[ORAL ARGUMENT NOT YET SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Department of the Treasury, **Petitioner-Appellant,** **v.** **Dennis Black; Charles Cunningham; Kenneth Hollis; Delta Salaried Retirees Association,** **Respondents-Appellees.**	**No. 17-5142**

EMERGENCY MOTION FOR STAY PENDING APPELLATE REVIEW AND FOR IMMEDIATE ADMINISTRATIVE STAY

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INTRODUCTION AND SUMMARY

The Department of the Treasury (Treasury) respectfully requests that this Court stay the district court's order requiring the production of 63 documents that the district court held were covered by the presidential communications privilege. The district court denied the government's motion for a stay pending appellate review on July 12, 2017, and ordered the government to produce the privileged documents by July 21, 2017.

This suit originated when Treasury moved to quash a third-party subpoena issued to it by the district court. The underlying litigation is a suit in the Eastern District of Michigan brought by former employees of Delphi Corporation against the Pension Benefit Guaranty Corporation. *Black v. Pension Benefit Guar. Corp. (PBGC)*, No. 09-cv-13616. In that suit, plaintiffs allege, among other things, that their pension plan was improperly terminated in 2009 as a result of political pressure from the federal government.

Plaintiffs in the underlying litigation (who are respondents in this suit) asked the District Court for the District of Columbia to issue a subpoena to Treasury (which had previously been dismissed as a party in the Michigan case). Although the district court recognized that the presidential communications privilege applies to the 63 documents now at issue, it nevertheless ordered disclosure on the ground that respondents' need for the documents outweighed the significant interests protected by the privilege. The district court identified no basis for its blanket order, which

relied on the wrong legal standard. Although the government furnished the documents to the court for *in camera* review, the court described no respect in which any of the documents, much less all the documents, bear on the claims asserted in the underlying litigation, let alone are sufficiently critical to overcome the presidential communications privilege. Nor did the district court explain how any, much less all, of the documents would add to the information already in respondents' possession, which includes not only voluminous discovery from the Pension Benefit Guaranty Corporation but thousands of documents already produced by Treasury.

Absent a stay during the pendency of this Court's review, disclosure will proceed and the important interests underlying the government's assertion of privilege will be vitiated. No urgency in the underlying litigation, which was instituted in 2009, justifies foreclosing review by this Court. We ask that the Court stay the district court's disclosure order by July 21, 2017, or, in the alternative, grant an immediate stay to permit full consideration of this stay motion.[1]

STATEMENT

A. The Underlying Litigation

Plaintiffs in the underlying action (respondents in this action) are former employees of auto parts manufacturer Delphi Corporation and beneficiaries of the pension plain maintained by Delphi for its salaried workers.

[1] Pursuant to Circuit Rule 8(a)(3), we have contacted counsel for respondents, who oppose this motion.

As relevant here, respondents sued the Pension Benefit Guaranty Corporation (PBGC) in the Eastern District of Michigan in September 2009, alleging that the PBGC wrongly terminated their pension plan in July 2009. Respondents challenge the termination on substantive and procedural grounds under a provision of the Employee Retirement Income Security Act (ERISA) that states that the PBGC may "institute proceedings" to terminate a plan if certain determinations are made, 29 U.S.C. § 1342(a)(1)-(4), and may then seek a judicial "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.* § 1342(c)(1). In this case, and in many others, the PBGC did not seek a judicial decree but instead entered an agreement with the plan administrator and terminated the plan.

In their complaint, respondents alleged that Delphi was "under strong pressure by the federal government" to agree to terminate the pension plan in order to "further the government's interest in restructuring the auto industry," and respondents claim this allegation bears on the court's statutory inquiry. Second Am. Compl. ¶ 27, Dkt. No. 145, *PBGC*, No. 09-cv-13616 (E.D. Mich.) (Add. 86-87).[2]

[2] Although Treasury and Treasury officials were initially named as defendants in respondents' suit, the claims against them were dismissed. *See PBGC*, No. 09-cv-13616, 2011 WL 3875055 at *4-9 (E.D. Mich. Sept. 2, 2011).

B. Third-Party Subpoenas

1. Motions to Quash

Pursuant to the then-applicable version of Federal Rule of Civil Procedure 45(a), respondents issued subpoenas in the United States District Court for the District of Columbia to Treasury seeking various documents and depositions.

From 2012 through 2015, the parties litigated whether the subpoenas should be quashed. The government urged, among other things, that the requested materials are cumulative and duplicative—particularly in light of the extensive discovery obtained by the respondents from the PBGC, depositions in a related proceeding, and testimony at seven congressional hearings where the termination of the Delphi plan was discussed. *See* Dkt. No. 15, at 11-13.

On June 19, 2014, the district court denied the government's renewed motion to quash. Dkt. No. 27 (Add. 54). As to relevance, the court deferred to the judge in the underlying Michigan case who had allowed discovery "designed to reveal whether the PBGC could have satisfied" the statutory standard for terminating the plan under 29 U.S.C. § 1342, had it sought a judicial decree to do so, and whether PBGC "yielded to pressure from other federal entities, including Treasury." Dkt. No. 27, at 15-16 (Add. 68-69).

2. Motion to Compel

a. During 2014 and 2015, Treasury produced thousands of documents. On July 9, 2015, respondents moved to compel production of the remaining documents that

Treasury had withheld or produced in redacted form based on assertions of various privileges, including the documents withheld under the presidential communications privilege. Dkt. No. 30, at 2. *See also* Dkt. No. 35-3, at 1-4 (declaration of Deputy White House Counsel formally asserting the presidential communications privilege over 63 documents) (Add. 50-53).

With respect to the presidential communications privilege, respondents urged that they could make a showing of need, citing their allegation that their pension plan "did not need to be terminated, and that the Treasury or the White House impermissibly pressured the PBGC to terminate the Salaried Plan for unlawful, impermissible, or political reasons." Dkt. No. 30, at 28-32.

The district court ordered the government to submit all of the withheld materials for *in camera*, ex parte review, along with explanations for the privileges asserted. Minute Orders 6/17/16, 7/15/16 (Add. 9-10). The government did so on July 25, 2016. Dkt. No. 40.

b. On December 20, 2016, the court ordered Treasury to produce to respondents 120 documents that had been withheld solely on deliberative process grounds. Dkt. No. 42, at 4 (Add. 39). The government complied.

The court's December 20 order also directed Treasury to submit a revised privilege log along with the relevant documents for *in camera* review, Dkt. No. 42, at 13 (Add. 48), which the government did, Dkt. No. 43.

c. On April 13, 2017, the district court ordered the government to produce all 63 documents over which it asserted the presidential communications privilege. Dkt. No. 45, at 3-11 (Add. 19-27). The court described the documents as falling into four categories: "(1) drafts of presidential speeches; (2) personal requests for information by President Obama; (3) draft memoranda from staffers to Dr. Lawrence Summers the Director of the National Economic Council, Assistant to the President for Economic Policy, and co-chair of the Presidential Task Force on the Auto Industry ('Auto Task Force'); and (4) electronic mail conversations among Auto Team members concerning advice to be provided to the President." *Id.* at 4 (footnotes omitted) (Add. 20).

The court acknowledged that the presidential communications privilege is plainly applicable. Dkt. No. 45, at 4-10 (Add. 20-26). The court held, however, that the privilege was overcome by respondents' need for the documents—pointing to respondents' allegation that the withheld documents "may show pressure exerted by Treasury or the White House to terminate the Delphi Plan for impermissible or political reasons." *Id.* at 10-11 (Add. 26-27).

d. On April 28, 2017, the government requested a stay pending any appeal. Dkt. No. 46. On May 17, the district court directed the government to file a motion for reconsideration. On June 7, the district court granted the motion in limited part. Dkt. No. 53 (Add. 14). The court "modified" its prior order to require the government to produce "only . . . those portions of the documents that relate to

General Motors, Delphi Corporation, or the Pension Benefit Guaranty Corporation." *Id.* at 3 (Add. 16). The district court ordered the government to "produce the redacted versions of those 63 documents to respondents by no later than June 30, 2017." *Ibid.* And the court ordered that "until the time for seeking appellate review passes—and during the pendency of any appeal should one be taken—the 63 documents shall remain under seal in Chambers." *Ibid.* On June 12, the government timely noticed an appeal. (Add. 11).

e. On June 19, the government asked the district court to clarify the nature of the production order and again sought a stay pending appeal. Dkt. No. 58. On June 23, the district court vacated the portion of its order of June 7 requiring production of the documents Treasury asserted were subject to the presidential communications privilege, so that the court could give further consideration to the government's stay request and the respondents' response. Minute Order 6/23/17 (Add. 12).

On July 12, the court denied the government's request for a stay pending appeal. The court ordered Treasury to "produce the portions of the documents at issue that relate to (1) General Motors, (2) Delphi Corporation, or (3) the Pension Benefit Guaranty Corporation by no later than July 21, 2017 pursuant to a protective order agreed to by the parties." Minute Order 7/12/17 (Add. 13). The court stated that it was "persuaded by respondents' arguments that further delay could cause substantial harm to respondents, who are pensioners in varying stages of retirement and who claim that production of these documents will trigger new discovery and

dispositive motion deadlines in the underlying litigation, which has been pending for over eight years." *Ibid.* The court also observed that "[s]hould Treasury succeed in its appeal, any alleged harm to Treasury from compliance with this Order may be remedied through exclusion of the protected material and its fruits from evidence. See Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 109, 112 (2009)." *Ibid.* (original formatting).

ARGUMENT

I. The Government Has a Strong Likelihood of Success on the Merits.

The district court recognized that the presidential communications privilege applies to all 63 documents at issue but nevertheless ordered the disclosure of all documents on the generalized ground that respondents' speculative allegations were sufficient to overcome the privilege for each and every document. The court's ruling is plain and significant error, and we respectfully submit that a stay is warranted.[3]

[3] Because this collateral action was filed in a different circuit from the underlying case, and the district court has concluded its proceedings in this action, there is a final judgment under 28 U.S.C. § 1291. *See Linder v. Department of Defense*, 133 F.3d 17, 22-23 (D.C. Cir. 1998). If there is any question, however, we respectfully submit that orders to produce materials over which the government has asserted the presidential communications privilege are appealable under the collateral order doctrine. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 113 n.4 (2009) (reserving the question); *cf. Al Odah v. United States*, 559 F.3d 539, 543 (D.C. Cir. 2009) (per curiam) (order to produce state secrets material is collateral order). Alternatively, the court's clear error and the significance of its ruling warrant the exercise of this Court's mandamus jurisdiction. *See Cobell v. Norton*, 334 F.3d 1128, 1140 (D.C. Cir. 2003); *Ukiah Adventist Hosp. v. FTC*, 981 F.2d 543, 548 n.6 (D.C. Cir. 1992); *see also, e.g.*, *In re United States*, 678 F. App'x 981 (Fed. Cir. 2017).

A. The "presumptive privilege" that applies to presidential communications 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). It is "necessary to guarantee the candor of presidential advisers and to provide '[a] President and those who assist him . . . [with] free[dom] to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.'" *In re Sealed Case*, 121 F.3d 729, 743 (D.C. Cir. 1997) (quoting *Nixon*, 418 U.S. at 708); *see Loving v. Department of Defense*, 550 F.3d 32, 37 (D.C. Cir. 2008); *Judicial Watch, Inc. v. Department of Justice*, 365 F.3d 1108, 1112 (D.C. Cir. 2004). Documents subject to the presidential communications privilege are shielded in their entirety. *Sealed Case*, 121 F.3d at 745. And the privilege "covers final and post-decisional materials as well as pre-deliberative ones." *Ibid.*

Although the privilege is not absolute, the bar to overcoming the presidential communications privilege is high and is "more difficult to surmount" than the deliberative process privilege. *Sealed Case*, 121 F.3d at 746. Even in a criminal case, where "the public interest in assuring fair trials and enforcing the law" is at stake, a party attempting to overcome the presidential communications privilege must demonstrate (1) "that each discrete group of the subpoenaed materials likely contains important evidence"—*i.e.*, evidence "directly relevant to issues that are expected to be central to the trial," and (2) "that this evidence is not available with due diligence elsewhere"—*i.e.*, "to detail" efforts to obtain "sufficient evidence" elsewhere and

"explain why evidence covered by the presidential privilege is still needed." *Id.* at 753-55. Courts must precisely scrutinize assertions of need. Such claims are "subject to greater scrutiny" than similar assertions with regard to other qualified privileges, such as the deliberative process privilege. *See id.* at 745, 746. A district court first determines, whether "each discrete group of the subpoenaed materials likely contains important evidence," *id.* at 754, and, if so, "review[s] the documents *in camera* to excise non-relevant material," *id.* at 745; *see id.* at 759.

Where material is sought for use in a civil case, the burden to overcome the presidential communications privilege is even greater. A request for materials for a criminal case carries with it "the 'constitutional need for production of relevant evidence in a criminal proceeding.'" *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 383 (2004) (quoting *Nixon*, 418 U.S. at 713). In contrast, "[t]he need for information for use in civil cases, while far from negligible, does not share the urgency or significance" of a criminal subpoena, and "the right to production of relevant evidence in civil proceedings does not have the same 'constitutional dimensions.'" *Id.* at 384*; see Sealed Case*, 121 F.3d at 753-54.

B. 1. The district court signally failed to apply these standards. Having found that the documents are covered by the privilege, the court stated only that "for substantially the same reasons advanced by Respondents, the Court is persuaded that Respondents have made 'at least a preliminary showing of necessity for information that is not merely demonstrably relevant but indeed substantially material to their

case.' *Dellums v. Powell,* 561 F.2d 242, 249 (D.C. Cir. 1977)." Dkt. No. 45, at 11 (Add. 27). The court offered no discussion of Treasury's arguments, summarily dismissing Treasury's contention that respondents' asserted need for the material was based on "'nothing but rank speculation'" as "unconvincing[]." Dkt. No. 45, at 11 (Add. 27) (quoting Dkt. No. 35, at 24).

2. The district court's cursory discussion falls far short of the stringent requirements for overcoming the presidential communications privilege. And contrary to this Court's precedent, the district court failed to separately scrutinize "each discrete group of the subpoenaed materials," *Sealed Case*, 121 F.3d at 754, let alone the separate documents that were before the court.

The district court, which had received the documents for *in camera* review,[4] did not make any findings as to whether the 63 documents contain evidence pertaining to, much less establishing, respondents' assertions of governmental pressure. Nor did the court explain why such information would be sufficiently critical to the Michigan case to override the presidential communications privilege.

Neither respondents nor the district court indicated how the documents described in the privilege logs and declaration could bear on respondents' theories. For example, neither respondents nor the court explained how a draft presidential speech could offer evidence of clandestine pressure (much less offer evidence not

[4] If this Court requests, the government will provide the relevant documents for *in camera* review.

already obtained in the thousands of documents respondents have already received from Treasury alone). The court's analysis would be inadequate even under the less demanding standards applicable to the deliberative process privilege.

3. Even on its face, the court's decision failed to apply the correct standard for determining whether a party in civil litigation has overcome the presidential communications privilege. In declaring that respondents had met their burden, the court quoted from *Dellums v. Powell*, 561 F.2d 242, 249 (D.C. Cir. 1977), concluding that respondents had "made 'at least a preliminary showing of necessity for information that is not merely demonstrably relevant but indeed substantially material to their case.'" Dkt. No. 45, at 11 (Add. 27).

The correct inquiry, however, is not whether a party has "made 'at least a preliminary showing of necessity for information that is . . . substantially material to their case.'" Even in criminal litigation, a court asks whether the information is "directly relevant to issues that are expected to be central." *Sealed Case*, 121 F.3d at 754. *Dellums* concerned an invocation of privilege only by a former President and not, at any stage, by a President who was in office. 561 F.2d at 243-44, 245, 247-48. The Court held that even "[a]ssuming arguendo a former President may present a claim of presidential privilege," such a claim is "entitled to lesser weight than that assigned the privilege asserted by an incumbent President." *Id.* at 245; *accord id.* at 247 ("[I]f he is to be allowed to do so, such a claim carries much less weight."). The Court made clear that in that scenario, the privilege is of "lesser significance" when deciding "whether

the claim is overcome." *Dellums*, 561 F.2d at 248. Here, in contrast, the privilege was initially asserted on behalf of a sitting President.

Moreover, the *In re Sealed Case* standard—which the district court quoted but failed to apply, Dkt. No. 45, at 10 (Add. 26)—concerned the inquiry in reviewing a grand jury subpoena where "the public interest in assuring fair trials and enforcing the law" is at stake. 121 F.3d at 753. The Supreme Court has made clear that in the ordinary civil context, the standard for overcoming the privilege is even higher. *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 383-84 (2004). "As *Nixon* recognized, the right to production of relevant evidence in civil proceedings does not have the same 'constitutional dimensions'" as a request for information in a criminal case. *Id.* at 383 (quoting *Nixon*, 418 U.S. at 713 (explaining that such a criminal subpoena carries with it "the 'constitutional need for production of relevant evidence in a criminal proceeding'")); *see Sealed Case*, 121 F.3d at 754 (declining to read *Nixon* as requiring that the information "must be shown to be *critical to an accurate judicial determination*" in a criminal case because that would be "incompatible with the [*Nixon*] Court's repeated emphasis on the importance of access to relevant evidence in a criminal proceeding") (emphasis added); *cf. Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc) ("[T]he sufficiency of the Committee's showing must depend solely on whether the subpoenaed evidence is *demonstrably critical* to the responsible fulfillment of the Committee's functions.") (emphasis added). Moreover, "[t]he need for information

for use in civil cases, while far from negligible, does not share the urgency or significance" of a criminal subpoena. *Cheney*, 542 U.S. at 384.

4. The district court also erred by uncritically accepting respondents' assertion that "[n]one of the[] [requested documents subject to the presidential communications privilege] are available through any other means," Dkt. No. 30, at 32, particularly in the face of serious questions whether respondents could obtain similar evidence elsewhere.

This Court has made clear that "privileged presidential communications should not be treated as just another source of information," and the party seeking privileged documents of that nature "should be prepared to detail" its efforts "to determine whether sufficient evidence can be obtained elsewhere" and "explain why evidence covered by the presidential privilege is still needed." *Sealed Case*, 121 F.3d at 755. The district court did not follow that procedure or make that finding.

The district court noted respondents' assertion "that the materials [at issue] are unavailable through any other means." Dkt. No. 45, at 11 (citing respondents' motion, Dkt. No. 30, at 32) (Add. 27). But the district court said nothing about whether *other materials* could constitute "sufficient evidence," that is, "why evidence covered by the presidential privilege is still needed." *See Sealed Case*, 121 F.3d at 755. The absence of any such analysis is particularly striking because, as the government urged in moving to quash, respondents had obtained more than one million pages of documents from the PBGC; had obtained depositions from a related bankruptcy proceeding; and had

access to testimony at seven congressional hearings discussing the termination of the Delphi plan. Dkt. No. 15, at 11-13, 23-24; *see also* Dkt. No. 36, at 13-14 (respondents' reply in support of motion to compel identifying relevant information in a public report). And pursuant to the district court's first order on respondents' motion to compel, respondents also obtained from Treasury the documents subject to the deliberative process that—they had claimed—would reveal the same pressure that they speculated might be found in the documents subject to the presidential communications privilege.[5]

II. The Balance of Harms and the Public Interest Strongly Favor a Stay.

The harm resulting from disclosure is irreparable. This Court has explained that the presidential communications privilege is "necessary to guarantee the candor of presidential advisers and to provide '[a] President and those who assist him . . . [with] free[dom] to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.'" *Sealed Case*, 121 F.3d at 743 (quoting *Nixon*, 418 U.S. at 708). To give effect to the privilege, it is essential that appellate review be available to correct clear district court error. And to require disclosure before this Court has the opportunity to do so undermines the constitutional interests at stake. *Id.* at 745 ("The presidential privilege

[5] In total, to date, respondents have received more than 70,000 pages of documents from Treasury.

is rooted in constitutional separation of powers principles and the President's unique constitutional role.").

In wholly discounting the harm posed to the government by disclosure, both respondents and the district court relied on the Supreme Court's decision in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), arguing that the harm resulting from disclosure in this case could be rectified by an order excluding the documents from consideration in the underlying litigation. *See* Minute Order 7/12/17 ("Should Treasury succeed in its appeal, any alleged harm to Treasury from compliance with this Order may be remedied through exclusion of the protected material and its fruits from evidence.") (Add. 13). Reliance on *Mohawk* is singularly misplaced.

In *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014), this Court made clear that *Mohawk* does not stand for the proposition that there is no harm when privileged documents are disclosed. *See id.* at 761 ("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* establishes that 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 issuance of a mandamus writ, it follows that it can constitute irreparable injury warranting a stay.

