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

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO COMPEL WITHHELD AND REDACTED DOCUMENTS OR FOR *IN CAMERA* REVIEW

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I. THE COURT SHOULD ORDER THE DISCLOSURE OF ALL OF THE DOCUMENTS THAT THE TREASURY HAS WITHHELD UNDER THE DELIBERATIVE PROCESS PRIVILEGE

A. The Treasury's Unbounded Interpretation of the Deliberative Process Privilege Dramatically Understates Treasury's Burden

As the Court has noted, this case arises out of federal litigation in Michigan, where the underlying issue presented is "whether the PBGC violated [ERISA] and improperly terminated [Plaintiffs' pension] Plan because it was under political pressure from the Treasury." DE 27 at 15. During discovery, Plaintiffs in the Michigan litigation served the United States Department of Treasury (the "Treasury") with a subpoena *ducus tecum*, seeking information about whether the Treasury had in fact put such political pressure on the PBGC, causing it to terminate Plaintiffs' pensions in violation of ERISA. The Treasury moved to quash the subpoena but the Court denied the motion, enforcing the subpoena *ducus tecum* and expressly finding that the subpoena sought information relevant to the Michigan litigation. *Id.* at 14-16. More than one year after the Court's Order, however, the Treasury is still withholding seemingly every substantive communication in its possession regarding its involvement in the pension issues underlying Plaintiffs' case against the PBGC. This withholding rests largely on the Treasury's claim that such communications are purportedly protected by the deliberative process privilege.

In their Motion to Compel, Plaintiffs demonstrated the many flaws in the Treasury's assertion of the deliberative process privilege, including the most basic one: The deliberative process privilege is designed to protect internal, pre-decisional advice and recommendations that ultimately result in a governmental decision, but for the past six years, Treasury officials had, at every opportunity, explicitly disclaimed having had any responsibility for decisions relating to the Delphi pension plans. In other words, having vigorously denied that it *decided* anything, the Treasury now invokes a privilege based solely on governmental *decision-making* as the basis for

withholding an enormous quantity of relevant documents. In its opposition, the Treasury does not attempt to reconcile these contradictory positions. Instead, the Treasury suggests a new, expanded, interpretation of the deliberative process privilege. Under the Treasury's theory of deliberative process, it is enough for an agency to suggest that a withheld document somehow "relates" to some governmental policy (in this case, "'to sensitive discussions regarding Treasury's policies with respect to the administration of taxpayer money, . . . as well as Treasury's broader role in preserving financial stability and protecting the U.S. economy'"), even if the agency never explains what precise role the document played in that policy, or how it "relates" to it. DE 35 at 12 (quoting Ex. A thereto ¶ 10). The Treasury also seeks to shift its burden on this motion, suggesting that it is not Treasury's burden to demonstrate the propriety of the privilege asserted, but rather Plaintiffs who must demonstrate the inapplicability of the privilege.[1]

The Treasury's theory of deliberative process is as novel as it is unbounded; indeed it is difficult to imagine any document or conversation undertaken by a Treasury employee that would not relate, in at least a remote way, to these goals. However, notwithstanding the

[1] The Treasury is forced to seek to expand the definition of the deliberative process privilege, lest it admit to actually having directed the decision-making on the Delphi Salaried Plan. If it were to admit that decision-making role, it would help sink the PBGC's case on the merits, since the admission would substantiate Plaintiffs' claims that the termination of the Plan was not the product of a detached PBGC considering only the statutory criteria for termination of a pension plan, and that, but for the Treasury's improper influence, viable alternatives to termination existed for the Delphi Salaried Plan. In effect, the Treasury seeks to have its cake and eat it too: it wants to hew the line that it had no role in the pension-plan decisions (in order to save the PBGC's defense and obscure its role in those decisions), but wants to shield from disclosure the documents necessary to determine the truth of the Treasury's position. And in so doing, the Treasury is left to contradict itself by claiming a privilege traditionally designed to protect decision-making for documents it says are not decisional. Its only way out of the box is thus to ask the Court for a change in the scope of the deliberative process privilege to, in actuality, non-decisional materials.

Treasury's attempts to expand the protections of deliberative process, the law requires a far greater showing than the Treasury has made.

