ORAL ARGUMENT NOT YET SCHEDULED

No. 17-5142 (consolidated with No. 17-5164)

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, AND DELPHI SALARIED RETIREES ASSOCIATION,[1]

Respondents-Appellees.

On Appeal from the United States District Court
for the District of Columbia (Judge Emmet G. Sullivan)

APPELLEES' RESPONSE IN OPPOSITION TO THE DEPARTMENT OF TREASURY'S EMERGENCY MOTION FOR STAY PENDING APPELLATE REVIEW AND FOR IMMEDIATE ADMINISTRATIVE STAY

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[1] The appeal was incorrectly captioned with "Delta Salaried Retirees Association"; it is correctly captioned with "Delphi Salaried Retirees Association."

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INTRODUCTION & BACKGROUND

In a litigation saga reminiscent of Dickens's *Bleak House*, Respondents-Appellees have fought for eight years to challenge the termination of their pension plan, stymied in their efforts even simply to get a meaningful day in court by a federal government that refuses to comply with its discovery obligations. On the discovery issues, not one but two federal courts (*i.e.*, the Eastern District of Michigan in the termination-challenge case and Judge Sullivan in the ancillary subpoena proceeding below) have rejected relevance and burdensomeness arguments by the government aimed at shielding itself from discovery; not one but two federal courts have rejected the government's improper privilege assertions; not one but two federal courts have rejected repeated reconsideration motions on the topics; and not one but two federal courts have suggested the government's discovery behavior bordered on bad faith. The result is that the litigation – again, eight years of it already – has still not exited the discovery phase, with the government's latest stay motion resulting, if granted, in another delay. All the while, retirees who have stood to gain from a win in the challenge to the plan's termination continue to age and near a time when they may be unable to enjoy the fruits of any victory; some, sadly, have already passed away.[2]

[2] Respondent-Appellees are three individual retirees of the General Motors-related Delphi Corporation ("Delphi") who participated in the now-terminated plan and an

The current appeal and stay motion replicate an earlier episode in this litigation. From 2011 to 2016, the Pension Benefit Guaranty Corporation ("PBGC"), which is the federal-government entity that terminated the plan and is the defendant in the underlying Michigan case, fought tooth and nail to stop discovery against it. The PBGC's discovery recalcitrance necessitated repeated motions to compel discovery, prompting the Magistrate Judge there at one point in exasperation to say the PBGC's arguments "reasonably" could be termed "frivolous" and aimed at "delay[ing] or ultimately avoiding" legitimate discovery. Retirees' Addendum ("RA") at 33. In the end, the district court there ordered the production of all relevant PBGC material, including all relevant material the PBGC tried to withhold as privileged. *See* RA1-14. When the PBGC filed in the Sixth Circuit a mandamus petition to strike the order and an emergency stay motion, the Sixth Circuit promptly denied them. It saw no likelihood of finding district-court clear error on the privilege determination and emphasized that – under *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 111 (2009) – production pursuant to a protective order and filings of court submissions under seal adequately preserved the status quo pending appeal from a final judgment. *See* RA15-16.

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association of retirees of Delphi (and their heirs) who participated in the plan. We generally refer to Respondents-Appellees in this brief as the "retirees."

Against that eerily similar backdrop comes the pending emergency stay motion from the federal entity involved here, the U.S. Department of Treasury ("Treasury"). Since 2012, Treasury has contested third-party subpoenas in the District Court below, in connection with the Michigan plan-termination litigation. Treasury is relevant to the Michigan case, the retirees contend, because the Treasury's *ad hoc* Auto Task Force – in order to achieve politically-expedient savings to the Troubled Asset Relief Program ("TARP") when restructuring the auto industry – impermissibly pressured the PBGC to terminate the plan, with the PBGC's costs of paying much-reduced benefits to the retirees after termination being cheaper than TARP funds being used to keep the plan intact paying promised benefits. The Employee Retirement Income Security Act, 29 U.S.C. § 1342(c), authorizes the termination of a plan at the PBGC's behest only as a last resort, upon a strict showing of narrow statutory criteria, and politics and saving money for TARP or the government in a commercial capacity are not among those criteria.

In the District Court, when the Treasury moved to quash the retirees' subpoenas seeking relevant Auto Task Force documents and depositions of Auto Task Force members (Matthew Feldman and Harry Wilson), the District Court denied the motion in a thorough, 24-page decision. *See* Treasury's Addendum ("TA") at 54-77. The District Court concluded:

> 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. . . .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).

TA75-76.

Then came the fight over material Treasury purports is privileged. In the first instance, Treasury provided a privilege log identifying nearly 1,300 supposedly privileged documents, based on attorney-client, deliberative-process, and presidential privileges. *See* TA37. But the privilege log and declaration supporting it were, the District Court noted (in a 14-page decision, TA36-49), "woefully inadequate" (TA42); indeed, production of the allegedly privileged government material could have been ordered on that basis alone. *See, e.g.*, *Eden Isle Marina, Inc. v. United States*, 89 Fed. Cl. 480, 494 (2009). Nonetheless, the District Court gave Treasury more tries at explaining the bases for its privilege assertions. TA37-38, 48.

In connection, then, with motions by the retirees to compel the production of 866 of the withheld documents, the District Court ordered on successive occasions deepening levels of *in camera* review of the allegedly privileged material. Tellingly, 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." TA38-39.

After *in camera* inspection, the District Court ordered production of all documents allegedly protected by the deliberative-process privilege because Treasury had, "[d]espite 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,'" "miserably failed" in doing so and had "essentially wasted" the Court's time. TA47 (quoting an earlier Minute Order). On the documents over which the Treasury claimed attorney-client and presidential privileges, the District Court (in a 17-page decision) denied the retirees' motion to compel production of the attorney-client materials, but ordered production of the documents subject to the presidential privilege (63 documents in total). By then, the District Court had "had some very serious concerns about whether the government's proceeding in good faith or not." RA40.

And that was not the end. The District Court thereafter allowed the Treasury to file a motion for reconsideration if it believed the District Court had erred, which the Treasury filed. After still further *in camera* inspection and a resulting denial of the reconsideration motion (except to note Treasury could redact non-relevant material from the to-be-produced documents), the District Court issued the Minute Order denying a stay of production of the documents subject to the presidential privilege pending appeal that prompted the current emergency stay motion before this Court. In the Minute Order, the District Court required Treasury "to produce the portions of the documents at issue that relate to (1) General Motors, (2) Delphi Corporation, or (3) the [PBGC] by no later than July 21, 2017 *pursuant to a protective order agreed to by the parties*." TA13 (emphasis added). The District Court added:

> 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 motions 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.

Id. (citing *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 109 (2009)).

The retirees subsequently proposed protective-order terms to the Treasury, whereby, from the retirees' side, only the retirees' attorneys (and associated legal

staff) would review and use the documents at issue (not even the retirees), the attorneys would file related court submissions under seal, and the attorneys would forever keep the documents and their contents confidential should Treasury win its appeal. *See* RA59-64. In response, Treasury said it would negotiate the terms of a protective order only if this Court denied a stay pending appeal. *See* RA65.[3]

This Court should now deny Treasury's emergency stay motion. Treasury is unlikely to succeed on the merits of its appeal because this Court has, at best, mandamus jurisdiction, and Treasury has no substantial arguments that the District Court's comprehensive, detailed, careful, and painstaking analysis of the law and the facts (over three lengthy opinions, based on five years of familiarity with the case, and after *in camera* review) constituted error at all, let alone the egregious error that mandamus would require. Moreover, the equities do not favor Treasury: whereas Treasury seeks, with the emergency stay, to protect from disclosure materials of former presidential advisors simply to a few attorneys who still would be sworn to keep them confidential until and if the appeal succeeds, retirees of advancing age would be relegated to potentially months of further delay in

[3] Through its *in camera* review, the District Court "determined that only 21 of the 63 documents [implicating presidential privilege] are 'unique' – the remaining 42 documents are either duplicate copies or drafts of those 21 documents." TA15 n.1. Of those 21 unique documents, it appears that only two were ever actually reviewed by President Obama: a draft presidential speech, and a personal request for information by him. TA20-21. "The vast bulk of the documents withheld from production" consisted of communications among staffers. TA21, 25.

litigation already extended by dubious discovery conduct on the federal government's part. In short, no less than in the situation facing the Sixth Circuit regarding the PBGC's withheld materials, here the protective-order route along with exclusion of the protected material and its fruits from evidence in the event Treasury succeeds on appeal sufficiently balances the interests of all parties, while this Court resolves Treasury's petition (or appeal).

ARGUMENT

I. THE TREASURY HAS NO LIKELIHOOD OF SUCCESS ON THE MERITS

A. Treasury faces a threshold complication on the likelihood of success on the merits of its "appeal" so as to warrant a stay: this Court likely has only limited jurisdiction, if any, under mandamus to consider the merits. Though Treasury filed notices of appeal, the notices are premature, as no final order yet exists from which to appeal. True, in the context of third-party subpoenas, "a pretrial discovery order may constitute a final appealable order when issued by a district court in an ancillary proceeding, and said district court is not within the jurisdiction of the circuit court having appellate jurisdiction to review the final adjudication of the main action." *Sik Gaek, Inc. v. Harris*, 789 F.3d 797, 799-800 (7th Cir. 2015). However, this rule applies "only to ancillary district court decisions *denying* discovery." *Hooker v. Continental Life Ins. Co.*, 965 F.2d 903, 904 n.1 (10th Cir. 1992) (emphasis added). "[A] non-party who wishes to appeal from an order

granting discovery should resist [the discovery] order, be cited for contempt, and then challenge the propriety of the discovery order in the course of appealing the contempt citation." *Chevron Corp. v. Page (In re Naranjo)*, 768 F.3d 332, 343 (4th Cir. 2014) (internal quotation marks omitted); *Hooker*, 965 F.2d at 904 n.1; *United States v. Columbia Broad. Sys., Inc.*, 666 F.2d 364, 367 n.2 (9th Cir. 1982). Here, Treasury did not "violate the order and incur contempt sanctions," precluding any final-order appeal at this time. *Id.*[4]

Nor should the Court accept Treasury's invitation to exercise collateral-order appellate jurisdiction. *See* Treasury Mot. 8 n.3. The majority of Circuits to have considered the question have held that an order requiring the government to produce documents subject to executive privilege is *not* a collateral order warranting immediate appellate review. *See*, *e.g.*, *Corporacion Insular de Seguros v. Garcia*, 876 F.2d 254, 257 (1st Cir. 1989); *Newton v. Nat'l Broad. Co.*, 726 F.2d 591, 593-94 (9th Cir. 1984); *Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 591 F.2d 174, 177 (2d Cir. 1979) (Friendly, J.). Only the Fifth Circuit, in an early case, has suggested otherwise, in a decision later criticized even within that Circuit.

[4] For another reason too, the District Court's Minute Order prompting this stay motion is not a final order: it did not "end[] the litigation on the merits and leave[] nothing for the court to do but execute the judgment." *Dhiab v. Obama*, 787 F.3d 563, 566 (D.C. Cir. 2015) (internal quotation marks omitted). The District Court anticipated the parties bringing before it a protective order for approval prior to disclosure, which has not occurred due to Treasury's decision not to negotiate one pending its stay request to this Court. *See* RA65.

Compare Cates v. LTV Aerospace Corp., 480 F.2d 620, 622 (5th Cir. 1973) *with Branch v. Phillips Petroleum Co*., 638 F.2d 873, 879 (5th Cir. 1981).

That leaves only mandamus as a possible way for Treasury to proceed here on the merits. But mandamus is a drastic remedy "reserved for really extraordinary causes." *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947). A party seeking mandamus must, among other things, show its "right to issuance of the writ is clear and indisputable." *Cheney v. U.S. D. Ct. for the District of Columbia*, 542 U.S. 367, 380-81 (2004) (internal quotation marks omitted). Transferring that standards to the present stay context, Treasury has the tall order of showing, in order to get the stay, not just that it has a substantial likelihood of persuading this Court that the District Court erred, but that the District Court has committed a "clear" error. *In re al-Nashiri*, 791 F.3d 71, 86 (D.C. Cir. 2015); *accord Plekowski v. Ralston-Purina Co*., 557 F.2d 1218, 1220 (5th Cir. 1977) (mandamus appropriate only "if a ruling on a question of law is so egregiously erroneous that the action could be deemed a usurpation of power") (internal quotation marks omitted).

B. Treasury does not have a substantial prospect of establishing that Judge Sullivan committed a clear error or even an error of any kind (or of satisfying the

other prerequisites for mandamus[5]). The controlling law surrounding Treasury's privilege assertions is found in two of this Court's decisions. In *Dellums v. Powell*, 561 F.2d 242, 245-46 (D.C. Cir. 1977), the Court rejected the contention "that a formal claim of privilege based on the generalized interest of presidential confidentiality, without more, works an absolute bar to discovery of presidential conversations in civil litigation, regardless of the relevancy or necessity of the information sought." Instead, the presumption associated with the presidential privilege may be overcome where – in what has come to be known as the "needs showing" – a plaintiff makes "at least a preliminary showing of necessity for information that is not merely demonstrably relevant but indeed *substantially material* to their case." *Id*. at 249 (emphasis added; internal quotation marks and citation omitted).