Even on its own terms, *Mohawk* is inapposite here. The harm at issue in *Mohawk* stemmed from the use of privileged documents in litigation and is therefore the kind of harm that can be remedied by "postjudgment appeals[, which] generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege." 558 U.S. at 109. The harm at issue here stems not from potential use of the documents in the underlying litigation—to which Treasury is not a party—but from disclosure itself of materials protected by the presidential communications privilege. "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. Department of Defense*, 550 F.3d 32, 37 (D.C. Cir. 2008) (citing *Judicial Watch, Inc. v. Department of Justice*, 365 F.3d 1108, 1112 (D.C. Cir. 2004)). The district court's order undermines the important public policies this privilege serves, including the President's authority—rooted in "constitutional separation of powers principles and the President's unique constitutional role"—to make confidential decisions based on the candid and forthright recommendations of his top advisors. *Sealed Case*, 121 F.3d at 745.

Respondents and the district court were 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. It has never been thought that executive privileges are adequately protected by allowing disclosure to adversaries in litigation subject to a protective order, or that such orders will eliminate any chill 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). A court might consider the use of a protective order "to minimize" the harm to the government that will result from compelling disclosure of privileged information. *In re Subpoena Served Upon the Comptroller of the Currency*, 967 F.2d 630, 634 (D.C. Circ. 1992) ("*Comptroller Subpoena*"). But a protective order neither eliminates that harm, nor justifies discounting the government's interest in maintaining the document's confidentiality. *Cf. Perry v. Schwarzenegger*, 591 F.3d 1147, 1163-64 (9th Cir. 2010) (granting defendants' mandamus petition and overruling a district court's order compelling the defendants to produce documents whose disclosure 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 Comptroller 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); *In re United States*, 678 F. App'x 981, 988-89 (Fed. Cir. 2017) (quoting *Perry*, 591 F.3d at 1163-64). It is also entirely unclear how broadly any protective order would extend, given that respondents seek the documents to use in litigation to which Treasury is not a party.

And even in an ordinary case not presenting interests of constitutional dimensions, where the issue on appeal is whether to order disclosure of privileged documents, it makes little sense to require production before proceeding with the appeal. *See, e.g., Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979) ("Meaningful review entails having the reviewing court take a fresh look at the decision of the trial court before it becomes irrevocable."). *Cf. Judicial Watch, Inc. v. Department of Justice*, 432 F.3d 366, 369 (D.C. Cir. 2005) (recognizing that requiring the production of material alleged by the government to be privileged "'would be to force the government to let the cat out of the bag'") (quoting *Irons v. FBI*, 811 F.2d 681, 683 (1st Cir. 1987)).

Granting a stay in this collateral proceeding can have only a minimal impact on the underlying case, which was filed in 2009. The district court's refusal to permit this Court the opportunity to consider its ruling prior to disclosure is particularly anomalous because the government first sought a stay on April 28, and then again on June 19, and the court then took several weeks of additional consideration before denying the stay on July 12.

In any event, the district court's stated concern about delay in the underlying litigation does not warrant the release of privileged presidential communications before this Court has the opportunity to fully consider the issue. To avoid unnecessary delay, the government stands ready to brief this matter on an expedited schedule, as directed.

CONCLUSION

We respectfully request that the Court issue a stay pending this Court's review of the district court's order of April 13, 2017, as modified by its order of June 7, 2017, or, in the alternative, that the Court issue an immediate administrative stay to permit consideration of this stay motion.

Respectfully submitted,

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JULY 2017

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 27(d)

I hereby certify that this motion complies with Federal Rule of Appellate Procedure 27(d)(1) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that it complies with Federal Rule of Appellate Procedure 27(d)(2) because it contains 4,852 words according to the count of Microsoft Word.

/s/ Samantha L. Chaifetz
Samantha L. Chaifetz

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on July 17, 2017, I electronically served and filed the foregoing document with the Clerk of the Court by using the appellate CM/ECF system. I also hereby certify that the participants in the case are registered CM/ECF users and will be served via the CM/ECF system.

/s/ Samantha L. Chaifetz
Samantha L. Chaifetz

ADDENDUM

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[ORAL ARGUMENT NOT SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES DEPARTMENT OF THE TREASURY, Appellant, v. DENNIS BLACK, et al., Appellees.	No. 17-5142

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIR. R. 28(a)(1)

A. Parties and Amici

The United States Department of Treasury was petitioner in the district court, and is appellant in this Court. Dennis Black, Charles Cunningham, Kenneth Hollis, and Delta Salaried Retirees Association were respondents in the district court and are appellees in this Court. The Pension Benefit Guaranty Corporation was an interested party in the district court. There were no amici or intervenors in the district court, and there are no amici or intervenors in this Court.

B. Rulings Under Review

Treasury seeks review of the district court's order of April 13, 2017, Dkt. No. 44, available at 2017 WL 1373234, as modified by the district court's orders of June 7, 2017, Dkt No. 53, and July 12, 2017 (7/12/17 Min. Order).

C. Related Cases

This case has not previously before this Court. A notice of appeal from the district court's minute order of July 12, 2017, was filed on July 13, 2017. Counsel is not aware of any other related cases currently pending in this Court or in any other court within the meaning of Cir. R. 28(a)(1)(C).

Respectfully submitted,

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JULY 2017

APPEAL

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:12−mc−00100−EGS

U.S. DEPARTMENT OF TREASURY v. BLACK et al
Assigned to: Judge Emmet G. Sullivan
Case in other court: USCA, 17−05142
USDC for the Eastern District of Michigan, 2:09−cv−13616
Cause: Motion to Quash Subpoenas

Date Filed: 02/17/2012
Jury Demand: None
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: U.S. Government Plaintiff

Petitioner

U.S. DEPARTMENT OF TREASURY

represented by **David Michael Glass**
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V.

Interested Party

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V.

Respondent

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Date Filed	#	Docket Text
02/17/2012	1	MOTION to Quash by U.S. DEPARTMENT OF TREASURY. (kb) (Entered: 02/21/2012)
02/17/2012	2	NOTICE OF RELATED CASE by U.S. DEPARTMENT OF TREASURY. Case related to Case No. 1:09−cv−13616, US District Court for the Eastern District of Michigan. (kb) (Entered: 02/21/2012)

02/24/2012	3	NOTICE of Appearance by Anthony F. Shelley on behalf of DENNIS BLACK, CHARLES CUNNINGHAM, DELTA SALARIED RETIREES ASSOCIATION, KENNETH HOLLIS (Shelley, Anthony) (Entered: 02/24/2012)
02/24/2012	4	NOTICE of Appearance by Timothy Patrick O'Toole on behalf of DENNIS BLACK, CHARLES CUNNINGHAM, DELTA SALARIED RETIREES ASSOCIATION, KENNETH HOLLIS (O'Toole, Timothy) (Entered: 02/24/2012)
02/24/2012	5	NOTICE of Appearance by Michael N. Khalil on behalf of DENNIS BLACK, CHARLES CUNNINGHAM, DELTA SALARIED RETIREES ASSOCIATION, KENNETH HOLLIS (Khalil, Michael) (Entered: 02/24/2012)
03/05/2012	6	Memorandum in opposition to re 1 MOTION to Quash filed by DENNIS BLACK, CHARLES CUNNINGHAM, DELTA SALARIED RETIREES ASSOCIATION, KENNETH HOLLIS. (Attachments: # 1 List of Exhibts, # 2 Exhibit A − Pappal Declaration, # 3 Exhibit B − Westenberg Declaration, # 4 Exhibit C − PBGC Press Release, # 5 Exhibit D − Mar. 20, 2009 Presentation, # 6 Exhibit E − M. Feldman Depo Transcript, # 7 Exhibit F − Sheehan Declaration, # 8 Exhibit G − Westenberg/Feldman Emails, # 9 Exhibit H − Discovery Ruling, # 10 Exhibit I − Second Mot. to Compel, # 11 Exhibit J − Apr. 2009 Termination Memo, # 12 Exhibit K − AR Cover Letter and TOC, # 13 Exhibit L − Sept. 2010 Hearing Transcript, # 14 Exhibit M − Three FOIA Transmittal Letters, # 15 Exhibit N − Part 1 Apr. 2010 FOIA Response, # 16 Exhibit N − Part 2 Apr. 2010 FOIA Response, # 17 Exhibit N − Part 3 Apr. 2010 FOIA Response, # 18 Text of Proposed Order)(Shelley, Anthony) (Entered: 03/05/2012)
03/08/2012	7	NOTICE of Appearance by John A. Menke on behalf of PENSION BENEFIT GUARANTY CORPORATION (Menke, John) (Entered: 03/08/2012)
03/09/2012	8	Unopposed MOTION for Extension of Time to File Response/Reply as to 1 MOTION to Quash by U.S. DEPARTMENT OF TREASURY (Glass, David) (Entered: 03/09/2012)
03/14/2012		MINUTE ORDER granting 8 the U.S. Department of Treasury's unopposed motion for an extension of time to file a reply in support of its Motion to Quash. Treasury shall file its reply by no later than March 26, 2012. Signed by Judge Emmet G. Sullivan on March 14, 2012. (lcegs4) (Entered: 03/14/2012)
03/15/2012		Set/Reset Deadlines: Replies due by 3/26/2012. (clv,) (Entered: 03/15/2012)
03/23/2012	9	Unopposed MOTION for Extension of Time to File Response/Reply as to 1 MOTION to Quash by U.S. DEPARTMENT OF TREASURY (Glass, David) (Entered: 03/23/2012)
03/28/2012		MINUTE ORDER granting 9 unopposed motion by U.S. Department of the Treasury ("Treasury") for extension of time to file reply in support of motion to quash. The Treasury shall file its reply in support of motion to quash by no later than April 2, 2012. Signed by Judge Emmet G. Sullivan on March 28, 2012. (lcegs4) (Entered: 03/28/2012)
03/28/2012		Set/Reset Deadlines: U.S. Department of Treasury reply due by 4/2/2012. (clv,) (Entered: 03/28/2012)
04/02/2012	10	REPLY to opposition to motion re 1 MOTION to Quash filed by U.S. DEPARTMENT OF TREASURY. (Attachments: # 1 Ex. List, # 2 Ex. M, # 3 Ex. N, # 4 Ex. O, # 5 Ex. P, # 6 Ex. Q, # 7 Ex. R)(Glass, David) (Entered: 04/02/2012)
05/17/2012		MINUTE ORDER. Upon review of the motion to quash, the response, and the reply thereto, it appears to the Court that a threshold issue in this matter is whether the court in the underlying action has permitted discovery regarding the factors enunciated in 29 U.S.C. 1342(c). In light of the fact that this precise issue is ripe for resolution before Judge Tarnow, the judge in the underlying action, the Court hereby STAYS this matter pending Judge Tarnow's resolution of PBGC's Objections to Magistrate Judge's Order of March 9, 2012 Granting Plaintiffs' Motion to Compel Discovery, Case 09−13616 (E.D. Mich), Doc. No. 209. Plaintiffs are directed to notify this Court of Judge Tarnow's decision within five calendar days after it issues. This Order is subject to reconsideration for good cause shown. Any motion for reconsideration shall be filed by no later than May 31, 2012. Signed by Judge Emmet G. Sullivan on May 17, 2012.

		(lcegs4) (Entered: 05/17/2012)
05/18/2012		Set/Reset Deadlines: Motions for reconsideration due by 5/31/2012. (clv,) (Entered: 05/18/2012)
08/13/2013	11	MOTION to Lift Stay *and Memorandum of Points and Authorities in Support* by DENNIS BLACK, CHARLES CUNNINGHAM, DELTA SALARIED RETIREES ASSOCIATION, KENNETH HOLLIS (Attachments: # 1 Exhibit A − PBGC Response to Rule 37 Mot. E.D. Mich., # 2 Exhibit B − SIGTARP Testimony, # 3 Exhibit C − Pls Opp'n to Mot. to Dismiss E.D. Mich., # 4 Exhibit D − Sept. 2010 Hr'g Tr., # 5 Exhibit E − Ex. 12 to Cann Depo, # 6 Exhibit F − Cann Depo Tr., # 7 Exhibit G − Snowbarger Depo Tr., # 8 Exhibit H − J. House Depo Tr., # 9 Exhibit I − Ex. 16 to House Depo, # 10 Exhibit J − Ex. 18 to House Depo, # 11 Exhibit K − Ex. 21 to House Depo, # 12 Exhibit L − Ex. 22 to House Depo, # 13 Exhibit M − Ex. 23 to Snowbarger Depo, # 14 Exhibit N − Ex. 27 to House Depo, # 15 Exhibit O − 8/9/13 Press Release, # 16 Text of Proposed Order)(Shelley, Anthony) (Entered: 08/13/2013)
08/23/2013	12	ERRATA by DENNIS BLACK, CHARLES CUNNINGHAM, DELTA SALARIED RETIREES ASSOCIATION, KENNETH HOLLIS 11 MOTION to Lift Stay *and Memorandum of Points and Authorities in Support* filed by KENNETH HOLLIS, DENNIS BLACK, DELTA SALARIED RETIREES ASSOCIATION, CHARLES CUNNINGHAM. (Attachments: # 1 Errata Corrected Page 5 to Memo in Support of Mot. to Lift Stay)(Shelley, Anthony) (Entered: 08/23/2013)
08/23/2013	13	SUPPLEMENTAL MEMORANDUM to re 11 MOTION to Lift Stay *and Memorandum of Points and Authorities in Support* filed by DENNIS BLACK, CHARLES CUNNINGHAM, DELTA SALARIED RETIREES ASSOCIATION, KENNETH HOLLIS. (Attachments: # 1 Exhibit List, # 2 Exhibit A − SIGTARP Report, # 3 Exhibit B − E.D. Mich. Order, # 4 Exhibit C − Subpoena on Dep't of Treasury)(Shelley, Anthony) (Entered: 08/23/2013)
08/30/2013	14	Unopposed MOTION for Extension of Time to File Response/Reply as to 11 MOTION to Lift Stay *and Memorandum of Points and Authorities in Support* by U.S. DEPARTMENT OF TREASURY (Glass, David) (Entered: 08/30/2013)
09/04/2013		MINUTE ORDER granting 14 the U.S. Dept of the Treasury's unopposed motion for extension of time. Treasury shall file a renewed motion to quash by no later than September 16, 2013. Treasury shall also file its response to 11 respondents' motion to lift the stay by no later than that same date. In view of the foregoing, Treasury's initial 1 Motion to Quash is hereby denied without prejudice to refiling. Signed by Judge Emmet G. Sullivan on September 4, 2013. (lcegs4) (Entered: 09/04/2013)
09/04/2013		Set/Reset Deadlines: Plaintiff's Motion to Quash due by 9/16/2013. Plaintiff's Response to 1 due by 9/16/2013. (mac) (Entered: 09/04/2013)
09/16/2013	15	Second MOTION to Quash *Subpoenas* by U.S. DEPARTMENT OF TREASURY (Attachments: # 1 Ex. List, # 2 Ex. S, # 3 Ex. T, # 4 Ex. U, # 5 Ex. V, # 6 Ex. W, # 7 Ex. X, # 8 Ex. Y, # 9 Ex. Z, # 10 Ex. 2A, # 11 Ex. 2B, # 12 Ex. 2C)(Glass, David) (Entered: 09/16/2013)
09/30/2013	16	Joint MOTION for Extension of Time to File *Opposition and Reply Briefs regarding Renewed Motion to Quash* by DENNIS BLACK, CHARLES CUNNINGHAM, DELTA SALARIED RETIREES ASSOCIATION, KENNETH HOLLIS, U.S. DEPARTMENT OF TREASURY (Attachments: # 1 Text of Proposed Order)(Shelley, Anthony) (Entered: 09/30/2013)
10/01/2013		MINUTE ORDER granting 16 joint motion for extension of time. The respondents shall file their opposition to the renewed motion to quash by no later than October 10, 2013; petitioner shall file its reply by no later than October 28, 2013. Signed by Judge Emmet G. Sullivan on October 1, 2013. (lcegs4) (Entered: 10/01/2013)
10/01/2013		Set/Reset Deadlines: Respondents opposition to renewed motion to quash due by 10/10/2013. Petitioner Reply due by 10/28/2013. (mac) (Entered: 10/01/2013)
10/09/2013	17	Unopposed MOTION for Extension of Time to File Response/Reply as to 15 Second MOTION to Quash *Subpoenas* by U.S. DEPARTMENT OF TREASURY (Glass, David) (Entered: 10/09/2013)

10/11/2013		MINUTE ORDER granting 17 unopposed motion for extension of time to complete briefing on renewed motion to quash due to the government shutdown. The parties shall file a joint status report with proposed deadlines for the remainder of the briefing schedule within two business days after Congress appropriates funds to the Department of Justice. SO ORDERED. Signed by Judge Emmet G. Sullivan on October 11, 2013. (lcegs4) (Entered: 10/11/2013)
10/17/2013	18	STATUS REPORT *(Joint) Proposing Remainder of Briefing Schedule for Petitioner's Renwed Motion to Quash* by U.S. DEPARTMENT OF TREASURY. (Glass, David) (Entered: 10/17/2013)
10/18/2013		MINUTE ORDER adopting the proposed dates for completion of briefing set forth in the parties 18 joint status report. Respondents shall file their opposition to the renewed motion to quash by no later than October 25, 2013, and Treasury shall file its reply by no later than November 12, 2013. Signed by Judge Emmet G. Sullivan on October 18, 2013. (lcegs4) (Entered: 10/18/2013)
10/18/2013		Set/Reset Deadlines: Respondent's opposition to motion to quash due by 10/25/2013. Plaintiff Reply due by 11/12/2013. (mac) (Entered: 10/18/2013)
10/25/2013	19	Memorandum in opposition to re 15 Second MOTION to Quash *Subpoenas* filed by DENNIS BLACK, CHARLES CUNNINGHAM, DELTA SALARIED RETIREES ASSOCIATION, KENNETH HOLLIS. (Attachments: # 1 Exhibit A − Jan. 26, 2009 email chain, # 2 Exhibit B − Delphi Mediation Statement, # 3 Exhibit C − May 28, 2009 email chain, # 4 Exhibit D − July 15, 2009 email chain, # 5 Exhibit E − June 30, 2009 AFTAP Cert., # 6 Exhibit F − Declaration of Jim DeGrandis, # 7 Text of Proposed Order)(Shelley, Anthony) (Entered: 10/25/2013)
11/06/2013	20	Unopposed MOTION for Extension of Time to File Response/Reply as to 15 Second MOTION to Quash *Subpoenas* by U.S. DEPARTMENT OF TREASURY (Glass, David) (Entered: 11/06/2013)
11/08/2013		MINUTE ORDER granting 20 unopposed motion by the Treasury for extension of time. Treasury shall file its reply in support of its renewed motion to quash by no later than November 19, 2013. Signed by Judge Emmet G. Sullivan on November 8, 2013. (lcegs4) (Entered: 11/08/2013)
11/08/2013		Set/Reset Deadlines: Reply due by 11/19/2013. (gdf) (Entered: 11/08/2013)
11/19/2013	21	REPLY to opposition to motion re 15 Second MOTION to Quash *Subpoenas* filed by U.S. DEPARTMENT OF TREASURY. (Attachments: # 1 Ex. List, # 2 Ex. 2D, # 3 Ex. 2E, # 4 Ex. 2F)(Glass, David) (Entered: 11/19/2013)
12/09/2013	22	Unopposed MOTION for Hearing *on Petitioner's Motion to Quash* by DENNIS BLACK, CHARLES CUNNINGHAM, DELTA SALARIED RETIREES ASSOCIATION, KENNETH HOLLIS (Attachments: # 1 Text of Proposed Order)(Shelley, Anthony) (Entered: 12/09/2013)
01/29/2014		MINUTE ORDER. The Court has received 22 respondents' unopposed motion to schedule a motions hearing, in order to address, in part, "new arguments" the Treasury raised in its reply brief. The Court, sua sponte, directs respondents to file a surreply, not to exceed 10 pages, by no later than February 10, 2014. The surreply is permitted for the limited purpose of addressing new arguments raised by Treasury in its reply brief, and no response to the surreply will be allowed. A hearing on Treasury's Renewed Motion to Quash will be held on March 5, 2014 at 11:00 AM in Courtroom 24A. SO ORDERED. Signed by Judge Emmet G. Sullivan on January 29, 2014. (lcegs4) (Entered: 01/29/2014)
01/29/2014		Set/Reset Hearings: Motion Hearing set for 3/5/2014 at 11:00 AM in Courtroom 24A before Judge Emmet G. Sullivan. (mac) (Entered: 01/29/2014)
02/06/2014	23	Unopposed MOTION *to Reschedule Hearing Date on Petitioner's Renewed Motion to Quash by DENNIS BLACK, CHARLES CUNNINGHAM, DELTA SALARIED RETIREES ASSOCIATION, KENNETH HOLLIS (Khalil, Michael) Modified on 2/6/2014 (jf,). (Entered: 02/06/2014)*
02/10/2014	24	SURREPLY to re 15 Second MOTION to Quash Subpoenas filed by DENNIS BLACK, CHARLES CUNNINGHAM, DELTA SALARIED RETIREES