In evaluating claims of deliberative process privilege, the D.C. Circuit has cautioned that the privilege "is to be construed as narrowly as consistent with efficient Government operation." *Wolfe v. Dep't of Health & Human Servs.*, 839 F.2d 768, 773-74 (D.C. Cir. 1988) (internal quotation marks and citation omitted). In order to claim the privilege, the government must show that the document in question is both predecisional, *i.e*, generated before the adoption of an agency policy, and deliberative, *i.e.*, part of the give-and-take of the consultative process. *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). While an "agency need not identify a specific final agency decision" it must "establish 'what deliberative process is involved and the role played by the documents at issue in the course of that process." *Dent v. Exec. Office for U.S. Attorneys*, 926 F. Supp. 2d 257, 268 (D.D.C. 2013) (Sullivan, J.) (quoting *Heggestad v. U.S. Dep't of Justice*, 182 F. Supp. 2d 1, 7 (D.D.C. 2000)).

B. The Treasury Has Not Met its Burden to Show that the Deliberative Process Privilege Applies to the Withheld Responsive Documents

A fundamental problem with the Treasury's position is that it fails to acknowledge, much less meet, its "burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process." *Coastal States Gas Corp.*, 617 F.2d at 868 (citing *Vaughn v. Rosen*, 523 F.2d 1136, 1146 (D.C. Cir. 1975)). Furthermore, in a case like this, where the "documents are not a part of a clear 'process' leading to a final decision on the issue, . . . they are less likely to be properly characterized as predecisional; *in such a case there is an additional burden on the agency to substantiate its claim of privilege*." *Id*. (emphasis added) The Treasury now attempts to satisfy its burden by relying on the declaration of Lorenzo Rasetti, the Chief Financial Officer at the Treasury's Office of Financial Stability (the "Rasetti

Declaration") (DE 35-1). The Rasetti Declaration is both untimely and insufficient to satisfy the Treasury's burden.

1. The Rasetti Declaration Should be Disregarded As Untimely

The law is clear that the Treasury was required to substantiate its assertion of the deliberative process privilege when the privilege itself was asserted. *See, e.g., Martin v. N.Y. City Transit Auth.*, 148 F.R.D. 56, 60 (E.D.N.Y. 1993) (holding that "[t]he person asserting the privilege must have 'personally' reviewed the purported privileged matter. In addition, the subordinate with high authority must provide specific reasons for the assertion of the deliberative process privilege with an affidavit *contemporaneous with the assertion of such privilege.*") (citing *Resolution Trust Corp. v. Diamond*, 137 F.R.D. 634, 641 (S.D.N.Y. 1991), and *King v. Conde*, 121 F.R.D. 180, 189 (E.D.N.Y. 1988) (internal citation omitted; emphasis added).[2]

That did not occur here. The subpoena at issue in this case was served on the Treasury in January 2012. DE 27 at 4-5. The Treasury moved to quash that subpoena, and this Court denied the Treasury's motion to quash the document subpoena on June 19, 2014. Under the resulting production Order entered by this Court pursuant to stipulation of the parties, DE 29, the Treasury was allowed until the end of March 2015 to respond fully to the subpoena *ducus tecum*, and then provided another two months (i.e., the end of May 2015) solely to allow the Treasury to prepare

[2]*See also Burch v. Regents of Univ. of Cal.*, No. S-04-0038, 2005 U.S. Dist. LEXIS 46998, at *3 (E.D. Cal. Aug. 30, 2005) (rejecting late-filed declarations, and holding that, in order for an agency to meet the burden for asserting the deliberative process privilege, they agency's privilege log "must also contain supporting affidavits or other competent evidence to prove the applicability of asserted privileges"); *P&G Co. v. United States*, Case 1:08-cv-608, 2009 U.S. Dist. LEXIS 124049, at *23, (S.D. Ohio Dec. 31, 2009) ("ordinarily, the assertion of the deliberative process privilege calls for support by an affidavit from the agency head at the time the privilege is first asserted") (citing *Alpha I, L.P. ex rel. Sands v. United States*, 83 Fed. Cl. 279, 290 (2008) and *EEOC v. Tex. Hydraulics, Inc.*, 246 F.R.D. 548, 551-52 (E.D. Tenn. 2007)); *Confidential Informant 59-05071 v. United States*, 108 Fed. Cl. 121, 135-36 (2012) (finding that government's production of affidavit in support of privilege assertions after litigation commenced was "not proper").