As then stated in *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997), "[i]f a court believes that an adequate showing of need has been demonstrated, it should then proceed to review the documents *in camera* to excise non-relevant material. The remaining relevant material should be released." "The district court's *in camera* review also aims to ensure that presidential confidentiality is not

[5] Treasury also is unlikely to succeed on the merits so as to obtain mandamus because, as to another mandamus prerequisite, it has "adequate means" other than mandamus for correcting any District Court errors – namely, an appeal from a final order holding Treasury in contempt for failure to comply with its production obligation. *See Dhiab*, 787 F.3d at 568.

unnecessarily breached, but it operates on the presumption that some privileged materials will probably be released. The court's task during its *in camera* review is simply to ensure that privileged materials that would not be of use to the subpoena proponent are not released." *Id*. at 759. The standard employed during *in camera* review for determining what parts of the privileged material might not be of use (*i.e.*, what material is not relevant) is much less difficult to satisfy than the substantial-materiality standard the court initially employed to determine whether *in camera* review was justified in the first instance; that is, having found the threshold needs showing satisfied, the court should release "any evidence that might reasonably be relevant" to the issues in the underlying litigation, regardless of whether they were part of the needs showing or not. *Id*.

The District Court applied these standards to a tee. It applied the threshold analysis articulated in *Dellums* and the Court's later decision in *In re Sealed Case*, finding the retirees to have made the requisite showing that the withheld information was "'substantially material to their case'" in Michigan, sufficient to justify *in camera* review. TA26-27 (quoting *Dellums*, 561 F.2d at 249). The District Court did not go further – by providing an *in camera* review excising irrelevant material – because Treasury had not asked the Court to do so. After a motion for reconsideration by the Treasury requested such *in camera* review, Judge Sullivan did exactly that, then entering an order on reconsideration that

reiterated the necessity for production, but that, consistent with *In re Sealed Case*, modified Treasury's production requirements to ensure disclosure only of the portions of the withheld documents relevant under the *In re Sealed* case standard. TA16.

And the District Court correctly determined that the withheld documents were "substantially material" to the retirees' Michigan case. As the District Court understood, the documents subpoenaed here are critical to the retirees' Michigan case because the sole focus there is on whether the PBGC's decision to terminate the plan satisfied the factors set forth in 29 U.S.C. § 1342(c) or was improperly influenced by the Auto Task Force, which undeniably played a role in the process. *See* TA26-27. In fact, the very same understanding undergirded the District Court's earlier rulings that directed compliance with the subpoenas and ordered production of documents over unsubstantiated claims of deliberative-process privilege. *See* TA67-69. Treasury did not challenge any of the earlier rulings, and it does not do so here.

Despite the District Court's careful and exhaustive decision-making, Treasury now levels four criticisms aimed at securing a stay, all of which are some variation of its basic position that the District Court "failed to apply the correct standard." Treasury's Mot. 12. None has merit.

First, Treasury seems to suggest (though it never directly argues) that *In re Sealed Case* imposes a higher burden on litigants seeking to overcome the presidential communications privilege than *Dellums* and that Judge Sullivan did not impose this higher burden. *Id.* at 12-13. The argument is belied not just by one of Judge Sullivan's meticulous decisions – in which he faithfully applied the law as set forth in both cases (TA26-27) – but also by a comparison of the two cases, which makes clear that the later panel in *In re Sealed* case was in accord (as it must be) with the earlier panel in *Dellums*. Both decisions required, in essence, a showing of "substantial materiality," which is precisely what the District Court found when it determined the retirees had overcome the privilege here.[6]

Second, Treasury suggests that Judge Sullivan did not apply the "substantial materiality" standard but imposed a lower burden based on relevance. But that contention confuses two very different principles and two very different rulings. As noted, the presidential privilege proceeds in two steps: (1) first the court finds substantial materiality under *Dellums* and *In re Sealed Case;* and (2) the court then excises any irrelevant material from the government's production. The District

[6] It is worth noting that, while it picks a fight now with the District Court on the issue, Treasury previously urged the very needs standard that the District Court employed. *See, e.g.*, D.D.C. ECF No. 35 at 23 ("[t]o make the required showing [of need], the party seeking to overcome the privilege must show that the withheld material 'is directly relevant to issues that are expected to be central to the trial'") (quoting *In re Sealed Case*, 121 F.3d at 754); D.D.C. ECF No. 50-1 at 8 (referencing *Dellums*, 561 F.2d at 249).

Court correctly applied both steps and appropriately applied a relevance standard only when performing the second part of its analysis. *See* TA14-16. Furthermore, the District Court's findings were well supported by the detailed showings the retirees made as to why "each discrete group of the [remaining] subpoenaed materials" (*In re Sealed Case*, 121 F.3d at 754) is likely to contain information of substantial relevance to the termination inquiry at the heart of the Michigan case. *See, e.g.*, D.D.C. ECF No. 51 at 16-28.[7]

Third, Treasury puts great weight on the distinction between criminal and civil proceedings. *See* Treasury Mot. 13-14. However, this Court's decision in *Dellums* also occurred in the context of civil litigation. Treasury attempts to distinguish *Dellums*, arguing that the case is inapposite because, here, "the privilege was initially asserted on behalf of a sitting President," *id.* at 13, while, in *Dellums*, President Nixon had already left office by the time the privilege had been asserted. To the contrary, *Dellums* specifically held that "it is the new President who has the information and attendant duty of executing the laws in light of current facts and circumstances, and who has the primary, if not the exclusive, responsibility of deciding when presidential privilege must be claimed." *Dellums*,

[7] The retirees note that the briefing on the Treasury's motion for reconsideration, D.D.C. ECF No. 51, was their first opportunity to engage in the needs analysis in light of the Treasury's supplemented privilege log (the redacted version of which was provided to the retirees in January of 2017).

561 F.2d at 247-48. "[T]he *significance* of the assertion by a former president is diminished when the succeeding president does not assert that the document is of the kind whose nondisclosure is necessary to the protection of the presidential office and its ongoing operation." *Id.* at 248; *see also Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 449 (1977).

Here, no such assertion has been made by the incumbent President, and, in reality, the confidentiality concerns are less than in those presented by *Dellums*, because the privilege here was not even invoked by a former President, but instead by a White House Counsel on behalf of the "Office of the President." TA51 (¶ 4). The distinction is significant. *See Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1114 (D.C. Cir. 2004) ("the issue of whether a President must personally invoke the privilege remains an open question").[8]

Treasury argues that, even if Judge Sullivan applied the controlling law in *Dellums* and *In re Sealed Case*, he provided only a "cursory discussion," Treasury Mot. 11, instead of the robust analysis required by the case law. The argument is

[8] Nor does *Cheney v. U.S. District Court*, 542 U.S. 367, 384 (2004), suggest that the District Court here somehow misapplied the controlling legal principles. The Executive's interests in *Cheney* were particularly acute because the Vice-President was actually a party. *See, e.g., id*. at 381. Additionally, the Court there noted that the "specificity of the subpoena" in question can "serve[] as an important safeguard against unnecessary intrusion into the operation of the Office of the President." *Id*. at 387; *see* TA70 (District Court here noting that the retirees' subpoenas are "narrow").

particularly unpersuasive, approaching disingenuous, in light of the litigation history below, in which the Treasury itself provided no analysis for the District Court to consider at all on the pertinent point: as the District Court noted, "[r]ather than substantively engage in the needs analysis or attempt to distinguish the cases upon which Respondents rely, Treasury argue[d] unconvincingly that Respondents' rationale for the material is 'nothing but rank speculation.'" TA27 (quoting D.D.C. ECF No. 35 at 24).

Fourth, Treasury's assertion that the District Court erred in determining the requested documents were unavailable through other means, *see* Treasury Mot. 14, is easily disposed of, as Treasury did not contest below the retirees' assertion that the material was unavailable through other means, *see* D.D.C. ECF No. 45 at 11 (citing D.D.C. ECF No. 35 at 24), and thus is foreclosed from raising the issue on appeal. Even had the Treasury not waived the point, it is here not persuasive to suggest that information is available from other avenues, in light of the District Court's fact-finding. *See, e.g.*, TA74-75 (overruling Treasury's objection that the subpoenas seek information that is duplicative or cumulative).

In sum, nothing went awry in the District Court. Certainly, Treasury cannot reasonably suggest something clearly or egregiously went wrong, so as to warrant mandamus. "Most district court rulings on [privilege] matters involve the routine application of settled legal principles," and they "are unlikely to be reversed on

appeal, particularly when they rest on factual determinations for which appellate deference is the norm." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 110 (2009). So too here. *See* RA15 (Sixth Circuit reasoning similarly in denying PBGC's request for mandamus and an emergency stay).

II. THE BALANCE OF HARMS AND PUBLIC INTEREST COUNSEL DECIDEDLY AGAINST A STAY

The balance of harms and equities tips against Treasury, providing another reason for rejecting the stay request. Taking first Treasury's interests, they are minimal. With disclosure pursuant to a protective order (as required by the District Court and given the protective order template offered by the retirees) and with court filings mentioning the disclosed documents being filed under seal until any appellate review is completed, the only private citizens on the retirees' side who will see the materials pending appeal are the retirees' attorneys (and associated legal staff, as necessary), subject to strict requirements of confidentiality. Moreover, if this Court eventually reverses the District Court, the Michigan court (where relevant submissions will have been filed under seal in the meantime) can "exclu[de] the protected material and its fruits from evidence," resulting in harmless error. TA13.

Thus, the maximum harm Treasury will suffer absent a stay is that a few attorneys will see the materials, attorneys who will potentially be required forever to keep them secret anyway if the District Court is overturned. And the materials

they will see will relate to a *prior* President's exercise of duties, not the current one's. Under these circumstances, Treasury's protestations of a "chill" on frank Executive Branch discussions (Treasury Mot. 17) without a stay take on a Chicken-Little quality: the disclosure of government materials about a commercial transaction undertaken by a former President's Administration to a few attorneys eight years after-the-fact supposedly will fundamentally undermine "confidential decision-making" for all Presidents. *Id.* The harm is not even associated with "military, diplomatic, or sensitive national security secrets." *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 447 (1977); *see also id.* (noting that even necessity to keep confidential such sensitive topics must sometimes yield to the "primary constitutional duty of the Judicial Branch").

In contrast, a stay would cause severe harm to the retirees. Completion of discovery in the Michigan case is dependent on resolution of the Treasury's motions to quash, with the Michigan court recognizing the interplay between the two matters and recommencing other discovery deadlines only after proceedings here finish. *See* RA19-25. The retirees have already suffered years of debilitating discovery delays at the government's hands, in large measure via government conduct that the presiding courts have roundly chastised. They are pensioners who have suffered enormous pension losses as a result of their plan's termination (between 30% to 70% of what they thought they would receive, *see* TA89).

Months are important to the retirees, as the passing of each day raises the prospect that they might not be able to enjoy the fruits of a victory. Justice delayed is justice denied for many of them.[9]

The retirees, accordingly, respectfully submit that the equities regarding a stay are not in equipoise and instead tip heavily against the award of a stay. That conclusion follows too from *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 112 (2009), where the Supreme Court sanctioned the use of "protective orders" and excluding "protected material and its fruits" from evidence in the event of an appellate reversal on a disclosure issue, rather than emergency appellate efforts to halt the disclosure in the first place. Whereas these mechanisms limit to negligible the harm Treasury might suffer without a stay, the retirees have no way of avoiding the harm to them of the delay the stay would engender. *See* RA15-16 (Sixth Circuit denying mandamus and emergency stay to PBGC based on *Mohawk*).

Treasury tries to distinguish *Mohawk* as an attorney-client privilege case, rather than one involving a presidential (or "constitutional") privilege. *See*

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[9] The heart-breaking toll that the plan termination and the protracted litigation has taken on the retirees' lives is poignantly displayed in a voicemail the District Court received and shared on the record (*see* TA13) with the parties' counsel soon after the District Court had denied the stay of the discovery order at issue here. In the voicemail, a widow noted the passing of her husband last November and the poverty in which the plan's termination left their family, and she thanked the District Court for the stay denial, even though the caller's husband, regrettably, could no longer benefit from a final decision on the merits, whenever it might come.

Treasury Mot. 17-18. Yet, the attorney-client privilege is an "absolute" one, whereas the presidential privilege is qualified, seemingly indicating greater judicial concern for the former, not the latter. *In re Lindsey*, 158 F.3d 1263, 1276 (D.C. Cir. 1998). "There has never been an expectation that the confidences of the Executive Office are absolute and unyielding," *Nixon*, 433 U.S. at 449, and "[a]n advisor to the President has no guarantee of confidentiality. His advice may be disclosed by the President or a successor." *Dellums v. Powell*, 561 F.2d at 242, 246.[10]

[10] *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014), is not to the contrary. As Treasury appears ultimately to recognize (*see* Treasury Mot. 16), it holds simply that, in some rare instances, there might be harm to a party in disclosing privileged material that is not sufficiently protected by the *Mohawk* mechanisms. But here, as noted, the harm to Treasury is negligible once *Mohawk*'s instructions are applied.

CONCLUSION

Treasury's emergency motion for stay pending appellate review should be denied, and the administrative stay should be lifted.

Dated: July 21, 2017

Respectfully submitted,

/s/ Anthony F. Shelley

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CERTIFICATE OF COMPLIANCE WITH LENGTH LIMITS

The undersigned hereby certifies that the foregoing motion complies with the length limits of Fed. R. App. P. 27(d)(2) and contains 5,184 words as calculated by Microsoft Word 2010, the word processing system used to prepare this document.

