertion that this case presents such constitutional concerns is not credible given that the incumbent President has not invoked the presidential communications privilege. As the D.C. Circuit noted in *Dellums*, it is "of cardinal significance, in the controversy *now before this court*, that the claim of privilege is being urged solely by a former president, and there has been no assertion of privilege by an incumbent president." *Dellums v. Powell*, 561 F.2d 242, 247 (D.C. Cir. 1977) (emphasis added). The court went on to emphasize the primacy of the views of the incumbent president in the analysis:

> Absence of support from the incumbent at least indicates that the risk of impairing necessary confidentially is attenuated. . . . [I]t is the new President who has the information and attendant duty of executing the laws in light of current facts and circumstances, and who has the primary, if not the exclusive, responsibility of deciding when presidential privilege must be claimed, when in his opinion the need of maintaining confidentiality in communications, in which of course it is he who has the on-going interest, outweighs whatever public interest or need may reside in disclosure. . . . Assuming [the privilege] may be asserted by someone other than the sitting president . . . the *significance* of the assertion by a former president is diminished when the succeeding president does not assert that the

[7] Quoting an amicus brief filed by the United States in *Mohawk*, the Treasury has previously asserted that "[d]ocuments covered by the presidential communications privilege stand on a different footing from documents covered by other privileges because of the '"structural constitutional grounding [of the privilege] under the separation of powers, relatively rare invocation, and unique importance to governmental functions."'" ECF No. 49 at 3 (quoting *Mohawk*, 558 U.S. at 113, quoting Brief for United States at 28). As noted above, the Supreme Court certainly did not endorse this position in *Mohawk*. Additionally, even if there were some merit to the argument, this case presents neither separation of powers nor governmental function concerns.

> document is of the kind whose nondisclosure is necessary to the protection of the presidential office and its ongoing operation. The former president's assertion has a cast of history – at first recent history, and ultimately mere history – and his claim has less significance as an assertion of the current needs of the office. Such lesser significance does not open the door to public disclosure, but only to consideration whether the claim is overcome by a showing of other need, here litigating need.

Id. at 247-48 (quotations omitted and emphasis in original).

These passages make clear that courts are to look to the *incumbent President*, rather than a former president, in assessing the significance of assertions of presidential privilege. The Supreme Court made the same point in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), holding that "it must be presumed that the incumbent President is vitally concerned with and in the best position to assess the present and future needs of the Executive Branch, and to support invocation of the privilege accordingly." *Id*. at 449. Here, of course, there has been no suggestion from the incumbent President of the United States that he believes maintaining the confidentiality of these 63 documents is necessary to the needs of the Executive Branch.

There are additional reasons to be skeptical of the Treasury's assertions in this regard. First, "this is not a case involving 'a quintessential and nondelegable Presidential power' – such as appointment and removal of Executive Branch officials, where separation of powers concerns are at their highest." *Ctr. for Effective Gov't v. U.S. Dep't of State*, 7 F. Supp. 3d 16, 25 (D.D.C. 2013) (quoting *In re Sealed Case*, 121 F.3d 729, 752-53 (D.C. Cir. 1997))). Instead, the declaration supporting the Treasury's assertion of the presidential communications privilege over these documents asserts that these documents "relate to the President's decisions as to how the United States should address the financial distress of several of its large automobile corporations," ECF No. 35-3 ¶ 7, and "what actions the United States should take with respect to the financial collapse of General Motors and other U.S. automobile companies." *Id*. ¶ 10. In doing so, the President, through Dr. Summers and Secretary Geithner, is said to have provided

"marching orders" that these decisions should be made according to a "commercially-reasonable standard." ECF No. 15-12 (Testimony before House Oversight Committee) at 44. This is a far cry from the sorts of constitutional concerns present in the cases relied upon by the Treasury.