		ASSOCIATION, KENNETH HOLLIS. (Attachments: # 1 Exhibit G − Emails re AFTAP Cert., # 2 Exhibit H − March 8, 2010 Letter, # 3 Exhibit I − March 22, 2010 Letter)(Shelley, Anthony) Modified on 2/11/2014 (jf,). (Entered: 02/10/2014)
02/12/2014		MINUTE ORDER granting 23 unopposed motion to reschedule hearing. The hearing previously scheduled for March 5, 2014 is hereby rescheduled for April 7, 2014 at 2:30 PM in Courtroom 24A. Signed by Judge Emmet G. Sullivan on February 12, 2014. (lcegs4) (Entered: 02/12/2014)
02/14/2014		Set/Reset Hearings: Motion Hearing set for 4/7/2014 at 2:30 PM in Courtroom 24A before Judge Emmet G. Sullivan. (mac) (Entered: 02/14/2014)
04/02/2014		MINUTE ORDER. The Court, sua sponte, cancels the motions hearing scheduled for April 7, 2014. In the event the Court is unable to resolve the pending motion to quash without a hearing, the Court will advise the parties and reschedule the hearing for a mutually agreeable date and time. Signed by Judge Emmet G. Sullivan on April 2, 2014. (lcegs4) (Entered: 04/02/2014)
05/29/2014	25	NOTICE *of Development in Underlying Case* by DENNIS BLACK, CHARLES CUNNINGHAM, DELTA SALARIED RETIREES ASSOCIATION, KENNETH HOLLIS re Order,,, (Attachments: # 1 Exhibit A − E.D. Mich. Docket Nos. 253 and 255)(Shelley, Anthony) (Entered: 05/29/2014)
06/19/2014	26	ORDER denying 15 Motion to Quash. Signed by Judge Emmet G. Sullivan on June 19, 2014. (lcegs7) (Entered: 06/19/2014)
06/19/2014	27	MEMORANDUM OPINION. Signed by Judge Emmet G. Sullivan on June 19, 2014. (lcegs7) (Entered: 06/19/2014)
11/03/2014	28	STIPULATION *and Protective Order Concerning Respondents' Subpoenas to Petitioner* by U.S. DEPARTMENT OF TREASURY. (Glass, David) (Entered: 11/03/2014)
11/06/2014	29	STIPULATION AND PROTECTIVE ORDER CONCERNING RESPONDENTS SUBPOENAS TO PETITIONER. Signed by Judge Emmet G. Sullivan on 11/04/14. (mac) (Entered: 11/06/2014)
07/09/2015	30	MOTION to Compel *Withheld and Redacted Documents, or for In Camera Review* by DENNIS BLACK, CHARLES CUNNINGHAM, DELTA SALARIED RETIREES ASSOCIATION, KENNETH HOLLIS (Attachments: # 1 Exhibit 1 − List of Documents That Should Be Produced, # 2 Exhibit 2 − Dep't of Treasury Priv Log, # 3 Exhibit 3 − Hearing − Administration's Auto Bailouts and Delphi Pension Decisions, # 4 Exhibit 4 − Deposition Transcript of M. Feldman, # 5 Exhibit 5 − Hearing − Lasting Implications of GM Bailout, # 6 Exhibit 6 − Hearing − Oversight of SIGTARP Report on Treasury's Role in Delphi Pension Bailout, # 7 Exhibit 7 − SICO v. US Discovery Order No. 6, # 8 Exhibit 8 − GAO Report − Delphi Pensions, Key Events Leading to Plan Terminations, # 9 Text of Proposed Order)(Shelley, Anthony) (Entered: 07/09/2015)
07/10/2015	31	MOTION to Expedite *Briefing Schedule on Their Motion to Compel Withheld and Redacted Documents, or for In Camera Review* by DENNIS BLACK, CHARLES CUNNINGHAM, DELTA SALARIED RETIREES ASSOCIATION, KENNETH HOLLIS (Attachments: # 1 Text of Proposed Order)(Shelley, Anthony) (Entered: 07/10/2015)
07/12/2015	32	Cross MOTION for Extension of Time to File Response/Reply as to 30 MOTION to Compel *Withheld and Redacted Documents, or for In Camera Review* by U.S. DEPARTMENT OF TREASURY (Attachments: # 1 Mem. Supp., # 2 Ex. List, # 3 Ex. A, # 4 Ex. B, # 5 Ex. C, # 6 Ex. D, # 7 Ex. E, # 8 Ex. F, # 9 Ex. G, # 10 Ex. H, # 11 Ex. I, # 12 Ex. J, # 13 Ex. K, # 14 Ex. L, # 15 Ex. M, # 16 Ex. N, # 17 Ex. O, # 18 Ex. P, # 19 Ex. Q, # 20 Prop. Order)(Glass, David) (Entered: 07/12/2015)
07/14/2015	33	Memorandum in opposition to re 32 Cross MOTION for Extension of Time to File Response/Reply as to 30 MOTION to Compel *Withheld and Redacted Documents, or for In Camera Review* filed by DENNIS BLACK, CHARLES CUNNINGHAM, DELTA SALARIED RETIREES ASSOCIATION, KENNETH HOLLIS. (Attachments: # 1 Exhibit A − June 12 Letter, # 2 Exhibit B − June 16 Email, # 3 Exhibit C − June 22 Email, # 4 Exhibit D − June 23 Letter, # 5 Exhibit E − June 3

		Email, # 6 Text of Proposed Order)(Shelley, Anthony) (Entered: 07/14/2015)
07/15/2015		MINUTE ORDER denying 31 plaintiff's motion to expedite briefing schedule on their motion to compel withheld and redacted documents, or for in camera review. In view of the numerous consent and unopposed motions to extend the discovery deadlines in the underlying case (Case 09−13616 (E.D. Mich.)), the 32 petitioner's cross motion for extension of time is granted. The U.S. Department of Treasury shall file its response to the 30 motion to compel by August 14, 2015. Signed by Judge Emmet G. Sullivan on July 15, 2015.(lcegs1) (Entered: 07/15/2015)
07/16/2015		Set/Reset Deadlines: Plaintiff Response to 30 Motion to Compel due by 8/14/2015. (mac) (Entered: 07/16/2015)
08/05/2015	34	Joint MOTION for Briefing Schedule *for Adjustment to Current Briefing Schedule* by DENNIS BLACK, CHARLES CUNNINGHAM, DELTA SALARIED RETIREES ASSOCIATION, KENNETH HOLLIS (Shelley, Anthony) (Entered: 08/05/2015)
08/12/2015		MINUTE ORDER granting the 34 Parties' Joint Motion for Adjustment to Current Briefing Schedule. The Treasury Department shall file its Memorandum in Opposition to the Motion to Compel no later than August 21, 2015. Plaintiffs' shall file their Reply Memorandum no later than August 31, 2015. Signed by Judge Emmet G. Sullivan on August 12, 2015. (lcegs4) (Entered: 08/12/2015)
08/21/2015	35	RESPONSE re 30 MOTION to Compel *Withheld and Redacted Documents, or for In Camera Review* filed by U.S. DEPARTMENT OF TREASURY. (Attachments: # 1 Ex. A, # 2 Ex. B, # 3 Ex. C, # 4 Ex. D, # 5 Ex. E)(Glass, David) (Entered: 08/21/2015)
08/31/2015	36	REPLY re Response to 30 Motion *to Compel Withheld and Redacted Documents or for In Camera Review* filed by DENNIS BLACK, CHARLES CUNNINGHAM, DELTA SALARIED RETIREES ASSOCIATION, KENNETH HOLLIS. (Shelley, Anthony) Modified on 9/1/2015 to correct linkage (jf). (Entered: 08/31/2015)
03/15/2016	37	NOTICE of Change of Address by Anthony F. Shelley (Shelley, Anthony) (Entered: 03/15/2016)
03/21/2016	38	NOTICE *of Opinion and Order in Underlying Case* by DENNIS BLACK, CHARLES CUNNINGHAM, DELTA SALARIED RETIREES ASSOCIATION, KENNETH HOLLIS (Attachments: # 1 Exhibit A − March 11, 2016 Opinion & Order, # 2 Exhibit B − July 2015 Stipulated Order)(Shelley, Anthony) (Entered: 03/21/2016)
06/13/2016		MINUTE ORDER. A hearing on 30 MOTION to Compel *Withheld and Redacted Documents, or for In Camera Review* filed by KENNETH HOLLIS, DENNIS BLACK, DELTA SALARIED RETIREES ASSOCIATION, CHARLES CUNNINGHAM shall take place on July 29, 2016 at 10:00 a.m. in Courtroom 24A. Signed by Judge Emmet G. Sullivan on June 13, 2016. (lcegs3) (Entered: 06/13/2016)
06/13/2016		Set/Reset Hearings: Motion Hearing set for 7/29/2016 at 10:00 AM in Courtroom 24A before Judge Emmet G. Sullivan. (mac) (Entered: 06/13/2016)
06/17/2016	39	Unopposed MOTION to Continue *(Reschedule) Hearing* by U.S. DEPARTMENT OF TREASURY (Glass, David) (Entered: 06/17/2016)
06/17/2016		MINUTE ORDER granting 39 motion to continue motions hearing. The hearing previously scheduled for July 29, 2016 will now take place on July 20, 2016 at 10:00 a.m. in Courtroom 24A. Signed by Judge Emmet G. Sullivan on June 17, 2016. (lcegs3) (Entered: 06/17/2016)
06/17/2016		Set/Reset Hearings: Motion Hearing set for 7/20/2016 at 10:00 AM in Courtroom 24A before Judge Emmet G. Sullivan. (mac) (Entered: 06/17/2016)
06/17/2016		MINUTE ORDER re 30 Respondent's motion to compel. In order to better evaluate the claims of privilege asserted by Petitioner Department of Treasury, the Court will review in camera a random selection of the withheld and redacted documents at issue. See Weisberg v. U.S. Dep't of Justice, 745 F.2d 1475, 1490 (D.C. Cir. 1984) ("sampling procedure is appropriately employed, where... the number of documents is excessive and it would not realistically be possible to review each and every one."). By no later than June 20, 2016 at 12:00 p.m., Petitioner Department of Treasury shall submit to chambers for in camera review two hard copies of every tenth document

		listed in its Privilege Log, ECF No. 35−5. Documents shall be clearly labeled and placed in three−ring binders. For those documents that have been partially redacted, Petitioner shall indicate, through use of gray or yellow highlighter, the portions of the document that have been redacted. Based on the Court's conclusions following in camera review of this random sampling of documents, the Court may order a supplemental production of documents for in camera review. Signed by Judge Emmet G. Sullivan on June 17, 2016. (lcegs3) (Entered: 06/17/2016)
07/15/2016		MINUTE ORDER re 30 Respondent's motion to compel. Upon review of the random sampling of documents submitted to chambers on June 20, 2016, the Court concludes that it has insufficient information to rule on many of Petitioner's claims of privilege and that all documents at issue must be examined in camera. Petitioner shall, by no later than 12:00 p.m. on July 25, 2016, submit to the Court for in camera review two sets of all documents at issue in Respondent's motion to compel. Petitioner need not submit for in camera review those documents which Respondent does not seek production. Documents shall be clearly labeled and placed in three−ring binders. For those documents that have been partially redacted, Petitioner shall indicate, through use of gray or yellow highlighter, the portions of the document that have been redacted. The binders shall be tabbed with each tab corresponding to the document number in Petitioner's privilege log and each binder shall include a table of contents. Along with these documents, Petitioner shall submit an ex parte submission clearly articulating why each document, or document portion, is protected by the privilege asserted. The explanation for each document shall not exceed one paragraph. For documents over which Petitioner has claimed the deliberative process privilege, Petitioner shall inform the Court "what deliberative process is involved, and the role played by the documents in issue in the course of that process." See Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 868 (D.C. Cir. 1980). The Petitioner is forewarned that should the Court determine that claims of privilege are frivolous, the Court shall impose significant sanctions, moentary and otherwise! A hint to the wise should be sufficient. Any motions for reconsideration or for an extension of time based on an argument that Petitioner has insufficient resources to comply with this Order shall be denied. Accordingly, the hearing scheduled for July 20, 2016 is CANCELLED and will be rescheduled upon completion of the Court's in camera review, if necessary. Signed by Judge Emmet G. Sullivan on July 15, 2016. (lcegs3) (Entered: 07/15/2016)
07/25/2016	40	NOTICE *of Production* by U.S. DEPARTMENT OF TREASURY re Order,,,,,,,, (Glass, David) (Entered: 07/25/2016)
12/20/2016	41	ORDER granting in part 30 motion to compel withheld and redacted documents, or for in camera review. Signed by Judge Emmet G. Sullivan on 12/20/2016. (lcegs4) (Entered: 12/20/2016)
12/20/2016	42	MEMORANDUM AND OPINION. Signed by Judge Emmet G. Sullivan on 12/20/2016. (lcegs4) (Entered: 12/20/2016)
01/10/2017	43	NOTICE *of Compliance* by U.S. DEPARTMENT OF TREASURY (Glass, David) (Entered: 01/10/2017)
04/13/2017	44	ORDER granting in part and denying in part the unresolved portion of Respondents' 30 motion to compel withheld and redacted documents. Signed by Judge Emmet G. Sullivan on 4/13/2017. (lcegs4) (Entered: 04/13/2017)
04/13/2017	45	MEMORANDUM AND OPINION. Signed by Judge Emmet G. Sullivan on 4/13/2017. (lcegs4) (Entered: 04/13/2017)
04/28/2017	46	MOTION to Stay re 44 Order by U.S. DEPARTMENT OF TREASURY (Attachments: # 1 Mem. Supp., # 2 Prop. Order)(Glass, David) (Entered: 04/28/2017)
05/01/2017		MINUTE ORDER directing respondents to file a response to 44 U.S. Department of Treasury's motion to stay by no later than May 8, 2017. The U.S. Department of Treasury is directed to file a reply by no later than May 11, 2017. Signed by Judge Emmet G. Sullivan on 5/1/2017. (lcegs2) (Entered: 05/01/2017)
05/01/2017		Set/Reset Deadlines: Respondents Response To 44 U.S. Department Of Treasury's Motion To Stay due by 5/8/2017. U.S, Department Of Treasury Reply due by 5/11/2017. (mac) (Entered: 05/01/2017)

05/08/2017	47	Memorandum in opposition to re 46 MOTION to Stay re 44 Order filed by DENNIS BLACK, CHARLES CUNNINGHAM, DELTA SALARIED RETIREES ASSOCIATION, KENNETH HOLLIS. (Attachments: # 1 Text of Proposed Order)(Shelley, Anthony) (Entered: 05/08/2017)
05/08/2017	48	ERRATA *Attaching Exhibit 1* by DENNIS BLACK, CHARLES CUNNINGHAM, DELTA SALARIED RETIREES ASSOCIATION, KENNETH HOLLIS 47 Memorandum in Opposition, filed by KENNETH HOLLIS, DENNIS BLACK, DELTA SALARIED RETIREES ASSOCIATION, CHARLES CUNNINGHAM. (Attachments: # 1 Exhibit)(Shelley, Anthony) (Entered: 05/08/2017)
05/11/2017	49	REPLY to opposition to motion re 46 MOTION to Stay re 44 Order filed by U.S. DEPARTMENT OF TREASURY. (Attachments: # 1 Ex. A)(Glass, David) (Entered: 05/11/2017)
05/12/2017		MINUTE ORDER. A hearing on Treasury's motion for a stay is scheduled for Tuesday, May 16 at 1:00 PM in Courtroom 24A. The Court directs that counsel with decision−making authority be present at the hearing. Signed by Judge Emmet G. Sullivan on 5/12/2017. (lcegs2) (Entered: 05/12/2017)
05/12/2017		Set/Reset Hearings: Motion Hearing set for 5/16/2017 at 1:00 PM in Courtroom 24A before Judge Emmet G. Sullivan. (mac) (Entered: 05/12/2017)
05/16/2017		Minute Entry for proceedings held before Judge Emmet G. Sullivan: Motion Hearing held on 5/16/2017. Filings Of Motions For Reconsideration due by 5/22/2017. Responses due by 5/31/2017. (Court Reporter SCOTT WALLACE.) (mac) (Entered: 05/16/2017)
05/17/2017		MINUTE ORDER. In light of the parties' arguments and for reasons stated on the record at the hearing, the Court enters the following briefing schedule for Treasury's motion to reconsider the Court's 44 April 13, 2017 Order: Treasury's motion for reconsideration shall be filed no later than May 22, 2017; respondents' response shall be filed no later than May 31, 2017; and Treasury's reply shall be filed no later than June 5, 2017. The parties' briefing 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. The portion of the Court's 44 April 13, 2017 Order directing that documents over which Treasury has asserted the presidential−communications privilege be "forthwith produced" is hereby vacated. Signed by Judge Emmet G. Sullivan on May 17, 2017. (lcegs2) (Entered: 05/17/2017)
05/22/2017	50	MOTION for Reconsideration re 44 Order by U.S. DEPARTMENT OF TREASURY (Attachments: # 1 Mem. Supp., # 2 Prop. Order, # 3 Ex. A, # 4 Ex. B)(Glass, David) (Entered: 05/22/2017)
05/31/2017	51	Memorandum in opposition to re 50 MOTION for Reconsideration re 44 Order filed by DENNIS BLACK, CHARLES CUNNINGHAM, DELTA SALARIED RETIREES ASSOCIATION, KENNETH HOLLIS. (Attachments: # 1 Exhibit A− Hr'g Transcript, # 2 Exhibit B − Revised Priv Log, # 3 Text of Proposed Order)(Shelley, Anthony) (Entered: 05/31/2017)
06/05/2017	52	REPLY to opposition to motion re 50 MOTION for Reconsideration re 44 Order filed by U.S. DEPARTMENT OF TREASURY. (Attachments: # 1 Ex. A)(Glass, David) (Entered: 06/05/2017)
06/07/2017	53	ORDER GRANTING 50 Treasury's motion for reconsideration and MODIFYING 44 the Court's Order compelling production of documents. Signed by Judge Emmet G. Sullivan on June 7, 2017.....VACATED IN PART PURSUANT TO MINUTE ORDER FILED 6/23/2017. (lcegs2) Modified on 6/26/2017 (znmw). (Entered: 06/07/2017)
06/12/2017	54	ENTERED IN ERROR.....NOTICE *of Appeal* by U.S. DEPARTMENT OF TREASURY (Glass, David) Modified on 6/13/2017 (znmw). (Entered: 06/12/2017)
06/12/2017	55	NOTICE OF APPEAL as to 44 Order, 6/17/16 Minute Order, 41 Order on Motion to Compel, 7/15/16 Minute Order, 53 Order on Motion for Reconsideration by U.S. DEPARTMENT OF TREASURY. Filing fee $0. Fee Status: No Fee Paid. Parties have

		been notified. (znmw) (Entered: 06/13/2017)
06/13/2017		NOTICE OF CORRECTED DOCKET ENTRY: Docket Entry 54 Notice (Other) was entered in error and was refiled as Docket Entry 55 Notice of Appeal.(znmw) (Entered: 06/13/2017)
06/13/2017	56	Transmission of the Notice of Appeal, Order Appealed, and Docket Sheet to US Court of Appeals. The Court of Appeals docketing fee was not paid because the fee was an Appeal by the Government re 55 Notice of Appeal. (znmw) (Entered: 06/13/2017)
06/14/2017	57	Supplemental Record on Appeal transmitted to US Court of Appeals re 55 Notice of Appeal. (znmw) (Entered: 06/14/2017)
06/16/2017		USCA Case Number 17−5142 for 55 Notice of Appeal, filed by U.S. DEPARTMENT OF TREASURY. (zrdj) (Entered: 06/20/2017)
06/19/2017	58	MOTION to Stay re 53 Order on Motion for Reconsideration by U.S. DEPARTMENT OF TREASURY (Glass, David) (Entered: 06/19/2017)
06/20/2017		MINUTE ORDER directing respondents to file a response to 58 Treasury's motion to stay by no later than June 21, 2017 at 12:00 pm. Treasury is directed to file a reply by no later than June 22, 2017 at 12:00 pm. Signed by Judge Emmet G. Sullivan on June 20, 2017. (lcegs2) (Entered: 06/20/2017)
06/20/2017		Set/Reset Deadlines: Respondents Response To 58 Treasury's Motion To Stay due on 6/21/2017 by 12:00PM. Treasury Reply due on 6/22/2017 by 12:00PM. (mac) (Entered: 06/20/2017)
06/21/2017	59	Memorandum in opposition to re 58 MOTION to Stay re 53 Order on Motion for Reconsideration filed by DENNIS BLACK, CHARLES CUNNINGHAM, DELTA SALARIED RETIREES ASSOCIATION, KENNETH HOLLIS. (Attachments: # 1 Text of Proposed Order)(Shelley, Anthony) (Entered: 06/21/2017)
06/22/2017	60	REPLY to opposition to motion re 58 MOTION to Stay re 53 Order on Motion for Reconsideration filed by U.S. DEPARTMENT OF TREASURY. (Glass, David) (Entered: 06/22/2017)
06/23/2017		MINUTE ORDER vacating the portion of the Court's June 7, 2017 Order requiring Treasury to produce documents that it asserts are protected from disclosure by the presidential−communication privilege until further order of the Court. Signed by Judge Emmet G. Sullivan on June 23, 2017. (lcegs2) (Entered: 06/23/2017)
06/26/2017		MINUTE ORDER. The Court sua sponte schedules a hearing on 54 Treasury's motion to stay pending appeal for July 12, 2017 at 11:30 AM in Courtroom 24A. Signed by Judge Emmet G. Sullivan on June 26, 2017. (lcegs2) (Entered: 06/26/2017)
06/27/2017		Set/Reset Hearings: Motion Hearing set for 7/12/2017 at 11:30 AM in Courtroom 24A before Judge Emmet G. Sullivan. (mac) (Entered: 06/27/2017)
07/11/2017	61	TRANSCRIPT OF PROCEEDINGS before Judge Emmet G. Sullivan held on 5−16−17; Page Numbers: (1−22). Date of Issuance:7−11−17. Court Reporter/Transcriber Scott Wallace, Telephone number 202−354−3196, Transcripts may be ordered by submitting the Transcript Order Form<P></P><P></P>For the first 90 days after this filing date, the transcript may be viewed at the courthouse at a public terminal or purchased from the court reporter referenced above. After 90 days, the transcript may be accessed via PACER. Other transcript formats, (multi−page, condensed, CD or ASCII) may be purchased from the court reporter.<P>**NOTICE RE REDACTION OF TRANSCRIPTS:** The parties have twenty−one days to file with the court and the court reporter any request to redact personal identifiers from this transcript. If no such requests are filed, the transcript will be made available to the public via PACER without redaction after 90 days. The policy, which includes the five personal identifiers specifically covered, is located on our website at www.dcd.uscourts.gov.<P></P> Redaction Request due 8/1/2017. Redacted Transcript Deadline set for 8/11/2017. Release of Transcript Restriction set for 10/9/2017.(Wallace, Scott) (Entered: 07/11/2017)