July 21, 2017 /s/ Anthony F. Shelley

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2017, I electronically filed the foregoing **APPELLEES' RESPONSE IN OPPOSITION TO THE DEPARTMENT OF TREASURY'S EMERGENCY MOTION FOR STAY PENDING APPELLATE REVIEW AND FOR IMMEDIATE ADMINISTRATIVE STAY** with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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/s/ Anthony F. Shelley

Addendum

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ORAL ARGUMENT NOT YET SCHEDULED

No. 17-5142 (consolidated with No. 17-5164)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES DEPARTMENT OF THE TREASURY,

Appellant,

v.

DENNIS BLACK, CHARLES CUNNINGHAM, KENNETH HOLLIS, AND DELPHI SALARIED RETIREES ASSOCIATION,[1]

Appellees.

On Appeal from the United States District Court
for the District of Columbia (Judge Emmet G. Sullivan)

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 12(c) and Circuit Rule 28(a)(1), Appellees Dennis Black, Charles Cunningham, Kenneth Hollis, and Delphi Salaried Retirees Association ("Appellees"), respectfully submit the following certificate of parties, rulings, and related cases.

[1] The case was incorrectly captioned as Delta Salaried Retirees Association; it is correctly captioned here as Delphi Salaried Retirees Association.

Parties and *Amici*

The following is a list of all individuals and groups who are known to be parties to this case at this time. There are no known *amici curiae*.

Appellant: The appellant is the United States Department of Treasury.

Appellees: The appellees are Dennis Black, Charles Cunningham, Kenneth Hollis, and the Delphi Salaried Retirees Association.

Interested Party: In the district court, the Pension Benefit Guaranty Corporation was an interested party to the proceeding

Rulings Under Review

Appellant seeks review of several orders regarding Appellees' motion to compel production, or alternatively for in camera review: June 17, 2016 Minute Order, July 15, 2016 Minute Order, December 20, 2016 Order (D.D.C. ECF No. 41) and accompanying Memorandum Opinion (D.D.C. ECF No. 42), April 13, 2017 Order (D.D.C. ECF No. 44) and accompanying Memorandum Opinion (D.D.C. ECF NO. 45), and June 7, 2017 Order granting Appellant's motion for reconsideration (D.D.C. ECF No. 53).

Related Cases

On July 13, 2017, Appellant filed a notice of appeal from the District Court's July 12, 2017 minute order, denying Appellant's motion for stay pending appeal.

Dated: July 21, 2017

Respectfully submitted,

/s/ Anthony F. Shelley
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ORAL ARGUMENT NOT YET SCHEDULED

No. 17-5142 (consolidated with No. 17-5164)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES DEPARTMENT OF THE TREASURY,

Petitioner-Appellant,

v.

DENNIS BLACK, *et al.*,

Respondents-Appellees.

On Appeal from the United States District Court
for the District of Columbia (Judge Emmet G. Sullivan)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rule 27(a)(4), Respondent-Appellee Delphi Salaried Retiree Association states that it has no parent company and no publicly-held corporation owns 10% or more of its stock.

Dated: July 21, 2017

Respectfully submitted,

/s/ Anthony F. Shelley

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Counsel for Appellees

9

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DENNIS BLACK, et al.,

Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORP., et al.,

Defendants.
_____/

CIVIL ACTION NO. 09-CV-13616

DISTRICT JUDGE ARTHUR J. TARNOW

MAGISTRATE JUDGE MONA K. MAJZOUB

ORDER GRANTING IN PART PLAINTIFFS' RULE 37 MOTION TO ENFORCE COURT ORDER (DOCKET NO. 218)

This matter comes before the Court on Plaintiffs' Rule 37 motion to enforce this Court's order granting Plaintiffs' second motion to compel discovery from Defendant Pension Benefit Guaranty Corporation ("PBGC"). (Docket no. 218). Defendant PGBC filed a response. (Docket no. 223). Plaintiffs filed a reply. (Docket no. 226). The motion has been referred to the undersigned for action pursuant to 28 U.S.C. § 636(b)(1)(A). (Docket no. 219). The motion being fully briefed, the Court dispenses with oral argument pursuant to E.D. Mich. LR 7.1(f). This matter is now ready for ruling.

Plaintiffs, participants in a pensio n plan formerly maintained by Delphi for salaried employees ("Delphi Salaried Plan"), co mmenced this lawsuit against the PBGC and others challenging the termination of the Plan. The Plan was terminated in or around July 31, 2009 after Delphi Corporation entered into an agreement with the PBGC that placed the Plan under the trusteeship of the PBGC. Plaintiffs' five count Second Amended Complaint alleges violations of

ERISA (Counts 1, 2, and 4), the Due Process Clause of the Fifth Amendment (Count 3), and the Equal Protection Clause of the Fifth Amendment (Count 5). (Docket no. 145). Counts 1 through 4 of the Second Amended Complaint are asserted against Defendant PBGC only.

On September 24, 2010, Judge Tarnow held a hearing on two dispositive motions filed by Defendant PGBC. In a bench ruling Judge Tarnow denied both motions on the grounds that they were premature because the parties had not had a chance to engage in discovery. (Docket no. 152, TR at 58:15-16). According to the transcript, no further discussion was had concerning the scope of discovery or whether discovery should proceed on all claims.

Several weeks after the hearing Plaintiffs filed a motion for adoption of a scheduling order which was referred to the undersigned. (Docket no. 152). The motion asked the Court to interpret Judge Tarnow's bench ruling in Plaintiffs' favor and adopt a scheduling order setting a deadline for initial disclosures and permitting eight months for discovery on Counts 1 through 4 of the Second Amended Complaint. (Docket no. 152). Defendant PBGC objected to the motion and offered a different interpretation of the bench ruling, requesting a much more limited three month discovery period limited to Count 4 only with no initial disclosures and limited to determining the completeness of the PBGC's administrative record. Ultimately, the undersigned denied Plaintiffs' motion in March 2011 and entered a scheduling order which allowed three months for discovery as to Count 4 only relative to determining the completeness of the administrative record. (Docket no. 170).

On September 1, 2011 Judge Tarnow ruled that discovery should proceed on Counts 1 through 4 of the Second Amended Complaint. (Docket no. 193). He further concluded that he had not decided that his review would be limited to the administrative record. In addressing the scope

of discovery, he stated that his initial focus was on Count 4 "and whether termination of the Salaried Plan would have been appropriate in July 2009 if ... 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.' " (Docket no. 193 at 4). Judge Tarnow stated that a finding by the Court that termination was proper under 29 U.S.C. § 1342(c) would moot the remainder of the complaint pertaining to PBGC. He further stated that he would consider the remaining issues in the complaint if he found that termination of the Plan was not supported under 28 U.S.C. § 1342(c). Citing the broad scope of discovery under Fed. R. Civ. Pro. 26(b), and stating that he would conduct a *de novo* review of the PBGC's decision to terminate the Plan, Judge Tarnow ordered the parties to serve their initial disclosures by September 16, 2011 and he set April 30, 2012 as the date by which all discovery related to Counts 1 through 4 should be completed.

In December 2011 Plaintiffs filed a second motion to compel discovery which was referred to the undersigned for determination. (Docket no. 197). In the motion Plaintiffs asked the Court to compel responses to their First Requests for Production of Documents nos. 1-14 and Second Requests for Production of Documents nos. 15-17. During the hearing on this motion the undersigned informed the parties that the Court had fully reviewed the parties' briefs on this matter and was familiar with the parties' arguments and with the objections to discovery raised by Defendant. After discussing Judge Tarnow's reliance on the broad scope of discovery under Rule 26(b) and the fact that he had not placed any limitations on discovery as it related to Counts 1 through 4 of the Second Amended Complaint, the undersigned granted the motion. (Docket nos.

204, 205). The March 9, 2012 order states that Defendant PBGC must produce full and complete responses to Plaintiffs' First and Second Requests for Production of Documents nos. 2 through 17 within ninety days of issuance of the order, or by June 9, 2012. Plaintiffs filed objections to the March 9, 2012 order. (Docket no. 209). Those objections have not yet been resolved.

Almost one year later Plaintiffs filed the instant Rule 37 motion to enforce the Court's March 9, 2012 order. (Docket no. 218). In their motion Plaintiffs state that Defendant PGBC has produced a portion of the responsive documents in its possession but has withheld almost 30,000 documents on the basis of an unspecified privilege, along with other key data and documents central to the merits of the case. Plaintiffs argue that the time for asserting privilege has long since passed. They ask the Court to impose sanctions under Rule 37(b) in light of Defendant's disregard of the Court's orders. They also seek an order compelling Defendant to produce documents responsive to Document Request nos. 12 and 13.

Document Request no. 12 asks Defendant to produce "[a]ll documents and things received, produced or reviewed by the PBGC since January 1, 2006 related to the PBGC's potential or actual liability for any benefit payments under Delphi's Pension Plans." Plaintiffs argue that Defendant PBGC refuses to produce Census Data in response to this request. They argue that a Plan's liabilities depend in part on the Census Data, which looks at how many participants are in the Plan, their ages and service histories, whether and when they began receiving benefits under the Plan, and the benefit each is entitled to under the Plan's formula. They contend that Defendant PBGC assumed the role of trustee of the Salaried Plan and has access to the Census Data.

Defendant argues that the Privacy Act of 1974 prohibits it from producing the Census Data without a court order because the documents contain sensitive personally identifiable information.

They argue that the Court must conduct an *in camera* review to examine the documents in light of the Privacy Act's requirements prohibiting disclosure of sensitive personally identifiable information, then craft an appropriate protective order for any Privacy Act protected information contained in the documents that must be disclosed.

In addition to the Census Data, Plaintiffs argue that Defendant PBGC has not produced any information responsive to Document Requests 12 and 13 that was received, produced, or reviewed by the PBGC subsequent to the Plan's termination. Document Request no. 12 is set forth above. Document Request no. 13 asks Defendant PBGC to produce "[a]ll documents and things received, produced or reviewed by you since January 1, 2009 related to potential PBGC recoveries in connection with the Delphi Pension Plans, including, but not limited to, the estimates of the potential recovery for each claim and the value the PBGC assigned to such claims in the valuation of the Salaried Plan's assets." Plaintiffs argue that Request no. 13 is directly relevant to the § 1346(c) determination in that it will go to show what funds were potentially available to fund the Delphi Plans. They argue that the information sought in Request nos. 12 and 13 will confirm the accuracy of the PBGC's initial 2009 estimates. In response, Defendant argues in part that Plaintiffs' Request no. 13 asking for "estimates of the potential recovery for each claim and the value the PBGC assigned to such claims" demands information contained in documents that have not yet been created.

The Privacy Act states that "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be ... (11) pursuant to the order of a court of

competent jurisdiction." 5 U.S.C. § 552a(b)(11). "The majority of courts that have addressed Exception (11) have held that the Privacy Act does not create any privilege against discovery and that ... the relevancy standard of Fed. R. Civ. P. 26(b) governs the court's discretion in ordering disclosure of government records." *Stiward v. United States*, No. 05-1926, 2007 WL 2417382, at *1-2 (E.D. La. Aug. 24, 2007) (citing cases). *See also Vinzant v. United States*, No. 06-10561, 2010 WL 2674609, at *6-7 (E.D. La. June 30, 2010); *Lynn v. Radford*, No. 99-71007, 2001 WL 514360, at *3 (E.D. Mich. March 16, 2001).

The Court is persuaded that the Census Data is relevant and discoverable and may be produced under the "court order" exception to the Privacy Act. Similarly, the Court finds that information responsive to Document Requests 12 and 13 received, produced, or reviewed by the PBGC subsequent to the Plan's termination is relevant to the claims at issue in this case. The Court is not persuaded by Defendant's argument that Request no. 13 asks for information in documents that have not yet been created since the request clearly asks for documents that Defendant has received, produced or reviewed.

The Court will grant Plaintiffs' motion to compel production of the Salaried Plan's Census Data as well as documents responsive to Request nos. 12 and 13 generated subsequent to the Plan's termination. In response to Plaintiffs' argument that a protective order is necessary for protecting the sensitive information contained in the requested documents, the Court will order the parties to meet and confer on the terms of an appropriate protective order.

Next, Plaintiffs argue that Defendant violated the Court's March 9, 2012 order by refusing to produce thousands of responsive documents on the basis of boilerplate privilege assertions. Defendant argues in response that it only agreed to produce non-privileged material and it expressly

reserved all rights to claim privilege in the future. Defendant also argues that it was not required to begin compiling its privilege log until after this Court's March 9, 2012 order.

Plaintiffs served the discovery requests at issue approximately two years ago in September and October 2011. Defendant served its objections and responses to the requests by November 2011. Defendant's written objections do not object on the basis of any particular privilege, but instead refer Plaintiffs to a string of boilerplate objections that generally and vaguely assert any privilege available under state or federal law. The Court has repeatedly found that the filing of boilerplate objections is tantamount to filing no objections at all. *See PML North Am., L.L.C. v. World Wide Personnel Servs of Virginia, Inc.*, No. 06-14447, 2008 WL 1809133, at *1 (E.D. Mich. April 21, 2008);*Cumberland Truck Equip. Co. v. Detroit Diesel Corp.*, No. 05-74594 and 05-74930, 2007 WL 4098727, at *1 (E.D. Mich. Nov. 16, 2007). Even assuming Defendant is correct in arguing that it was not required to begin logging its privileged documents until after the March 9, 2012 order was entered, the order was entered well over one year ago. The parties both state in their briefing of this motion that Defendant still has not produced a privilege log. The Court finds that Defendant has waived its right to assert privilege to the documents requested in Plaintiffs' First and Second Requests for Production of Documents.

