UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

U.S. DEPARTMENT OF THE TREASURY, **Petitioner,** **v.** **PENSION BENEFIT GUARANTY CORPORATION,** **Interested Party,** **v.** **DENNIS BLACK, *et al.*,** **Respondents.**	**No. 1:12-mc-00100-EGS** **REPLY IN SUPPORT OF PETITIONER'S RENEWED MOTION TO QUASH**

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PRELIMINARY STATEMENT

Respondents Dennis Black, Charles Cunningham, Kenneth Hollis, and the Delphi Retirees Association (DSRA) have issued two subpoenas to petitioner U.S. Department of the Treasury (Treasury). Both are subpoenas of this Court. The first subpoena (Document Subpoena) asks Treasury to produce certain documents allegedly relevant to respondents' claims against interested party Pension Benefit Guaranty Corporation (PBGC) in Counts 1-4 of *Black v. PBGC*, No. 2:09-cv-13616-AJT-MKM (E.D. Mich.) (*Black I*). The second subpoena (Deposition Subpoena) asks Treasury to produce one or more witnesses to testify at deposition about certain matters allegedly relevant to those claims.

By renewed motion dated September 16, 2013, Treasury has moved to quash both of respondents' subpoenas. ECF No. 15.[1] By opposition dated October 25, 2013, respondents have asked the Court to deny Treasury's motion and to order compliance "forthwith" with their subpoenas. ECF No. 19 at 2. Respondents focus in their opposition on the reasons why the information they seek from Treasury is allegedly relevant to their claims against PBGC. However, respondents' claims against PBGC focus on the statutory authority of PBGC and the alleged fiduciary duty of Delphi Corporation (Delphi), not on the actions of Treasury. At no time do respondents show in their opposition that they have standing to litigate Counts 1-4 of *Black I* or, if they do, that the discovery they seek by means of their subpoenas is relevant to those counts. Neither do they refute Treasury's contention that compliance with their subpoenas could place an undue burden on Treasury. Nor do they show that their subpoenas are necessary in view of the tremendous amount of information already available to respondents from sources other than Treasury. Treasury's renewed motion to quash should therefore be granted. If the

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[1] Docket entries in this action (*Black II*) are cited in this memorandum as "ECF." Docket entries in *Black I* are cited as "*Black I* ECF." A table of docket entries cited in this memorandum appears at p. vi, *supra.*

motion is denied, Treasury should be given adequate time to comply with the Document Subpoena.

THE STATUTORY SCHEME

"PBGC is a United States government corporation established under 29 U.S.C. § 1302(a) to administer the pension plan termination insurance program established by Title IV [of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*]." Ex. E ¶ 4.[2] "PBGC guarantees the payment of certain, but not all, pension benefits provided by defined benefit pension plans that are covered by Title IV of ERISA." *Id.* PBGC is authorized by ERISA to institute proceeding to terminate a pension plan "whenever it determines" that any of certain enumerated circumstances exist. 29 U.S.C. § 1342(a). PBGC is also authorized, subject to certain notice requirements, to

> apply to the appropriate United States district court for a decree adjudicating 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.

Id. § 1342(c)(1). However, "a court adjudication" is not required by § 1342(c)(1) in cases where "PBGC and the plan administrator agree to terminate a plan." *In re Jones & Laughlin Hourly Pension Plan*, 824 F.2d 197, 200 (2d Cir. 1987); *see* pp. 13-14, *infra* (discussing respondents' agreement with that proposition).

PBGC guarantees the payment of "all non-forfeitable benefits" under "a single-employer plan which terminates at a time when [Title IV of ERISA] applies to it." 29 U.S.C. § 1322(a). However, the payment guarantee provided by PBGC is limited to "those [benefits] having an actuarial value that does not exceed a specified cap." *In re Braniff Airways*, 27 B.R. 222, 229

[2] References to exhibits are to Treasury's exhibits in this action. A table of exhibits cited in this memorandum appears at p. iv, *supra.*

(Bankr. N.D. Tex. 1982) (citing 29 U.S.C. § 1322(b)(3)). For that reason, "vested benefits of well-paid retirees such as airline pilots are not fully insured." *In re UAL Corp.*, 468 F.3d 444. 447 (7th Cir. 2006). "When a plan covered under Title IV terminates with insufficient assets to satisfy its pension obligations," the trustee of the plan "tak[es] over the plan's assets and liabilities." *PBGC v. LTV Corp.*, 496 U.S. 633, 637 (1990). The trustee "then uses the plan's assets to cover what it can of the benefit obligations." *Id.* In addition, PBGC "add[s] its own funds" to ensure that benefits are paid under the plan, but only to the extent that the benefits are guaranteed. *See id.*

STATEMENT OF FACTS

A. The Delphi Retirement Program for Salaried Employees (Delphi Salaried Plan) and Its Termination

The Delphi Salaried Plan was a defined-benefit pension plan maintained by Delphi for certain of its salaried employees. *See* Ex. E ¶ 14. Respondents Black, Cunningham, and Hollis are participants in the Delphi Salaried Plan. *Id.* ¶ 5. Respondent DSRA is an association of participants in the Delphi Salaried Plan and dependents of participants in the plan. *Id.* ¶ 6.

"Over the period 2001 to 2005, Delphi suffered large losses, and the company filed for Chapter 11 bankruptcy in October 2005, although it continued to operate." Ex. A at 4. On June 1, 2009, Delphi moved the bankruptcy court for an order approving a proposed plan for its reorganization. Ex. 2D at 5. Granting that motion by order dated July 30, 2009, the court held that "clear grounds exist[ed] under Section 4042 of ERISA, 29 U.S.C. § 1342, for the PBGC to initiate involuntary terminations of the [Delphi] Pension Plans [and] for [Delphi] to enter into termination and trusteeship agreements with the PBGC." *In re Delphi*, 2009 WL 2842146, at *19 (Bankr. S.D.N.Y. July 30, 2009).