a privilege log for any responsive documents it claimed to be privileged. *Id.* at 3, ¶ 7. Nonetheless, at the end of that period, and even up until the time it filed its opposition papers here – more than a year after this Court entered its Order denying the motion to quash – the Treasury (despite having withheld hundreds of documents on the basis of a purported deliberative process privilege) refused to explain in any instance what decision was supposedly being deliberated, when the decision was made, and whether each document purportedly protected by the deliberative process privilege actually related to the process by which policies are formulated. Nor did the Treasury include a declaration or affidavit of the responsible agency official supporting the privilege assertions, despite the fact that an assertion of deliberative process privilege requires: "(1) a formal claim of privilege by the 'head of the department' having control over the requested information; (2) assertion of the privilege based on actual personal consideration by that official; and (3) a detailed specification of the information for which the privilege is claimed, with an explanation why it properly falls within the scope of the privilege." *Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000). The purpose of this requirement is plain: "to ensure that the privileges are presented in a deliberate, considered, and reasonably specific manner." *Id.* (Internal citations omitted).[3]

[3] The Treasury's failure to include a timely declaration in support of its deliberative process privilege assertions also hampered Plaintiffs' ability to assess the Treasury's assertions and determine whether to accept or challenge those assertions. Plaintiffs respectfully suggest that if the Treasury's position (that an agency need articulate its basis for asserting the deliberative process privilege only after a motion to compel is filed) is accepted, it will serve to increase discovery litigation needlessly, while at the same time undermining the efficacy of meet-and-confer efforts between parties, as no litigant should be required to accept assertions of privilege blindly, and those litigants' attorneys would not be doing their job zealously if they did not file motions in just about every case where there is no detailed assertion of the privilege in the first instance, and no representation that a competent agency official will consider whether the agency desires to actually assert the privilege unless and until a motion to compel is filed.

The Treasury acknowledges that it failed to document its privilege assertions in the time allowed under the Stipulated Order – either when it invoked the privileges in March 2015 and when it provided its privilege log in June 2015. The Treasury points to *In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997), and argues that "a litigant is not required to formally invoke its privileges in advance of the motion to compel." DE 35 at 8 (internal citation omitted). But the partial quotation provided by the Treasury does not fairly capture the holding of the Court of Appeals in *In re Sealed Case*, where the question was whether the government has the obligation to invoke its claim of privilege at the time it first objects to a subpoena, and before any contested litigation over the subpoena had occurred. *See In re Sealed Case,* 121 F.3d at 741. The Court of Appeals found that documenting the privilege claim at the time of the motion to compel was permitted under *those* circumstances, but it did so precisely because "[t]he motion to compel was the first event which could have forced disclosure of the documents." *Id.* Here, however, contested litigation over the subpoena *ducus tecum* has been on-going for over three years, and this Court had long ago entered an Order that presumptively "forced disclosure of the documents." *Id*. Moreover, even after this Court's Order, the Treasury entered into a stipulation (reflected in an order of this Court) that required it to assert the privileges by March 2015, and then specifically allotted Treasury an additional *two months* to document any privilege claims it had through the production of a privilege log. In short, this is a case where three years of litigation over the subpoena *ducus tecum* culminated in an Order to respond to the subpoena and a Court-imposed deadline to assert privilege. Unlike in *In re Sealed Case*, therefore, this motion to compel was filed long after the Treasury had a host of opportunities (indeed, obligations) to assert and document its purported privilege claims; the Treasury long ago blew past its "first" opportunity to assert the privilege. Again, allowing it to do so now is not only fundamentally

unfair, but also deprived the Plaintiffs of the opportunity to reasonably assess the validity of the privilege before filing additional litigation, and it allowed the agency to assert the privilege in the absence of an assurance that a high-level agency official had considered the assertion in a reasonably specific and deliberate manner before withholding documents otherwise within the scope of this Court's production Order.