Next, Plaintiffs ask the Court to impose Rule 37 sanctions should the PBGC fail to comply with an order compelling production. They also move for costs and attorney fees associated with this motion. The Court is aware that the scope of discovery in this case has been hotly contested and Defendant is awaiting resolution of its objections to the March 9, 2012 order. The Court has also read Defendant's assertions and the declaration of John Menke that state that Defendant has made a good faith effort to produce documents responsive to Plaintiffs' discovery requests. The Court will

deny Plaintiffs' request for sanctions at this time.

IT IS THEREFORE ORDERED that Plaintiffs' Rule 37 motion to enforce this Court's order granting Plaintiffs' second motion to compel discovery from Defendant Pension Benefit Guaranty Corporation ("PBGC") (docket no. 218) is **GRANTED IN PART**. On or before September 30, 2013 Defendant must produce the following:

a) the Salaried Plan's Census Data as it is responsive to Request for Production nos. 12 and 13,

b) documents responsive to Request for Production nos. 12 and 13 generated subsequent to the Plan's termination, and

b) documents withheld on the basis of privilege as discussed in this order.

IT IS FURTHER ORDERED that the parties must meet and confer regarding the terms of an appropriate protective order that will protect the disclosure of personally identifiable sensitive information contained in the Census Data or other information deemed sensitive or confidential by the parties. The proposed stipulated protective order must be filed with the Court by September 6, 2013. If the parties are unable to agree upon the terms of an appropriate protective order, the parties are ordered to each file their own proposed protective order by September 9, 2013 and the undersigned will select one of the two orders for entry.

IT IS FURTHER ORDERED that Plaintiffs' request for sanctions, costs and attorney fees is denied.

NOTICE TO PARTIES

Pursuant to Fed. R. Civ. P. 72(a), the parties have a period of fourteen days from the date of this Order within which to file any written appeal to the District Judge as may be permissible under 28

U.S.C. § 636(b)(1).

Dated:

s/ Mona K. Majzoub
MONA K. MAJZOUB
UNITED STATES MAGISTRATE JUDGE

PROOF OF SERVICE

I hereby certify that a copy of this Order was served upon Counsel of Record on this date.

Dated: 8/21/13

s/
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DENNIS BLACK, et al.,

Plaintiffs,

v.

PENSION BENEFIT GUARANTY CORPORATION,

Defendant.
_____/

Case No. 09-13616

SENIOR UNITED STATES DISTRICT JUDGE ARTHUR J. TARNOW

MAGISTRATE JUDGE MONA K. MAJZOUB

ORDER OVERRULING DEFENDANT'S OBJECTIONS TO MAGISTRATE JUDGE'S ORDER OF AUGUST 21, 2013 [234] AND MOOTING PLAINTIFFS' MOTION REQUESTING THE MAGISTRATE JUDGE DISSOLVE THE PARTIAL STAY OF THE AUGUST 21, 2013 ORDER [245]

Before the Court are Defendant's Objections to Magistrate Judge's Order of August 21, 2013 [234], Plaintiffs' Response [239], and Defendants' Reply [242] and Plaintiffs' Motion Requesting the Magistrate Judge Dissolve the Partial Stay of the August 21, 2013 Order [245], Defendants' Motion to Strike Plaintiff's Motion to Dissolve [246], and Plaintiffs' Reply [247]. For the following reasons, Defendants' Objections [234] are overruled and Plaintiffs' Motion to Dissolve [245] is moot.

STATEMENT OF FACTS

On August 21, 2013, the Magistrate Judge entered an Order [231] ("the Waiver Order") requiring the Defendant Pension Benefit Guaranty Corporation ("PBGC") to

produce to Plaintiffs by September 30, 2013 improperly withheld documents responsive to discovery requests Plaintiff served in 2011. Part of the basis of the Magistrate Judge's privilege ruling was that the PBGC's failure to produce a privilege log for more than one year after the Court ordered the PBGC to comply with Plaintiffs' 2011 discovery requests waived its ability to assert any privileges or protections as to those document requests.

On August 30, 2013, PBGC filed a Motion for Reconsideration of the Waiver Order [232] and an Emergency Motion for Stay Pending Reconsideration of the Court's Waiver Order [233]. While those motions were pending, PBGC also filed Objections to the Order [234]. In an Order [237], the Magistrate Judge denied the PBGC's Motion for Reconsideration of the Waiver Order, holding that PBGC had not shown any palpable defect in the Waiver Order, and that PBGC had not demonstrated that the Court or the Parties had been misled. The Magistrate Judge's Order [237] effectively mooted PGBC's Emergency Motion for Stay Pending Reconsideration of the Court's Waiver Order [233]. The Magistrate Judge partially stayed its previous Order [231] until this Court considered Defendant's Objections [234]. Because the Court now addresses Defendant's Objections [234], Plaintiffs' Motion Requesting the Magistrate Judge Dissolve the Partial Stay of the August 21, 2013 Order [245] and Defendants' Motion to Strike Plaintiff's Motion to Dissolve [246] are hereby moot.

STANDARD OF REVIEW

If a litigant expresses an objection to a magistrate judge's ruling on a nondispositive pretrial matter, the district court may "modify or set aside any part of the order that is clearly erroneous or is contrary to law." FED. R. CIV. P. 72(a). The "clearly erroneous" standard does not permit a district court to reverse the magistrate judge's finding simply because the issue would have been decided differently. *Anderson v. City of Bessemer, N.C.*, 470 U.S. 564, 573 (1985). Rather, a "finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

ANALYSIS

Defendant first objects that the Magistrate Judge failed to account for the parties' understanding that PBGC would produce a privilege log at the conclusion of its production. Defendant's argument that they had an understanding regarding discovery procedures is not compelling. Plaintiffs have filed multiple motions to compel discovery and oppose this Defendant's instant objection. Plaintiffs do not agree that the parties had an understanding regarding PBGC's privilege log. Accordingly, the Court is not left with a "definite and firm conviction" that the Magistrate Judge made a mistake by compelling discovery in its previous Order [231].

Defendant next objects that the Magistrate Judge failed to account for the practicalities involved in creating a privilege log for a document production of massive scope in the case at hand. In fact, the Magistrate Judge directly and thoroughly addressed this same argument in its previous Order [231]. *See* [231] at 7. Defendant has been under court order to since March 9, 2012 to respond to Plaintiffs' discovery requests. The Court agrees with the reasons stated in the Magistrate Judge's Order [231] that Defendant's argument that the discovery requests are too large to properly address is not compelling.

Lastly, Defendant objects that the severity of the Magistrate Judge's sanction denying PBGC the right to assert privilege claims is inappropriate in this case. PBGC has been under court order since March 9, 2012 to respond to Plaintiff's discovery requests and has only asserted boilerplate objections. Filing boilerplate objections to discovery requests is tantamount to filing no objections at all. *Cumberland Truck Equip. Co. v. Detroit Diesel Corp.*, 2007 WL 4098727 (E.D. Mich. 2007) (Mazjzoub). The Court strongly condemns the practice of asserting boilerplate objections to every discovery request. *Powerhouse Licensing, LLC v. CheckFree Services Corp.*, 2013 WL 1209971 at *3 (E.D. Mich. 2013) (Drain, D.J.). "As a general rule, failure to object to discovery requests within the thirty days provided by Rules 33 and 34 'constitutes a waiver of any objection.'" *Cozzens v. City of Lincoln*

Park, 2009 WL 152138 at *2 (E.D. Mich. 2009) (Hlucianuck, M.J.) (internal citation omitted). The Magistrate Judge's conclusion that PGBC has waived the right to claim privilege here was based on well-settled law and the Court will not disturb it.

Accordingly,

IT IS ORDERED that Defendant's Objections [234] are **OVERRULED**.

IT IS FURTHER ORDERED that Plaintiffs' Motion Requesting the Magistrate Judge Dissolve the Partial Stay of the August 21, 2013 Order [245] is **MOOTED**.

IT IS FURTHER ORDERED that Defendant's Motion to Strike Plaintiff's Motion to Dissolve [246] is **MOOTED.**

SO ORDERED.

S/Arthur J. Tarnow
Arthur J. Tarnow
Senior United States District Judge

Dated: July 21, 2014

I hereby certify that a copy of the foregoing document was served upon parties/counsel of record on July 21, 2014, by electronic and/or ordinary mail.

S/Catherine A. Pickles
Judicial Assistant

No. 14-2072

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: PENSION BENEFIT GUARANTY CORPORATION,	)	
	)	
	)	O R D E R
Petitioner.	)	

Before: BOGGS, ROGERS, and SUTTON, Circuit Judges.

On July 21, 2014, the district court entered an order finding that defendant Pension Benefit Guaranty Corporation ("PBGC") waived its privilege objections by responding to plaintiffs' discovery requests with boilerplate objections and failing to provide a privilege log. PBGC petitions for a writ of mandamus striking the order and moves for an emergency stay. Plaintiffs oppose a stay.

"The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations where the petitioner can show a clear and indisputable right to the relief sought." *In re Am. President Lines, Ltd.*, 929 F.2d 226, 227 (6th Cir.1991) (citations omitted). In the context of a disclosure order, extraordinary circumstances exist when the order amounts "to a judicial usurpation of power or a clear abuse of discretion, or otherwise works a manifest injustice." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009) (internal quotation marks omitted). But most district court rulings on matters of privilege "involve the routine application of settled legal principles. They are unlikely to be reversed on appeal, particularly when they rest on factual determinations for which appellate deference is the norm." *Id.* at 110. We conclude that this is such a case. The district court's decision rests on detailed factual findings that developed over a five-year period.

Moreover, PBGC is a party to the litigation "with recourse in a post-judgment appeal." *Holt-Orsted v. Dickson*, 641 F.3d 230, 238 (6th Cir. 2011).

> [P]ostjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege. Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence.

Mohawk, 558 U.S. at 109.

There are ways for PBGC to prevent or minimize the public disclosure of information that it believes to be privileged until post-judgment appeal becomes available. PBGC can move the district court to issue protective orders at the discovery stage upon a showing of "good cause." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984). PBGC could also move the court to place those documents under seal by showing "compelling reasons" that the interests of privacy outweigh the public's right to know." *In re Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470, 474, 476 (6th Cir. 1983). We have held that preservation of attorney-client and work-product privileges as to the public-at-large can justify sealing documents even where a litigant may have waived those privileges as to the opposing party. *In re Perrigo Co.*, 128 F.3d 430, 439 (6th Cir. 1997). PBGC has not demonstrated that it is clearly and indisputably entitled to a writ of mandamus. *See, e.g., In re Prof'ls Direct Ins. Co.*, 578 F.3d 432, 443 (6th Cir. 2009). Accordingly, the petition for a writ of mandamus is **DENIED**. The motion for an emergency stay is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Re: Case No. 14-2072, *In re: Pension Benefit Guar*
Originating Case No. : 2:09-cv-13616

Dear Counsel,

The Court issued the enclosed (Order/Opinion) today in this case.

Sincerely yours,

s/Michelle M. Davis
for Robin Duncan, Case Manager
Direct Dial No. 513-564-7025

cc: Mr. David J. Weaver

Enclosure

No mandate to issue

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

Dennis Black, *et al.*, Plaintiffs, v. Pension Benefit Guaranty Corporation, Defendant.	Case No. 2:09-cv-13616 Hon. Arthur J. Tarnow Magistrate Judge Mona K. Majzoub

STIPULATED ORDER

Plaintiffs Dennis Black, Charles Cunningham, Ken Hollis, and the Delphi Salaried Retirees Association (collectively "Plaintiffs") and Defendant Pension Benefit Guaranty Corporation ("PBGC") (together with Plaintiffs, the "Parties") do hereby present the Court with this Stipulated Order.

On September 1, 2011, this Court entered a Scheduling Order setting forth certain deadlines to govern discovery and the filing of dispositive motions in this case. Dkt. No. 193. Those deadlines have been modified numerous times. *See, e.g.*, Dkt. Nos. 212, 217, 222, 225, 229, 241, 244, 249, 270 and 273. On June 10, 2015, the Court entered the most recent modification to the discovery schedule, holding that:

1) All discovery related to claims 1-4 shall be served in time to be completed by August 14, 2015;

2) The Parties shall provide an updated list of all witnesses, lay and expert, by June 30, 2015;

3) All discovery motions related to claims 1-4 shall be served by August 14, 2015; and

4) All dispositive motions related to claims 1-4 must be filed no later than September 22, 2015.

Dkt. No. 273.

The Parties have conferred and believe that there is good cause for another modification of the discovery schedule, such that new discovery deadlines will be triggered upon: (a) the resolution of Plaintiffs' recently-filed motion in the in the United States District Court for the District of Columbia (the "D.C. Court") to compel the United States Department of the Treasury (the "Treasury") to produce withheld and redacted documents, or for in camera review (*see* D.D.C. ECF No. 30, hereafter, the "Motion to Compel"), and (b) the completion of depositions of two former Treasury officials, Matthew Feldman and Harry Wilson (hereafter, the

"Feldman and Wilson Depositions"), which are to occur after the Motion to Compel is resolved.[1]

As such, it is hereby stipulated and agreed as follows by and among the undersigned:

Fact Discovery

1. Except as described in paragraphs (2), (3), (4) and (7) below, all fact discovery related to claims 1-4 shall be served in time to be completed by August 14, 2015.