By notice of determination dated July 20, 2009, PBGC advised Delphi of certain adverse determinations it had made under 29 U.S.C. § 1342(a) with respect to the Delphi Salaried Plan. Ex. S. By the same notice, PBGC advised Delphi of its having determined under 29 U.S.C. § 1342(c) "that the [p]lan must be terminated in order to avoid any unreasonable increase in the liability of the PBGC insurance fund." *Id.* By agreement dated as of August 10, 2009, Delphi and PBGC terminated the plan voluntarily effective July 31, 2009, and named PBGC trustee of the terminated plan. Ex. B ¶¶ 1-3.

B. *Black I*

Black I was commenced by respondents on September 14, 2009. Hon. Arthur J. Tarnow is the district judge assigned to *Black I*. PBGC is the sole defendant remaining in *Black I*. Counts 1-4 are the sole counts remaining for adjudication in *Black I*. All of those counts focus on PBGC's statutory authority or the alleged fiduciary duty of Delphi, not on actions of Treasury. Count 1 alleges that the termination of the Delphi Salaried Plan was wrongful because PBGC may not terminate a pension plan except by court order. Ex. E ¶ 39. Count 2 alleges that the termination of the Delphi Salaried Plan was wrongful because Delphi did not execute the agreement terminating the plan in its capacity as fiduciary for the participants in the plan. *Id.* ¶ 44. Count 3 alleges that termination of the Delphi Salaried Plan was wrongful because the participants in the plan were not given notice of the termination or an opportunity for a pre-termination hearing and thus were denied due process. *Id.* ¶ 52. Count 4 alleges that termination of the Delphi Salaried Plan was wrongful because "PBGC cannot satisfy the standards for the termination of the [plan] under 29 U.S.C. § 1342(a) and (c)." *Id.* ¶ 56

C. Respondents' Subpoenas

Dated January 4, 2012, the Document Subpoena asks Treasury to produce the following:

> All documents and things (including e-mails or other correspondence, spreadsheets, reports, analyses, snapshots, funding estimates, proposals, or offers) received, produced, or reviewed by [Steven L. Rattner, Matthew A. Feldman, or Harry J. Wilson] between January 1, 2009 and December 31, 2009 related to: (1) Delphi; (2) the Delphi Pension Plans; or (3) the release and discharge by [PBGC] of liens and claims relating to the Delphi Pension Plans.

Ex. J, att. A at 5-6.

Dated August 20, 2013, the Deposition Subpoena asks Treasury to produce one or more witnesses pursuant to Fed. R. Civ. P. 30(b)(6) to testify at deposition about the following:

> [Matthew A. Feldman's and Harry J. Wilson's] communications in 2009 relating to the GM-Delphi Relationship; the Delphi Pension Plans; and the release, waiver or discharge by the PBGC of liens and claims relating to the Delphi Pension Plans. These communications include, but are not limited to, communications with the PBGC, Delphi, GM, the Delphi DIP Lenders, Federal Mogul, Platinum Equity, the National Economic Council, and the Executive Office of the President.

ECF No. 13-4, att. A at 1, 3.

ARGUMENT

I. TREASURY'S RENEWED MOTION TO QUASH SHOULD BE GRANTED.

A. Respondents Have Not Shown that They Have Standing to Litigate Counts 1-4 of *Black I.*

The doctrine of standing "requires federal courts to satisfy themselves that 'the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction.'" *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975)) (internal quotation marks omitted). To demonstrate standing, "'[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'"

DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 (2006) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). A court "cannot assume 'hypothetical jurisdiction' to order discovery when [the plaintiff's] lack of standing is apparent from the face of the complaint." *Cady v. Anthem Blue Cross Life & Health Ins. Co.*, 583 F. Supp. 2d 1102, 1107 (N.D. Cal. 2008). For that reason, a party who does not have standing to litigate a claim is not entitled to conduct discovery with respect to that claim.

In this case, the injury that respondents allege in bringing Counts 1-4 of *Black I* is that the participants in the Delphi Salaried Plan are not receiving the full amount of the pension benefits to which they were entitled under the plan. ECF No. 19 at 26. However, PBGC did not cause respondents' alleged injury by terminating the Delphi Salaried Plan. Instead, Delphi caused that injury by failing to fund the plan adequately. In view of that fact, respondents lack standing to litigate Counts 1-4 because the injury they allege is not "'fairly traceable to [PBGC's] allegedly unlawful conduct.'" *See DaimlerChrysler*, 547 U.S. at 342 (quoting *Allen*, 468 U.S. at 751).

In addition, "parties asserting federal jurisdiction" bear the burden of "establishing their standing under Article III." *DaimlerChrysler*, 547 U.S. at 342. Respondents have not satisfied that burden with respect to Counts 1-4 because they have not identified any statute that would permit PBGC to be ordered to pay the participants in the Delphi Salaried Plan the full amount of the pension benefits to which they were entitled under the plan. That failure is critical because "payments of money from the Federal Treasury are limited to those authorized by statute." *OPM v. Richmond*, 496 U.S. 414, 416 (1990). In view of that failure, respondents lack standing to litigate Counts 1-4 because the injury they allege is not "'likely to be redressed by the requested relief.'" *See DaimlerChrysler*, 547 U.S. at 342 (quoting *Allen*, 468 U.S. at 751).