07/12/2017		Minute Entry for proceedings held before Judge Emmet G. Sullivan: Motion Hearing held on 7/12/2017 re 58 MOTION to Stay re 53 Order on Motion for Reconsideration. The Court Will Issue An Order Forthcoming. (Court Reporter SCOTT WALLACE.) (mac) (Entered: 07/12/2017)
07/12/2017		MINUTE ORDER. On June 23, 2017, the Court vacated the portion of its June 7, 2017 Order requiring production of documents that Treasury asserts are protected from disclosure by the presidential−communications privilege to enable the Court to give further consideration to the issues raised by the parties. Having heard from the parties at a hearing on July 12, 2017, and upon careful consideration of [46, 58] Treasury's motions, the responses and replies thereto, the relevant case law, the representations of the parties in open court, and the entire record, 58 Treasury's motion to stay is HEREBY DENIED. See Nken v. Holder, 556 U.S. 418, 427 (2009) (a stay pending appeal "is not a matter of right, even if irreparable injury might otherwise result to the appellant"). Accordingly, Treasury is ORDERED to produce the portions of the documents at issue that relate to (1) General Motors, (2) Delphi Corporation, or (3) the Pension Benefit Guaranty Corporation by no later than July 21, 2017 pursuant to a protective order agreed to by the parties. The Court is persuaded by respondents' arguments that further delay could cause substantial harm to respondents, who are pensioners in varying stages of retirement and who claim that production of these documents will trigger new discovery and dispositive motion deadlines in the underlying litigation, which has been pending for over eight years. Should Treasury succeed in its appeal, any alleged harm to Treasury from compliance with this Order may be remedied through exclusion of the protected material and its fruits from evidence. See Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 109, 112 (2009). Signed by Judge Emmet G. Sullivan on July 12, 2017. (lcegs2) (Entered: 07/12/2017)
07/13/2017		MINUTE ORDER. Earlier today, the Court received a voice mail message from Judith Fooks. The Court will send a copy of the message to counsel of record at the email address provided to the Court. Signed by Judge Emmet G. Sullivan on July 13, 2017. (lcegs2) (Entered: 07/13/2017)
07/13/2017	62	NOTICE *of Appeal* by U.S. DEPARTMENT OF TREASURY re Order on Motion to Stay,,,,,, (Glass, David) (Entered: 07/13/2017)

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	Case No. 12-mc-100 (EGS)

ORDER

This ancillary proceeding was initiated over five years ago when the U.S. Department of Treasury ("Treasury") moved to quash respondents' subpoena requesting the production of certain documents. Since that time, this Court has expended considerable judicial resources in evaluating Treasury's various claims of privilege over those documents, conducting an *in camera* review of hundreds of documents across multiple rounds of briefing.

On April 13, 2017, the Court resolved the last of those privilege claims and, *inter alia*, ordered Treasury to produce 63 documents that it had asserted were protected under the

presidential-communications privilege. *See U.S. Dep't of Treasury v. Pension Benefit Guar. Corp.*, No. 12-MC-100 (EGS), 2017 WL 1373234 (D.D.C. Apr. 13, 2017) ("April 13 Order"). In so doing, the Court held that, although the documents at issue were covered by the presidential-communications privilege, respondents had made an adequate showing of need to overcome the privilege and require disclosure. *Id.* at *2-3.

On April 28, 2017, Treasury filed a motion to stay the Court's April 13 Order on the ground that it was considering whether to appeal that order. *See* Mot. to Stay, ECF No. 46. The Court subsequently held a hearing on that motion, during which Treasury requested an opportunity to file a motion for reconsideration of the April 13 Order. The Court granted Treasury's request, and that motion is now ripe for resolution.

Upon careful consideration of Treasury's motion for reconsideration, the response and the reply thereto, the parties' previous submissions, a supplemental *in camera* review of the 63 documents at issue,[1] and the entire record, it is hereby

ORDERED that Treasury's motion for reconsideration is **GRANTED**; and it is

[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.

FURTHER ORDERED that the Court's April 13 Order requiring production of the 63 documents over which Treasury has asserted the presidential-communications privilege shall be modified to require production only of those portions of the documents that relate to General Motors, Delphi Corporation, or the Pension Benefit Guaranty Corporation; and it is

FURTHER ORDERED that Treasury shall produce the redacted versions of those 63 documents to respondents by no later than June 30, 2017; and it is

FURTHER ORDERED that, until the time for seeking appellate review passes – and during the pendency of any appeal should one be taken – the 63 documents shall remain under seal in Chambers.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
June 7, 2017

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.	Case No. 12-mc-100 (EGS)

MEMORANDUM OPINION

Pending before the Court are the U.S. Department of Treasury's contested privilege assertions that were not resolved by the Court's December 20, 2016 Opinion ordering Treasury to: (1) produce all documents over which it asserted the deliberative process privilege in isolation; and (2) submit a revised privilege log and *in camera* production. Upon consideration of Respondents' motion to compel, response and reply thereto, the relevant caselaw, the *in camera* production and the entire record, and for the reasons set forth below, the

unresolved portion of the motion is **GRANTED in part** and **DENIED in part.**

I. BACKGROUND

Respondents in this miscellaneous action are plaintiffs in *Black v. PBGC*, Case No. 09-13616, a civil action pending in the United States District Court for the Eastern District of Michigan. Respondents are current and former salaried workers at Delphi Corporation ("Delphi"), an automotive supply company. In the civil action, Respondents allege that in July 2009, the Pension Benefit Guaranty Corporation ("PBGC") improperly terminated Delphi's pension plan for its salaried workers ("Plan") via an agreement with Delphi and General Motors. Treasury is not a party to the civil action.

On July 9, 2015, Respondents filed a motion to compel the production, or alternatively *in camera* review, of the documents Treasury withheld or redacted under four separate claims of privilege: (1) the deliberative process privilege; (2) the presidential communications privilege; (3) the attorney-client privilege; and (4) the work product doctrine. *See generally* Mot. Compel, ECF No. 30. 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. *See* Op., ECF No. 42. 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. The 85 documents over which Treasury asserts one of these privileges are now at issue before the Court.

II. THE PRESIDENTIAL COMMUNICATIONS PRIVILEGE

The purpose of the presidential communications privilege is to "guarantee the candor of presidential advisers and to provide '[a] President and those who assist him ... [with] freedom to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.'" *In re Sealed Case*, 121 F.3d 729, 743 (D.C. Cir. 1997) (quoting *U.S. v. Nixon*, 418 U.S. 683, 708 (1974)). This privilege extends not only to communications directly involving the President, but also "to communications authored or received in response to a solicitation by members of a presidential adviser's staff, since in many instances advisers must rely on their staff to investigate and issue and formulate the advice to be given to the President." *ACLU v. Dep't of Justice*, Case No. 10-123, 2011 U.S. Dist. LEXIS 156267, *30

(D.D.C. Feb. 14, 2011) (citing *In re Sealed Case*, 121 F.3d at 752). "Unlike the deliberative process privilege, the presidential communications privilege covers documents in their entirety." *Loving v. Dep't of Def.*, 496 F. Supp. 2d 101, 107 (D.D.C. 2007), *aff'd sub nom. Loving v. Dep't of Def.*, 550 F.3d 32 (D.C. Cir. 2008).

Treasury has raised the presidential communications privilege as the basis for withholding 63 documents from production. The documents can be grouped into four categories: (1) drafts of presidential speeches;[1] (2) personal requests for information by President Obama;[2] (3) draft memoranda from staffers to Dr. Lawrence Summers, the Director of the National Economic Council, Assistant to the President for Economic Policy, and co-chair of the Presidential Task Force on the Auto Industry ("Auto Task Force");[3] and (4) electronic mail conversations among Auto Team members concerning advice to be provided to the President.[4] O'Connor Decl., ECF No. 35-3 ¶ 7. For the following reasons, the Court concludes that while these documents are covered by the presidential communications

[1] *See* Document Nos. 612 and 778.
[2] *See* Document No. 764.
[3] *See* Document Nos. 67, 72, 84, 94, 275, 560, 593, 596, 599, 601, 603, 605, 611, 623, 627, 629, 631, 633, 638, 668, 670, 672, 674, 676, 692, 758, 759, 760, 761, 762, 766, 770, 777, 849, 856, 859, 860, 863, 944, 948, 950, 956, 1006, 1089, 1091, 1094, 1152, 1166, 1168, 1217, 1219, 1221, and 1223.
[4] *See* Document Nos. 358, 610, 621, 763, 765, 767, and 776.

privilege, Respondents have demonstrated a need sufficient to overcome the privilege.

The Court can swiftly resolve the first two categories of documents. With regard to the draft presidential speeches, Respondents, in their reply brief, "concede that these two documents are covered by the privilege" because they "would have been seen by the President[.]" Reply, ECF No. 36 at 18. By the same token, the draft letter containing a handwritten request from President Obama to consult Dr. Summers regarding the Delphi salaried pension plan is also covered by the presidential communications privilege.[5] *See Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1114 (D.C. Cir. 2004) (recognizing that "communications directly involving and documents actually viewed by the President" are privileged).

The vast bulk of the documents withheld from production under the presidential communications privilege – *i.e.*, 53 of the remaining 60 documents – fall into the third category. To justify withholding these draft memoranda from production, Treasury submitted a declaration from Jennifer M. O'Connor, the Deputy Counsel to the President. *See* O'Connor Decl., ECF No. 35-3. Ms. O'Connor's responsibilities in the White House Counsel's Office include providing legal advice to White House staff,

[5] *See* Document No. 764.

including on matters involving the invocation of the presidential communications privilege. *Id.* ¶ 1. Ms. O'Connor represents that all of the withheld 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 and protect the country from the potential consequences of their bankruptcy." *Id.* ¶ 7. Ms. O'Connor also sheds light on the relationship between the Auto Task Force, Dr. Lawrence Summers, and the President. During the time of the challenged communications, Dr. Summers served as co-chair of the Auto Task Force, the Director of the National Economic Council, and Assistant to the President for Economic Policy. *Id.* ¶ 8. In this role, Dr. Summers led the President's daily economic briefing and advised the President on decisions relating to the United States' actions in response to the bankruptcy and restructuring of major automotive companies, including General Motors. *Id.* ¶ 9. A team of federal employees (the "Auto Team") supported Dr. Summers and the Auto Task Force. *Id.* ¶ 8.

In *In re Sealed Case*, the Court of Appeals, determined that "communications made by presidential advisers in the course of preparing advice for the President come under the presidential communications privilege, even when these communications are not made directly to the President." *In re Sealed Case*, 121 F.3d at 752. In defining the scope of the privilege, the Court reasoned

that "[g]iven the need to provide sufficient elbow room for advisers to obtain information from all knowledgeable sources, the privilege must apply both to communications which these advisers solicited and received from others as well as those they authored themselves." *Id.*

Here, the draft memoranda from Auto Team members to Dr. Summers concerning the Auto Task Force's duties are clearly protected by the presidential communications privilege. Respondents do not seem to dispute that Dr. Summers, the co-Chair of the Auto Task Force and Assistant to the President for Economic Policy, qualifies as a presidential adviser for purposes of the privilege. *See* Reply, ECF No. 36 at 18-19. Not only did President Obama select Dr. Summers to helm the Auto Task Force, a group formed to review viability plans submitted by major automotive manufacturers, but Dr. Summers also advised the President on economic issues on a daily basis.[6] O'Connor Decl., ECF No. 35-3 ¶ 9. The privilege that would attach to communications between Dr. Summers and the President also extends to communications between Dr. Summers and his staff members who have responsibility for formulating the advice to be given the President concerning the government's bankruptcy and

[6] To the extent that Dr. Summers' title leaves any room for doubt as to his position as a presidential advisor, President Obama, in a handwritten note on a letter regarding the Delphi pension plan, specifically requested that Dr. Summers be consulted on the matter at issue. *See* Document No. 764.

restructuring efforts. *See In re Sealed Case*, 121 F.3d at 752. Each draft memoranda that Treasury has withheld from production is authored by the Auto Team, addressed specifically to Dr. Summers, and concerns the Auto Team's efforts to provide the Auto Task Force and the President with sufficient information to achieve the government's automotive restructuring objectives.

Respondents contend that the presidential communications privilege should not apply because Treasury has not shown that the challenged documents were *solicited* by Dr. Summers, rather than merely received by him. *See* Reply, ECF No. 36 at 19. According to Respondents, "if everything a presidential advisor or his staff received was automatically covered by the privilege, vast swaths of government communications could be hidden from public view merely by regularly copying such people on emails." *Id.* While Respondents are correct that the presidential communications privilege applies only to documents that are "solicited and received by those members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given the President[,]" *In re Sealed Case*, 121 F.3d at 752, Respondents' argument is unpersuasive for two reasons. First, the White House Counsel's Office expressly represented that the disputed materials "were authored by or solicited and received by the President or senior presidential advisors and

staff, including Lawrence H. Summers." O'Connor Decl., ECF No. 35-3 ¶ 8. Second, upon examination of the challenged documents *in camera*, it is apparent from the faces of the memoranda that they were in fact solicited by Dr. Summers. For instance, the Auto Team prefaced many draft memoranda with a note that the included information was being provided "as requested" or "as discussed" in a recent meeting with Dr. Summers. The content of the withheld material also suggests that the drafters of the memoranda met frequently with Dr. Summers to inform him of research results, discuss strategy, and formulate advice to the President. As a result, the Court is satisfied that the draft memoranda were solicited rather than merely received by Dr. Summers. *See also In re Sealed Case*, 121 F.3d at 758 (remarking that a "review of the [challenged] documents themselves demonstrates that from the nature of their contents and the persons to whom they were directed there can be little question that they had been solicited").

For the same reasons, the seven documents in the fourth category – *i.e.*, emails among Auto Team members regarding the formulation of advice to the President – are covered by the presidential communications privilege. Although, Dr. Summers may not be present on some of these communications, it is apparent from the documents' content that the Auto Team members were responding to requests for information by Dr. Summers or the

President. In these communications, Auto Team members discussed the preparation of memoranda to the President and harmonized edits to be presented to Dr. Summers. Because the presidential communications privilege extends "to communications authored or solicited and received by those members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate[,]" these documents are privileged. *Id.* at 752.

Although the Court has established that the documents in all four categories are covered by the presidential communications privilege, the Court's inquiry is not complete. The presidential communications privilege "is qualified, not absolute, and can be overcome by an adequate showing of need." *Id.* at 745. To overcome the privilege, Respondents must demonstrate two elements: (1) that 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." *Id.* at 754. Here, Respondents have satisfied both prongs. First, Respondents assert that they need the withheld material because it 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. Mot. Compel, ECF No. 30 at 32. 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. *Id.* at 4. Rather than substantively engage in the needs analysis or attempt to distinguish the cases upon which Respondents rely, Treasury argues unconvincingly that Respondents' rationale for the material is "nothing but rank speculation." Opp'n, ECF No. 35 at 24. Nonetheless, for substantially the same reasons advanced by Respondents, the Court is persuaded that Respondents have made "at least a preliminary showing of necessity for information that is not merely demonstrably relevant but indeed substantially material to their case." *Dellums v. Powell*, 561 F.2d 242, 249 (D.C. Cir. 1977). Second, Respondents represent that the materials are unavailable through any other means, *see* Mot. Compel, ECF No. 30 at 32, and Treasury does not challenge this assertion in its opposition motion. *See* Opp'n, ECF No. 35 at 24. Accordingly, the Court finds that Respondents have demonstrated a need sufficient to overcome the presidential communications privilege.

III. THE ATTORNEY-CLIENT PRIVILEGE

Treasury has withheld or redacted 15 documents under the attorney-client privilege.[7] "The attorney-client privilege protects confidential communications made between clients and their attorneys when the communications are for the purpose of securing legal advice or services." *In re Lindsey*, 158 F.3d 1263, 1267 (D.C. Cir. 1998). The purpose of the privilege is to protect a client's confidences to his or her attorney, thereby encouraging an open and honest relationship between the client and the attorney. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). The privilege is "narrowly construed and is limited to those situations in which its purposes will be served." *Id.* Hence, the privilege "protects only those disclosures necessary to obtain informed legal advice which may not have been made absent the privilege." *Id.* (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)). The privilege protects communications between the attorney and the client, but does not shield the underlying facts contained in those conversations from disclosure. *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981).

As a threshold matter, six of the challenged documents concern communications between Auto Team members and attorneys

[7] *See* Document Nos. 30, 207, 210, 446, 499, 558, 570, 679, 685, 720, 789, 792, 1071, 1113, and 1204.

at Cadwalader, Wickersham, and Taft LLP ("Cadwalader"), one of the law firms that served as outside counsel to the Auto Team.[8] Because Respondents have indicated that they "do not dispute the Treasury's invocation of attorney-client privilege for those communications [with Cadwalader attorneys]," Mot. Compel, ECF No. 30 at 33, the Court will not order the production of these documents.

With regard to the remaining nine documents, each one concerns a communication between Auto Team members and Matthew Feldman, an Auto Team member who is also an attorney.[9] Respondents argue that these communications are not privileged because Mr. Feldman, while an attorney, provided both legal and non-legal advice to the Auto Team. *Id.* at 35. Respondents admit, however, that "Treasury can invoke the attorney-client privilege only for those communications of Mr. Feldman which were primarily legal in nature[.]" *Id.* at 35-36. After reviewing these documents *in camera*, the Court is satisfied that Mr. Feldman acted in his legal capacity in each communication. In some cases, Auto Team members asked Mr. Feldman a legal question – *e.g.*, the potential liability surrounding specific Auto Team proposals – and Mr. Feldman provided his legal opinion. In other instances, Mr. Feldman requested information from Treasury

[8] *See* Document Nos. 685, 720, 792, 1071, 1113, and 1204.
[9] *See* Document Nos. 30, 207, 210, 446, 499, 558, 570, 679, and 789.

employees to aid the preparation of Treasury's response to congressional inquiries. Nothing in these communications suggests that their confidential nature was compromised or that the privilege was waived. As a result, the Court concludes that Treasury correctly withheld these 15 documents from production under the attorney-client privilege.