2. The Rasetti Declaration Is In Any Event Deficient

Assuming, *arguendo*, that the Treasury may rely on its late-filed declarations, it does nothing to satisfy the Treasury's burden here, and if anything, it further undermines the Treasury's already-deficient showing. Indeed, the Rasetti Declaration undermines the Treasury's position because it confirms Plaintiffs' contention (on the merits) that the Treasury was involved with *decisions* relating to Delphi pension issues. In fact, the Treasury has carved out an entire category of documents (the "PBGC Category") that it describes as "[d]eliberations and materials shared with or related to PBGC discussions," which "reflect[] Treasury and PBGC deliberation on issues related to GM and Delphi pension obligations." DE 35-1 ¶ 14. As Plaintiffs noted in their opening brief, the Treasury cannot claim the protections of a privilege that guards the government's decision-making process, while simultaneously claiming it was never involved in that process. DE 30 at 8-10. Neither the Treasury's opposition brief, nor the Rasetti Declaration, make any attempt to reconcile this discrepancy, or explain how the Treasury's decision-making process could be implicated by issues over which it had no "position" and made no "decisions."

For example, in one case, the Treasury redacted the majority of an email between two Auto Team members from March 28, 2009 (shortly after the creation of the Auto Task Force, but prior to the time that the PBGC abandoned its efforts advocating for GM assumption of the Delphi Salaried Plan). Privilege Log Item No. 25. The Privilege Log describes the email as

"internal communications regarding plan for GM, Delphi, and Chrysler bankruptcies, and possible PBGC involvement." *Id*. Similarly, the Treasury has redacted a portion of another email exchange between these two Auto Task Force members from April 15, 2009 (approximately one day before Mr. Feldman informed the PBGC that GM assumption of the Delphi Salaried Plan was no longer a viable possibility), which is described as "Internal communications regarding potential inheritance of pension/PBGC liability." Privilege Log Item No. 30. In order to justify withholding these documents as pre-decisional, the Treasury's obligation is to state, with sufficient specificity, "'what deliberative process is involved, and the role played by the documents at issue in the course of that process.'" *Dent v. Exec. Office for U.S. Attorneys*, 926 F. Supp. 2d 257, 268 (D.D.C. 2013) (Sullivan J.) (quoting *Heggestad v. U.S. Dep't of Justice*, 182 F. Supp. 2d 1, 7 (D.D.C. 2000)). The Treasury relies on the Rasetti Declaration to make this showing, which states, in conclusory terms, that documents in this category "are pre-decisional and constitute part of the deliberative process regarding Treasury facilitation of GM's restructuring, which included the need to stabilize the financial condition of Delphi, which was a key supplier to GM." DE 35-1 ¶ 14. The showing is plainly insufficient.

First, the Rasetti Declaration does not identify a decision or policy that these "deliberations" were supposed to further. A "facilitation" is neither a decision nor a policy; it is merely the act of assisting another party in their efforts. Indeed, the Treasury has assuredly chosen to word facilitation precisely because it avoids any connotations of decision-making. The Treasury has never explained how a process that involves no decision-making could possibly be pre-decisional. Second, the Treasury has not explained what role these particular documents played in its "facilitation." Third, the Treasury's assertions, such as they are, are too vague and conclusory to carry the Treasury's burden. *See Vaughn v. Rosen*, 523 F.2d 1136 (D.C. Cir.

1975). In *Vaughn*, the D.C. Circuit rejected agency assertions of deliberative process based on the insufficiency of the agency declarations upon which those assertions relied. There, the court held that Government's affidavits failed, both on the grounds that they were "conclusory," and on the basis that they "fail to carry the Government's burden of proof here because at no place do they define, explain, or limit the 'deliberative process' which the Government seeks to protect." *Id*. at 1146. The Rasetti Declaration suffers from the exact infirmities complained of in *Vaughn*, especially in light of the previously-cited assertions by Auto Team members that the Treasury played no role, and took no position, on PBGC or Delphi pension issues. If the Treasury made no decisions with respect to the PBGC/Delphi pension issues, these email exchanges cannot possibly reflect "decision-making." In short, not only can the deliberative process privilege not be asserted here because the Rasetti Declaration is insufficiently specific and detailed, the Declaration is fundamentally at war with the Treasury's over-arching position that it was uninvolved with the Delphi pension decisions.