Respondents make a number of arguments to try to counter these points. None is persuasive. First, they argue that their standing to litigate Counts 1-4 of *Black I* ought not to be questioned because a holding that they lacked standing would "call into question the last four years of proceedings [in *Black I*]." ECF No. 19 at 38. However, "the requirement that a litigant have standing to invoke the authority of a federal court is an essential and unchanging part of the case-or-controversy requirement of Article III.'" *DaimlerChrysler*, 547 U.S. at 342 (quoting *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560 (1992)). For that reason, "Article III standing [is] a jurisdictional issue that can be raised at any time." *Whelan v. Abell*, 953 F.2d 663, 671 (D.C. Cir. 1992). In addition, the fact that respondents have spent "the last four years" litigating Counts 1-4 is not a reason to ignore their lack of standing to do so. "Parties often spend years litigating claims only to learn that their efforts and expense were wasted in a court that lacked jurisdiction." *Christianson v. Colt Indus. Operating Corp*, 486 U.S. 800, 818 (1988).

Second, respondents attempt to show that they can satisfy the causational prong of standing by arguing that PBGC rather than Delphi is responsible for respondents' alleged injury because the Delphi Salaried Plan was "actually well-funded" at the time of its termination and thus did not need to be terminated. ECF No. 19 at 39. Respondents base that argument on the report dated June 30, 2009, of Watson Wyatt & Co., Delphi's actuary. *Id.* Watson Wyatt stated in its report that the Delphi Salaried Plan was underfunded as of October 1, 2008, by 14.38%, or $502,913. ECF No. 19-5 at 3. Even assuming, *arguendo*, that Watson Wyatt's figures were accurate as of October 1, 2008, respondents filed a brief in the Delphi bankruptcy on July 15, 2009, in which they stated that the Delphi Salaried Plan was "underfunded by approximately $2 billion." Ex. 2D at 2. That figure is in rough agreement with PBGC's estimate that the plan was underfunded by $2.7 billion as of July 31, 2009, the effective date of its termination. Ex. G, att.

C, encl. ¶ 9. That figure is also plausible. Not only did Delphi stop making any contributions to the Delphi Salaried Plan in 2008, Ex. 2E at 6, but the fall of 2008 was the time of "the most serious financial crisis since the Great Depression," 154 Cong. Rec. H10702 (Oct. 3, 2008) (statement of Rep. Slaughter), and July 2009 was "the bottom of the market." ECF No. 19 at 41. In view of these facts, no truth exists to respondents' allegation that the Delphi Salaried Plan was "actually well-funded" at the time of its termination.

Third, respondents attempt to show that they can satisfy the redressability prong of standing by alleging that 29 U.S.C. § 1303(f)(1) is a statute that permits a court to order PBGC to pay the participants in the Delphi Salaried Plan the full amount of the pension benefits to which they were entitled under the plan. ECF No. 19 at 40. However, a waiver of sovereign immunity cannot be expanded "beyond what the statutory text clearly requires." *FAA v. Cooper*, 132 S. Ct. 1441, 1453 (2012). Except in certain cases, § 1303(f)(1) authorizes a participant in a pension plan who is "adversely affected by any action of [PBGC] with respect to [the] plan" to "bring an action against [PBGC] for the appropriate equitable relief in the appropriate court." However, nothing in § 1303(f)(1) permits a court to issue an order in the guise of "equitable relief" that would require PBGC to pay pension benefits to the participants in a terminated pension plan in excess of the payment guarantees it has provided to those participants.

Respondents counter by citing *Cigna Corp. v. Amara*, 131 S. Ct. 1866 (2011). ECF No. 19 at 41. *Amara* holds that a plaintiff in an action under 29 U.S.C. § 1132(a)(3) may obtain "relief in the form of monetary 'compensation' for a loss resulting from [the defendant's] breach of duty, or to prevent [the defendant's] unjust enrichment." 131 S. Ct. at 1880. However, an action under § 1132(a)(3) is an action to enjoin "any act or practice which violates [Title I of ERISA]" or to obtain "other appropriate equitable relief" to redress that violation. In this case,

the provision of ERISA that PBGC is alleged to have violated is 29 U.S.C. § 1342(c)(1), a provision of Title IV of ERISA, not a provision of Title I. For that reason *Amara* and its construction of 29 U.S.C. § 1132(a)(3) are inapposite.

Finally, respondents attempt to show that they can satisfy the redressability prong of standing by arguing that Judge Tarnow has already ruled that PBGC may be ordered to pay the participants in the Delphi Salaried Plan the full amount of the pension benefits to which they were entitled under the plan and that further consideration of the issue is therefore precluded. ECF No. 19 at 38. Respondents are mistaken. By motion filed October 23, 2009, respondents asked Judge Tarnow to enjoin PBGC pending the adjudication of Counts 1-4 from paying the participants in the Delphi Salaried Plan less than the full amount of the pension benefits to which they were entitled under the plan. *Black I* ECF No. 7. By order dated January 26, 2010, Judge Tarnow denied respondents' motion, subject to certain conditions. *Black I* ECF No. 101. By motion dated January 28, 2010, PBGC asked Judge Tarnow to amend his order by deleting the conditions. *Black I* ECF No. 107. In support of its motion, PBGC argued that it was prohibited from paying pension benefits to participants in the Delphi Salaried Plan in excess of the payment guarantees it had provided to those participants and that the plan would have to be transferred back to whatever remained of Delphi if its termination were invalidated. *Id.* at 2-3. Denying PBGC's motion by order dated February 17, 2010, Judge Tarnow "decline[d] to accept [PBGC's] position that [respondents] cannot obtain any relief in this lawsuit if the Court concludes that the PBGC acted improperly." *Black I* ECF No. 122 at 3.