IV. ATTORNEY WORK PRODUCT DOCTRINE

Treasury has raised the attorney work product doctrine over seven documents.[10] The work product doctrine "protects written materials lawyers prepare 'in anticipation of litigation.'" *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998) (quoting Fed. R. Civ. P. 26(b)(3)). In assessing whether the proponent has carried its burden to show a document is protected as work product, the relevant inquiry is "whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared ... because of the prospect of litigation." *EEOC v. Lutheran Soc. Servs.*, 186 F.3d 959, 968 (D.C. Cir. 1999). Although an agency need not have a specific claim in mind when preparing the documents, there must exist some articulable claim that is likely to lead to litigation in order to qualify the documents as attorney work product. *Coastal States Gas Corp.*,

[10] *See* Document Nos. 203, 792, 983, 985, 987, 989, and 1259.

617 F.2d at 865; *Am. Immigration Council v. Dep't of Homeland Security*, 905 F. Supp. 2d 206, 221 (D.D.C. 2012) (work product encompasses documents prepared for litigation that is "foreseeable," if not necessarily imminent; "documents that ... advise the agency of the types of legal challenges likely to be mounted to a proposed program, potential defenses available to the agency, and the likely outcome," are covered).

Here, there can be little doubt that the material Treasury has withheld under the work product doctrine is protected from disclosure. Four of the seven documents at issue are draft memoranda authored by Cadwalader attorneys.[11] The remaining three documents are draft letters prepared by Department of Justice attorneys.[12] It is apparent from the face of each of the challenged documents that they were prepared by counsel in anticipation of the Chrysler and General Motors bankruptcy proceedings - *i.e.*, in anticipation of litigation. Among other things, the documents outline potential legal approaches to disposing of corporate assets, discuss proposed amendments to loan agreements, and detail objectives for pending mediation proceedings. Further, these materials constitute opinion work product, rather than fact work product, because they reveal "the mental impressions, conclusions, opinions, or legal theories of

[11] *See* Document Nos. 203, 792, 983, and 1259.
[12] *See* Document Nos. 985, 987, and 989.

a party's attorney" concerning potential litigation. *F.T.C. v. Boehringer Ingelheim Pharm.*, Inc., 778 F.3d 142, 151 (D.C. Cir. 2015).

Nonetheless, as with the presidential communications privilege, the work product doctrine is not an absolute privilege. Disclosure may be warranted if the party seeking the privileged material can make a showing of substantial need and an inability to obtain the equivalent without undue hardship. *See Upjohn*, 449 U.S. at 400. Respondents, however, have not articulated a specific need for these documents. Whereas Respondents claim that they need the materials protected under the presidential communications privilege because those documents may reveal undue pressure exerted by the White House or Treasury over the decision to cancel the Delphi Plan, Respondents make no similar claim as to these seven documents. Respondents simply have not made "the extraordinary showing of necessity" required to obtain access to opinion work product. *In re Sealed Case*, 676 F.2d 793, 811 (D.C. Cir. 1982). Accordingly, the Court will not order the production of the documents withheld under the work product doctrine.

V. RELEVANCE

Treasury has withheld one document from production on grounds of relevance.[13] The document consists of a weekly report from Treasury to the White House and an email circulating the report among Treasury personnel. Because Respondents have not challenged Treasury's relevance assertion, the Court will not order the production of this document.

VI. CONCLUSION

For the foregoing reasons, the unresolved portion of Respondents' motion to compel the production, or alternatively *in camera* review, of the documents withheld and redacted by Treasury is **GRANTED in part** and **DENIED in part**. The 63 documents over which Treasury has asserted the presidential communications privilege shall be **FORTHWITH PRODUCED** to Respondents. The documents over which Treasury has asserted a claim of relevance, attorney-client privilege or work product are protected from production. An appropriate Order accompanies this Memorandum Opinion, filed this same day.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
April 13, 2017

[13] *See* Document No. 619.

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.	Case No. 12-mc-100 (EGS)

ORDER

For the reasons stated in the accompanying Memorandum Opinion issued this same day, it is hereby

ORDERED that the unresolved portion of Respondents' motion to compel the production, or alternatively *in camera* review, of the documents withheld and redacted by Treasury is **GRANTED in part** and **DENIED in part.** It is further

ORDERED that the 63 documents over which Treasury has asserted the presidential communications privilege shall be **FORTHWITH PRODUCED** to Respondents. It is further

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.	Case No. 12-mc-100 (EGS)

MEMORANDUM OPINION

Pending before the Court is Dennis Black, Charles Cunningham, Ken Hollis, and the Delphi Salaried Retirees Association's (collectively, "Respondents") motion to compel the production, or alternatively *in camera* review, of documents withheld and redacted by the U.S. Department of Treasury (the "Treasury") for privilege. Upon consideration of the motion, response and reply thereto, the relevant caselaw, and the entire record, and for the reasons set forth below, the motion is **GRANTED in part**.

I. BACKGROUND

Respondents in this miscellaneous action are plaintiffs in *Black v. PBGC*, Case No. 09-13616, a civil action pending in the United States District Court for the Eastern District of Michigan. Respondents are current and former salaried workers at Delphi Corporation ("Delphi"), an automotive supply company. In the civil action, Respondents allege that in July 2009, the Pension Benefit Guaranty Corporation ("PBGC") improperly terminated Delphi's pension plan for its salaried workers ("Plan") via an agreement with Delphi and General Motors. Treasury is not a party to the civil action.

On July 9, 2015, Respondents filed a motion to compel the production, or alternatively *in camera* review, of the documents Treasury withheld or redacted under four separate claims of privilege: (1) the deliberative process privilege; (2) the presidential communications privilege; (3) the attorney-client privilege; and (4) the work product doctrine. *See generally* Mot. Compel, ECF No. 30. Although Treasury asserted a privilege over 1,273 documents, Respondents only challenged 866 documents. Opp., ECF No. 35 at 1.

In order to better evaluate Treasury's claims of privilege, the Court ordered an *in camera* review of a random selection of the withheld and redacted documents. Minute Entry of June 17, 2016. The Court directed Treasury to submit hard copies of every

tenth document listed in its privilege log and to clearly identify the redacted material. *Id*.

Upon review of the random sampling of documents that Treasury submitted, the Court concluded that it lacked sufficient information to rule on many of Treasury's privilege claims and ordered that Treasury submit *all* of the documents at issue for *in camera* inspection. Minute Entry of July 15, 2016. As part of this exercise, the Court ordered Treasury to submit an *ex parte* submission clearly articulating why each document, or document portion, was protected by the privilege asserted. *Id*. For documents over which Treasury claimed the deliberative process privilege, the Court specifically directed Treasury to inform the Court "what deliberative process is involved, and the role played by the documents in issue in the course of that process." *Id*. The Court warned that "should [it] determine that [Treasury's] claims of privilege are frivolous, the Court shall impose significant sanctions, mo[ne]tary and otherwise." *Id*.

On July 25, 2016, Treasury produced, *in camera*, hard copies of the contested documents, noting that "[i]n preparing its production, Treasury decided not to continue withholding certain documents." *See* Notice of Production, ECF No. 40. Of the original 866 contested documents, Treasury revoked its claims of privilege over nearly 640 documents in light of the Court's order to produce the contested documents *in camera*. Treasury

provided no explanation as to why it suddenly withdrew its privilege assertions over nearly 75% of the documents it had previously claimed were privileged. *Id*. The 221 documents over which Treasury continues to assert a claim of privilege are now at issue before the Court.

II. THE DELIBERATIVE PROCESS PRIVILEGE

Treasury has raised the deliberative process privilege as the sole basis for withholding 120 documents from production. For 63 documents, Treasury has asserted the deliberative process privilege in conjunction with another privilege.[1] According to Treasury, these 183 communications are protected from disclosure because they involve government deliberations regarding the 2009 bankruptcy and restructuring of Chrysler and General Motors. *See* Opp., ECF No. 35 at 11-12. For the following reasons, the Court will order the production of all of the documents over which Treasury has asserted the deliberative process privilege in isolation.

a. The Legal Standard.

The deliberative process privilege serves to preserve the "open and frank discussion" necessary for effective agency decisionmaking by protecting from disclosure "documents reflecting advisory opinions, recommendations, and deliberations

[1] Because Treasury has not provided a revised privilege log reflecting only the 222 contested entries, the Court derives these figures from the cover pages to Treasury's July 25, 2016 *in camera* production.

that are part of a process by which Government decisions and policies are formulated." *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8-9 (2001). The privilege "rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news." *Abtew v. U.S. Dep't of Homeland Sec.*, 808 F.3d 895, 898 (D.C. Cir. 2015) (quoting *Klamath Water*, 532 U.S. at 8-9.). As the U.S. Court of Appeals for the D.C. Circuit has noted, agency officials "should be judged by what they decided, not for matters they considered before making up their minds." *Russell v. Dep't Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982).

To fall within the scope of the deliberative-process privilege, withheld materials must be both "predecisional" and "deliberative." *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993). A communication is predecisional if "it was generated before the adoption of an agency policy" and deliberative if it "reflects the give-and-take of the consultative process." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). "Even if the document is predecisional at the time it is prepared, it can lose that status if it is adopted formally or informally, as the agency position on an issue[.]" *Id*. The deliberative process privilege is to be construed "as narrowly as consistent with

efficient Government operation." *United States v. Phillip Morris*, 218 F.R.D. 312, 315 (D.D.C. 2003) (quoting *Taxation with Representation Fund v. IRS*, 646 F.2d 666, 667 (D.C. Cir. 1981)). To properly invoke the privilege, the agency must "make a detailed argument...in support of the privilege" because "without a specific articulation of the rationale supporting the privilege, a court cannot rule on whether the privilege applies." *Ascom Hasler Mailing Sys., Inc. v. U.S. Postal Serv.*, 267 F.R.D. 1, 4 (D.D.C. 2010) (internal quotation marks omitted).

b. Treasury Has Not Properly Invoked the Deliberative Process Privilege.

Respondents contend that they are entitled to the documents that Treasury has withheld under the deliberative process privilege because: (1) the material does not fall within the scope of the privilege; (2) the privilege has been waived; (3) Respondents' need for the material overcomes the privilege; and (4) Treasury's alleged misconduct nullifies the privilege. *See* Mot. Compel, ECF No. 30 at 6-18. As a threshold matter, the Court need not analyze Respondents' myriad arguments as to why the deliberative process privilege should not apply because Treasury has failed to comply with its basic obligation to provide the Court with "a specific articulation of the rationale supporting the privilege" to enable the Court to assess the

appropriateness of the privilege. *See Ascom Hasler*, 267 F.R.D. at 4; *Landry v. F.D.I.C.*, 204 F.3d 1125, 1135 (D.C. Cir. 2000).

A "common practice of agencies seeking to invoke the deliberative process privilege is to establish the privilege through a combination of privilege logs, which identify specific documents, and declarations from agency officials explaining what the documents are and how they relate to the agency decision." *Ascom Hasler*, 267 F.R.D. at 4 (citing *N.L.R.B. v. Jackson Hosp. Corp.*, 257 F.R.D. 302, 308 (D.D.C. 2009)). The Court finds both Treasury's privilege log and accompanying declaration to be woefully inadequate.

First, for the Treasury's assertions to be adequate, the Court "must be able to determine, from the privilege log, that the documents withheld are (1) predecisional; (2) deliberative; (3) do not 'memorialize or evidence' the agency's final policy; (4) were not shared with the public; and (5) cannot be produced in a redacted form." *Id*. Treasury's privilege log does not enable the Court to assess at least three of these factors. For context, Treasury's log provides fields for the documents' date, type, author, and recipients. *See generally* Treasury Privilege Log, ECF No. 35-5. The log also provides a brief description of each document, lists the privilege asserted, and indicates whether the document was redacted or entirely withheld from production. Noticeably absent from the entries in which Treasury

asserts the deliberative process privilege, however, is any indication that the documents do not "memorialize or evidence the agency's final policy" and "were not shared with the public." *Ascom Hasler*, 267 F.R.D. at 4. Further, the purported predecisional nature of each entry cannot readily be discerned from the privilege log. Treasury states that these communications were sent before the implementation of the auto-restructuring policies, *see* Opp., ECF No. 35 at 12-13, but the mere fact that a communication is dated prior to the agency's adoption of a policy is insufficient to establish that it is predecisional. Rather, the party invoking the privilege must also demonstrate that the content was not later adopted. *See Coastal States*, 617 F.2d at 866 (reasoning that a document that "is predecisional at the time it is prepared...can lose that status if it is adopted formally or informally, as the agency position on an issue[.]"). Although Treasury has designated on the privilege log which documents are drafts, the fact that a document is in draft form does not automatically cloak it with the deliberative process privilege. "[D]rafts are not presumptively privileged, and the designation of documents as 'drafts' does not end the inquiry into whether a document is predecisional." *Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d 252, 260 (D.D.C. 2004) (internal quotation marks omitted). Treasury has not shown that these drafts do not

reflect final agency policy. For these reasons, the Court finds Treasury's privilege log inadequate in so far as it relates to the assertion of the deliberative process privilege.

Moreover, Treasury's declaration from Lorenzo Rasetti, the Chief Financial Officer at Treasury's Office of Financial Stability, does not change the result. To be adequate, an agency declaration supporting a deliberative process privilege claim must contain:

> 1) a formal claim of privilege by the head of the department having control over the requested information;
> 2) assertion of the privilege based on actual personal consideration by that official; and
> 3) a detailed specification of the information for which the privilege is claimed, with an explanation why it properly falls within the scope of the privilege.

Landry, 204 F.3d at 1135 (internal quotation marks omitted). The Court does not question whether Mr. Rasetti is of sufficient rank to assert the privilege ——*see id*. (reasoning that it "would be counterproductive to read 'head of the department' in the narrowest possible way")—— and recognizes that Mr. Rasetti's statement is based on his "personal review of each of the entries on the Privilege Log and a review of a sampling of the documents described on the [log]." Rasetti Decl., ECF No. 35-1 at 4. The Court, however, finds that Treasury has failed to present "a detailed specification of the information for which the [deliberative process] privilege is

claimed" along with an explanation sufficient to show why the content "properly falls within the scope of the privilege." *Landry*, 204 F.3d at 1135.

In his declaration, Mr. Rasetti divides the documents over which Treasury asserts the deliberative process privilege into four categories: (A) Draft slides and presentations and related deliberations on Chrysler and GM bankruptcy considerations; (B) Deliberations regarding substantive responses to congressional or press inquiries and prepared public statements; (C) Deliberations and materials shared with or relating to PBGC discussions; and (D) Internal deliberations regarding financing, cash flows, or other restructuring considerations related to Delphi. *See* Rasetti Decl., ECF No. 35-1 at 6-10. Nonetheless, the rationale provided to withhold the documents under these categories is inadequate.

As an initial matter, Categories A and D do not establish that Treasury "has never implemented the opinions or analyses contained in the document, incorporated them into final agency policy or programs, referred to them in a precedential fashion, or otherwise treated them as if they constitute agency protocol." *Gen. Elec. Co. v. Johnson*, No. 00-2855, 2006 WL 2616187, at *5 (D.D.C. Sept. 12, 2006). To the contrary, in many instances Mr. Rasetti notes that the documents "may have been considered in developing...the policy positions that Treasury

may have adopted." Rasetti Decl., ECF No. 35-1 at 7, 8. If Treasury implemented the opinions or analyses contained in these communications into its final policies, the documents would not be protected from disclosure under the deliberative process privilege. *Coastal States*, 617 F.2d at 866. The Court simply lacks sufficient information to know whether or not that is the case. Additionally, Mr. Rasetti summarily states that the documents in Categories B, C, and D "are pre-decisional and constitute part of the deliberative process" without offering any support for his assessment. *See* Rasetti Decl., ECF No. 35-1 at 8-10. It is well-established that such conclusory assertions made in an agency's declaration are insufficient to establish a deliberative-process privilege claim. *See Ascom Hasler*, 267 F.R.D. at 6 (finding privilege log and declaration deficient "because the assertions in the declaration [were] conclusory" and recognizing the court's right "to deny the claim of privilege on that ground").

Finally, the rationale Treasury offers in its *ex parte* submission in support of its privilege assertions is also deficient. Analogous to the Rasetti declaration, Treasury summarily declares that many documents are predecisional and deliberative without demonstrating that the guidance contained therein hasn't been adopted, in whole or in part, by subsequent policies. In other instances, Treasury attaches *ex parte* cover

sheets concerning the same document but asserting different privileges. For example, a cover page for Document No. 30 asserts the attorney-client and deliberative process privilege but is immediately preceded by a separate cover page, also for Document No. 30, that invokes only the attorney-client privilege. Such inconsistent treatment cannot be understood to constitute "a specific articulation of the rationale supporting the privilege." *See Ascom Hasler*, 267 F.R.D. at 4.

Treasury has had ample opportunities to provide sufficient detail to enable the Court to assess its deliberative process privilege claims, including in: (1) its privilege log, (2) the Rasetti declaration, and (3) its *ex parte* submission justifying its privilege assertions on a per-document basis. Despite receiving explicit instructions from the Court to explain "what deliberative process is involved, and the role played by the documents in issue in the course of that process," Treasury has miserably failed to do so. *See* Minute Entry of July 15, 2016. Indeed, Treasury has essentially wasted this Court's precious and limited time, notwithstanding the Court's stern warning in its Minute Order dated July 15, 2016. *Id*. ("A hint to the wise should be sufficient."). Accordingly, the Court **ORDERS** the forthwith production of all documents withheld or redacted solely under the deliberative process privilege. The documents over which Treasury has raised a deliberative process claim

along with another privilege will be analyzed after Treasury produces a revised privilege log.

III. THE REMAINING PRIVILEGE CLAIMS

Treasury has also raised three other privileges to rationalize withholding responsive material from Respondents: the presidential communications privilege, the attorney-client privilege, and the work product doctrine. *See generally* Opp., ECF No. 35. Noting that Treasury withdrew nearly 75% of its previous privilege assertions once ordered to make an *in camera* submission, the Court is of the opinion that it will be better positioned to assess the merits of the remaining claims after Treasury has produced a revised privilege log and *in camera* submission containing only the remaining contested documents.

IV. CONCLUSION

For the foregoing reasons, Respondents' motion to compel the production, or alternatively *in camera* review, of the documents withheld and redacted by Treasury is **GRANTED in part**. The documents over which Treasury has asserted the deliberative process privilege in isolation shall be **FORTHWITH PRODUCED** to Respondents. Treasury shall also produce a revised privilege log to both the Court and Respondents by no later than January 10, 2017. Treasury shall submit for *in camera* review two copies of an updated binder containing only the documents in the revised privilege log by January 10, 2017. The revised submission shall

follow the same production specifications as the July 25, 2016 submission. The Court will not extend the time to comply with this order. The Court will analyze the merits of Treasury's remaining privilege assertions upon receipt of the revised submission. Treasury is again reminded of the Court's Minute Order dated July 15, 2016.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
December 20, 2016

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DECLARATION OF JENNIFER M. O'CONNOR

Jennifer M. O'Connor says:

1. I currently hold the position of Deputy Counsel to the President. In this capacity, I am responsible for, *inter alia*, providing legal advice to White House staff, including advice on matters involving the invocation of the presidential communications privilege.

2. I submit this declaration in opposition to the motion of respondents to compel the production of documents withheld pursuant to the presidential communications privilege. I base this declaration on my personal knowledge and on information made available to me in the performance of my duties.

3. I am aware that, upon consultation with the Office of the Counsel to the President, the U.S. Department of the Treasury (Treasury) has withheld certain documents in whole or in

part on the basis of the presidential communications privilege. I understand that descriptions of these documents have been provided to respondents in a privilege log submitted by Treasury.

4. On behalf of the Office of the President, I hereby assert the presidential communications privilege with respect to all portions of the documents identified in the Treasury privilege log as Doc. Nos. 67, 72, 84, 94, 275, 560, 593, 596, 599, 601, 603, 605, 610-12, 619, 621, 623, 627, 629, 631, 633, 638, 668, 670, 672, 674, 676, 692, 758-68, 770, 776-78, 849, 856, 859-60, 863, 944, 948, 950, 956, 1006, 1089, 1091, 1094, 1152, 1166, 1168, 1217, 1219, 1221, 1223 and the portion of Doc. No. 358 redacted from page no. UST-BL-044502. This assertion of privilege is based on my review of each of those documents. In making this declaration, I have also relied on the description of the documents provided by my staff and on the description of the documents contained in the Treasury privilege log.

5. The presidential communications privilege is no longer being invoked with respect to the documents identified in the Treasury privilege log as Doc. Nos. 634, 771, and 779.

6. I understand that Treasury is also asserting other privileges, such as the deliberative process privilege, with respect to the documents or portions of documents as to which the presidential communications privilege is being asserted. The fact that my assertion is limited to the presidential communications privilege is in no way intended to suggest that those documents or portions of documents are not protected in whole or in part by other privileges.

7. The documents or portions of documents as to which the presidential communications privilege is being asserted consist of memoranda, drafts of presidential speeches, and electronic mail conversations, including, in some cases, attachments, that relate to the President's decisions as to how the United States should address the financial distress of

several of its large automobile corporations and protect the country from the potential consequences of their bankruptcy.