These same problems persist elsewhere in the Rasetti Declaration. For example, another category of withheld documents is described as Treasury's "[i]nternal deliberations regarding financing, cash flows, or other restructuring considerations related to Delphi." DE 35-1 ¶ 15. According to Mr. Rasetti, this category includes documents "that may have been considered by members of the Auto Team as Treasury provided high-level, strategic advice to GM about Delphi." *Id*. This category would thus subsume emails between Treasury officials discussing the Treasury's "high-level strategic advice to GM" about, inter alia, GM's potential assumption of Delphi pension liabilities, and its need to do so in the face of the PBGC's liens and claims for the pension underfunding. Yet, the Treasury has not just disclaimed responsibility for the PBGC's decision-making; it has also stated that it took no position as to GM's decision about

whether to assume the Delphi Pension Plans. *See* DE 30 at 9 (quoting Ron Bloom testimony before Congress that the Treasury was uninvolved with GM's decision-making process regarding how GM would deal with the pension benefits of Delphi's hourly and salaried employees and that those decisions were left to GM). Nevertheless, these documents too have been withheld by the Treasury as part of some unspecified deliberative process.

Again, the Treasury has the burden to state the "deliberative process" implicated by these documents, and the "role played by the documents at issue in the course of that process." *Dent*, 926 F. Supp. 2d at 268. But, the Treasury does not claim that these communications preceded any actual Treasury decision-making, only "facilitation," taking it outside of the protections of the deliberative process privilege. *See* DE 35-1 ¶ 15 ("Treasury *facilitated* GM's consideration of several issues related to the Delphi restructuring, and Treasury personnel communicated internally regarding such *facilitation*. These documents are pre-decisional and constitute part of the deliberative process regarding Treasury support for GM's restructuring.") (emphasis added). Further, the Treasury fails to explain what role consideration of these Delphi pension issues played in its "facilitation" process, relying simply on "buzzwords" and conclusory assertions that "fail[] to identify the particular [agency] policy (or some step in the development thereof) that the documents relate to." *GE Co. v. Johnson*, No. 00-2855, 2006 U.S. Dist. LEXIS 64907, at *28-29, (D.D.C. Sept. 12, 2006)

The assertions of the Rasetti Declaration are further undermined by the fact that the declarant has not personally reviewed each of the documents in question in making these conclusory assertions about the role these documents played in the Treasury's vague facilitation process. Rather, the declaration's broad and conclusory assertions about these documents are

based on the declarant's "personal review" of only "a *sampling*[4] of the documents described on the Privilege Log," along with his review of the entries on the privilege log and the description and evaluation of the documents provided by the Treasury attorneys who prepared his declaration. DE 35-1 ¶ 8. There is no hard and fast requirement that an agency declarant review every document for which the agency wants to assert a privilege. However, a declaration that is not based on actual knowledge is of no probative value. Here, there is no showing that the declarant has reviewed more than a few of the documents in question, and there is certainly no attempt to place those documents within any concrete deliberative process. Instead, the Treasury seeks to withhold a "mass of information" of an "amorphous nature" (*Vaughn*, 523 F.2d at 1146) on the basis of a declaration that does not "come to grips with and define what it is out of this mass of documents that the Government considers the 'deliberative process,'" and indeed does not even purport to have actually taken into account the majority of the actual documents in question. *Id.* Because the Treasury has not met its burden of demonstrating that the hundreds of documents it has withheld on the deliberative process privilege played a role in Treasury decision-making, it should be ordered to produce those documents forthwith.

[4] The Rasetti Declaration is silent as to the size of the declarant's "sampling."

C. In Any Event, Because Plaintiffs Have Demonstrated That Their Need for the Withheld Documents Outweighs the Treasury's Purported Interest in Preventing Disclosure and That the Documents May Shed Light on Governmental Misconduct, the Deliberative Process Privilege Should Not Prevent The Documents' Disclosure

Assuming, *arguendo*, that the Treasury could justify an assertion of deliberative process privilege for any of the withheld documents, Plaintiffs have argued that under the governing five-factor balancing test, their need for the information in question is sufficient to overcome the Treasury's assertion of privilege for these documents. DE 30 at 12-16. Under this test, a court must consider: (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the "seriousness" of the litigation; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are voidable. *Cobell v. Norton*, 213 F.R.D. 1, 5 (D.D.C. 2003).