[1] In January 2012, and August 2013, Plaintiffs served the Treasury with subpoenas to produce information relevant to the case. The Treasury moved to quash those subpoenas in the D.C. Court. *See U.S. Dep't of the Treasury v. Black*, Case 1:12-mc-00100 (D.D.C.). The D.C. Court denied the Treasury's motion to quash in June 2014, *see* Dkt. No. 256, and the Plaintiffs and the Treasury subsequently conferred regarding the manner and timing of the Treasury's response to the Subpoenas. On November 3, 2014, Plaintiffs, the Treasury, and the Defendant PBGC entered into a stipulation and protective order in the D.C. Court stating, *inter alia*, that the Treasury would have until March, 19, 2015 to complete the production of documents in response to the 2012 subpoena *duces tecum*, and another sixty days from that point (*i.e.*, until May 18, 2015) to provide a privilege log. D.D.C. ECF No. 28 (the "Treasury Stipulated Order") at 2-3. On March 31, 2015, the Treasury completed its document production, and by June 10, 2015, the Treasury had provided Plaintiffs with a privilege log covering approximately 1,273 documents that the Treasury withheld or redacted. On July 9, 2015, Plaintiffs filed the Motion to Compel, seeking the production of roughly 900 documents that the Treasury had withheld in whole or part pursuant to claims of privilege. While Plaintiffs requested that the D.C. Court enter an expedited briefing schedule to resolve the Motion to Compel, the Treasury asked the D.C. Court to extend its time to respond until August 14, 2015 (the date that discovery is to close). The D.C. Court denied Plaintiffs' motion, and granted the Treasury's cross-motion, such that the Treasury's opposition to the Motion to Compel is not due until August 14, 2015.

2. Notwithstanding paragraph (1), Plaintiffs may conduct depositions of Matthew Feldman (the "Feldman Deposition") and Harry Wilson (the "Wilson Deposition") within 30 days following the resolution of the Motion to Compel, or as soon thereafter as the schedules of the witnesses and all interested counsel permit.[2]
3. Notwithstanding paragraph (1), Plaintiffs may conduct additional discovery after the resolution of the Motion to Compel, if the discovery arises from information disclosed either: (i) in response to the Motion to Compel; or (ii) during either the Feldman or Wilson Depositions.
    a. Discovery under this paragraph will not extend to the PGGC, except that Plaintiffs may conduct additional depositions of the PBGC or persons affiliated with the PBGC, if those depositions arise from information disclosed either: (i) in response to the Motion to Compel; or (ii) during either the Feldman or Wilson Depositions.
    b. Discovery under this paragraph must be served in time to be completed by the later of: (a) 60 days following the resolution of

[2] The Parties agree that for purposes of this Order, a resolution of the Motion to Compel means either the date that a denial of the Motion to Compel by the D.C. Court becomes final, or if the Motion to Compel is granted, the date on which the Treasury produces all the documents required by the D.C. Court.

the Motion to Compel, or (b) 30 days after both the Feldman and Wilson Depositions have been completed.

c. The PBGC reserves the right to object to any discovery Plaintiffs seek to conduct under this paragraph as not arising from information disclosed either: (i) in response to the Motion to Compel; or (ii) during either the Feldman or Wilson Depositions, or otherwise as provided in the Federal Rules of Civil Procedure.

4. Plaintiffs' responses to the PBGC's First Set of Requests for Admission, dated July 15, 2015, shall be due 60 days following the resolution of the Motion to Compel. PBGC may amend or supplement its First Set of Requests for Admission, as a result of information disclosed either: (i) in response to the Motion to Compel or (ii) during either the Feldman or Wilson Depositions, with any such amendment or supplement to be served no later than 7 days following the Feldman or Wilson Depositions. Similarly, Plaintiffs may serve the PBGC with Requests for Admission as a result of information disclosed either: (i) in response to the Motion to Compel or (ii) during either the Feldman or Wilson Depositions, with such Requests to be served no later than 7 days following the Feldman or Wilson Depositions, and the PBGC's responses to such Requests due 60 days following the resolution of the Motion to Compel. The Parties

reserve their right to object to any Request for Admission served under this paragraph as not arising from information disclosed either: (i) in response to the Motion to Compel; or (ii) during either the Feldman or Wilson Depositions. The Parties similarly reserve their rights to object to any Request for Admission as otherwise provided in the Federal Rules of Civil Procedure.

Discovery Motions

5. Except as described in paragraph (6) below, all discovery motions related to claims 1-4 must be filed no later than August 14, 2015.
6. Notwithstanding paragraph (5) above, any discovery motion related to discovery authorized by paragraphs (2), (3), (4) or (7) must be filed by the later of: (a) 60 days following the resolution of the Motion to Compel, or (b) 30 days after both the Feldman and Wilson Depositions have been completed.

Expert Discovery

7. Defendant may serve any rebuttal expert report on or before September 28, 2015, and each party may depose the other party's expert within 30 days following the resolution of the Motion to Compel.[3]

Dispositive Motions

8. All dispositive motions related to claims 1-4 must be filed by the later of (a) 90 days following the resolution of the Motion to Compel, or (b) 60 days following the completion of the Feldman and Wilson Depositions.

IT IS SO ORDERED.

s/Arthur J. Tarnow
Hon. Arthur J. Tarnow
Senior United States District Judge

Dated: July 23, 2015

[3] If the Motion to Compel is resolved prior to September 28, 2015, then Plaintiffs shall have 30 days from the date they receive any rebuttal expert report to depose the PBGC's rebuttal expert.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DENNIS BLACK, et al.,

Plaintiffs, **CIVIL ACTION NO. 09-cv-13616**

v. **DISTRICT JUDGE ARTHUR J. TARNOW**

PENSION BENEFIT GUARANTY CORP., et al., **MAGISTRATE JUDGE MONA K. MAJZOUB**

Defendants.
_____/

OPINION AND ORDER GRANTING PLAINTIFFS' RULE 37 MOTION TO ENFORCE COURT ORDER [275] AND DENYING PLAINTIFFS' MOTION FOR LEAVE TO FILE A SUPPLEMENTAL REPLY BRIEF [280]

This matter comes before the Court on Plaintiffs' Rule 37 motion to enforce this Court's August 21, 2013 Order. (Docket no. 275.) Defendant Pension Benefit Guaranty Corporation (PBGC) responded to Plaintiffs' motion (docket no. 278), and Plaintiffs replied to Defendant's response (docket no. 279). Also before the Court is Plaintiffs' Motion for Leave to File a Supplemental Reply Brief in support of their Rule 37 motion. (Docket no. 280.) The motions have been referred to the undersigned for consideration. (Docket nos. 276 and 281.) The Court has reviewed the pleadings and dispenses with oral argument pursuant to Eastern District of Michigan Local Rule 7.1(f)(2). The Court is now ready to rule pursuant to 28 U.S.C. § 636(b)(1)(A).

I. BACKGROUND

The Court previously set forth the relevant facts and procedural history of this matter in its August 21, 2013 Order:

Plaintiffs, participants in a pension plan formerly maintained by Delphi for salaried employees ("Delphi Salaried Plan"), commenced this lawsuit against the PBGC and others challenging the termination of the Plan. The Plan was terminated in or around July 31, 2009 after Delphi Corporation entered into an agreement with the PBGC that placed the Plan under the trusteeship of the PBGC. Plaintiffs' five count Second Amended Complaint alleges violations of ERISA (Counts 1, 2, and 4), the Due Process Clause of the Fifth Amendment (Count 3), and the Equal Protection Clause of the Fifth Amendment (Count 5). (Docket no. 145). Counts 1 through 4 of the Second Amended Complaint are asserted against Defendant PBGC only.

On September 24, 2010, Judge Tarnow held a hearing on two dispositive motions filed by Defendant PGBC. In a bench ruling Judge Tarnow denied both motions on the grounds that they were premature because the parties had not had a chance to engage in discovery. (Docket no. 152, TR at 58:15-16). According to the transcript, no further discussion was had concerning the scope of discovery or whether discovery should proceed on all claims.

Several weeks after the hearing Plaintiffs filed a motion for adoption of a scheduling order which was referred to the undersigned. (Docket no. 152). The motion asked the Court to interpret Judge Tarnow's bench ruling in Plaintiffs' favor and adopt a scheduling order setting a deadline for initial disclosures and permitting eight months for discovery on Counts 1 through 4 of the Second Amended Complaint. (Docket no. 152). Defendant PBGC objected to the motion and offered a different interpretation of the bench ruling, requesting a much more limited three month discovery period limited to Count 4 only with no initial disclosures and limited to determining the completeness of the PBGC's administrative record. Ultimately, the undersigned denied Plaintiffs' motion in March 2011 and entered a scheduling order which allowed three months for discovery as to Count 4 only relative to determining the completeness of the administrative record. (Docket no. 170).

On September 1, 2011 Judge Tarnow ruled that discovery should proceed on Counts 1 through 4 of the Second Amended Complaint. (Docket no. 193). He further concluded that he had not decided that his review would be limited to the administrative record. In addressing the scope of discovery, he stated that his initial focus was on Count 4 "and whether termination of the Salaried Plan would have been appropriate in July 2009 if ... 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.' " (Docket no. 193 at 4). Judge Tarnow stated that a finding by the Court that termination was proper under 29 U.S.C. § 1342(c) would moot the remainder of the complaint pertaining to PBGC. He further stated that he would consider the remaining issues in the complaint if he found that termination of the Plan was not supported under 28 U.S.C.

> § 1342(c). Citing the broad scope of discovery under Fed. R. Civ. Pro. 26(b), and stating that he would conduct a *de novo* review of the PBGC's decision to terminate the Plan, Judge Tarnow ordered the parties to serve their initial disclosures by September 16, 2011 and he set April 30, 2012 as the date by which all discovery related to Counts 1 through 4 should be completed.
>
> In December 2011 Plaintiffs filed a second motion to compel discovery which was referred to the undersigned for determination. (Docket no. 197). In the motion Plaintiffs asked the Court to compel responses to their First Requests for Production of Documents nos. 1-14 and Second Requests for Production of Documents nos. 15-17. During the hearing on this motion the undersigned informed the parties that the Court had fully reviewed the parties' briefs on this matter and was familiar with the parties' arguments and with the objections to discovery raised by Defendant. After discussing Judge Tarnow's reliance on the broad scope of discovery under Rule 26(b) and the fact that he had not placed any limitations on discovery as it related to Counts 1 through 4 of the Second Amended Complaint, the undersigned granted the motion. (Docket nos. 204, 205). The March 9, 2012 order states that Defendant PBGC must produce full and complete responses to Plaintiffs' First and Second Requests for Production of Documents nos. 2 through 17 within ninety days of issuance of the order, or by June 9, 2012. [Defendant] filed objections to the March 9, 2012 order. (Docket no. 209). Those objections [were denied as moot. (Docket no. 255.)]
>
> Almost one year later Plaintiffs filed [a] Rule 37 motion to enforce the Court's March 9, 2012 order. (Docket no. 218). In their motion Plaintiffs state[d] that Defendant PGBC [] produced a portion of the responsive documents in its possession but [] withheld almost 30,000 documents on the basis of an unspecified privilege, along with other key data and documents central to the merits of the case. Plaintiffs argue[d] that the time for asserting privilege ha[d] long since passed. They ask[ed] the Court to impose sanctions under Rule 37(b) in light of Defendant's disregard of the Court's orders. They also [sought] an order compelling Defendant to produce documents responsive to Document Request nos. 12 and 13.

(Docket no. 231 at 1-4.)

The Court granted Plaintiffs' motion in part on August 21, 2013. (Docket no. 231.) The August 21, 2013 Order states, in relevant part, that Defendant PBGC must produce on or before September 30, 2013 "documents responsive to Request for Production nos. 12 and 13 generated subsequent to the Plan's termination" and "documents withheld on the basis of privilege as discussed in th[e] order." (*Id*. at 8.) Defendant's Motion for Reconsideration of the Order was

denied on September 5, 2013, and its objections to the Order were overruled on July 21, 2014. (Docket nos. 237 and 257.) Defendant then filed a petition for a writ of mandamus with the United States Court of Appeals for the Sixth Circuit, which was denied on September 23, 2014. (Docket no. 266.) Defendant also moved Judge Tarnow to certify for appeal the July 21, 2014 Order overruling Defendant's objections to the August 21, 2013 Order (docket no. 258); Judge Tarnow denied this motion as moot on March 30, 2015 (docket no. 271).

On the discovery motion deadline of August 14, 2015, Plaintiffs filed the instant Rule 37 motion to enforce the August 21, 2013 Order, alleging that Defendant has refused to produce (1) more than 15,000 documents that it withheld on the basis of privilege; and (2) documents related to Defendant's audit of the Plan's assets, which Plaintiffs assert is responsive to their Request for Production (RFP) no. 12. (Docket no. 275.) As relief, Plaintiff seeks production of these documents.