8. In particular, the documents or portions of documents as to which the presidential communications privilege is being asserted consist of communications among the Presidential Task Force on the Auto Industry (Auto Task Force) or the team of federal employees that staffed it (Auto Team) and the White House that were authored by or solicited and received by the President or senior presidential advisors and staff, including Lawrence H. Summers, the Director of the National Economic Council and Assistant to the President for Economic Policy and the co-chair of the Auto Task Force. The documents or portions of documents as to which the presidential communications privilege is being asserted also consist of communications that summarize or otherwise reflect communications with the President or that contain information provided to White House officials.

9. At the time of these communications, Dr. Summers was the chief White House advisor to the President on the development and implementation of economic policy. In that capacity, he led the President's daily economic briefing. As co-chair of the Auto Task Force, Dr. Summers advised the President on decisions relating to the United States' actions in response to the bankruptcy and restructuring of, among other companies, General Motors Corporation.

10. The communications as to which the presidential communications privilege is being asserted thus reflect or disclose information, views, and advice exchanged among the President, his senior advisors, and the Auto Task Force or Auto Team and were part of the process that informed the President's determinations as to what actions the United States should take with respect to the financial collapse of General Motors and other U.S. automobile companies.

11. I believe that without the protection of the presidential communications privilege over the communications described above, presidential advisors and their staffs would be chilled from gathering relevant information, exploring alternatives, and providing fully informed recommendations regarding the performance of the President's duties.

12. I declare under penalty of perjury that the foregoing is true and correct. Executed this 6 day of August 2015

JENNIFER M. O'CONNOR

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.	Case No. 12-mc-100 (EGS)

MEMORANDUM OPINION

Pending before the Court is petitioner U.S. Department of the Treasury's ("Treasury") renewed motion to quash a subpoena *duces tecum* and motion to quash a deposition subpoena served upon it by Dennis Black, Charles Cunningham, Kenneth Hollis, and the Delphi Salaried Retirees Association (hereinafter "Respondents"). Upon consideration of the motions, responses and replies thereto, the relevant caselaw, and the entire record, and for the reasons set forth below, the motions are **DENIED**.

I. BACKGROUND

Respondents in this miscellaneous action are plaintiffs in *Black v. PBGC*, Case No. 09-13616, a civil action pending in the United States District Court for the Eastern District of Michigan (hereinafter "civil action" or "Michigan action"). Respondents are current and former salaried workers at Delphi Corporation ("Delphi"), an automotive supply company. In the civil action, Respondents allege that in July 2009, the Pension Benefit Guaranty Corporation ("PBGC") improperly terminated Delphi's pension plan for its salaried workers ("Plan") via an agreement with Delphi and General Motors ("GM"). Treasury is not a party to the civil action.

The civil action contains four counts. Count One alleges that the termination violated the Employee Retirement Income Security Act ("ERISA") because no court made findings that the Plan was unsustainable. Plaintiffs argue that such findings are a condition prerequisite to a valid termination under ERISA. *Black v. PBGC*, ECF #145 ¶ 39. Counts Two and Three allege additional procedural infirmities with the termination-by-agreement. *Id.* ¶¶ 44, 52. Finally, and most relevant to this miscellaneous action, Count Four alleges that the PBGC could not have satisfied ERISA's statutory requirements for termination had it actually sought court approval, pursuant to 29 U.S.C. §

1342(c). *Id.* ¶ 56. Essentially, plaintiffs' theory of the case in the civil action, and specifically Count Four, is that PBGC terminated the Plan "not because of anything related to its statutory role under ERISA, but as a result of pressure imposed by the Treasury and the related U.S. Auto Task Force to support their efforts to restructure the auto industry in general and GM in particular." Resp'ts Opp'n to Renewed Mot. to Quash, ECF #19 at 3-4.

In September 2011, Judge Tarnow, who is presiding over the civil action, ordered discovery to move forward. He instructed the parties to focus first on Count Four, specifically:

> [W]hether 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."

Black v. PBGC, ECF #193 at 3-4. Judge Tarnow explained that he was proceeding in this fashion because:

> A finding by the Court in PBGC's favor on Count 4 after [discovery under the Federal Rules] would render moot the remainder of the complaint pertaining to the PBGC. In the event that the Court finds that termination of the plan was not supported by the factors set forth in 28 U.S.C. § 1342(c), the Court will consider the remaining issues raised in the complaint.

Id. at 5-6.

The PBGC unsuccessfully moved for reconsideration of Judge Tarnow's order. Shortly thereafter, plaintiffs served the PBGC with discovery requests which, they argue, are highly relevant to § 1342(c). One of the requests directs PBGC to produce "all documents and things you received from . . . 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 . . . including but not limited to, documents related to the termination of the Delphi Pension Plans." Pet'r's Mot to Quash, ECF #1, Ex. H at 8-9. The PBGC refused to produce the documents, the plaintiffs moved to compel, and Magistrate Judge Majzoub ordered the PBGC to produce full and complete responses. *Black v. PBGC*, ECF #209 at 1. The PBGC filed objections to that order with Judge Tarnow.

Meanwhile, in January 2012, Respondents served Treasury with a subpoena seeking:

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

Pet'r's Mot. to Quash, ECF #1, Ex. J at 5-6. Respondents allege that Feldman, Wilson and Rattner were the three principal Treasury employees who negotiated with the PBGC to terminate the Delphi Plan. Resp'ts Opp'n to Mot. to Quash, ECF #6 at 4, 10.[1] The Treasury filed this miscellaneous action to quash the subpoena in February 2012. Treasury made the same argument to this Court that the PBGC asserted in unsuccessfully opposing the motion to compel before Judge Majzoub and in its objections which were then pending before Judge Tarnow: the requested discovery is irrelevant because it relates to § 1342(c), and § 1342(c) is irrelevant to the Michigan action. *See, e.g.*, Pet'r's Reply in Support of Mot. to Quash, ECF #10 at 4-12.

Accordingly, in May 2012, this Court entered a minute order stating, in relevant part:

> [I]t appears to the Court that a threshold issue in this matter is whether the court in the underlying action has permitted discovery regarding the factors enunciated in 29 U.S.C. § 1342(c). In light of the fact that this precise issue is ripe for resolution before Judge Tarnow, the judge in the underlying action, the Court hereby STAYS this matter pending Judge Tarnow's resolution of PBGC's Objections to Magistrate Judge's Order of March 9, 2012 Granting Plaintiffs' Motion to Compel Discovery, Case 09-13616 (E.D. Mich.), Doc. No. 209. Plaintiffs are directed to notify this Court of Judge Tarnow's decision within five calendar days after it issues. This Order is subject to reconsideration for good cause shown.

Minute Order, May 17, 2012.

[1] All three left Treasury and returned to the private sector at some point during the summer of 2009. Pet'r's Renewed Mot. to Quash, ECF #15 at 10.

On August 13, 2013, Respondents moved to lift the stay. They noted that although Judge Tarnow had not yet ruled on the objections, in the interim, the PBGC "produced all documents sought by plaintiffs" which were responsive to Judge Majzoub's order. Resp'ts Mot. to Lift Stay, ECF #11 at 2. Accordingly, "it seems likely that the PBGC's objections to Judge Tarnow are now moot, or waived, or both." *Id.* at 3.[2] Respondents also proposed a modification to their subpoena *duces tecum*. *Id.* at 6. Respondents believe that Treasury has already produced certain documents and email correspondence relevant to the Delphi Pension issues to the Special Inspector General for the Troubled Asset Relief Program (SIGTARP). *Id.* at 7. They suggest it would be "a reasonable compromise" to modify the subpoena to request only those documents. *Id.* In proposing the modification, Respondents tried to address Treasury's argument that the subpoena imposes an undue burden; "producing documents already assembled and produced to SIGTARP involves no burden." *Id.* at 6.

A week later, on August 20, 2013, Respondents issued a deposition subpoena, which asks Treasury to produce one or more witnesses pursuant to Federal Rule of Civil Procedure 30(b)(6) to testify at deposition about:

[2] Indeed, on May 27, 2014 Judge Tarnow denied as moot the PBGC's Objections to Judge Majzoub's March 9, 2014 order. See Resp'ts Notice of Development in Underlying Case, ECF #25 Ex. A.

> [Matthew Feldman's and Harry 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 leaders, Federal Mogul, Platinum Equity, the National Economic Council, and the Executive Office of the President.

Deposition Subpoena, ECF #13-4. Shortly thereafter, Treasury filed a combined Renewed Motion to Quash the 2012 subpoena *duces tecum* and Motion to Quash the 2013 deposition subpoena. ECF #15. In its renewed motion, Treasury makes the same three arguments as its initial motion – relevance, undue burden, and cumulative/duplicative information. *Id.* at 16-23. It also adds a new argument, claiming for the first time that the Respondents lack standing to litigate the Michigan action, and thus may not conduct any discovery, including discovery from Treasury. *Id.* at 13-16. The renewed motion is ripe for review by the Court.

II. STANDARD OF REVIEW

A. Standing

In a civil action, the plaintiff has the burden of establishing that it has Article III standing. *Sierra Club v. Jackson*, 813 F. Supp. 2d 149, 154 (D.D.C. 2011) (citations omitted). To establish standing, plaintiff must show "at an irreducible constitutional minimum": (1) that it has suffered an injury in fact; (2) that the injury is fairly traceable to defendant's conduct; and (3) that a favorable decision on the

merits likely will redress the injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "While the burden of production to establish standing is more relaxed at the pleading stage than at summary judgment, a plaintiff must nonetheless allege 'general factual allegations of injury resulting from the defendant's conduct.'" *Nat'l Ass'n of Home Builders v. E.P.A.*, 667 F.3d 6, 12 (D.C. Cir. 2011). *See also NB ex rel. Peacock v. Dist. of Columbia*, 682 F.3d 77, 82 (D.C. Cir. 2012) (noting that "at the pleadings stage, 'the burden imposed' on plaintiffs to establish standing 'is not 'onerous'").

B. Motion to Quash

A party "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . [or which] appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Limiting discovery and quashing subpoenas pursuant to Rule 26 and/or Rule 45 "goes against courts' general preference for a broad scope of discovery." *North Carolina Right to Life, Inc. v. Leake*, 231 F.R.D. 49, 51 (D.D.C. 2005). "Moreover, the general policy favoring broad discovery is particularly applicable where, as here, the court making the relevance determination has jurisdiction only over the discovery dispute, and hence has less familiarity with the intricacies of the governing substantive law than does the court overseeing the

underlying litigation." *Jewish War Veterans of the United States of Am., Inc. v. Gates*, 506 F. Supp. 2d 30, 42 (D.D.C. 2007) (citing *Flanagan v. Wyndham Int'l, Inc.*, 231 F.R.D. 98, 103 (D.D.C. 2005)).[3]

Discovery must be limited, however, if the "discovery sought is unreasonably cumulative or duplicative." Fed. R. Civ. P. 26(b)(2)(c). In addition, "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *Id.* at 26(c); *see also* Fed. R. Civ. P. 45(d).

"The individual or entity seeking relief from subpoena compliance bears the burden of demonstrating that a subpoena should be modified or quashed." *Sterne Kessler Goldstein & Fox, PLLC v. Eastman Kodak Co.*, 276 F.R.D. 376, 379 (D.D.C. 2011) (citations omitted). "The quashing of a subpoena is an extraordinary measure, and is usually inappropriate absent extraordinary circumstances. A court should be loath to quash a subpoena if other protection of less absolute character is possible. Consequently, the movant's burden is greater for a

[3] Treasury suggests that a more restrictive test of relevancy applies when the subpoena is directed to a non-party, Pet'r's Renewed Mot. at 17, "but it seems that there is no basis for this distinction in the rule's language." 9A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2459 (3d ed.); *see also Flanagan*, 231 F.R.D. at 103 (applying relevance standards to non-party subpoena that is at least as broad as party subpoenas).

motion to quash than if she were seeking more limited protection." *Flanagan*, 231 F.R.D. at 102 (internal citations and quotation marks omitted).

III. DISCUSSION

A. Standing

For the first time in its renewed motion to quash, Treasury, a non-party to the underlying case, argues that respondents have no standing to litigate the Michigan action. Pet'r's Renewed Mot. to Quash at 13-16. Treasury concedes that the parties to the Michigan action have not raised standing issues in the Michigan court. *Id.* at 13-14. Nevertheless, it contends that "this Court is a proper forum in which to challenge the standing of respondents to litigate" the Michigan case, because "third party discovery may be permitted only to the extent it relates to viable claims." *Id.* at 14, n.11. It then makes cursory arguments, in just four pages of its brief, which purport to address standing issues in the highly complex ERISA litigation which has been pending in Michigan for five years.

This Court is deeply skeptical of Treasury's argument that the Court should address Article III standing in a case where the merits are not before it, and indeed, where it "*has jurisdiction only over the discovery dispute*, and hence has less familiarity with the intricacies of the governing substantive

law than does the court overseeing the underlying litigation." *Jewish War Veterans*, 506 F. Supp. 2d at 42 (citations omitted) (emphasis added). It is true, of course, that an "ancillary discovery proceeding is, by its very terms, an extension of the underlying proceeding and the subject matter jurisdiction of the ancillary proceeding is derived from the jurisdiction of the underlying case." *McCook Metals LLC v. Alcoa, Inc.*, 249 F.3d 330, 334 (4th Cir. 2001). However, this does not mean that in resolving the discrete, non-party discovery issue before it, the Court may reach into the merits of the underlying case, ongoing in another court halfway across the country, and determine that court's jurisdiction over those claims. Indeed, Treasury has not provided a single authority where a court exercising ancillary jurisdiction over only a single discovery motion has addressed the subject matter jurisdiction of a sister court presiding over the underlying litigation. Asking this Court to review another court's jurisdiction seems particularly inappropriate because the issue can never be waived: a standing challenge may be raised at any time during the Michigan litigation, either by the parties or *sua sponte* by that court.[4]

[4] If the subpoenas had been issued after December 1, 2013, the Court would have seriously considered transferring the motion to quash to the Michigan court in light of the December 1, 2013 amendments to Rule 45. The Rule, as amended, now requires that subpoenas be issued "from the court where the action is pending," Fed. R. Civ. P. 45(a)(2), and further provides that

Assuming *arguendo* it is appropriate for this court to undertake a standing analysis, and based on the limited record before it, the Court rejects Treasury's arguments. In order to demonstrate standing, a plaintiff must adequately establish an injury-in-fact, causation and redressability. *Lujan*, 504 U.S. at 560–61. At the pleading stage, where the underlying litigation remains, "'the burden imposed' on plaintiffs to establish standing 'is not onerous'." *NB ex. rel. Peacock*, 682 F.3d at 82. Treasury does not dispute that Respondents have been injured through the termination of their pension plan, but denies causation and redressability. Pet'r's Renewed Mot. at 14-16.

On the causation issue, Treasury argues that Respondents cannot show that their injury was fairly traceable to the PBGC.

> [T]he fact that respondents are not receiving the full amount of their pension benefits is attributable to the fact that "Delphi did not have enough money to fund its pensions" . . . . not to the fact PBGC terminated the . . . Plan by agreement with Delphi "to avoid any unreasonable increase in the liability of the PBGC insurance fund."

Id. at 14 (citations omitted). This argument is nothing more than an assertion that the PBGC should win on the merits of the case. In their Second Amended Complaint, plaintiffs have alleged that their Plan was terminated by PBGC for political

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"[w]hen the Court where compliance is required did not issue the subpoena, it may transfer a motion [to quash] to the issuing court if the person subject to the subpoena consents or if the court finds exceptional circumstances." *Id.* 45(f).

reasons and in violation of ERISA, *not* because the Plan was no longer financially viable or because PBGC had statutory authority to terminate. *See, e.g., Black v. PBGC*, Second Amended Complaint, ECF #145 ¶ 56. This is precisely the issue in discovery in the Michigan court. This Court takes no position whether Respondents will prevail on their claims. At the pleading stage, however, it appears that Respondents have alleged a causal link.

Treasury also argues that plaintiffs' injuries are not redressable by the Michigan Court. It claims that Respondents are not entitled to equitable relief from the PBGC because equitable "payments of money from the Federal Treasury are limited to those authorized by statute," *OPM v. Richmond*, 496 U.S. 414, 416 (1990), and "[r]espondents do not point to any statute that would authorize PBGC to pay them more in pension benefits than they now are receiving." Pet'r's Renewed Mot. at 16. This argument fares no better than Treasury's causation claims. Congress has authorized any plan participant "adversely affected by any action of the [PBGC] . . . [to] bring an action against the [PBGC] for appropriate equitable relief in the appropriate court." 29 U.S.C. § 1303(f)(1). Plaintiffs request a variety of forms of equitable relief in their Second Amended Complaint, not limited to an order forcing the PBGC paying higher pensions to the salaried workers and retirees. *See Black*

v. PBGC, Sec. Am. Compl. Prayer for Relief, ECF #145 at 22-23. Again, this Court takes no position on what relief, if any, Respondents will obtain from the PBGC or the other defendants in the case. However, at the pleading stage of the litigation, this Court agrees with Judge Tarnow, who "declin[ed] to accept [the PBGC's] position that Plaintiffs cannot obtain any relief in this lawsuit if the [Michigan] [c]ourt concludes that the PBGC acted improperly." *Black v. PBGC*, Order 2/17/10, ECF #122 at 3.

B. Relevance

Treasury argues that the information Plaintiffs seek is irrelevant because 29 U.S.C. § 1342(c) authorizes the PBGC to initiate a termination of a pension plan "in order to avoid 'any unreasonable increase in the liability of the [PBGC insurance] fund.'" Pet'r's Renewed Mot. at 18. Accordingly, Treasury claims, it is irrelevant whether Treasury encouraged PBGC to do anything; the PBGC acted in accordance with ERISA in seeking termination. *Id.* at 18-19. Respondents counter that § 1342(a) permits the PBGC to *seek* termination on this basis, but does not permit it to actually terminate a Plan without a court's determination that a Plan "must" be terminated under the § 1342(c) criteria: "[I]n 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." *See* Resp'ts Opp'n to Renewed Mot. at 21-22. Respondents argue that a reviewing court would not have made findings that these statutory criteria were met and that the Plan "must" terminate; rather, the PBGC violated the statute and improperly terminated the Plan because it was under political pressure from Treasury. *Id.* They argue that discovery from Treasury is therefore relevant. Respondents prevail.

In Judge Tarnow's September 1, 2011 discovery order, the U.S. District Court for the Eastern District of Michigan made a determination that this information was relevant. Judge Tarnow allowed discovery to move forward on Count 4 of the Complaint, specifically:

> [W]hether 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." . . . . In the event that the Court finds that termination of the plan was not supported by the factors set forth in 28 U.S.C. § 1342(c), the Court will consider the remaining issues raised in the complaint.

Black v. PBGC, ECF #193 at 3-6. Following Judge Tarnow's order, Plaintiffs requested information from the PBGC very similar to that it now requests from Treasury: information designed to reveal whether the PBGC could have satisfied the § 1342(c) factors or whether, instead, it improperly yielded to pressure

from other federal entities, including Treasury. Pet'r's Mot to Quash, ECF #1, Ex. H at 8-9. Judge Majzoub granted Plaintiffs' motion to compel that information. *Black v. PBGC*, ECF #209. Accordingly, two judges in the underlying action evaluated the question of relevance for very similar materials, sought for very similar reasons, and found them relevant. Although the "law of the case" doctrine is not dispositive of Respondents' motion, it does support this Court's decision to rely on the relevance analysis performed by the Eastern District of Michigan. *See Flanagan*, 231 F.R.D. at 103, n.2 ("While the doctrine of the law of the case is no more than a guiding principle and does not diminish this Court's discretion to revisit prior decisions of a coordinate court, it 'expresses the practice of courts generally to refuse to reopen what has been decided.'") (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988)). In the context of Rules 26 and 45, the above considerations establish a sufficient showing of relevance needed to permit the Respondents to obtain documents and other items and to depose a Treasury official in this case.

C. Burden

A trial court may quash or modify a subpoena on the ground that the request is unreasonable or oppressive. Fed. R. Civ. P. 26(c). "What constitutes unreasonableness or oppression is, of

course, a matter to be decided in the light of all the circumstances of the case. . . ." *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 403 (D.C. Cir. 1984) (citation and internal quotation marks omitted). "[T]he burden of proving that a subpoena . . . is oppressive is on the party moving for relief on this ground. . . . The burden is particularly heavy to support a motion to quash as contrasted to some more limited protection," such as a request for modification. *Id.* at 404 (quoting *Westinghouse Elec. Corp. v. City of Burlington, Vt.*, 351 F.2d 762, 766 (D.C. Cir. 1965)). The moving party may not "simply allege a broad need for a protective order so as to avoid general harm, but must demonstrate specific facts which would justify such an order." *Flanagan*, 231 F.R.D. at 102 (citations omitted). There are two subpoenas at issue in this case. The Court examines them in turn.

