IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

RESPONDENTS' OPPOSITION TO PETITIONER'S MOTION FOR STAY

Respondents respectfully file this opposition to the motion for a stay of discovery production pending appeal, filed by Petitioner U.S. Department of the Treasury (the "Treasury").

Introduction

On April 13, 2017, the Court ordered the Treasury to forthwith produce to Respondents the 63 documents over which the Treasury had asserted the presidential communications privilege, ECF No. 44 at 1, on the grounds that that Respondents had "made at least a preliminary showing of necessity for [the] information that is not merely demonstrably relevant but indeed substantially material to their case." ECF No. 45 at 11 (internal quotations omitted).

The Treasury has moved for a stay to allow it further time to "consider[] whether to appeal that order." ECF No. 46-1 at 1. 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* – a case that the Treasury ignores entirely – 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 in this miscellaneous action are plaintiffs in *Black v. PBGC*, Case No. 09-13616, pending in the United States District Court for the Eastern District of Michigan (the "Michigan Court"). In *Black*, which concerns the 2009 termination of Respondents' pension plan (the "Delphi Plan") by the Pension Benefit Guaranty Corporation ("PBGC"), "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." ECF No. 45 at 11.

In January 2012, Respondents served the Treasury with 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, which is now more than five years ago, 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. Minute Order, May 17, 2012.[1]

The Court denied the Treasury's motion to quash the subpoena *duces tecum* in June 2014, and 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.

Mindful of the Court's direction, Respondents agreed to enter into a stipulation and protective order with the Treasury, 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.

In June 2014, the Treasury produced two privilege logs to Respondents stating that the Treasury was withholding roughly 1,260 responsive documents on the basis of various privileges, the bulk of which were assertions of the deliberative process and the presidential communications privileges. 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.

[1] 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.

"After reviewing the withheld documents *in camera*, the Court concluded that Treasury failed to provide a specific articulation of the rationale supporting the deliberative process privilege and ordered 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 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), 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 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 v. Powell*, 561 F.2d 242, 249 (D.C. Cir. 1977).

Argument

"[G]ranting a stay pending appeal is 'always an extraordinary remedy,' and that 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 (D.C. Cir. 1966), and citing *Cuomo v. U.S.*

NRC, 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 Pol'y Dev. Grp., 230 F. Supp. 2d 12, 14 (D.D.C. 2002) (Sullivan, J.). "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., Inc.*, 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 976) (additional citation omitted).

In this instance, the Treasury asserts irreparable harm on the ground that its right to appeal the April 13, 2017 Order will allegedly become moot once it produces the 63 documents covered by that Order. It says compliance 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. 46-1 at 4 (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 makes no mention of *Mohawk* in its brief, and its authorities all predate the Supreme Court's 2009 *Mohawk* decision. *See* ECF No. 46-1 at 4 (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 *Kellogg* situation, 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 while it mulls over whether to appeal an adverse ruling on a *qualified* executive privilege. 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 *16 (citing *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 16 n.9 (1992)).

Moreover, 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 PBGC, 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 (attached here as Ex. 1); and prior to the filing of the Treasury's motion to stay, Respondents 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 April 13, 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 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)).[2]

[2] 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 these 63 documents "to limit the spillover effects" of compliance with the April 13, 2017 Order pending appellate review. *Mohawk*, 558 U.S. at 112. Respondents have included in their attached proposed order language to this effect.

Nor is there any merit to the Treasury's contention that institution of the Office of the President will be harmed absent a stay. *See* ECF No. 46-1 at 4-5 (suggesting that "'[s]pecial considerations,'" involving the President's ability to obtain candid information from advisors and maintain confidential communications, necessitate a stay here) (quoting *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 385 (2004)). 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. Further, because the documents at issue here involve a claim of privilege by a former President, the institutional concerns are far less significant. *See Dellums v. Powell*, 561 F.2d 242, 247 (D.C. Cir. 1977) (the fact "that the claim of privilege is being urged solely by a former president," is "of cardinal significance," such that "the risk of impairing necessary confidentiality is attenuated") (internal citation omitted); *Cheney*, 542 U.S. at 381 (noting that a case in which the Vice-President is not an actual party in the case "might present different considerations").