II. DISCUSSION

A. Documents Withheld on the Basis of Privilege

Defendant argues that it need not produce the 15,000 documents that Plaintiffs seek because the parties agreed to exclude them from Plaintiffs' discovery requests. (Docket no. 278 at 12-16.) According to Defendant, the alleged agreement was effectuated through communications between the parties in January and February of 2013. On January 30, 2013, Plaintiffs' counsel sent a letter to Defendant's counsel, which states, in relevant part:

> In the spirit of cooperation, Plaintiffs have worked with PBGC to modify the discovery schedule numerous times to accommodate the PBGC's repeated requests for production extensions. Similarly, you'll recall that, in an effort to speed the process along, Plaintiffs made a number of offers to narrow the scope of production, some of which the PBGC has taken advantage of *(e.g.*, our proposal that the PBGC need not review or produce responsive "archived documents"), and some of which the PBGC has ignored (for example, after Plaintiffs explicitly agreed that the PBGC need not produce bankruptcy court filings in its

> productions, the PBGC's very first production consisted largely of just that; indeed the PBGC has produced such documents by the thousands). In the same vein of cooperation, Plaintiffs wish to make clear that, notwithstanding their right to have the PBGC produce the entirety of documents that have been improperly withheld, and notwithstanding our position that had the PBGC limited its productions to those documents expressly requested rather than producing voluminous, irrelevant documents (like the bankruptcy filings) solely to be able to claim (as has often happened during our conference calls) that the PBGC has produced "hundreds of thousands" of pages of documents, Plaintiffs are willing to modify the scope of their request regarding the remaining responsive documents in two ways:
>
> (1) PBGC's production going forward need not include any documents created, received or produced by the PBGC prior to August 2008.
> (2) PBGC need not produce any correspondence solely among lawyers in its Office of Chief Counsel, or between lawyers in its Office of Chief Counsel and its outside counsel.
>
> Again, just as with the Plaintiffs' previous offers, it is ultimately the PBGC's decision whether to accept these modifications or to continue producing documents that Plaintiffs have not asked for. However, we would ask that in deciding how to proceed the PBGC be mindful of the Court's current Scheduling Order, which cuts off the time for discovery motions at the end of March (and cuts off discovery at the end of April). The PBGC's plan to finalize its production in the middle of April is plainly incompatible with these deadlines, and to the extent that these delays could be ameliorated by a modification to the discovery parameters, we hope that the PBGC will accept our good faith offer to negotiate an appropriate modification.

(Docket no. 275-6 at 3-4 (footnote omitted).) Defendant claims that it accepted Plaintiffs' offer in a February 13, 2013 letter from Defendant's counsel to Plaintiffs' counsel:

> PBGC appreciates plaintiffs' offer to narrow the production to exclude documents created, received or produced by PBGC prior to August 1, 2008 and to exclude correspondence solely among lawyers in its Office of Chief Counsel and its outside counsel. We will remove those documents from the privilege log as we work to complete it. However, as a practical matter, this offer comes far too late in PBGC's review process to have a meaningful impact on the time within which PBGC can complete its production.

(Docket no. 275-7 at 3.) Plaintiffs contest Defendant's assertion that the exchange cited above resulted in an agreement, arguing that there was no meeting of the minds and no consideration (docket no. 275 at 20); the Court agrees. The cited exchange demonstrates that Plaintiffs offered

to modify their discovery requests in exchange for the expedited production of documents. And while Defendant accepted Plaintiffs' proposed modifications, it did not expressly agree to accelerate its production, and the Court is not persuaded by Defendant's allegations that it accepted the offer by conduct. Conversely, Defendant argues that Plaintiffs received consideration for the agreement because by limiting its production according to Plaintiffs' offer, Plaintiffs did not receive documents that they no longer wanted. (Docket no. 278 at 13-14.) Defendant's argument in this regard belies logic; if Plaintiffs no longer wanted those documents, Plaintiffs would not have consistently and continuously sought them throughout the discovery period, and this issue would not be before the Court.

The lack of an agreement is further evidenced by the pleadings related to the August 21, 2013 Order, and the Order itself. Plaintiffs filed their Rule 37 motion to enforce this Court's March 9, 2012 Order one week after the exchange cited above. In that motion, Plaintiffs mention their January 30, 2013 offer and Defendant's response, but they continued to seek the entire lot of 30,000 documents that were withheld on the basis of privilege. (*See* docket no. 218 at 10, 21.) In its response to Plaintiffs' motion, Defendant notes Plaintiffs' offer in a footnote, but makes no mention of an ensuing agreement and does not dispute the production of any documents on the basis of such an agreement. (*See* docket no. 223 at 19 n.40.) The Court addressed Plaintiffs' motion in its August 21, 2013 Order, in which it noted Plaintiffs' assertion that Defendant had withheld almost 30,000 documents on the basis of an unspecified privilege, found that Defendant had waived its right to assert privilege with regard to those documents, and ordered Defendant to produce the "documents withheld on the basis of privilege as discussed in [the] order."[1] (Docket no. 231 at 4, 7, 8.) Notably, the Court did not acknowledge the alleged

[1] Defendant seemingly interprets the Order differently; however, Defendant's interpretation does not supersede that of the issuing Court.

February 2013 agreement, and it did not reduce the number of documents to be produced in accordance with the alleged agreement.

Moreover, as Plaintiffs point out, Defendant raised four separate challenges to the August 21, 2013 Order, but not once did Defendant challenge the Order or the production of any of the 30,000 documents on the basis of the alleged February 2013 agreement. (*See* docket no. 275 at 19.) To raise such an argument over two years later at this juncture is inappropriate. Additionally, while the Court declines to do so, one could reasonably construe Defendant's argument as a frivolous last-ditch effort to delay or ultimately avoid the production of these documents. Accordingly, the Court holds that the August 21, 2013 Order stands as written. To the extent that Defendant has not produced all of the approximately 30,000 documents that it had previously withheld on the basis of privilege, it will do so within thirty days of this Opinion and Order. Defendant is advised that failure to comply with this Opinion and Order in this regard may result in sanctions under Federal Rule of Civil Procedure 37(b)(2)(A).

B. Documents Related to Defendant's Audit of the Plan's Assets

Plaintiffs assert that Defendant has withheld documents generated between 2011 and 2012 that are responsive to Request for Production no. 12 concerning its audit of the Plan's assets, in violation of the August 21, 2013 Order. (Docket no. 275 at 7, 22.) Specifically, the documents that Plaintiffs seek in this regard are documents generated by Bazillo, Cobb, and Associates (BCA), a contractor employed by Defendant between June 2011 and August 2012 to provide asset evaluation services related to the Delphi pension plans.[2] (*Id*. at 24; docket no. 275-11 at 4.)

[2] Defendant terminated BCA's service contract for deficient performance in August of 2012 and subsequently contracted with KPMG to perform the asset evaluation work. Without conceding its responsiveness to any of Plaintiffs' document requests, Defendant has agreed to produce the final Plan Asset Audit generated by KPMG once it is complete. (Docket no. 275 at 23-24; docket no. 275-11 at 4; docket no. 278 at 20.)

Plaintiffs' Request for Production no. 12 asks Defendant to produce "[a]ll documents and things received, produced or reviewed by the PBGC since January 1, 2006 related to the PBGC's potential or actual liability for any benefit payments under Delphi's Pension Plans." (Docket no. 275-2 at 11.) Plaintiffs argue that the documents sought are responsive to RFP no. 12 because Defendant needs to know the value of the Plan's assets to determine its liability for benefit payments under the Plan. (Docket no. 275 at 22-23.) To support this argument, Plaintiffs cite to a report generated by Defendant's Office of Inspector General in which Defendant's Assistant Inspector General for Audit states that "[t]he value of a plan's assets is important because it is used in calculating retirement benefits. For some plans, increases in the calculated value of plan assets at the date of plan termination result in increased benefits for plan participants." (*Id*. at 23 (citing docket no. 275-10 at 4).) Plaintiffs also cite to a November 28, 2014 letter from Defendant's Director to members of Congress regarding the Delphi Pension Plans, in which she states that completion of asset evaluation reports "are a necessary prerequisite to issuing final benefit determinations." (*Id*. at 23 (citing docket no. 275-11 at 5).) Plaintiffs also assert that Defendant has been on notice since January of 2013 that Plaintiffs were seeking the documents at issue in response to RFP no. 12 and that Defendant had not disputed their responsiveness until now, instead asserting that the documents had not yet been created. (*Id*. at 24-25.)

Defendant argues that it should not be required to produce the documents that Plaintiffs seek because Plaintiffs' RFP no. 12 did not state with reasonable particularity a request for documents related to Defendant's audit of the Plan's assets.[3] (Docket no. 278 at 16.) Defendant expounds that no reasonable reading of the RFP suggests that it encompasses such documents because by its terms, the RFP is directed at documents related to "liability," and nowhere in the

[3] Requests for production "must describe with reasonable particularity each item or category of items to be inspected." Fed. R. Civ. P. 34(b).

RFP do the words "assets," or "plan asset audit" appear. (*Id*. at 17-18.) Defendant contends that if Plaintiffs' position – that information related to the Plan's assets relates to Defendant's actual or potential liability for benefits payments – is adopted, the purpose of the reasonable particularity rule would be defeated because "[p]arties like PBGC would not only have to produce the specific documents that the request put them on notice that the other party wanted, but they would also have to guess, at their peril, everything that the other party might think was 'related' to those documents." (*Id*. at 18.)

While Defendant's argument may hold weight in some instances, it is illogical here in light of Defendant's own statements cited by Plaintiffs, *supra*. If, as Defendant says, the value of a plan's assets and the asset evaluation reports are so "important" and "necessary" to calculating benefits and making benefit determinations, then ascertaining that documents concerning the audit of the Plan's assets are indeed responsive to Plaintiffs' request for documents related to Defendant's liability for benefit payments under the Plan would not require any guesswork; such a determination should be automatic. Having previously found in the August 21, 2013 Order that information responsive to Request for Production no. 12 that has been received, produced, or reviewed by Defendant subsequent to the Plan's termination is relevant to the claims at issue in this case (docket no. 231 at 6), and in currently finding that documents concerning the audit of the Plan's assets are responsive to RFP no. 12, the Court will grant Plaintiffs' motion in this regard and order Defendant to produce those documents within thirty days of this Opinion and Order.

IT IS THEREFORE ORDERED that Plaintiffs' Rule 37 motion to enforce this Court's August 21, 2013 Order [275] is **GRANTED** as follows:

a. To the extent that Defendant has not produced all of the approximately 30,000 documents that it had previously withheld on the basis of privilege, it will do so within thirty (30) days of this Order. Failure to comply with this Order may result in sanctions; and

b. Defendant will produce all documents in its possession related to an audit of the Plan's assets as they are responsive to Plaintiffs' Request for Production no. 12 within thirty (30) days of this Order.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Leave to File a Supplemental Reply Brief [280] is **DENIED** as moot.

NOTICE TO THE PARTIES

Pursuant to Federal Rule of Civil Procedure 72(a), the parties have a period of fourteen days from the date of this Order within which to file any written appeal to the District Judge as may be permissible under 28 U.S.C. § 636(b)(1).

Dated: March 11, 2016

s/ Mona K. Majzoub
MONA K. MAJZOUB
UNITED STATES MAGISTRATE JUDGE

PROOF OF SERVICE

I hereby certify that a copy of this Order was served upon counsel of record on this date.

Dated: March 11, 2016

s/ Lisa C. Bartlett
Case Manager

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

U.S. DEPARTMENT OF TREASURY,	)	
	)	
et al.,	)	MC Action
	)	No. 12-100
Petitioner,	)	
	)	May 16, 2017
v.	)	1:00 p.m.
	)	
DENNIS BLACK,	)	Washington, D.C.
	)	
Respondent.	)	

TRANSCRIPT OF MOTION HEARING PROCEEDINGS
BEFORE THE HONORABLE EMMET G. SULLIVAN,
UNITED STATES DISTRICT COURT JUDGE

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AFTERNOON SESSION, MAY 16, 2017

(1:05 p.m.)

THE COURTROOM CLERK: Your Honor, this is Miscellaneous Case 12-100, U.S. Department of Treasury versus Dennis Black, et al.

Will all parties please come forward to this lectern and introduce yourselves for the record.

MR. GLASS: Good afternoon, Your Honor. I'm David Glass from the civil division of the Justice Department, and with me at counsel table is Jacqueline Snead, who is an Assistant Branch Director in our branch, and Alexander Haas, who is the Chief of Staff to the Acting Assistant Attorney General for civil and the Acting Deputy Assistant Attorney General.

THE COURT: All right. Good afternoon to everyone. Welcome.

MR. KHALIL: Good afternoon, Your Honor. Michael Khalil with respondent, and with me is Michael Shelley and Tim O'Toole.

THE COURT: All right. Good afternoon, Counsel. Let me say this. I think in my haste to what I thought would finally conclude this matter after three substantive opinions, I probably overreacted when I said produce the documents forthwith.

I think in fairness, the government should have its -- I think any party should have the full allotment of time to consider any -- to consider seeking any appellate review, so -- and I can't think of a compelling reason to deprive the

government of that 60 days. I mean, I know that the respondent, Mr. Black, has said, well, they haven't really said they want to appeal, but so what. Why shouldn't a litigant have the full complement of 60 days in which to determine whether or not they want to file an appeal or not? Let me just pose that question to counsel.