For two reasons, Judge Tarnow's refusal to "accept [PBGC's] position" has no bearing on respondents' standing to litigate Counts 1-4 of *Black I*. First, PBGC did not argue in support of its motion to amend Judge Tarnow's order that respondents lacked standing to litigate Counts

1-4. That fact is critical because Judge Tarnow has been sensitive to questions of standing when they have been raised in *Black I.* By motion dated December 20, 2010, Treasury and four other defendants moved to dismiss Former Count 5 of *Black I* on the ground that respondents lacked standing to litigate that count. *Black I* ECF No. 164, at 3. Granting that motion by order dated September 1, 2011, Judge Tarnow recited the "three elements [that] must be demonstrated to establish constitutional standing" and held that respondents "lack[ed] standing based on lack of causation and redressability" to litigate the denial of equal protection alleged in Former Count 5. Ex. R at 6, 9. Thus, no ruling that Judge Tarnow has made to date should be viewed as a ruling on the standing of respondents to litigate Counts 1-4 of *Black I*.

Second, "the law-of the-case doctrine rests on a simple premise: 'the *same* issue presented a second time in the *same case* in the *same court* should lead to the *same* result." *Kimberlin v. Quinlan*, 199 F.3d 496, 500 (D.C. Cir. 1999) (quoting *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc)). The doctrine thus applies "within the same case, proceeding or action" but does not apply to "a new, albeit ancillary proceeding, in a different court." *In re Subpoena Duces Tecum to CFTC*, 439 F.3d 740, 749 (D.C. Cir. 2006). As a result, the doctrine has no applicability to an action under Fed. R. Civ. P. 45, like this one, because any such action is "'technically a different case'" from the action to which it is ancillary. *Id.* (quoting *In re Subpoena Duces Tecum Served on OCC*, 145 F.3d 1422, 1425 (D.C. Cir. 1998)) (internal quotation marks omitted). For that reason, no ruling that Judge Tarnow made in his order dated February 17, 2010, would be binding on this Court even assuming, *arguendo*, that any such ruling could be viewed as a ruling on respondents' standing to litigate Counts 1-4.

B. Respondents Have Not Shown that the Discovery that They Seek by Means of Their Subpoenas Is Relevant to Counts 1-4 of *Black I.*

"Federal Rule of Civil Procedure 26(b)(1) provides in part that, '[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.'" *Food Lion, Inc. v. United Food & Comm'l Workers*, 103 F.3d 1007, 1012 (D.C. Cir. 1997). "Generally speaking, 'relevance' for discovery purposes is broadly construed." *Id.* "'[N]o one would suggest,'" however, "'that discovery should be allowed of information that has no conceivable bearing on the case.'" *Id.* (quoting Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice & Procedure* § 2008 (1994)).

In this case, respondents try to establish a link between PBGC's termination of the Delphi Salaried Plan and actions taken by Treasury to help restructure General Motor in the spring of 2009. They do so by speculating that PBGC could have compelled Treasury to make funds available in connection with the restructuring that would have permitted General Motors or a potential buyer of Delphi to assume the obligations of Delphi under the Delphi Salaried Plan. *See* ECF No. 19 at 3-4, 15, 19. They then speculate that PBGC could have compelled Treasury to make those funds available by refusing to release certain liens that PBGC had placed on Delphi assets. *See id.* at 3-4, 15, 41. To try to establish the relevance of the discovery they seek by means of their subpoenas, they then allege that the subpoenas are intended to explore "whether the [Delphi Salaried Plan] had to be terminated in July 2009 to avoid any unreasonable increase in the liability of the PBGC's insurance fund, or whether there were viable alternatives to the [p]lan's termination."[3] *Id.* at 10.

[3] Respondents criticize Treasury for having used "[t]he 'commercially-reasonable' standard" to make decisions about the restructuring of General Motors. ECF No. 19 at 20. Respondents object to that standard on the ground that "there's no definition of it." *Id.* (quotation marks omitted). However, the "'commercially-reasonable' standard" is well established in the law, notwithstanding respondents' objection to it use by Treasury. *E.g.*, *DBI*

Continued

The possible existence of such “viable alternatives” is irrelevant, however, to the claims against PBGC that respondents assert in Counts 1-4 of *Black I*.[4] PBGC is authorized by 29 U.S.C. § 1342(c)(1) to

> apply to the appropriate United States district court for a decree adjudicating 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.

Nothing in § 1342(c)(1) requires PBGC to exercise whatever bargaining power it may have to try to compel a third party to make funds available that would obviate the need for a plan to be terminated. By respondents' own admission, “PBGC received over $660 million from [General Motors] in return for releasing [its] liens.” ECF No. 19 at 41. Any speculation that PBGC could have held out for a greater sum has “‘no conceivable bearing’” on whether PBGC had sufficient grounds under § 1342(c)(1) to terminate the Delphi Salaried Plan, as it did, effective July 31, 2009. *See Food Lion*, 103 F.3d at 1012 (quoting Wright, Miller & Marcus § 2008). Respondents' subpoenas to Treasury should therefore be quashed.[5]

Falling back on yet another of Judge Tarnow's rulings, respondents argue that they are authorized by his order dated September 1, 2011, to conduct discovery into any matter they consider relevant to Counts 1-4. *See* ECF No. 19 at 22. They are mistaken for three separate

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Architects v. Am. Express Travel-Related Servs. Co., 388 F.3d 886, 895 (D.C. Cir. 2004) (holding that the plaintiff had failed to raise a genuine issue as to whether the defendant's “automated processing of checks was commercially reasonable”); *JSG Trading Corp. v. Dep't of Agric.*, 235 F.3d 608, 615 (D.C. Cir. 2001) (holding that certain payments constituted bribes because the payments were made without “‘honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade’”) (quoting 7 C.F.R. § 46.2(hh)).