In response, the Treasury contests only the first factor – relevance. *See* DE 35 at 16-18. The simple answer to this challenge is that the Court already considered and rejected this argument in denying the Treasury's Motion to Quash. *U.S. Dep't of Treasury v. Pension Benefit Guar. Corp. v. Black ("D.C. Black")*, 301 F.R.D. 20, 28 (D.D.C. 2014) ("two judges in the underlying action evaluated the question of relevance for very similar materials, sought for very similar reasons, and found them relevant. . . . In the context of Rules 26 and 45, the above considerations establish a sufficient showing of relevance needed to permit the Respondents to obtain documents and other items and to depose a Treasury official in this case").

Moreover, the Court's previous relevance determination (as well as the similar determinations by Judges Tarnow and Majzoub) was entirely proper. Again, the issue underlying Plaintiffs' claim against the PBGC is whether "the PBGC violated [ERISA] and improperly terminated [Plaintiffs' pension] Plan because it was under political pressure from the

Treasury." DE 27 at 15. It is hard to imagine a more crucial form of evidence to this claim than documents involving Treasury's interactions with the PBGC and GM relating to the Delphi pension plans, and the Rasetti Declaration makes clear that the Treasury is withholding hundreds of such documents.

Such evidence could also shed light on government misconduct, which is generally sufficient to defeat an assertion of deliberative process protection. Indeed, the Treasury seems to concede this point, but argues that it nonetheless may rely on the deliberative process privilege because Plaintiffs, allegedly, have failed to provide "actual evidence that could raise a reasonable inference of wrongdoing on Treasury's part." DE 35 at 19 (internal citation and quotation omitted). It is important to note that, for purposes of overcoming the deliberative process privilege, government wrongdoing includes allegations of arbitrary government action and government activities for improper or purposes. *See, e.g.*, DE 30 at 16 (citing *Texaco P.R., Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995)). Here, Plaintiffs have presented ample evidence in this Court in litigating the Treasury's motion to quash showing the substantial prospect of the Treasury intervening to seek termination of the Delphi pension plans, intervention that is arbitrary and ultra vires in light of ERISA assigning to the PBGC and the courts the responsibility for terminating pension plans. *See* DE 19 at vi - vii (listing 27 exhibits relied upon in opposing the Treasury's Renewed Motion to Quash). One of the exhibits Plaintiffs previously supplied to the Court was the report of the Special Inspector General for the Troubled Asset Relief Program (SIGTARP) on the Treasury's Role in the Decision for GM to Provide Pension Payments to Delphi Employees. DE 13-2. The SIGTARP Report noted, inter alia, that:

(1) "The Auto Team specifically pressed GM to be less generous in relation to Delphi and pensions." *Id*. at 13.

(2) "GM officials told SIGTARP that GM needed PBGC to release liens on Delphi assets so Delphi could successfully emerge from bankruptcy. According to one GM official interviewed by SIGTARP, 'Ultimately to get Delphi out of bankruptcy, we needed the [pension] plans to be terminated.' PBGC officials told SIGTARP that PBGC advocated that GM go beyond the top-ups and take back (assume the full cost) of both Delphi's hourly and salaried pension plans." *Id*. at 13-14 (alternation in original).

(3) "Auto Team official Feldman negotiated with PBGC on behalf of GM, which contributed to an expectation that the presence of Treasury could potentially change the outcome. Mr. Rattner told SIGTARP that having the Auto Team work directly with PBGC was viewed as more efficient because it was Government to Government." *Id*. at 14.

(4) "The PBGC official told SIGTARP, 'As it relates to the possibility of GM sucking up the hourly plan . . . I knew what GM's position was. It didn't have to do anything with GM. . . . It would be Treasury folks because they had the right of refusal and could dictate what was going to happen.'" *Id*. at 15.