Furthermore, "[c]onfidentiality is the touchstone of the [presidential communications] privilege," *Ctr. for Effective Gov't,* 7 F. Supp. 3d at 24, but these documents do not appear to have the traits typically associated with confidentially. For example, "there is no evidence that [these documents were] intended to be, or ha[ve] been treated as, a confidential communication." *Id*. at 25. Indeed, these are "non-classified document[s] . . . that lack[] any inherent (or claimed) basis for secrecy. . . . As such, the claim of the privilege is absent of any 'need to protect military, diplomatic, or sensitive national security secrets,' but instead it 'depends solely on the broad, undifferentiated claim of public interest in the confidentiality of' the document[s]." *Id*. (quoting *United States v. Nixon*, 418 U.S. 683, 706 (1974)). Finally, "the 'President's ability to communicate his [final] decisions privately' is not implicated," as the bulk of these documents were "distributed far beyond the President's close advisers," *id*. (quoting *In re Sealed Case*, 121 F.3d at 746), while never being seen by the President. Indeed, most of the documents in question were circulated widely among the auto team, none of whom, except for Dr. Summers, were considered Presidential advisors.

B. The Treasury Has Shown No Likelihood of Success on the Merits

The Treasury's argument on the merits is equally infirm. Typically, it is not enough to raise "a 'serious legal question' on the merits" to obtain a stay; rather, "a movant must show a likelihood of success on the merits" to succeed. *In re Special Proceedings*, 840 F. Supp. 2d 370, 372 (D.D.C. 2012). The Treasury does not come close to making the requisite showing.

In its April 13, 2017 Opinion, the Court applied the well-settled needs analysis in making its determination. *See* ECF No. 45 at 10 (presidential communications privilege can be

overcome by a demonstration that (1) "the subpoenaed material likely contains evidence 'directly relevant to issues that are expected to be central to the trial;' and (2) that the evidence 'is not available with due diligence elsewhere'") (quoting *In re Sealed Case*, 121 F.3d 729, 754 (D.C. Cir. 1997)).

In opposing Respondents' challenge to the presidential communications privilege, the Treasury conceded that the privilege could be overcome by a showing of sufficient need, ECF No. 35 at 23, and did not contest Respondents' assertion that the material was unavailable through other means. ECF No. 45 at 11. However, "[r]ather than substantively engage in the needs analysis or attempt to distinguish the cases upon which Respondents rely," the Treasury argued "unconvincingly that Respondents' rationale for the material is 'nothing but rank speculation.'" *Id*. at 11 (quoting ECF No. 35 at 24).

Applying the needs analysis (after having conducted an *in camera* review of the 63 documents at issue), the Court found that Respondents had made "a preliminary showing of necessity for information that is not merely demonstrably relevant but indeed substantially material to their case." *Id*. (quoting *Dellums v. Powell*, 561 F.2d 242, 249 (D.C. Cir. 1977)). As the Court noted:

> [T]he withheld material …may show pressure exerted by Treasury or the White House to terminate the Delphi Plan for impermissible or political reasons, an issue at the core of the parties' dispute in the Michigan case. In that case, Respondents allege that the PBGC's termination of the Delphi Plan was not justified by the applicable statute but instead the result of undue pressure imposed by Treasury and the Auto Task Force.

ECF No. 45 at 10-11 (internal citations omitted).

The Treasury suggests now, for the first time, that "this Court did not apply the correct standard when it held, notwithstanding Treasury's motion for reconsideration, that respondents had made a showing of need sufficient to overcome the applicability of the presidential

communications privilege to the 63 documents." ECF No. 58 at 4-5. This is a curious argument to make, given that the Treasury has on numerous occasions conceded that the needs analysis the Court employed was appropriate, and never presents an alternative standard which it believes should have governed the Court's analysis.

For example, in its opposition to Respondents' motion to compel, ECF No. 35, the Treasury argued that, "[t]o make the required showing [of need], the party seeking to overcome the privilege must show that the withheld material 'is directly relevant to issues that are expected to be central to the trial. *Id*. at 23 (quoting *In re Sealed Case*, 121 F.3d at 754). While noting that "a party seeking to overcome the privilege in a civil case must make an even more persuasive demonstration of need than that required in *Sealed Case*, a criminal case," *id*., the Treasury further asserted that the relevant question was whether Respondents had shown that "the material that Treasury has withheld under the presidential communications privilege 'is directly relevant to issues that are expected to be central to the trial' in *Black I*." *Id*. at 24[8] (quoting *In re Sealed Case*, 121 F.3d at 754). Similarly, in its reconsideration motion, the Treasury again conceded that the presidential communications privilege can be overcome by an adequate showing of need, s*ee* ECF No. 50-1 at 6 (citing *In re Sealed Case*, 121 F.3d at 745), and that, in civil cases, where a litigant has "made 'at least a 'preliminary showing of necessity' for information,'" to the effect that the information is "'not merely 'demonstrably relevant' but indeed substantially material to their case,'" the need showing is satisfied. *Id*. at 8 (quoting *Dellums*, 561 F.2d at 249). Having twice urged this Court to use the very needs standard that it actually employed, the Treasury's contention that the Court employed the wrong legal standard