[4] In addition, General Motors and the potential buyers of Delphi would be in a much better position than Treasury to provide evidence that such “viable alternatives” existed, even assuming, *arguendo*, that the existence of such “alternatives” were relevant to respondents' claims against PBGC.

[5] Respondents try to create a justification for their subpoenas by arguing that the claims they assert against PBGC in Counts 1-4 of *Black I* “arguably involve a much wider audience” than themselves. ECF No. 19 at 26. However, “a lawsuit is about deciding the particular rights of these parties arising out of these events, not about discovery for its own sake.” *Adams v. City of Chicago*, 2011 WL 856859, at *3 (N.D. Ill. Mar. 9, 2011). For that reason, respondents' subpoenas are unjustified regardless of the interest, if any, that others may have in the claims they assert against PBGC in Counts 1-4 of *Black I.*

reasons. First, as noted above, this action is "'technically a different case'" from *Black I. See Subpoena Duces Tecum to CFTC*, 439 at 749 (quoting *Subpoena Duces Tecum Served on OCC*, 145 F.3d at 1425) (internal quotation marks omitted). For that reason, Judge Tarnow's order dated September 1, 2011, is not binding on this Court.

Second, Judge Tarnow's order dated September 1, 2009, does nothing more than authorize respondents to conduct discovery within "'the limits imposed set forth in *Rule 26.*'" Ex. U at 3 (quoting *Conti v. Am. Axle & Mfg.*, 326 F. App'x 900, 904 (6th Cir. 2009)) (internal quotation marks omitted). Rule 26 does not authorize discovery into irrelevancies, like the discovery that respondents seek from Treasury by means of their subpoenas.[6]

Third, respondents filed a brief in the Delphi bankruptcy two months before commencing *Black I* in which they objected to the proposed plan for the reorganization of Delphi on the ground that the proposed plan "depend[ed] on a termination of the [Delphi Salaried Plan] that [was] neither assured nor imminent." Ex. 2D at 2. Commenting on the difference between voluntary and involuntary terminations of pension plans, respondents stated in their brief that "[t]he typical involuntary termination requires the PBGC to file an action in federal *district court* seeking to terminate the plan" but that PBGC may "terminate a plan under § 1342 outside of a formal district court adjudication" by entering into an agreement with the plan administrator to "terminate the plan" and to appoint a trustee for the terminated plan. Ex. 2D at 13 (citing *Jones & Laughlin*); *id.* at 16 (citing and quoting the relevant text of § 1342(c)(1)). These steps are precisely the steps that PBGC took when it terminated the Delphi Salaried Plan. Ex. B ¶¶ 1, 3.

[6] Respondents argue that a court should be "'cautious in determining relevance of evidence, and in case of doubt should err on the side of permissive discovery'" where, as here, "'a subpoena [is] served in this district with respect to an action pending in another district.'" ECF No. 19 at 23 (quoting *Hesco Bastion Ltd. v. Greenberg Traurig LLP*, 2009 WL 5216932, at *4 (D.D.C. Dec. 23, 2009)). In this case, however, no "doubt" exists as to the irrelevance of the discovery that respondents seek by means of their subpoenas.

The attorneys who represented respondents in the Delphi bankruptcy are the same attorneys who represent them in *Black I* and who represent them here. Despite that fact, respondents did not disclose in their complaint in *Black I* that they had stated in the Delphi bankruptcy that PBGC is permitted by 29 U.S.C. § 1342(c)(1) to terminate a pension plan by agreement with the plan administrator. Nor, to the best of Treasury's knowledge, have respondents ever disclosed that fact in *Black I*.[7] Treasury did not learn that respondents had so stated in the Delphi bankruptcy until after they began work on this memorandum.[8]

Judge Tarnow held in his order dated September 1, 2011, that the scope of discovery as to Counts 1-4 should be governed by "Count 4 and whether termination of the [Delphi Salaried Plan] would have been appropriate in July 2009 if, as [respondents] allege, [PBGC was] required under 29 U.S.C. § 1342(c) to file before this court 'for a decree adjudicating that the plan must be terminated.'" Ex. U at 3-4 (footnote omitted). That holding was unwarranted if, as respondents stated in the Delphi bankruptcy, PBGC may "terminate a plan under § 1342 outside of a formal district court adjudication." Ex. 2D at 16. For that reason, respondents are wrong to rely on that holding, or any portion of the order of Judge Tarnow dated September 1, 2013, as a justification for the discovery they seek from Treasury.

C. Respondents Have Not Refuted Treasury's Contention that Compliance with the Document Subpoena Could Place an Undue Burden on It.

"'[T]he paramount interests of the Government in having justice done between litigants in the Federal courts militates in favor of requiring a great effort on its part to produce any documents relevant to a fair termination of [the] litigation.'" *Freeman v. Seligson*, 405 F.2d

[7] Treasury was a defendant in *Black I* from November 2009 until September 2011 and continues to receive and review all papers filed in *Black I*.

[8] As of November 15, 2013, the docket in the Delphi bankruptcy contained more than 22,000 entries. *See In re Delphi Corp*., http://www.dphholdingsdocket.com/dph/document/list (accessed Nov. 15, 2013).

