UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

REPLY IN SUPPORT OF PETITIONER'S RENEWED MOTION FOR STAY

INTRODUCTION

Respondents Dennis Black, Charles Cunningham, Kenneth Hollis, and Delphi Salaried Retiree Association agree with petitioner U.S. Department of Treasury (Treasury), *see* ECF No. 59-9, that Treasury's renewed motion for stay, ECF No. 58, is governed by the following four factors:

> whether the stay applicant has made a strong showing that he is likely to succeed on the merits . . . whether the applicant will be irreparably injured absent a stay . . . whether issuance of the stay will substantially injure the other parties interested in the proceedings . . . and . . . where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987). Respondents disagree, however, that any of the four factors militates in favor of the granting of Treasury's motion. ECF No. 59 at 9. Respondents are mistaken, for the reasons set forth below.

ARGUMENT

I. TREASURY HAS DEMONSTRATED THAT IT WILL BE IRREPARABLY HARMED IN THE ABSENCE OF A STAY.

Pointing to *Mohawk Industries v. Carpenter*, 558 U.S. 100 (2009), ECF No. 59 at 2, 10-12, respondents argue as a threshold matter that Treasury cannot make "the necessary showing of irreparable harm." ECF No. 59 at 9. The reliance that respondents place on *Mohawk* is misplaced in view of the recent holding of the D.C. Circuit that the existence of an adequate remedy does not obviate the harm caused by the disclosure of privileged documents. *See In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014) ("As this Court and others have explained, post-release review of a ruling that documents are unprivileged is often inadequate to vindicate a privilege the very purpose of which is to prevent the release of those confidential documents."). *Kellogg* thus makes it clear that the disclosure of privileged documents may well constitute irreparable harm, and indeed, that the harm rises to the level of injury that warrants the exercise of the court of appeals' mandamus jurisdiction. If such injury can justify the issuance of a writ of mandamus, and it would here, it surely constitutes irreparable injury warranting a stay.

Respondents attempt to distinguish *Kellogg*, ECF No. 59 at 11-12, but do so unsuccessfully. Nothing in *Kellogg* hinged on the nature of the privilege at issue and the fact that mandamus relief was warranted only underscores the harm caused by the disclosure of privileged documents.

Mohawk is inapposite, moreover. The harm at issue in *Mohawk* stemmed from the use of privileged documents in litigation and was therefore the kind of harm that could be remedied by "postjudgment appeals [which] generally suffice to protect the rights of litigants and assure the vitality of the attorney-client privilege." 558 U.S. at 109. The harm at issue here stems from the

disclosure of materials protected by the presidential communications privilege, not from the potential use of those documents in litigation.

Mohawk is also inapposite because the Court emphasized that its holding in that case had no applicability to documents covered by the presidential communications privilege. The Court made that point when it said:

> Participating as *amicus curiae* in support of respondent Carpenter, the United States contends that collateral order appeals should be available for rulings involving certain governmental privileges "in light of their structural constitutional grounding under the separation of powers, relatively rare invocation, and unique importance to governmental functions." Brief for United States as *Amicus Curiae* 28. *We express no view on that issue.*

Id. at 113 n. 4 (emphasis added).

Respondents try to argue that *Mohawk* governs this case nonetheless because the presidential communications privilege can be overcome by a showing of need while the attorney-client privilege cannot. *See* ECF No. 59 at 13-14. This argument overlooks the fact that "[t]he presidential communications privilege is rooted in constitutional separation of powers principles and the President's unique constitutional role," *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997), while the attorney-client privilege is not. *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (holding that "the attorney-client privilege is the oldest of the privileges for confidential communications known to the common law"). "The presidential communications privilege . . . preserves the President's ability to obtain candid and informed opinions from his advisors and to make decisions confidentially." *Loving v. Dep't of Defense*, 550 F.3d 32, 37 (D.C. Cir. 2008) (citing *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1112 (D.C. Cir. 2004)). The privilege's constitutional underpinnings thus make it appropriate for the Government to possess "the right to . . . an immediate interlocutory appeal over all discovery

disputes involving [the] privilege." ECF No. 59 at 14; *see also Mohawk*, 558 U.S. at 113 n.4 (preserving that right).