[8] The Treasury then cites the same needs analysis again, stating that the "motion to compel should therefore be denied because of their failure to make the 'focused demonstration of need' that overcoming the privilege would require." *Id*. (quoting *In re Sealed Case*, 121 F.3d at 746).

comes far too late to constitute a valid basis for appeal, let alone one likely to succeed. *See, e.g., DHL Express, Inc. v. NLRB*, 813 F.3d 365, 371 (D.C. Cir. 2016) ("We are, of course, precluded from considering any issue raised by a party for the first time on appeal").

Moreover, none of the authorities the Treasury relies upon suggest that the Court's needs analysis was incorrect. While the Treasury puts great weight on the distinction between criminal and civil proceedings,[9] *see* ECF No. 58 at 5 n.2, the fact is that the D.C. Circuit's decision in *Dellums* also occurred in the context of civil litigation, and the needs analysis articulated in *Dellums* is precisely the analysis utilized by this Court in the Orders under appeal. *See* ECF No. 45 at 11 (quoting *Dellums*, 561 F.2d at 249). And, as Respondents demonstrated in opposing the Treasury's reconsideration motion, the Treasury's attempts to distinguish *Dellums* are not only untimely, but also unavailing. *See* ECF No. 51 at 14-16.

Given that the Treasury cannot make a credible challenge to the legal standard underlying the Court's Orders, the Treasury suggests that it will also appeal the Court's relevance determination. *See* ECF No. 58 at 5. The Treasury offers no authority (other than conclusory assertions) suggesting that such a relevance challenge would be successful, especially given that

[9] The Treasury puts a great deal of reliance on language from the Supreme Court's decision in *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 384 (2004) in suggesting that the Court's needs analysis was somehow in error. The Treasury's reliance on *Cheney* is misplaced. As Respondents have previously noted, the Supreme Court emphasized in *Cheney* that the Executive's interests were particularly acute in that case because the Vice President was actually a party to the litigation. *See, e.g., id*. at 381 (noting that a case in which the Vice-President is not an actual party in the case "might present different considerations"). Here by contrast, no current or former member of the Executive Branch is a party to the case or a subject of the subpoena, and so the concerns presented by the *Cheney* litigation, where "[t]he discovery requests [were] directed to the Vice President and other senior Government officials," are not present here. *Id*. at 385. Additionally, the Court there noted that the "specificity of the subpoena" in question can "serve[] as an important safeguard against unnecessary intrusion into the operation of the Office of the President." *Id*. at 387. Here, not only is the subject of the subpoena an agency as opposed to the Office of the President, but the Court has already found that Respondents' subpoena is "narrow." ECF No. 27 at 17.

its relevance argument has already been considered and rejected, both by this Court and the Michigan Court. *See, e.g.*, ECF No. 27 at 16 (denying the Treasury's relevance objection and noting that "two judges in the underlying action evaluated the question of relevance for very similar materials, sought for very similar reasons, and found them relevant").

The prospects for the Treasury's proposed appeal are further diminished because, "[m]ost district court rulings on [privilege] matters involve the routine application of settled legal principles. 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. 10, 110 (2009) (internal citations omitted); *see also Gilmore v. Palestinian Interim Self-Gov't Auth.*, 843 F.3d 958, 968 (D.C. Cir. 2016) (discovery decisions are reviewed "'solely for abuse of discretion,'" and are subject to reversal "'only if the party challenging the decision can show it was clearly unreasonable, arbitrary, or fanciful'") (quoting *Bowie v. Maddox*, 642 F.3d 1122, 1136, (D.C. Cir. 2011); *United States v. Edwards*, 388 F.3d 896, 899 (D.C. Cir. 2004) ("We review a trial court's evidentiary rulings, including its admission of testimony over a relevance objection, for abuse of discretion") (citing *United States v. Smith*, 232 F.3d 236, 241 (D.C. Cir. 2000)). The Treasury offers no authority to suggest that the Court has abused its discretion here, and has therefore failed to show that an appeal of the Court's Orders would be likely to succeed.