1326, 1337-38 (D.C. Cir. 1968) (quoting *Westinghouse Elec. Corp. v. City of Burlington*, 351 F.2d 762, 767 (D.C. Cir. 1965)). Limits exist, however, on the amount of effort that the government may be required to expend. The government has an interest in "'not being used as a speaker's bureau for private litigants.'" *Watts v. SEC*, 482 F.3d 501, 509 (D.C. Cir. 2007) (quoting *Exxon Shipping Co. v. Dep't of the Interior*, 34 F.3d 774, 780 (9th Cir. 1994)). The government also has "'serious and legitimate concerns that its employee resources not be commandeered into service by private litigants to the detriment of the smooth functioning of government operations.'" *Id.* (quoting *Exxon Shipping*, 34 F.3d at 779). "[I]n cases involving third-party subpoenas to government agencies or employees," Fed. R. Civ. P. 26 and 45 must therefore be applied to "properly accommodate" those concerns. *Id.*

"The burden of proving that a subpoena is oppressive is on the party moving to quash." *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 403 (D.C. Cir. 1984). This burden is "heavy," *id.*, but not insurmountable. A party seeking to quash a subpoena may satisfy that burden by submitting evidence of "[the] cost of complying with [the subpoena], the time associated with producing the requested information, or the procedure by which the information is obtained and released." *AF Holdings LLC v. Does 1-1,058*, 286 F.R.D. 39, 51 (D.D.C. 2012).

In this case, Treasury relies on the declaration of Rachana A. Desai, Acting Chief Counsel in Treasury's Office of Financial Stability, to show that compliance with the Document Subpoena could place an undue burden upon it. Ms. Desai says the following in her declaration:

> In order to search for document responsive to [the Document Subpoena], Treasury could be required to engage in at least the following time-consuming and unduly burdensome steps:
>
> a. Identify and segregate all emails, which [Matthew A. Feldman, Steven L. Rattner, and Harry J. Wilson] received, produced or reviewed. This process would require searches of the relevant Outlook email mailboxes.

> b. Identify and segregate the electronic and hardcopy documents that Mr. Feldman, Mr. Rattner or Mr. Wilson received, produced or reviewed. Treasury maintains over 15,000 electronic Auto Team related documents on its computer system and over 28 boxes of Auto Team hard copy files. Once identified, these documents would have to be searched one by one for those related to any of respondents' broad requests. Adding further burden to this review, the "properties" of each electronic document would have to be individually reviewed to determine whether Mr. Feldman, Mr. Rattner, or Mr. Wilson authored the document. * * * *
>
> c. Once the universe of possibly relevant document [was] identified and segregated, a Treasury attorney familiar with the subject matter would need to review each document page by page to determine if the contained information is responsive to any of respondents' broad requests.
>
> d. Thereafter, Treasury attorneys would need to review each document line by line to determine whether the document contains any material protected by the attorney-client privilege, the deliberative process privilege or other applicable privileges.

Ex. X ¶ 7.

Ms. Desai also discusses the documents that Treasury has produced to the Special Inspector General for the Troubled Asset Relief Program (SIGTARP) and the documents that Treasury has produced to the House Committee on Government Reform (House Committee). Ex. X ¶¶ 8-11. As she states in her declaration, the documents produced to SIGTARP or to the House Committee would need to be reviewed for responsiveness to the Document Subpoena before they could be produced to respondents. *Id.* ¶¶ 8-9, 11.

Respondents make a series of arguments to try to refute Ms. Desai's declaration. Their arguments are unpersuasive. First, respondents argue that compliance with the Document Subpoena would not place an undue burden on Treasury because "Treasury has an operating discretionary budget for 2013 of approximately $12.5 billion and employs more than 100,000 worldwide." ECF No. 19 at 26. However, compliance with the Document Subpoena would be the job of but a limited number of Treasury employees. Those employees have numerous other

responsibilities as well. Compliance with the subpoena would therefore trigger "'[Treasury's] serious and legitimate concerns that its employee resources not be commandeered into service by private litigants to the detriment of the smooth functioning of government operations.'" *See Watts*, 482 F.3d at 509 (quoting *Exxon Shipping,* 34 F.3d at 779).

Second, respondents argue that compliance with the Document Subpoena would not place an undue burden on Treasury because the steps that Treasury would need to take in order to comply with the subpoena are no different from the steps that "any entity responding to a document subpoena" would need to take. ECF No. 19 at 27. However, this argument ignores the amount of time and effort that taking those steps would require in this case. As Ms. Desai has stated in her declaration, the amount of time and effort that compliance with the Deposition Subpoena would require of Treasury could be substantial. *See* Ex. X ¶ 7.

Third, respondents argue that compliance with the Document Subpoena would not place an undue burden on Treasury because Treasury could conduct electronic searches for potentially responsive documents. ECF No. 19 at 28. Treasury is prepared to conduct such searches if its renewed motion to quash is denied. However, any documents located through those searches would still need to be reviewed to determine their responsiveness to the Document Subpoena and any documents found to be responsive to the Document Subpoena would still need to be reviewed separately for the possible assertion of claims of privilege. Ex. X ¶ 7(c)-(d).

Fourth, respondents argue that compliance with the Document Subpoena would not place an undue burden on Treasury because its production of documents to SIGTARP has waived any privileges that might apply to those documents. ECF No. 19 at 29 n.8. Respondents are mistaken. "In conducting their work, Congress certainly intended that the various [Offices of Inspector General (OIGs)] would enjoy a great deal of autonomy." *NASA v. FLRA*, 527 U.S.