Because the Treasury has failed to demonstrate that it will suffer irreparable harm absent a stay, its motion should be denied.

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 at 372. The Treasury does not come close to making the requisite showing.

As noted above, 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*. (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 that the Court's relevance determination would form the basis of any hypothetical appeal. *See* ECF No. 46-1 at 6 ("Respondents assert in this case that . . . the documents 'may show pressure exerted by Treasury or the White House to terminate the Delphi plan for impermissible or political reasons.' Treasury disagrees that the exertion of any such pressure would have rendered the termination of the Delphi Salaried Plan wrongful.") (internal citation omitted). However, the Treasury offers no authority (other than conclusory assertions) in support of this contention, and more importantly, it ignores that 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"). As the Court has previously noted in another case, simply repeating arguments that the Court has already considered and rejected, without any new arguments or support, is insufficient to demonstrate "a probability of success on the merits." *In re Special Proceedings,* 840 F. Supp. 2d 370, 373 (D.D.C. 2012).

Should it attempt an appeal, the Treasury would face an additional hurdle that would make a successful appeal improbable. "Most 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*, 558 U.S. at 110 (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). 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 April 13, 2017 Order 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 nearly 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 v. Nat'l Energy Pol'y Dev. Grp.,* 230 F. Supp. 2d 12, 16 (D.D.C. 2002). Moreover, 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 (and the PBGC as well) have a substantial interest in avoiding further delays in *Black*'s prosecution.[3] Indeed, as the Treasury is aware, Respondents are

[3] 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"). Additionally, Respondents note that the Treasury has sought extensions six times in this action. *See* ECF Nos. 8, 9, 14, 17, 20, 32.

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, the Treasury asserts in conclusory fashion that the public has an interest in preventing the surrender of these 63 documents to Respondents prior to the adjudication of a potential appeal, on the theory that the public's interest aligns completely with that of the Treasury. However, the Treasury offers no support for the proposition that these interests are so aligned, and "broad, conclusory statements" about the injury "the public may suffer . . . are not sufficient to 'justify the court's exercise of such an extraordinary remedy.'" *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.) (quoting *Cuomo v. United States NRC*, 772 F.2d 972, 978 (D.C. Cir. 1985)). In contrast to the Treasury's conclusory assertions regarding 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. Finally, even assuming that there is some mutuality of interest between the Treasury and the public at large, as Respondents noted above, the fact "that the claim of privilege is being urged solely by a former president," is "of cardinal significance," such that "the risk of impairing necessary confidentiality is attenuated." *Dellums*, 561 F.2d at 247 (internal quotation omitted).

Conclusion

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

Date: May 8, 2017

Respectfully submitted,

/s/ Anthony F. Shelley

Anthony F. Shelley (D.C. Bar No. 420043)
Timothy P. O'Toole (D.C. Bar No. 469800)
Michael N. Khalil (D.C. Bar No. 497566)
Miller & Chevalier Chartered
900 Sixteenth St. NW
Washington, DC 20006
Telephone: 202-626-5800
Facsimile: 202-626-5801
E-mail: ashelley@milchev.com
totoole@milchev.com
mkhalil@milchev.com

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 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:

David M. Glass
U.S. Dep't of Justice - Civil Division
20 Massachusetts Avenue, NW
Washington, DC 20530
Email: david.glass@usdoj.gov

John A. Menke
PENSION BENEFIT GUARANTY CORPORATION
Office of the Chief Counsel
1200 K Street, NW
Washington, DC 20005-4026
Email: menke.john@pbgc.gov

/s/ Anthony F. Shelley