MR. KHALIL: Thank you, Your Honor. We are --

THE COURT: I would like to bring some finality to this case. This case has drained this Court's time and resources, and the Court has had some very serious concerns about whether the government's proceeding in good faith or not, and I've articulated those concerns, actually warned the government to be very careful, but in fairness, even though they wasted the Court's time on three prior occasions, why shouldn't they be entitled to their 60-day allotment of time under the rules? Why should I treat them unfairly?

MR. KHALIL: Well, Your Honor, respectfully, we don't think that the immediate production of the documents would be unfair. There are protective orders that can be issued. There's already a protective order in this case in place that could be modified very easily to allow the petitioner a chance to protect whatever confidentiality concerns either the Treasury has or the Office of the President has in these documents. *Mohawk*, we think, made pretty clear that those sorts of protective orders are appropriate and sufficient to eliminate any confidentiality

concerns referred to the Court, referred to as spillover concerns.

THE COURT: Wouldn't the government have to consent to that order?

MR. KHALIL: I don't know that it would. I don't see why it would have to consent to the order at all.

It seems to me this Court has full authority to govern the production of the documents and respondent's use of those documents. The protective order that's in place currently with the other documents that the Treasury has produced allow only for counsel to view the documents and one of the respondents, who has also been given permission in the underlying litigation to view documents under the protective order. He's completely trustworthy.

THE COURT: You know what, I just don't recall whether the government consented to the other protective order or not. I just don't recall. Did they?

MR. KHALIL: They did.

THE COURT: The government indicated in this case they have no interest in consenting to the protective order, which I don't really understand, but --

MR. KHALIL: To be -- and I'll let Mr. Glass speak --

THE COURT: Can I throw out a suggestion? The reason why -- you're probably wondering, why did the Court say "people with decision-making authority." I have a suggestion, and I

don't know whether it's going to be persuasive to anyone right now, but I want to raise it right now, a time out for a second. Here's my suggestion. Would the government consent to, either today or some other day, in this court showing the documents to opposing counsel; not giving them, just showing the documents to them? It's not a trick question. I'm just trying -- you know what, once they see the documents, arguments may change. I don't know.

MR. GLASS: Well, we have represented to the Court, and I'll repeat that representation today, that there is nothing in these documents.

THE COURT: All right. Let me stop you. I know that, and I haven't lost sight of that, but here's the problem the Court has, and I may be wrong, and maybe, you know, maybe counsel -- maybe opposing counsel will tell me I'm wrong in thinking about this, but I have a limited view about issues in this case. I don't know what other information they have. I query whether -- and what concerns me is -- I query whether the other information that opposing counsel may have, coupled with these documents, may shine a different light on relevance. Do you follow me?

MR. GLASS: I do follow you.

THE COURT: And that's what's troubling to the Court, because I don't know the full universe because this case has gone on before two courts for years, and it has required a lot of time and attention, and that's fine. You know, that's what we're here

for, but three opinions in one case. And I was trying to think, is there some way I can bring about finality in this case, because the other thing that concerns me is this: The government says, well, we can file for expedited appeal. That happened in the *Cheney* case that was before me some years ago. On October 21st, 2002, the defendants moved for a stay pending appeal of my October 17th, 2002 order, and the case -- the issue was decided July 8th, 2003, and that case took on a life of its own and ended up before the Supreme Court, and to this day I still don't recognize what the issues were that brought it before the Supreme Court, but the case took on a life of its own. And it was expedited consideration. So, with all due respect to the circuit, I'm not taking a shot at the circuit, but, you know, I was on the D.C. Court of Appeals for a couple of years, and it used to drive me nuts when we would grant expedited consideration in cases that warranted it, like termination of parental rights and other cases, and essentially just dropped the ball.

So, I said, what can I do -- I said, maybe, maybe, maybe everyone would just be curious about what the documents say. They could conceivably look at the documents and say. You know what, we want to move on to Michigan, Judge. That's the other thing, because they can't move on to Michigan until there's a final decision with respect to discovery here, which may be in another year or so, which is so unfair.

MR. GLASS: They could, Your Honor.

THE COURT: They could?

MR. GLASS: Sure.

THE COURT: I thought the judge there said you have to exhaust discovery here.

MR. GLASS: Oh, they could go back to Judge Turnaugh in Detroit at any time. They have a million --

THE COURT: Oh really?

MR. GLASS: They have a million pages of documents from the Pension Benefit Guaranty Corporation.

THE COURT: So, in other words, there's no harm in asking the Court to proceed, but I think the judge made pretty clear, finish what you're doing in D.C. here first before we start that million mile journey?

MR. GLASS: Yeah. I'm not going to cast aspersions on any federal district judge.

THE COURT: I'm not casting aspersions. I want to be clear. I'm not casting aspersions. I thought it was clear that he said we have to finish here. If I'm wrong, then I'm wrong.

MR. GLASS: That's a way of not addressing the underlying case, frankly.

THE COURT: Okay.

MR. GLASS: The position that we're in here is that this is a --

THE COURT: I want to be clear. I wasn't taking a whack at the judge there at all.

MR. GLASS: No, I would not think that.

THE COURT: Okay.

MR. GLASS: No. The position we're in here is that this is a special privilege. This is a Constitutional privilege. And as I told Mr. Khalil back before we submitted our last submission, you know, it is my experience with different administrations, republicans and democrats, that they all take the presidential communications privilege very seriously, and that's why we couldn't show these documents to plaintiffs and --

THE COURT: But essentially your position here is under no circumstances should these documents ever see the light of day to opposing counsel. That --

MR. GLASS: We disagree that they have established a showing of need that justified -- it's a qualified privilege, but our position is that they haven't --

THE COURT: Is there something else the Court should have addressed in its opinion to demonstrate need? The judge said it's a privilege here, but under, I think it was *Dellums* {sp}, I'm, you know, persuaded that you can't get these documents, this information from any other source. And basically you're saying, well, the information they get, Judge, doesn't really shed any light on the issue. And I guess the bottom line is, if it doesn't shed any light, then what's the harm?

MR. GLASS: Well, there's that. I mean, it's our position that there wouldn't be any need anyway because if the -- even if

there had been all kinds of pressure put on the Pension Benefit Guaranty Corporation to terminate this pension plan, that would not invalidate the termination. But putting that all to one side, nothing goes out -- nothing is supposed to go out under the presidential communications privilege anyway unless it's determined to be relevant to that particular case, and so, frankly, what we should have asked for was reconsideration so Your Honor could have gone through the documents.

THE COURT: I was wondering the same thing. Do you want to file a motion? I'll give you time to do that?

MR. GLASS: Sure. We could do that.

THE COURT: Because I think, in fairness, you're entitled. I'm not going to squeeze you out of 60 days. I think, in fairness, I think it was my exuberance seeing a light at the end of the tunnel, give up those documents, and I probably shouldn't have done that. In fairness, I probably shouldn't have. In all these other cases there are interlocutory -- I don't know if you made a final decision, and I'm not going to inquire about that. That's within the, you know -- that's your prerogative. I understand it has to go up the ladder, if you're seeking that consideration, and I can't really quarrel with that. Sure, I want finality, but it doesn't seem like I'm going to get finality here. I think it's fair. I want to hear from the other side, but I think it's fair on a quick basis to give you a chance to persuade me to reconsider. I mean, if there's something else I

should have done -- they can't argue, they can't argue, so it's me and you here.

MR. GLASS: Sure. Exactly.

THE COURT: I think my analysis is correct. I think my conclusion is correct, but if I'm missing something there, then I want you to tell me what I'm missing.

MR. GLASS: Okay. Well, the only thing that's missing is the fact that there isn't anything in these documents that shows any kind of improper pressure, putting aside the fact that we don't think it makes any difference if there is, but there simply isn't anything in there.

THE COURT: In those documents, but what about in those documents viewed in connection with whatever other discoverable material they have, which -- and that leaves me at a disadvantage because I don't know what else is out there in the universe.

MR. GLASS: Sure, but they've got the universe and they have never come in with a single piece of paper -- In view of the fact that they have a million pages from the Pension Benefit Guaranty Corporation dealing with the Delphi Corporation, they have never come in with a single piece of paper indicating that there was any kind of improper pressure put on PBGC.

I mean, there was an earlier claim in the underlying lawsuit against the Treasury --

THE COURT: -- right --

MR. GLASS: -- and that claim was that, for political

reasons, certain decisions were made. Those were dismissed for failure to state a claim because they couldn't make the IQBAL threshold. They were simply saying, Well, you know, there has to have been all kinds of pressure. They have no evidence of any kind that they've shown us that there was any kind of pressure, and, as I say, they have a million pages from PBGC. They have documents from us. There have been no fewer than seven congressional hearings on the termination of this pension plan. They've got the transcripts of those.

One of the fellows who was on the group at Treasury that worked on the restructuring of GM wrote a book about it. There's nothing in there. There's nothing that they have cited that there was any kind of improper pressure, and if Your Honor looks at these 63 documents --

THE COURT: Wait a minute. He worked at Treasury and he wrote a book on it?

MR. GLASS: His name was Rafner {sp}. What happened was when the decision was made to rescue General Motors in 2009, Treasury put together a team of about 14 or 15 people who basically over a 60-day period came up with the restructuring. What happened in the restructuring was that the assets of what was then GM was sold to a new company called GM. Delphi, the pension -- the pension sponsor here, started out as a division of the old GM. It was called Delco. Your Honor may remember genuine Delco parts.

THE COURT: Absolutely. Sure.

MR. GLASS: It was spun off as a separate company in 2009 -- I'm sorry, 1999. The new GM thought that it would need Delphi parts, so the resolution of the Delphi bankruptcy in the minds of General Motors was necessary to its continued success. It was not Treasury's view.

Treasury didn't think that the new GM would need Delphi parts.

As part of the Delphi bankruptcy, the new GM bought four Delphi factories -- I think they made axles -- and shortly thereafter sold them, so they didn't need them. So, this is kind of marginally tied in with the General Motors bankruptcy, but the fact of the matter is, -- and, you know, the million pages that have been produced will show that, that the team at Treasury that worked on the restructuring were aware of the Delphi pensioners. They talked to lots and lots of people, but they were, you know, just a very minor player when it came to the considerations of restructuring General Motors so that it could be a functioning company. But we would be happy to move for reconsideration and asking for Your Honor to take a look at the documents and confirm that there is no --

THE COURT: No, I have the documents, and I've gone back and looked at them again, and I'm just troubled. Thank you, Counsel. Let me hear from opposing counsel. I think it was probably -- I misspoke when I said "forthwith." They're entitled

to their 60 days. And actually, I'm not sure what merit there would be for a motion for reconsideration, but after all this time, effort and work, I'm not going to shortchange myself either. So, I think I'll probably give them an opportunity to persuade me that -- within a very short period of time -- that there's a basis for reconsideration.

But what about the Michigan litigation? I thought it was clear that you couldn't do anything with respect to further discovery until you had concluded discovery here. Am I wrong in that regard?

MR. KHALIL: You're not wrong, Your Honor. That's the way the current discovery order --

THE COURT: Right, and I'm very sensitive to that, and I understand what the government said about seeking an expedited appeal. But I know what happened in *Cheney*, and I know what happens to these big cases, with all due respect to the circuit. They have a lot on their plate, too. So, you know, another year? That doesn't have a lot of appeal to me.

I don't know. I guess that was a no to my question, can you just see the documents in the courtroom, I guess, and that's fine. Is that a no, a resounding no? One, two, three.

MR. GLASS: Yes.

THE COURT: Okay. That's fine. I understand. There's no harm in asking, as my mom used to tell me. That's fine. I'm sorry. Go ahead. It is frustrating, because I would like to get

done with this case and get on to some other FOIA cases.

MR. KHALIL: Your Honor, I would just like to address a couple of points.

THE COURT: Sure.

MR. KHALIL: And I should express, on behalf of respondents, we appreciate that you have invested -- this Court has invested a great deal of time and issued three opinions. The respondents do not believe or understand -- my clients are retirees. They're not sophisticated business people. They have a little bit of trouble understanding how a subpoena could take this long to negotiate.

THE COURT: Well, they should understand that it's unusual for three substantive opinions to be issued in one case, too. I know that's difficult for litigants to understand. They think we don't do anything, and I understand that. It's difficult -- good luck there. It's difficult.

MR. KHALIL: I don't think their frustration is with the Court, Your Honor, I think the frustration is with the -- we cited in our brief that there have been -- you know, it would be asserting deliberative process privilege over nearly 900 documents, and then when calling for an in-camera review, withdrawing those assertions at the last minute for 75 percent of them.

THE COURT: That didn't please me either when I saw that. No explanation given.

MR. KHALIL: None. None, Your Honor. So, behavior like that, we think, my clients think has extended these proceedings. And, you know, again, sure, every litigant should have an opportunity to pursue it's appeal rights, and we're not saying that -- we're not suggesting that denying a stay would deny the Treasury those appeal rights. We think that that's exactly what the Supreme Court made clear in *Mohawk*, that post-appeal review would be more than sufficient to validate those.

And, of course, if you feel like you want to -- if this Court feels like it wants to reconsider and give the Treasury an opportunity to present reconsideration arguments --

THE COURT: I was actually surprised they didn't file a motion, but they -- I'm not going to reach out and tell people to file a motion, why don't you file a motion for reconsideration? They didn't raise it. But I think it was an error, probably, for me to say "forthwith."