229, 240 (1999). "But unlike the jurisdiction of many law enforcement agencies, an OIG's investigative office, as contemplated by the [Inspector General Act (IG Act), 5 U.S.C. App. 3], is performed with regard to, and on behalf of, the particular agency in which it is stationed." *Id.* As a result, each OIG is given statutory access "to all records, reports, audits, reviews, documents, papers, recommendations, or other materials available to the applicable establishment which relate to programs and operations with respect to which [the OIG] has responsibilities under [the IG Act]." IG Act § 6(a)(1). In addition, documents reflecting "legitimate, back-and forth deliberations" between an agency and its OIG are covered by the deliberative process privilege. *Neighborhood Assistance Corp. v. U.S. Dep't of HUD*, 2013 WL 5314457, at *13 (D.D.C. Sept. 24, 2013).

In this case, respondents allege that SIGTARP is "an independent investigatory agency." ECF No. 19 at 29 n.8. Respondents are mistaken. SIGTARP is a "component[]" of Treasury, notwithstanding its autonomy as an OIG. 31 C.F.R. § 1.1(a)(1)(i)(Y). For that reason, the documents that Treasury has produced to SIGTARP have been produced "on an intra-agency basis, and subject to Section 6 of the [IG Act]." Ex. X ¶ 9. In view of that fact, no privilege applicable to any such document has been waived by its production to SIGTARP.[9]

Finally, respondents argue that compliance with the Document Subpoena would not place an undue burden on Treasury because no document that Treasury has produced to SIGTARP or to the House Committee would need to be reviewed for responsiveness to the Document Subpoena if the Document Subpoena were amended to require the production of those

[9] Though respondents do not raise the point, no privilege applicable to any document that Treasury has produced to the House Committee has been waived by that production. *See Rockwell Int'l Corp. v. U.S. Dep't of Justice*, 235 F.3d 598, 604 (D.C. Cir. 2001) (holding that the deliberative process privilege is not waived by the production to Congress of agency documents that are not "created specifically to assist Congress, but rather [are] memoranda and correspondence created as part of the [agency's] deliberative processes").

documents. ECF No. 19 at 30. However, respondents express uncertainty that "these document productions would produce all of the relevant data that [respondents] need in connection with their action against the PBGC." *Id.* By so stating, respondents make it clear that Treasury's production of the documents it has produced to SIGTARP and to the House Committee would merely lead to requests for the production of other documents.

D. Respondents Have Not Refuted Treasury's Contention that Compliance with the Deposition Subpoena Could Place an Undue Burden upon It.

The Deposition Subpoena asks Treasury to produce one or more witnesses to testify at deposition about "communications" relating to certain matters in which Matthew A. Feldman and Harry J. Wilson participated as members of the Auto Team in 2009. ECF No. 13-4, att. A at 1, 3. However, "[n]o one currently working at Treasury has knowledge of the communications referenced in [the subpoena] except insofar as he or she has reviewed the record or read emails to or from Mr. Feldman or Mr. Wilson since the time that Mr. Feldman and Mr. Wilson left the Auto Team." Ex. X ¶ 12. In addition, "the members of the Auto Team have left Treasury." *Id.* Any witness designated to testify in response to the Deposition Subpoena would therefore need "a substantial amount of time to prepare." *Id.* For both of these reasons, the subpoena should be quashed.

Respondents counter with two arguments. First, respondents express disbelief that "Treasury does not have some individual competent to testify as to [Mr. Feldman's and Mr. Wilson's] communications in 2009." ECF No. 19 at 31. However, the Auto Team consisted of but 14 people, only 12 of whom were employed by Treasury. Ex. 2F at ix. The fact that none of the 12 continues to work for Treasury should therefore come as no surprise to respondents.

Second, respondents express disbelief that Treasury cannot compel Mr. Feldman or Mr. Wilson to appear for deposition, "especially given that the Treasury's *Touhy* regulations * * *

specifically contemplate deposition testimony by former employees." ECF No. 19 at 31 (citing 31 C.F.R. § 1.11(d)). However, "*Touhy* regulations are relevant for internal housekeeping and determining who within the agency must decide how to respond to a federal court subpoena." *Watts*, 482 F.3d at 508-09. For that reason, neither Treasury's *Touhy* regulations nor anything else gives it the authority to compel former employees like Mr. Feldman or Mr. Wilson to appear for deposition.

As a separate matter, respondents express their readiness to withdraw the Deposition Subpoena and issue deposition subpoenas to Mr. Feldman and Mr. Wilson directly. ECF No. 19 at 31. Treasury will respond to such subpoenas if and when they are issued because such subpoenas will seek information belonging to Treasury. However, this Court's ruling on Treasury's renewed motion to quash is likely to have a bearing on the enforceability of any such subpoena. For that reason, Treasury asks that respondents refrain from issuing any such subpoena until after this Court issues its ruling on Treasury's renewed motion.

E. Respondents Have Not Shown That Their Subpoenas Are Necessary in View of the Tremendous Amount of Information Already Available to Respondents from Sources Other Than Treasury.

"'It is contrary to the first principles of justice to allow a search through all [of a party's] records, *relevant or irrelevant*, in the hope that something will turn up.'" *Okla. Press Publ'n Co. v. Walling*, 327 U.S. 186, 207 n.40 (1946) (quoting *FTC v. Am. Tobacco Co.*, 264 U.S. 298, 306 (1924) (Holmes, J.)). For that reason, "[d]iscovery must have an end point." *Stevo v. Frasor*, 662 F.3d 880, 886 (7th Cir. 2011). Permission to conduct discovery may thus be denied if the court finds that "the requested discovery would not alter the resolution of [the] lawsuit." *Halebian v. Berv*, 2013 WL 5977962, at *5 (2d Cir. Nov. 12, 2013). Permission to conduct discovery may also be denied if the proponent of the discovery "already ha[s] access to 'a

significant amount of source material'" on the issue to which the discovery pertains. *Jewish War Vets. v. Gates*, 506 F. Supp.2d 30, 40 (D.D.C. 2007) (internal quotation marks omitted).