C. A Stay Would Injure Respondents and Would Not Serve the Public Interest

Respondents have a substantial interest in avoiding a stay. The 63 documents in question are responsive to a subpoena that was served more than five years ago, and the Court's Order denying the Treasury's motion to quash was issued three years ago. As the Court observed in denying a stay in another matter, "[a]s time proceeds, the value of the information sought by plaintiffs and the public declines substantially, thereby effectively denying plaintiffs the relief to

which they contend they are entitled." *Judicial Watch, Inc. v. U.S Nat'l Energy Policy Grp.*, 230 F. Supp. 2d 12, 16 (D.D.C. 2002). Furthermore, the proceedings in *Black* have been stayed for nearly two years as the parties await the resolution of the dispute before this Court, and the production of those documents to Respondents will trigger new discovery deadlines in the case, including depositions of Auto Task Force fact witnesses whose memories may continue to fade. As a result of production of the documents in dispute, the eight-year-old litigation will proceed in short order to a close-out of discovery and to summary judgment. *See* ECF No. 38 at 1; ECF No. 38-2. Respondents have a substantial interest in avoiding further delays in *Black*'s prosecution.[10]

Additionally, as the Court has observed, these proceedings have been extended by the Treasury's questionable behavior in this case. *See, e.g.* ECF No. 27 at 10 (noting that the Court was "deeply skeptical" of the Treasury's decision to raise a standing argument in response to the subpoena); ECF No. 42 at 4 (after the Court warned that the Treasury risked sanctions if it determined the Treasury's privilege claims to be frivolous, the Treasury, without explanation, "suddenly withdrew its privilege assertions over nearly 75% of the documents it had previously claimed were privileged"); *id.* at 12 (even after providing the Treasury with "ample opportunities" to establish its deliberative process claims, the Treasury "miserably failed to do so . . . essentially wast[ing] this Court's precious and limited time, notwithstanding the Court's stern warning in its Minute Order dated July 15, 2016"); ECF No. 51-1 at 4:10-11 (noting, during the hearing on the Treasury's first motion to stay, that the Court "has had some very serious concerns about whether the government [has been] proceeding in good faith or not.".

[10] The Treasury continues to assert that Respondents will not be harmed by a stay because they supposedly have failed to make a sufficient showing of need, ECF No. 58 at 4, notwithstanding two Court Orders to the contrary. Such fanciful assertions need not be credited. *See, e.g., Council of the Dist. of Columbia v. Gray*, No. 14-655, 2014 U.S. Dist. LEXIS 185218, at *8 (D.D.C. May 22, 2014) (Sullivan, J.) ("broad and conclusory statements regarding lack of the injury" to the non-moving party are insufficient to justify the "extraordinary remedy" of a stay).

Additionally, Respondents note that the Treasury has sought extensions six times in this action. *See* ECF Nos. 8, 9, 14, 17, 20, 32. Indeed, as the Treasury is aware, Respondents are pensioners in the latter stages of their lives, and still further delay only make more likely the prospect that they, as opposed to their estates, may never enjoy the benefits of any victory in the underlying litigation.

As for the public interest, "both Congress and the Judicial Branch have recognized the public interest in avoiding 'piecemeal' litigation occasioned by stays and interlocutory appeals." *Judicial Watch*, 230 F. Supp. 2d at 16. This is especially true in this case, where the Treasury has turned what should have been a relatively routine discovery matter into a six-year legal odyssey (and counting). Adding to those delays will not serve the public interest. And, as discussed above, given that the confidentiality concerns of the President are attenuated here, *supra* 14-16, and that Respondents propose that these documents be governed by the stipulated protective order already in place in this case, ECF No. 28, the public cannot be said to have any great interests in maintaining the confidentiality of these documents. Finally, given the rather widespread dissemination of the documents in this case, those interests are further diminished. *See, e.g., Ctr. for Effective Gov't v. U.S. Dep't of State*, 7 F. Supp. 3d 16, 26 (D.D.C 2013) ("it is axiomatic that the privilege's purpose of promoting candor and confidentiality between the President and his closest advisors becomes more attenuated, and the public's interest in transparency and accountability more heightened, the more extensively a presidential communication is distributed").

Conclusion

For the foregoing reasons, the Treasury's renewed motion for stay should be denied.

Date: June 21, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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