You know, again, it was probably my exuberance because I could see the light at the end of the tunnel, but --

MR. KHALIL: I would note that it sounds to me like the basis of that reconsideration motion is a relevance determination, and that relevance determination basically is the one that this Court made in 2014.

THE COURT: Right, in the first opinion.

MR. KHALIL: So we're going to ask -- it just seems odd that we would in 2017 be litigating a reconsideration motion of a

determination made in 2014, but with that said --

THE COURT: That was before the Court had an opportunity to review the documents in question.

MR. KHALIL: That is true.

THE COURT: So the relevance determination would be, Here it is, Judge? How do I -- is it farfetched for the Court to be concerned about reviewing these documents on the one hand and just wondering how they fit in with everything else with the universe with everything else? Is that farfetched for the Court to be -- because it's very difficult sometimes. So how does the Court do that?

MR. KHALIL: I don't think the case law requires the Court to do that. I think that the case law says that it's the Court's determination -- responsibility in the initial decision when determining whether to have an in-camera review to undertake a stringent relevance determination like the one this Court undertook. Then the in-camera review is just supposed to weed out purely irrelevant documents that might embarrass the executive or are plainly irrelevant, but it's not the stringent determination -- that's supposed to occur before the in-camera review occurs. And once you determine that, well, okay, I've done the in-camera review and now I can go forth and award or disclose documents that are on the basis of need. That is purely within the Court's discretion and I do not believe is subject to a heightened review.

THE COURT: Right.

MR. KHALIL: Any other questions?

THE COURT: But then you're at a loss, though, too. Because they filed a motion for reconsideration, there's not a lot you can say, really, is there, other than what you just very eloquently just told me?

MR. KHALIL: That is true.

THE COURT: Through no fault of yours. That's the way the system is. So thank you, Counsel.

Let me do this. Let me take a five-minute recess. Do you want to say anything else, Mr. Glass?

MR. GLASS: No, Your Honor. What we are here for is simply to get a stay of this order so that we can -- pending any appeal that we may take.

THE COURT: No, I understand. I think you're entitled to that. You're entitled to the 60 days. Believe me, it was not the Court's -- I wasn't focused on that aspect. Again, I could see the light and I was focusing on this case being over, and I wasn't trying to deprive the government of a meaningful opportunity to consider an appeal. I wasn't trying to do that. Look, after all these years, I recognize how arduous that process is for the government to get approval to appeal. So, at the very least, you walk out of here with that. I'll grant you that. And I think there may be some merit to a motion for reconsideration on a fast track, I think, although that's the reason why I'm

going to take a very short recess, about a ten-minute recess. No need to stand. Thank you.

(Thereupon, a recess in the proceedings occurred from 1:29 p.m. until 1:47 p.m.)

THE COURT: All right, Counsel. I'm going to let you file a motion for reconsideration. I'm not going to talk about the parameters and what I need in that motion now, and we'll issue it today or tomorrow. I don't want to put it on the fast track. I don't want to get into -- I don't want to have to resolve another issue about when the notices of appeal divest the Court. I don't want to do that.

So I recognize that the filing of a motion will probably impact the date, the drop dead date for the filing of a notice of appeal, but I don't even want to get into that. But I'm going to put things on a fast track. Today is the -- what is today, the 18th?

MR. GLASS: 16th, Your Honor.

THE COURT: 16th. So, a week from today will be the 23rd. The week of the 22nd. Memorial Day is the following Monday. I don't want to interfere with that. Is that the following Monday, the 29th? So, the 22nd for the filing of any motion for reconsideration. The 31st is two days after the Memorial Day for the filing of a response. I'm not going to rule out the possibility of bringing in counsel for the government ex parte in the event I have other questions. I haven't finally concluded

just what I'm going to put in the order providing for the filing of a motion for reconsideration, but I need more information that addresses the issue of need and relevance. And believe me, I'm going to decide these issues as soon as I possibly can. I may not write another opinion, but at least I want to be in a position to say I've reconsidered what I did, the reasons why I did it, and then finally conclude, whatever the decision is.

But I just want to be clear, though. Again, and I think you've said this earlier, Mr. Glass, but essentially, even if the documents showed themselves an independent basis for need by the movant, by opposing counsel, your argument would be that in view of the presidential privilege, they still should not be produced, right?

MR. GLASS: Right. That's correct, Your Honor.

THE COURT: So, under no circumstances should they ever be produced because it's the presidential privilege?

MR. GLASS: Well, what the cases hold is that the privilege can be overcome by a showing of need, and Your Honor has held that they have made a showing of need. Once that is made, what the cases say is that the District Court should go through the documents and excise anything that is not pertinent to that showing of need, and so that's what we would be moving to reconsider.

THE COURT: Fair enough. Fair enough. And I think, in fairness -- I don't think this -- I don't think I'm precluded

from saying this, but indeed I doubt if we're even talking about 63 documents. There's some duplication, so I think that's a fair statement.

MR. GLASS: I'm starting to forget. I think there is. I think there is.

THE COURT: There's some duplication.

MR. GLASS: Copies.

THE COURT: Sure. So we'll post a minute order later today or tomorrow. Tell me what's in store -- once these issues are resolved here, you receive documents pursuant to the other court orders, correct, Counsel?

MR. KHALIL: (Nodded head affirmatively.)

THE COURT: What awaits you in Michigan?

MR. KHALIL: Me?

THE COURT: Yes, please. What's the next journey?

MR. KHALIL: Once we get the documents from the Treasury or the Court of Appeals tells us we are not entitled to any documents or you tell us we're not entitled to anymore documents, we have a 30 day clock with the PBGC in which we need to resolve expert discovery. Then we have a 60-day clock subject to everyone's best efforts to try to depose the two Treasury -- former Treasury officials, Mr. Feldman and Mr. Wilson. And then a 90-day clock to resolve summary judgment, and those are the highlights.

THE COURT: So if this case goes to trial, how long a

trial are you looking at?

MR. KHALIL: A week.

THE COURT: Is that all? Okay. All right. Thank you. Good to see everyone. Thank you.

(Proceedings adjourned at 1:53 p.m.)

C E R T I F I C A T E

I, Scott L. Wallace, RDR-CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Scott L. Wallace 5/24/17

Scott L. Wallace, RDR, CRR **Date**
Official Court Reporter

Khalil, Michael

From: Khalil, Michael
Sent: Thursday, July 13, 2017 2:13 PM
To: Glass, David (CIV) (David.Glass@usdoj.gov)
Cc: Anthony F. Shelley, Esq. (ashelley@milchev.com); Timothy P. O'Toole (totoole@milchev.com)
Subject: FW: Activity in Case 1:12-mc-00100-EGS U.S. DEPARTMENT OF TREASURY v. BLACK et al Order on Motion to Stay
Attachments: Draft Stipulated Protective Order.DOCX

David,

Pursuant to yesterday's Order, attached please find a draft stipulated protective order for your review. If this looks ok to you, I'll send it to the PBGC for their comments.

Mike

MICHAEL N. KHALIL
Member | Miller & Chevalier Chartered
mkhalil@milchev.com | 202.626.5937

From: DCD_ECFNotice@dcd.uscourts.gov [mailto:DCD_ECFNotice@dcd.uscourts.gov]
Sent: Wednesday, July 12, 2017 5:26 PM
To: DCD_ECFNotice@dcd.uscourts.gov
Subject: Activity in Case 1:12-mc-00100-EGS U.S. DEPARTMENT OF TREASURY v. BLACK et al Order on Motion to Stay

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U.S. District Court

District of Columbia

Notice of Electronic Filing

The following transaction was entered on 7/12/2017 at 5:25 PM and filed on 7/12/2017
Case Name: U.S. DEPARTMENT OF TREASURY v. BLACK et al
Case Number: 1:12-mc-00100-EGS

Filer:

Document Number: No document attached

Docket Text:

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)

1:12-mc-00100-EGS Notice has been electronically mailed to:

David Michael Glass david.glass@usdoj.gov

Timothy Patrick O'Toole TOtoole@milchev.com, ktafuri@milchev.com

John A. Menke menke.john@pbgc.gov, efile@pbgc.gov

Anthony F. Shelley ashelley@milchev.com, ktafuri@milchev.com

Michael N. Khalil mkhalil@milchev.com, ktafuri@milchev.com

1:12-mc-00100-EGS Notice will be delivered by other means to::

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

STIPULATED PROTECTIVE ORDER

Pursuant to the Court's July 12, 2017 Minute Order, petitioner U.S. Department of the Treasury ("Treasury"), interested party Pension Benefit Guaranty Corporation ("PBGC"), and respondents Dennis Black, Charles Cunningham, Kenneth Hollis, and the Delphi Salaried Retiree Association ("Respondents"), do hereby stipulate and agree as follows, subject to the approval of the Court.

1. The procedures described below shall govern the treatment of the documents (the Protected Documents) produced pursuant to the Court's June 7, 2017 Order pending Treasury's appeal of same. The protections described below will expire if the Court's June 7, 2017 Order is upheld on appeal, at which time Respondents and PBGC will no longer have to treat the documents produced to them pursuant to the Court's June 7, 2017 Order as Protected Documents.

2. As used in this stipulated protective order, the following terms shall have the following meanings: (a) "Treasury," "PBGC," and "Respondents" shall have the meanings ascribed to them in the preamble to this stipulated protective order; (b) "Protected Documents" means the 63 documents referred to in the Court's June 7, 2017 Order that Treasury asserts are protected under the presidential-communications privilege; (c) the "Action" shall refer collectively to the above captioned miscellaneous action, and the underlying action, *Black v. PBGC*, Case No. 09-13616, pending in the United States District Court for the Eastern District of Michigan; (d) "Court" shall mean the United States District Court for the District of Columbia, The United States Court of Appeals for the District of Columbia Circuit, the United States District Court for the Eastern District of Michigan, and the United States Court of Appeals for the Sixth Circuit; and (e) "Counsel" shall mean counsel for Respondents and counsel for PBGC.

3. Protected Documents shall not be disclosed directly or indirectly to persons other than the following persons, as to whom disclosure shall be limited to the extent reasonably necessary for the prosecution, defense, settlement, enforcement, and/or appeal of the Action:

a. The Court, persons employed by the Court, and qualified persons (including necessary clerical personnel) recording, taking or transcribing testimony or argument at a hearing, trial, or deposition in the Action or any appeal therefrom;

b. Counsel of record for the parties in the Action, including associates, legal assistants, paralegals, secretarial and clerical employees who are assisting counsel in the prosecution, defense, and/or appeal of the Action;

c. Matthew A. Feldman and Harry J. Wilson, both of whom are expected to testify at a deposition or a court proceeding in the Action, as well as counsel for these witness, for the purpose of assisting in the preparation or examination of the witnesses;

d. Other persons upon further order of the Court.

4. If Counsel desires to file Protected Documents in Court, Counsel shall file the Protected Documents under seal, in a manner consistent with the local rules of the Court.

Dated: July XX, 2017

CHAD A. READLER
Acting Assistant Attorney General
CHANNING D. PHILLIPS
United States Attorney
JACQUELINE COLEMAN SNEAD
Assistant Branch Director

s/ *DRAFT*
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Attorneys for Petitioner

Dated: July XX, 2017

s/ *DRAFT*
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Attorneys for Interested Party

Dated: July XX, 2017

s/ *DRAFT*
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Attorneys for Respondents

APPROVED AND SO ORDERED.

Dated: _____

_____
UNITED STATES DISTRICT JUDGE

Khalil, Michael

From: Glass, David (CIV) <David.Glass@usdoj.gov>
Sent: Thursday, July 13, 2017 4:28 PM
To: Khalil, Michael
Cc: Shelley, Anthony; O'Toole, Timothy
Subject: RE: Activity in Case 1:12-mc-00100-EGS U.S. DEPARTMENT OF TREASURY v. BLACK et al Order on Motion to Stay

Mike –

We have appealed yesterday's order and will get back to you with respect to your proposed protective order if we are unable to obtain a stay pending appeal from the court of appeals.

David

From: Khalil, Michael [mailto:mkhalil@milchev.com]
Sent: Thursday, July 13, 2017 2:13 PM
To: Glass, David (CIV) <DGlass@CIV.USDOJ.GOV>
Cc: Shelley, Anthony <ashelley@milchev.com>; O'Toole, Timothy <TOtoole@milchev.com>
Subject: FW: Activity in Case 1:12-mc-00100-EGS U.S. DEPARTMENT OF TREASURY v. BLACK et al Order on Motion to Stay

David,

Pursuant to yesterday's Order, attached please find a draft stipulated protective order for your review. If this looks ok to you, I'll send it to the PBGC for their comments.

Mike

MICHAEL N. KHALIL
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From: DCD_ECFNotice@dcd.uscourts.gov [mailto:DCD_ECFNotice@dcd.uscourts.gov]
Sent: Wednesday, July 12, 2017 5:26 PM
To: DCD_ECFNotice@dcd.uscourts.gov
Subject: Activity in Case 1:12-mc-00100-EGS U.S. DEPARTMENT OF TREASURY v. BLACK et al Order on Motion to Stay

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U.S. District Court

District of Columbia

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Case Name: U.S. DEPARTMENT OF TREASURY v. BLACK et al
Case Number: 1:12-mc-00100-EGS
Filer:
Document Number: No document attached

Docket Text:
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)

1:12-mc-00100-EGS Notice has been electronically mailed to:

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