In this case, respondents already have access to "a significant amount of source material" pertaining to the termination of the Delphi Salaried Plan. The "source material" to which they have access consists of the following:

a. *PBGC's Document Production.* PBGC has produced almost 1.1 million pages of documents in response to respondents' requests for production (RFPs) in *Black I*. Ex. V at 7-8. Thousands of those pages are responsive to RFP Category 8, the sub-category of the RFPs that mirrors the Document Subpoena.[10] Ex. X ¶ 6. Respondents acknowledge that PBGC has produced "some (and hopefully most) of the email correspondence between it and the Treasury." ECF No. 19 at 35. The mere possibility that "a few more" emails between PBGC and Treasury might exist is not enough by itself to "justify the resources" that Treasury would need to expend to find and review those emails. *See Linder v. Calero-Portocarrero*, 183 F.R.D. 314, 321 (D.D.C. 1998).

b. *The Oversight Reports*. The Government Accountability Office has issued two reports dealing with the Delphi pension plans. *See* Ex.A at 1 & n.3. SIGTARP has issued a report of its own. ECF No. 13-2.

c. *Steven L. Rattner's Book.* Steven L. Rattner has published a 309-page memoir of the work of the Auto Team. Ex. 2F.

d. *The Congressional Hearings*. Committees of the House and Senate have held seven separate at which the Delphi Salaried Plan and its termination have been discussed. S. Hrg. No. 111-1078 (Oct. 29, 2009); H. Serial No. 111-42 (Dec. 2, 2009); H. Serial No. 111-143 (July 13, 2010); H. Serial No. 112-69 (June 22, 2011); H. Serial No. 112-106 (Nov. 14, 2011); H. Serial No. 112-178 (July 10, 2012); Ex. 2C (Sept. 11, 2013). Matthew A. Feldman and Harry J. Wilson were witnesses at the hearings held on July

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[10] RFP Category 8 asked PBGC to produce the following:

> All documents and things you received from the Federal Executive Branch [the Treasury Department, the Auto Task Force, the Labor Department, and the Executive Office of the President] or produced to the Federal Executive Branch, since January 1, 2009, related to Delphi or the Delphi Pension Plans, including, but not limited to, documents related to the termination of the Delphi Pension Plans, the assumption of any liability associated with the Delphi Pension Plans by GM, PBGC liens on Delphi assets, recoveries related to the Delphi Pension Plans, the Waiver and Release Agreement, and the Delphi-PBGC Settlement Agreement.

Ex. H at 8, 9.

10, 2012, and September 11, 2013. H. Serial No. 112-178 at iii; Ex. 2C at 9.

e. *The Depositions of Matthew A. Feldman and Harry J. Wilson.* Matthew A. Feldman was deposed in the Delphi bankruptcy. Ex. Z at 1. Harry J. Wilson was deposed in the General Motors bankruptcy. Ex. 2A at 1.

f. *The Depositions of PBGC Officials.* Respondents have taken the depositions in *Black I* of four present or officials of PBGC. ECF Nos. 11-6, 11-7, 11-8; Ex. Y. Discussing one of those officials, respondents say: "The communication between the Auto Task Force and the PBGC on Delphi issues took place almost exclusively through two individuals, Joe House at the PBGC, and the Auto Team's Matt Feldman." ECF No. 19 at 15. Respondents criticize Mr. House because he could not remember the details at his deposition of everything about which he was asked. *Id.* at 16, 17. Their criticism is tempered, however, by the acknowledgement of their counsel that the recollection of Mr. House was "a little bit fuzzy on some of these matters since they took place three, four years ago." ECF No. 11-8 at 47:9-10.

Despite the availability of all of this material, respondents allege that "their need for discovery" is not "obviated." ECF No. 19 at 32. However, respondents' opposition to Treasury's renewed motion to quash contains a nine-page summary of the evidence that allegedly substantiates their view of the involvement of Treasury in the restructuring of General Motors. *Id.* at 10-19. The ability of respondents to prepare that summary shows that the discovery they seek from Treasury by means of their subpoenas "would not alter the resolution of [Counts 1-4 of *Black I*]." *See Halebian v. Berv*, 2013 WL 5977962, at *5. Respondents' subpoenas should therefore be quashed.

II. TREASURY SHOULD BE GIVEN ADEQUATE TIME TO COMPLY WITH THE DOCUMENT SUBPOENA IF ITS RENEWED MOTION TO QUASH IS DENIED.

Respondents ask that Treasury be given 30 days to "comply fully" with the Document Subpoena if its renewed motion to quash is denied. ECF No. 19-7. Treasury will not be able to say with assurance how long compliance with the subpoena will take until it initiates its efforts to comply with it. Nonetheless, Treasury is certain for the reasons set forth in Ms. Desai's

declaration that compliance with the subpoena will take far longer than 30 days. Treasury therefore proposes to provide respondents with a proposed schedule for compliance with the subpoena no later than 30 days after its renewed motion to quash is denied. If respondents object to the schedule that Treasury proposes, Treasury, respondents, or both will apply to the Court for guidance. *See Linder*, 183 F.R.D. at 323 (adopting a similar procedure).

CONCLUSION

For the foregoing reasons, Treasury's renewed motion to quash (ECF No. 15) should be granted.

Respectfully submitted,

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Dated: November 19, 2013

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2013, I served the within memorandum and the exhibits submitted with the memorandum on all counsel of record by filing them with the Court by means of its ECF system.

s/ *David M. Glass*