1) Subpoena Duces Tecum

Respondents' subpoena duces tecum is narrow. It seeks documents created, received or reviewed by three Treasury officials, over a single calendar year, relating only to Delphi. Moreover, Respondents have expressed their willingness to modify the subpoena to encompass only those documents Treasury already produced to SIGTARP and to the House Oversight and Government Reform Committee. *See, e.g.*, Resp'ts Opp'n to Renewed Mot. at 29-30. Nevertheless, Treasury argues that the subpoena, even

with proposed modifications, is oppressive and must be quashed. Treasury provides a declaration from Rachana Desai, Acting Chief Counsel of the Treasury's Office of Financial Stability, which states that in responding to the subpoena *duces tecum*, Treasury "could be" required to search the three officials' email inboxes, review over 15,000 electronic documents and 28 boxes of files, and then review documents for responsiveness and privilege. Desai Decl. ¶ 7, ECF #15-7. Even the modifications offered are unacceptable, Desai asserts, because Treasury "would need to review each responsive document" provided to SIGTARP and the U.S. House Committee for "responsiveness" and "possible assertion of claims of privilege." *Id.* ¶¶ 9-11.

Treasury has not carried its heavy burden to show that the subpoena *duces tecum* is oppressive. Although Treasury claims it will have to search a significant number of documents to respond to the subpoena, "volume alone is not determinative." *Northrup Corp.*, 751 F.2d at 404 (citation omitted). Moreover, the number of documents could drop significantly if Treasury agreed to Respondents' proposed modifications.[5]

[5] Treasury responded negatively to Respondents' offer to modify the subpoena *duces tecum*, arguing that the modifications would result in an equally heavy burden on the Treasury. *See, e.g.*, Pet'r's Renewed Mot. at 21-22. Accordingly, the Court does not modify the subpoena. The parties are of course free to negotiate modifications to the subpoena without further litigation.

Treasury's remaining claim of burdensomeness is that it will have to make privilege determinations for the documents. This naked assertion is insufficient to quash the subpoena for two reasons. First, Treasury offers no support for its claim that a substantial number of the documents will be privileged. There is no basis for the Court to impose the "extraordinary measure" of quashing a subpoena, *Flanagan*, 231 F.R.D. at 102, based on a "purely speculative" privilege claim. *Northrup*, 751 F.2d at 405. Second, most subpoenas *duces tecum* require the recipient to conduct a privilege review. If the "good cause" requirement for quashing a subpoena could be met by a bare assertion that privilege review constitutes an undue burden, discovery under the Federal Rules would quickly grind to a halt.

2) Deposition Subpoena

Treasury argues that "[n]o one currently working at Treasury has knowledge of the communications referenced in respondents' deposition subpoena to Treasury 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 [they] left the Auto Team . . . . [A]ny witness designated to testify . . . would need a substantial amount of time to prepare." Desai Decl. ¶ 12, ECF #15-7; see also Pet'r's Reply in Support of Renewed Mot. at 19, ECF #21 (explaining that the Auto Team had twelve Treasury employees, none of whom still works for Treasury).

Respondents counter that Treasury likely has the ability to compel Feldman and Wilson to testify; "[n]evertheless, if it is the Treasury's position that it cannot produce [Mr. Feldman and Mr. Wilson], and further that it is otherwise incompetent to testify about the communications these individuals undertook with respect to the Delphi issues, then Respondents will withdraw the Deposition Subpoena and reissue Rule 45 subpoenas to Messrs. Feldman and Wilson directly." Resp'ts Opp'n to Renewed Mot. to Quash at 31, ECF #19. Treasury responds by insinuating that it would move to quash such subpoenas "if and when they are issued because such subpoenas will seek information belonging to Treasury." Pet'r's Reply in Support of Renewed Mot. at 20.[6]

It appears that Treasury's principal undue burden argument is that no one with institutional knowledge about Mr. Feldman's and Mr. Wilson's role in the termination of the Delphi Plans remains at Treasury; accordingly, someone would have to learn the material as new in order to testify. Respondents effectively concede that this would be burdensome by offering to withdraw their deposition subpoenas if and only if Treasury

[6] Obviously, it would be premature to speculate as to the contents of a future, hypothetical motion to quash. Treasury is cautioned, however, to carefully consider this Opinion before filing any such motion.

cannot compel Mr. Feldman and Mr. Wilson to testify in response to the outstanding subpoena.

The Court agrees with Respondents. Treasury has made no showing that the deposition subpoena would be burdensome except in the event that no one at Treasury (or from whom it has authority to compel testimony) is competent to respond to it. Accordingly, the parties are directed to confer and determine, within 30 days of the date of this Order, whether Treasury can compel Mr. Feldman and Mr. Wilson to testify in response to the subpoena. In the event that it cannot, Respondents shall withdraw the deposition subpoena.

D. Duplicative/Cumulative Information

Finally, Treasury argues the subpoenas should be quashed because they are cumulative. Treasury contends that "[t]he immensity of PBGC's document production and the overlap between" the document requests to PBGC "and respondents' subpoenas to Treasury leave little need for Treasury to respond to [the] subpoena[]." Pet'r's Renewed Mot. at 24. Treasury also argues that Mr. Feldman and Mr. Wilson have testified at depositions in other actions, and at "numerous congressional hearings at which the Delphi Salaried Plan and its termination have been discussed." *Id.* Respondents counter that "at the time the Plan was terminated, the Treasury was directly negotiating the future of Delphi with a number of players besides the PBGC, including

GM, Delphi, Delphi's DIP Lenders, Federal Mogul, Platinum Equity, and various unions. Moreover the Auto Team was deliberating amongst itself and various White House officials as to what to do in relation to the Delphi plans. . . . In short, while it is true that the PBGC has produced some (and hopefully most) of the email correspondence between it and the Treasury, such information is only a part of the relevant responsive documents in the Treasury's possession." Resp'ts Opp'n to Renewed Mot. at 34-35. Respondents also argue that Feldman and Wilson's testimony would not be cumulative because neither of them has been deposed in *Black v. PBGC*. *Id.* at 36.

For the reasons discussed throughout, the motion to quash must be denied. The subpoenas request information that has been adjudicated as relevant to, and discoverable in, the Michigan litigation. Although the documents requested may have some overlap with documents already produced by PBGC, Treasury has failed to show, as it must, that it would be "unreasonably cumulative or duplicative." Fed. R. Civ. P. 26(b)(2)(c)(i). Likewise, Feldman and Wilson have access to information about Treasury's role in the Plan's termination which Respondents are unable to obtain elsewhere. Again, although their depositions will likely overlap somewhat with Feldman and Wilson's testimony in other proceedings, some overlap does not justify foreclosing discovery in this case. As this Circuit has noted,

"[d]epositions . . . rank high in the hierarchy of pre-trial, truth-finding mechanisms." *Founding Church of Scientology v. Webster*, 802 F.2d 1448, 1451 (D.C. Cir. 1986). Without the opportunity to depose Mr. Feldman and Mr. Wilson in this case, Respondents' counsel is denied "the opportunity . . . to probe the veracity and contours of the[ir] statements . . . [and] is denied the opportunity to ask probative follow-up questions." *Alexander v. FBI*, 186 F.R.D. 113, 121 (D.D.C. 1998).

IV. CONCLUSION

For the foregoing reasons, the Court concludes that non-party Department of the Treasury has failed to meet its burden under Federal Rules of Civil Procedure 26 and 45 to quash the subpoena *duces tecum*. Accordingly, the Renewed Motion to Quash is **DENIED** insofar as it relates to the subpoena *duces tecum*.[7]

The Court further concludes that the Department of the Treasury has failed to meet its burden under Federal Rules of Civil Procedure 26 and 45 to quash the deposition subpoena unless Treasury is unable to compel its former employees, Mr. Feldman and Mr. Wilson, to testify in response to the subpoena. The record before the Court is unclear on this point.

[7] Respondents ask that Treasury be given 30 days to comply fully with the subpoena, while Treasury states that it will take "far longer" to comply. Pet'r's Reply in Support of Renewed Mot. at 23. The parties are directed 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.

Accordingly, it is hereby **ORDERED** that the parties confer and determine, within 30 days of the date of this Order, whether Treasury can compel Mr. Feldman and Mr. Wilson to testify in response to the subpoena. In the event that Treasury can compel their testimony, the Renewed Motion to Quash the Deposition Subpoena is **DENIED**. In the event that it cannot compel these two individuals to testify, it is **FURTHER ORDERED** that Respondents shall withdraw the deposition subpoena.

A separate order accompanies this Memorandum Opinion.

SIGNED: Emmet G. Sullivan
United States District Judge
June 19, 2014.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DENNIS BLACK, CHARLES CUNNINGHAM, KENNETH HOLLIS, and THE DELPHI SALARIED RETIREE ASSOCIATION, Plaintiffs, v. THE PENSION BENEFIT GUARANTY CORPORATION; THE U.S. TREASURY DEPARTMENT; THE PRESIDENTIAL TASK FORCE ON THE AUTO INDUSTRY; and TIMOTHY GEITHNER, STEVEN RATTNER, RON BLOOM, and DOES 1-50, individually and in their official capacities, Defendants.	Case No. 2:09-cv-13616 Hon. Arthur J. Tarnow Magistrate Judge Donald A. Scheer **JURY DEMANDED**

SECOND AMENDED COMPLAINT

Dennis Black, Charles Cunningham, Kenneth Hollis, and the Delphi Salaried Retiree Association (collectively referred to as "the Salaried Workers"), through their undersigned attorneys, hereby submit this second amended complaint against the Pension Benefit Guaranty Corporation ("PBGC"), the United States Treasury Department, the Presidential Task Force on the Auto Industry, Timothy F. Geithner, Steven Rattner, Ron Bloom, and DOES 1-50 .

I. Jurisdiction and Venue

1. This case arises under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, the First and Fifth Amendments to the U.S. Constitution, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706.

2. This Court has jurisdiction to hear this action pursuant to 29 U.S.C. § 1303(f)(2)(B), 28 U.S.C. § 1331, and 5 U.S.C. § 702.

3. Venue properly lies in this judicial district under 29 U.S.C. § 1303(f)(2)(B) and 28 U.S.C. § 1391(b), (c) & (e).

II. Parties

4. The 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 ERISA. The 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. Its board of directors includes, among its three members, the Secretary of the Treasury. ERISA § 4002(d), 29 U.S.C. § 1302(d).

5. Dennis Black, Charles Cunningham, and Kenneth Hollis are retired salaried employees of Delphi Corporation ("Delphi"). They receive benefits from the Delphi Retirement Program for Salaried Employees (the "Salaried Plan" or the "Plan"), which on information and belief has now been terminated and transferred to the PBGC. As a result of termination, Messrs. Black, Cunningham, and Hollis have lost a substantial portion of their pension income.

6. The Delphi Salaried Retiree Association is a nonprofit organization, comprised of participants in the Salaried Plan and dependents of participants who are beneficiaries in the Salaried Plan.

7. Defendant U.S. Department of the Treasury is the executive agency responsible for promoting economic prosperity and ensuring the financial security of the United States.

8. Defendant Presidential Task Force on the Auto Industry (the "Auto Task Force") is a cabinet level group appointed by the President to oversee the administration's efforts to support and stabilize the domestic automotive industry. It is co-chaired by Secretary of the Treasury Timothy Geithner and National Economic Council Director Larry Summers.

9. Defendant Timothy F. Geithner ("Geithner") is the Secretary of the Treasury, a co-chair of the Auto Task Force, and one of three directors of the PBGC. At all relevant times, Defendant Geithner was acting under color of law. He is sued in his individual and official capacities.

10. Defendant Steven Rattner ("Rattner") was, at times relevant to this case, the lead advisor to the Secretary of the Treasury on the automotive industry and a member of the Auto Task Force. At all relevant times, Defendant Rattner was acting under color of law. He is sued in his individual and official capacities.

11. Defendant Ron Bloom ("Bloom") is a senior advisor on the auto industry at the Treasury Department and replaced Defendant Rattner as the lead advisor of the Auto Task Force. At all relevant times, Defendant Bloom was acting under color of law. He is sued in his individual and official capacities.

12. At all relevant times, Defendants DOES 1-50 (also "DOE Defendants") were agents, employees, or otherwise representatives of the Treasury Department and/or the Auto Task Force. At all relevant times, DOES 1 through 50 were acting under color of law. Upon information and belief, Plaintiffs allege that DOES 1 through 50, among others, are legally responsible for the wrongs committed against Plaintiffs described in this Second Amended Complaint. When Plaintiffs become aware of the true identities of one or more DOE Defendants, Plaintiffs will amend this Second Amended Complaint to add or substitute them as named Defendants.

III. Factual Allegations

13. General Motors LLC (f/k/a General Motors Company and hereafter "New GM") became the successor entity to General Motors Corporation (who was the original sponsor of the Plan and is now known as "Motors Liquidation Company" and hereinafter referred to as "Old GM") when it purchased substantially all of the assets of Old GM. New GM is one of the world's largest automakers and maintains its global headquarters in Detroit. New GM's majority owner is the Defendant U.S. Department of the Treasury, who owns 60.8% of the common stock. Plaintiffs allege that the actions undertaken by New GM complained of herein were the result of overt government coercion in connection with governmental policies, such that it was a governmental actor whose actions are subject to the guarantees of the United States Constitution.

14. Delphi is a global producer of automobile electronics and parts and does business in this judicial district. Until the termination of the Plan, Delphi was the contributing sponsor of the Plan, a defined benefit pension plan designed to provide for the payment of tax-qualified and non tax-qualified pension benefits to eligible Plan participants and beneficiaries.

15. Under the terms of the Plan, Delphi was designated as the Plan Administrator. Delphi, in turn, delegated the functional responsibilities as Plan Administrator to its Executive Committee, stating that "the Executive Committee of the Corporation's Board of Directors is the Named Fiduciary with respect to this Program. The Executive Committee may delegate authority to carry out such of its responsibilities as it deems appropriate in order to carry out the proper and effective administration of this Program to the extent permitted by ERISA." *See* Delphi Retirement Program for Salaried Employees § 14. The individual members of the Executive Committee are, accordingly, the "persons" identified as Plan Administrator under 29 U.S.C. § 1002(16)(a)(1), and serve as individual fiduciaries under 29 U.S.C. § 1002(21)(A).[1]

16. Delphi was originally an operating unit of Old GM, the original sponsor of the Salaried Plan. Delphi was incorporated separately in 1998 and was spun-off from Old GM in 1999. When Delphi was spun off in 1999, it assumed responsibility for maintaining the pension plans for all Delphi employees. Those plans included the Salaried Plan, as well as plans for unionized workers, which had been negotiated by their unions. The Salaried Workers were not unionized during their tenures at Old GM and Delphi or currently. There are currently over 15,000 participants in the Plan. Most spent the bulk of their careers working for Old GM, but became subject to Delphi's oversight of the Plan at the time of the spin-off in 1999.

[1] In prior proceedings between Delphi's Executive Committee and some of the Plaintiffs, *see* ¶ 26 (describing prior action in this District), there has been dispute as to whether the Plan Administrator of the Plan is Delphi or its Executive Committee. Plaintiffs steadfastly adhere to their position (as stated in the prior proceedings) that the Executive Committee, through delegation from Delphi, is the Plan Administrator. Delphi has asserted that it, not the Executive Committee, is the Plan Administrator. For present purposes, it does not make any difference whether the Plan Administrator is actually Delphi or the Executive Committee. We therefore generally sometimes here use "Delphi" as a shorthand for the Plan Administrator, whether the Plan Administrator is the company itself or the company's Executive Committee.

17. In October 2005, Delphi filed for Chapter 11 bankruptcy in the United States District Court for the Southern District of New York. *See In re Delphi Corp.*, No. 05-44481 (RDD) (S.D.N.Y. Bankr., filed Oct. 8, 2005). Because the Plan was a potential creditor with claims against Delphi, and because Delphi (*i.e.*, its Executive Committee) was also a fiduciary of the Plan, Delphi's financial distress placed Delphi in a conflicted situation -- namely, it obligated Delphi to file creditor claims against itself in the bankruptcy. In January 2006, in recognition of the obvious conflict of interest inherent in retaining fiduciary powers along with its corporate offices, Delphi delegated the fiduciary responsibility to file claims (though no other responsibilities) to Fiduciary Counselors, Inc.

18. In September 2008, Delphi announced that it had concluded a deal with Old GM and the PBGC in which Delphi could potentially transfer billions of dollars in pension liabilities from the plans for unionized workers (but not the Salaried Plan) to existing plans of Old GM. When the PBGC learns that an employer has not made required minimum funding contributions, and unpaid amounts total more than $1 million, the PBGC can perfect and enforce a statutory lien on behalf of the pension plan against property of the plan sponsor. The use of these statutory liens is the PBGC's primary tool to prevent a plan's termination or to mitigate potential losses. In return for Old GM's assumption of the hourly pension liabilities, the PBGC released more than $1.2 billion in liens that it had filed against Delphi's non-debtor foreign affiliates on behalf of the pension plan for unionized hourly workers.

19. Although it did not appear at the time of the September 2008 deal that Delphi had attempted to secure a similar arrangement to protect the Salaried Workers, such an arrangement was, according to Delphi, unnecessary. In this regard, in a September 8, 2008 press release,

Delphi reiterated a commitment it had made since the start of the bankruptcy proceedings that it would itself continue the Salaried Plan, stating that Delphi "remained committed to fully funding our pension plans."

20. One month later, in November 2008, Old GM sought and received billions of dollars in emergency secured financing from the U.S. Government, through the Department of Treasury. In order to secure this financing, the Treasury Department required Old GM to submit a proposed viability plan to Congress. The Treasury Department continued to offer massive financial assistance to Old GM, but required it to submit a proposed business plan that required, among other things, the restructuring of employee benefits and work rules. *See In re General Motors Corp.*, 407 B.R. 463, 478 (S.D.N.Y. Bankr. 2009).

21. On February 15, 2009, the President appointed the Auto Task Force to oversee the administration's efforts to support and stabilize the domestic automotive industry. The President appointed Treasury Secretary Geithner and National Economic Council Director Larry Summers as co-chairs of the Auto Task Force.

22. On March 30, 2009, the government announced that the viability plan proposed by Old GM was not satisfactory, however the United States would provide substantial assistance to Old GM if it took certain steps to justify such assistance, including restructuring its relationship with the United Auto Workers union ("UAW"). *Id.* at 479.

23. At this point the Treasury Department was Old GM's largest secured creditor and was poised to become its majority owner after an expedited bankruptcy sale. The U.S. government had invested enormous amounts of capital (both financial and political) in the effort

to reorganize the auto industry and would face severe political consequences if its efforts with respect to Old (and New) GM were not successful.

24. On information and belief, beginning in the spring of 2009, the United States, acting through the Treasury Department and the Auto Task Force, began to enter into discussions with officials from Delphi, the PBGC, and Old GM regarding the future of Delphi's pension plans. During these negotiations, a number of factors become clear to the Treasury Department: (1) an interruption in the supply of parts from Delphi to Old GM would be devastating to the latter; (2) Delphi's lenders could seek to foreclose on all or some portion of Delphi's assets as early as July 10, 2009, resulting in a significant interruption of supplies; (3) the best way to avoid the possibility of an interruption of Delphi supplies to Old (or New) GM required that Delphi's assets be sold to a stable entity; (4) Delphi's assets were currently subject to significant PBGC liens asserted on behalf of the Salaried Plan, and as of April 25, 2009, could be subject to still more PBGC liens; and (5) there were no potential purchasers willing to purchase Delphi's assets while they were subject to the threat of the PBGC liens.

25. The facts began to emerge to the public beginning June 1, 2009, with Old GM filing for bankruptcy, the sale of Old GM's assets to New GM (*i.e.*, General Motors Company), and the federal government becoming the majority shareholder of New GM. At that time, Delphi announced, in conjunction with a filing in its own bankruptcy proceeding, that it had developed "a workable pension solution for its defined benefit plans." The bankruptcy filing stated that Delphi expected to enter into an agreement with the PBGC, whereby the PBGC would initiate involuntary termination proceedings concerning the Salaried Plan. Upon the Salaried Plan's termination, responsibility for paying out benefits owed under the Salaried Plan would

transfer from Delphi to the PBGC, and the benefits would be subject to the statutory maximums provided for under ERISA.