Respondents are also wrong insofar as they assert that the harm to the President's confidential decision-making would be mitigated if a protective order were to issue here. Protective orders do not eliminate the recognized chill of disclosure on the willingness of government officials to engage in "open, frank discussion between subordinate and chief concerning administrative action." *EPA v. Mink*, 410 U.S. 73, 87 (1973). At best, a court might consider the use of a protective order "to minimize" the resulting harm to the government. *In re Subpoena Served Upon the Comptroller of the Currency*, 967 F.2d 630, 634 (D.C. Cir. 1992). But a protective order neither eliminates that harm, nor justifies discounting the government's interest in maintaining the confidentiality of its documents. *Cf. Perry v. Schwarzenegger*, 591 F.3d 1147, 1163-64 (9th Cir. 2009) (granting defendants' mandamus petition and overruling a district court's order compelling the defendants to produce documents the disclosure of which threatened to "inhibit[] internal campaign communications that are essential to effective association and expression," while emphasizing that "[a] protective order limiting dissemination of this information will ameliorate but cannot eliminate these threatened harms"); *see also In re Subpoena*, 967 F.2d at 634 (stating that a court should consider the availability of a protective order *after* it has first determined that the plaintiff's particularized need for a document outweighs the government's interest in its confidentiality). It is also entirely unclear how broadly any protective order would extend in this case in view of the fact that the documents at issue are sought by respondents for use in litigation to which Treasury is not a party.

Respondents argue as a separate matter that Treasury cannot make the showing of irreparable harm that the granting of its renewed motion for stay would require because "the

incumbent President of the United States" has not expressed his belief that "maintaining the confidentiality of these 63 documents is necessary to the needs of the Executive Branch." ECF No. 59 at 15 (relying on *Dellums v. Powell*, 561 F.2d 242 (D.C. Cir. 1977). This case differs from *Dellums* because the Office of the then-sitting President asserted the presidential communications privilege over the 63 documents at issue in this case. Respondents have cited no precedent suggesting that the successor Office must renew the claim of privilege. And, in any event, the Government continues to defend the 63 documents against unwarranted disclosure.

Respondents argue finally that Treasury cannot make the showing of irreparable harm that the granting of its renewed motion for stay would require because the 63 documents were prepared in connection with the efforts of Treasury to determine in 2009 whether billions of additional taxpayer dollars should be invested in the private sector to try to save the American automotive industry and because the documents were circulated among the small group of employees of Treasury and the National Economic Council responsible for those efforts. ECF No. 59 at 15-16. Respondents do not explain, however, why the disclosure of the 63 documents pending the adjudication of Treasury's appeal should hinge on whatever views they may have about the importance of those documents. Neither do they explain why the circulation of the 63 documents among employees given a task deemed by the President to be crucial, *see* ECF No. 52-1 at 1, should negate the privilege.

II. RESPONDENTS HAVE NOT OVERCOME TREASURY'S DEMONSTRATED LIKELIHOOD OF SUCCESS ON THE MERITS.

Pointing to Treasury's acknowledgment that the presidential communications privilege may be overcome by a sufficient showing of need, respondents argue that Treasury has not established a likelihood of success on the merits sufficient to justify the granting of its renewed motion for stay. *See* ECF No. 59 at 17-19. This argument is unpersuasive because, as Treasury

has shown, respondents have not made a showing of need sufficient under any standard to overcome the applicability of the presidential communications privilege to the 63 documents, let alone the standard appropriate to this case. ECF No. 52 at 2-7.

III. RESPONDENTS HAVE NOT DEMONSTRATED THAT THEY WOULD BE HARMED BY A STAY OR THAT THE PUBLIC INTEREST WOULD BE SERVED BY THE DENIAL OF TREASURY'S RENEWED MOTION FOR STAY.

Referring to the length of time that has elapsed in this case, ECF No. 59 at 20-22, respondents argue that they have a "substantial interest in avoiding a stay." *Id.* at 20. This argument is unpersuasive in view of the failure of respondents ever to articulate how the 63 documents are necessary to their case. This argument is also unpersuasive in view of the failure of respondents to address the willingness of Treasury, *e.g.*, ECF No. 58 at 4, to minimize the length of any stay by agreeing to expedite its appeal.

Recapitulating the other arguments that they make, respondents argue in addition that the public interest does not favor the granting of Treasury's renewed motion for stay. ECF No. 59 at 22. Respondents do not address the fact, however, that the presidential communications privilege is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974). Their argument is therefore unpersuasive.

CONCLUSION

Treasury's renewed motion for stay should be granted for the foregoing reasons and for the reasons set forth in the points and authorities in support of the motion, ECF No. 58 at 3-5.

Respectfully Submitted,

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Dated: June 22, 2017

CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2017, I served the within memorandum on all counsel of record by filing it with the Court by means of its ECF system.

s/ *David M. Glass*