26. On July 16, 2009, the Salaried Workers filed a complaint for equitable relief against the named fiduciaries of the Salaried Plan, seeking, *inter alia*, the appointment of an independent fiduciary for the Salaried Plan for purposes of negotiating any Plan termination and protecting participants' and beneficiaries' rights in any termination proceedings. *See Black v. Naylor*, Case No. 2:09-cv-12810 (E.D. Mich.). The complaint alleged that the named fiduciaries were in a position where their responsibilities as officers of Delphi prevented their functioning with the complete loyalty to the Salaried Plan's participants and beneficiaries that is demanded as ERISA fiduciaries in matters of Plan administration. On July 21, 2009 the Salaried Workers filed a motion for a temporary restraining order and a preliminary injunction against the named fiduciaries of the Salaried Plan, which sought to prohibit the Plan Administrator from negotiating, signing, or effectuating an agreement with the PBGC summarily to terminate the Salaried Plan, pending determination of the underlying complaint.

27. In later proceedings on the Salaried Workers' complaint, Delphi's executives plainly admitted that they did not treat the decision to enter any agreement to terminate the Plan as a fiduciary function but as a "settlor" function and that they therefore could or would make any decision in the best interests of the company, not the Plan's participants and beneficiaries. On information and belief, Delphi (including its Executive Committee) was under strong pressure by the federal government to agree to the termination of the Plan, which at the time was underfunded, because termination of the Plan would further the government's interest in restructuring the auto industry at the lowest cost to the government and expediently,

notwithstanding that termination would not be in the best interests of the Plan's participants and beneficiaries. Delphi executives communicated to the Salaried Workers that the federal government was pressuring or did pressure Delphi to consent to termination of the Plan.

28. Also on July 21, 2009, and unbeknownst at the time to the Salaried Workers, the PBGC signed a settlement agreement with Delphi. Under the settlement agreement, it was anticipated that the PBGC would initiate involuntary termination procedures to terminate Delphi's pension plans, and Delphi was obligated to direct the Plan Administrator to agree to summary termination of all of those plans, including the Salaried Plan. Under the agreement, the PBGC agreed to release all of its statutory liens against Delphi. On information and belief, the vast bulk of these liens were held on behalf of the Salaried Plan, and in fact the PBGC no longer held any statutory liens on behalf of the plan for unionized hourly workers, despite the fact that hourly workers' plan's under-funding was significantly greater than that of the Salaried Plan. Despite the obvious benefit the release of these liens provided to New GM, and the fact that the liens were the most significant tool available to ensure additional funding for the Salaried Plan, New GM did not top-up any benefits for participants and beneficiaries of the Salaried Plan in exchange for the release of the liens. Additionally, the PBGC unconditionally released Delphi, Old GM, and the successor entities, as well as all of their current and former officers, directors, and employees from any and all suits and causes of action "upon any legal or equitable theory, (whether contractual, common law, statutory, federal, state, local or otherwise)."

29. Consistent with the settlement agreement, on July 22, 2009, the PBGC filed a complaint against Delphi, seeking, *inter alia*, the termination of the Salaried Plan and the appointment of the PBGC as statutory trustee of the Plan. *See PBGC v. Delphi Corp.*, Case No.

2:09-cv-12876 (E.D. Mich.). Under ERISA, in order for a plan to be involuntarily terminated, the PBGC must initiate an action in a district court and must prove that certain statutory conditions for termination exist. *See* 29 U.S.C. § 1342. The only exception to the requirement of district court adjudication is for "small plans," which potentially can be terminated in a streamlined manner, but only if the PBGC makes special provision for safeguarding the interests of beneficiaries. *Id.*

30. In response to the PBGC's lawsuit, the Salaried Workers voluntarily dismissed their complaint on July 23, 2009, noting that they intended to intervene in the PBGC's lawsuit to protect their interests. ERISA provides that the PBGC's filing of an action to initiate termination of a plan automatically stays all other pending cases against that plan. *See* 29 U.S.C. § 1342(f).

31. On July 30, 2009, the bankruptcy court overseeing Delphi's bankruptcy approved a modified reorganization plan that included the PBGC-Delphi settlement agreement calling for involuntary termination of the Plan. *See In re Delphi Corp.*, No. 05-44481 (RDD), Dkt. No. 18707 (S.D.N.Y. Bankr. July 30, 2009). In addition, the bankruptcy court approved the sale of Delphi's assets, a sale in which New GM is a principal participant and through which the purchaser of Delphi's assets will be a chief parts supplier to New GM.

32. On August 6, 2009, the Salaried Workers contacted the PBGC and Delphi to seek their consent to the Salaried Workers' proposed intervention in the termination action.

33. One day later, on August 7, 2009, the PBGC filed a notice of voluntary dismissal of its termination action.

34. The PBGC has since posted an announcement on its website stating that, "[o]n August 10, 2009, the Pension Benefit Guaranty Corporation assumed responsibility for the

pension plans of Delphi Corp. The plans ended as of July 31, 2009." As such, it appears that the PBGC and the Plan Administrator of the Salaried Plan have entered into an agreement summarily to terminate the Plan and that the PBGC is attempting to terminate the Plan without adjudication by or even the consent of a United States District Court. Nor has the PBGC in any manner attempted to safeguard the interests of Plan beneficiaries through notice or opportunity for comment or participation with respect to termination.

35. The financial consequences to the Salaried Workers of the Plan's termination will likely be severe. The Salaried Workers had undertaken an analysis of the impact to them should the PBGC assume responsibility for the Plan, and that analysis concludes that they stand to lose between 30% and 70% of their current pension benefits. The PBGC concedes as well that the Salaried Workers will suffer losses in pension benefits. *See* PBGC Press Release (July 22, 2009). The losses in benefits stem, in part, from various statutory limits placed on distribution of a terminated plan's remaining assets and the manner in which the PBGC interprets its obligation to guarantee benefits for a terminated plan. *See, e.g.*, 29 U.S.C. § 1344(a) (containing various limitations on distribution of remaining Plan assets); *id.* § 1322(b) (PBGC maximum guarantee); *see also* PBGC Press Release (July 22, 2009) ("The PBGC will pay pension benefits up to the limits set by law. In 2009, the maximum benefit for a 65-year-old is $54,000 per year. The maximum is lower for those who retire earlier or elect survivor benefits. In addition, certain early retirement subsidies and supplements are generally not insured, and benefit increases made within the past five years may not be fully insured").

36. As a result of unlawful government discrimination, only the salaried retirees of Delphi will suffer these pension losses. On information and belief, after becoming the majority

owner of New GM, the United States government, acting through Defendants Treasury Department, Auto Task Force, Geithner, Rattner, Bloom, and DOES 1-50, exercised considerable control over the actions of New GM, using New GM to carry out governmental policies. In response to the Delphi-PBGC settlement agreement, New GM announced that it would "top-up" the pension benefits for "certain limited groups" of Delphi retirees, specifically the hourly workers represented by the United Auto Workers union. As a result of the "top-up," benefits that would otherwise be lost because of the PBGC's limits and exclusions would be made up by New GM.

37. On September 1, 2009, at the direction of the United States government, acting through the Treasury Department and the Auto Task Force, New GM agreed to "top-up" the pension benefits and provide health benefits to additional union-affiliated Delphi retirees, but not to the salaried retirees of Delphi. On information and belief, this discriminatory decision was the result of significant pressure by the United States, carried out in connection with governmental policies that were politically motivated, and the result of the Treasury Department's management and control of New GM. As a result of these actions, Plaintiffs have been denied the benefit of a top-up solely on the basis of their choice not to associate with a union, in violation of the First and Fifth Amendments to the United States Constitution.

IV. Claims for Relief

COUNT 1
Failure to Comply with ERISA's Requirements Regarding the Adjudication of Plan Terminations
(Against Defendant PBGC)

38. Plaintiffs incorporate by reference the allegations in the paragraphs above as though fully set forth here.

39. In order for the PBGC to terminate a pension plan, it must obtain a court decree to that effect. 29 U.S.C. § 1342(a), (c). Any allowance in ERISA for termination via a summary agreement between the PBGC and a Plan Administrator applies, if at all, only to small plans and, even then, only when the PBGC has made special provision for adequate procedural safeguards for the interests of participants and beneficiaries. 29 U.S.C. § 1342(a) ("The corporation may prescribe a simplified procedure to follow in terminating small plans as long as that procedure includes substantial safeguards for the rights of the participants and beneficiaries under the plans, and for the employers who maintain such plans (including the requirement for a court decree under subsection (c)).")

40. The Salaried Plan is not a small plan and therefore cannot be terminated through summary agreement between the PBGC and Plan Administrator, and the termination of the Salaried Plan through agreement between the PBGC and the Plan Administrator therefore violates ERISA. Moreover, in summarily terminating the Plan through agreement with the Plan's Plan Administrator, the PBGC made no provision for substantial safeguards of the interests of Plan participants and beneficiaries; therefore, for this reason as well, the termination of the Salaried Plan through agreement between the PBGC and the Plan Administrator violates ERISA.

41. For these reasons, the PBGC's termination of the Plan through summary agreement is null and void and illegal.

COUNT 2
Failure to Comply with ERISA's Requirement that Any Summary Termination Agreement Be with a Plan Administrator Properly Acting in that Capacity
(Against Defendant PBGC)

42. Plaintiffs incorporate by reference the allegations in the paragraphs above as though fully set forth here.

43. Under ERISA, a Plan Administrator is an ERISA fiduciary with respect to any discretionary functions, and an ERISA fiduciary must discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries of the plan. 29 U.S.C. §§ 1002(21)(A), 1104(a). As a result, the Plan Administrator of the Salaried Plan, at least prior to and at the time of the signing of any agreement with the PBGC terminating the Plan, owed a fiduciary duty to the Plan's participants and beneficiaries in deciding whether to enter into and execute a termination agreement.

44. In entering an agreement summarily to terminate the Plan, the PBGC unlawfully entered into an agreement with a Plan Administrator who -- in violation of ERISA -- did not act as a fiduciary of the Plan. Instead, Delphi and its executives have stated that the decision, through the Plan Administrator, to enter into an agreement with the PBGC summarily to terminate the Plan involves a "settlor" function to be done in the corporate interest, rather than in the Plan participants' and beneficiaries' interests.

45. The PBGC's summary termination of the Plan based on an agreement with the Plan's Plan Administrator, when the Plan Administrator acted in the corporate interest as a settlor rather than as a fiduciary in the participants' and beneficiaries' best interests, violates

ERISA, which requires that any such agreement (if at all allowable) be entered with a Plan Administrator properly acting in its fiduciary capacity.

46. In addition, even in the absence of any showing that the Plan Administrator entered a summary termination agreement based on the corporate interest rather than Plan participants' and beneficiaries' interests, the PBGC's termination of the Plan based on such an agreement violates ERISA because the agency entered the agreement with a Plan Administrator laboring under a conflict of interest. ERISA fiduciaries have an obligation under ERISA to avoid placing themselves in a position where their acts as directors or officers of the corporation will prevent their functioning with the complete loyalty to participants demanded of them as fiduciaries. This duty requires that fiduciaries avoid conflicts of interest and that they resolve them promptly whenever they occur. This duty of loyalty requires the fiduciary to step aside in favor of a neutral fiduciary whenever it labors under a conflict of interest.

47. The Plan's Plan Administrator, whether that is Delphi or its Executive Committee, faced an irreconcilable conflict of interest that required it to step aside in favor of a neutral fiduciary with respect to any termination issues. Delphi and its executives' corporate interest necessarily favored a rapid termination of the Plan under the terms pressed by the federal government, including the PBGC. For one thing, those terms included the release of liens against Delphi assets; in addition, the terms included a release of any and all causes of action the PBGC might have against Delphi and its executives associated with the Plan, including mismanagement. Furthermore, Delphi and its executives were being pressured by the federal government to terminate the Plan as part of an orchestrated effort on the federal government's part to restructure the auto industry as expediently and cheaply as possible; compliance with the

government's will was in the furtherance of the corporate interest to emerge from bankruptcy immediately. To that end, Delphi has stated that its settlement with the PBGC is vital to its reorganization and that the summary termination agreement is a necessary element of that settlement.

48. In contrast, the interests of the Salaried Plan's participants and beneficiaries, who have vested and accrued benefits due to them under the Plan was, and is, in seeing the Plan maintained and fully funded or at least not terminated under the conditions the PBGC pursued. As fiduciaries of the Plan, the Plan's Plan Administrator should have favored careful consideration of any issues of Plan termination, a judicial adjudication of termination (as is the norm), and even rejection altogether of termination.

49. Delphi's and its executives' interests in selling Delphi's assets as quickly as possible and in terminating the Salaried Plan consistent with the government's will directly conflict with the interests of the Plan's participants and beneficiaries against termination. As such, the Plan's Plan Administrator labored under a conflict of interest with respect to termination and lacked capacity to sign a summary termination agreement with the PBGC (if any such agreement is otherwise allowable). By terminating the Plan based on a summary agreement with a Plan Administrator who labored under a conflict of interest, and therefore was incompetent to make fiduciary determinations, the PBGC has violated ERISA.

50. For these reasons, the PBGC's termination of the Plan through summary agreement is null and void and illegal.

COUNT 3
Violation of the Due Process Clause of the Fifth Amendment
(Against Defendant PBGC)

51. Plaintiffs incorporate by reference the allegations in the paragraphs above as though fully set forth here.

52. If an agreement summarily to terminate the Plan between the PBGC and the Plan Administrator is otherwise allowable and authorized under ERISA, ERISA's authorization for summary plan termination is unconstitutional in violation of the Due Process Clause of the Fifth Amendment to the U.S. Constitution. In all instances, the Salaried Workers, because they have a cognizable property interest in their vested pension benefits, are entitled to meaningful notice of any Plan termination and the opportunity for a hearing prior to the Plan's termination. Because any ERISA provisions allowing for summary plan termination deprive the Salaried Workers of protected interests without adequate procedural safeguards, the provisions violate the Due Process Clause.

53. For these reasons, The PBGC's termination of the Plan through summary agreement is null and void and illegal.

COUNT 4
Plan Termination in Violation of ERISA
(Against Defendant PBGC)

54. Plaintiffs incorporate by reference the allegations in the paragraphs above as though fully set forth here.

55. If the Plan is to be terminated, it may only be terminated consistent with ERISA and Due Process after the full adjudication set forth in 29 U.S.C. § 1342(a) and (c) and compliance with the substantive standards for termination there set forth.

56. The PBGC cannot satisfy the standards for termination of the Salaried Plan under 29 U.S.C. § 1342(a) and (c) with the current termination terms it has negotiated and put in place. The termination of the Plan pursuant to the current termination terms is (i) unsupported by fact; (ii) not in accordance with 29 U.S.C. § 1342(a) and (c); (iii) unsupported by the law; (iv) the result of the PBGC's clear error in judgment and consideration of irrelevant factors; and (iv) otherwise arbitrary and capricious. Contrary to the statutory requirements, the PBGC's termination of the Plan was politically motivated; the fact that the PBGC's decision was the result of political expediency rather than relevant statutory criteria is evidenced by the allegations described in this Second Amended Complaint, including among other things: the PBGC's release of its liens against Delphi's foreign assets, its failure to place additional liens against Delphi's foreign assets despite the under-funding of the Salaried Plan; its waiver of actions against Delphi and GM entities, and its failure to obtain additional funding from Old and New GM for the Salaried Plan in exchange for the release of the liens.

COUNT 5
Violation of the Equal Protection Component of the Fifth Amendment
(First and Fifth Amendments, APA, and *Bivens*)
(Against Defendants Treasury Department, Auto Task Force, and Bloom, Geithner, Rattner and DOES 1-50)

57. Plaintiffs incorporate by reference the allegations in the paragraphs above as though fully set forth here.

58. The decision to top-up the pension benefits of only certain union-affiliated Delphi retirees was made at the direction of Defendants Treasury Department, Auto Task Force, Bloom, Geithner, Rattner and DOES 1-50.

59. The decision to provide to Delphi retirees pension top-ups has benefited only certain union-affiliated retirees. Plaintiffs allege that the decision was made for political reasons -- on the basis of affiliation with a particular union or unions -- and not on the basis of any relevant extenuating circumstances. As described in this Second Amended Complaint, the government's decision to terminate Plaintiffs' pension benefits but to maintain intact those of union-affiliated retirees or retirees affiliated with certain unions was not rationally related to any legitimate public purpose.

60. The decision to discriminate against similarly situated retirees based directly on associational status violates the Equal Protection component of the Fifth Amendment to the U.S. Constitution and the First Amendment's associational and speech guarantees, particularly in light of the lack of relevant extenuating circumstances to support the decision. The termination of these vested benefits is a permanent and severe economic penalty based entirely on the Plaintiffs' decision not to affiliate with a union. This decision has directly and substantially interfered with Plaintiffs' associational rights, in that, as a direct consequence of their decision not to associate with particular unions, Plaintiffs have been forced to forfeit a significant portion of their pension benefits. Through these top-ups, the government has injected undue favoritism into private labor relationships, and in doing so it has unconstitutionally burdened Plaintiffs' right to choose freely how and with whom to associate.

61. Plaintiffs seek specific relief against Defendants Treasury Department and Auto Task Force, as well as against Defendants Bloom, Geithner, Rattner and DOES 1-50 in their *official* capacities (all such Defendants are hereinafter collectively referred to as the "Treasury Defendants"), such that the Court should:

a. (i) declare that the Treasury Defendant's selective provision of top-up benefits to certain Delphi retirees on the basis of associational status violates the Constitution, and (ii) require the Treasury Defendants only (and not New GM) to extend the top-up benefits to all Salaried Plan participants; or

b. grant such other relief against the Treasury Defendants as this Court deems appropriate.

62. Plaintiffs also allege that the Treasury Defendants are responsible for the decision to provide pension top-ups to only those Delphi retirees associated with particular unions, and not to Plaintiffs. As described in this Second Amended Complaint, at all relevant times, the federal government was the majority shareholder and a significant creditor of New GM, and was extensively involved in questions related to the outcome of pension benefits to Delphi's retirees. As such it exercised significant coercive power and provided significant encouragement to New GM in connection with the benefits decision such that New GM's ultimate decision in this regard must be deemed to be that of the government, or at least that the government was a joint participant in the decision. *See San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987). Moreover, because the Treasury Defendants were extensively entwined with New GM's management and control in making the decision, New GM must be deemed a governmental actor. *See Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001).

63. Plaintiffs seek compensatory and punitive damages against Defendants Bloom, Geithner Rattner and DOES 1-50 in their *personal* capacities, for denying Plaintiffs the same benefits provided to the similarly situated union-affiliated retirees on the basis of their non-union

affiliation, in violation of their rights to equal protection under the Fifth Amendment of the Untied States Constitution. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 389 (1971), the Supreme Court authorized a federal cause of action for monetary damages against individual federal officers alleged to have violated constitutional rights. In *Davis v. Passman*, 442 U.S. 228 (1979), the Court recognized the availability of a *Bivens* action for an alleged violation of the equal protection component of the Fifth Amendment.

64. Plaintiffs do not seek damages from the Treasury Defendants. Rather, Plaintiffs seek these damages from Defendants Geithner, Bloom and Rattner, in their individual capacities, as authorized by *Bivens* and its progeny.

V. Prayer for Relief

WHEREFORE, the Salaried Workers request a judgment in their favor:

A. Declaring that, under ERISA, the Salaried Plan cannot be terminated summarily by agreement between the PBGC and the Plan Administrator and therefore that the PBGC has unlawfully terminated the Salaried Plan;

B. Declaring that, under the Due Process Clause, the Salaried Plan cannot be terminated summarily by agreement between the PBGC and the Plan Administrator and therefore that the PBGC has unlawfully terminated the Salaried Plan;

C. Declaring that the PBGC's termination of the Salaried Plan, on the terms put in place by the PBGC, violates ERISA;

D. Permanently enjoining the PBGC from terminating the Salaried Plan on the termination conditions and terms currently in place and otherwise setting aside the PBGC's termination of the Plan;

E. Awarding appropriate equitable relief against the Defendants to undo the Plan's termination and to place the parties in the position they were prior to termination of the Plan;

F. Declaring that the Treasury Defendants' selective provision of top-up benefits to certain Delphi retirees on the basis of associational status violates the Constitution;

G. Ordering the Treasury Defendants only (and not New GM) to extend the top-up benefits to all Salaried Plan participants;

H. Awarding compensatory and punitive damages against Defendants Geithner, Bloom and Rattner, in their individual capacities, for violation of Plaintiffs' First and Fifth Amendment rights.

K. Awarding costs and attorney fees and other expenses pursuant to 29 U.S.C. § 1303(f)(3), or under the Equal Access to Justice Act, 5 U.S.C. § 2412.

L. Awarding such other relief against the Defendants as the Court deems appropriate.

JURY DEMAND

A jury is demanded on all issues triable by a jury.

Respectfully submitted,

/s/ Anthony F. Shelley
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Attorneys for Plaintiffs

ORDERED that the documents over which Treasury has asserted a claim of relevance, attorney-client privilege or work product are protected from production.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
April 13, 2017