(5) "Auto Team leader Rattner told SIGTARP that GM came to the Auto Team because 'GM wanted to do something for the [Delphi] salaried retirees.' Mr. Rattner discussed it with then-GM CEO Henderson. Although Mr. Rattner could not remember the specifics of the conversation, he told SIGTARP that he thought there was nothing defensible from a commercial standpoint that could be done for the Delphi salaried retirees. Mr. Rattner told SIGTARP, 'We didn't' think there was anything defensible. We felt bad, but we didn't' think it was justifiable.'" *Id*. at 28-29 (alteration in original).

(6) "The Auto Team's role in the decision to top up the pensions of Delphi's UAW workers was not advisory. Consistent with the Auto Team's practice, as with any liability, it would have been Treasury's decision as the buyer to assume or reject the liability to top up the pensions of Delphi hourly UAW employees. The Auto Team made it clear to GM that they wanted an agreement with the UAW prior to bankruptcy and the Auto Team actively negotiated and made the overall deal." *Id*. at 38.

In sum, Plaintiffs have substantiated their assertions about the active and determinative role the Treasury played in the resolution of Delphi pension issues, a resolution to which – by law – the Treasury was to play no role. Accordingly, Plaintiffs "have produced [ample] evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 175 (2004).

D. The Treasury Has Waived the Ability to Assert the Deliberative Process Privilege With Regard to Any Deliberations in Which It Was Involved Concerning the Delphi Plan

In their motion to compel, Plaintiffs demonstrated how the Treasury has waived any purported deliberative process privilege by repeatedly discussing the manner in which the Treasury supposedly addressed the Plan's termination. As Plaintiffs noted, these discussions included repeatedly providing sworn testimony on precisely this topic, both to Congress and in judicial proceedings, without any invocation of the privilege. DE 30 at 11. For example, in the summer of 2009, Mr. Feldman discussed in great detail what he described as the Treasury's role in "'facilitating an agreement where the salaried plan would get terminated and taken over by PBGC and General Motors would assume liability for the hourly plans.'" *Id.* (citation omitted). This discussion included answering questions, without objection, regarding Treasury's internal thinking as to Delphi's pensions at critical times relevant to this lawsuit. *Id.* Having repeatedly allowed others to subject it to public questioning about precisely the subject matter of this lawsuit, the Treasury should not be heard now to invoke the deliberative process privilege as to precisely the same sort of questioning. *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (holding that deliberative process privilege can be waived when disputed materials are "used by the agency in its dealings with the public."). As this Court made clear in denying the Treasury's Renewed Motion to Quash, limiting the discovery available in this case to those statements would deny Plaintiffs "'the opportunity . . . to probe the veracity and contours of their statements'" *D.C. Black,* 301 F.R.D. at 30 (quoting *Alexander v. FBI*, 186 F.R.D. 113, 121 (D.D.C. 1998)).

The Treasury's only response to this argument is to cite boilerplate waiver principles addressing entirely different circumstances. There can be no doubt that subject matter waiver

principles apply less stringently in the deliberative process context than they do in the attorney-client privilege context.[5] *In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997). Thus, when it comes to the disclosure of a particular document to the public, that disclosure is only "for the document or information specifically released, and not for related materials." *Id.*

But this case involves far more than a claim that a subject matter waiver occurred due to the Treasury's disclosure of a similar document. The Treasury has repeatedly permitted substantial, unrestricted questioning of Mr. Feldman and other members of the Auto Task Force with regard to precisely the same subject matter for which Treasury is now attempting to invoke the deliberative process privilege. Finding that such a broad release of information to the public – a release that was clearly intentional and calculated – constitutes a waiver of the privilege creates no risk that officials will decline to voluntarily disclose some documents on a given subject matter under fear that doing so will require disclosure of more sensitive information. *See id.* The Treasury is not seeking to protect "more sensitive" information but rather it is seeking to prevent the release of information that could shed light on the credibility (or lack of credibility) of statements its officials have made with regard to precisely the same subject matter. Allowing disclosure of such information will simply make clear that, if governmental officials determine that it is in the public interest to provide unrestricted testimony about the process that purportedly led to particular results, they cannot circumvent "'the opportunity . . . to probe the veracity and contours of their statements '" *D.C. Black,* 301 F.R.D. at 30 (quoting *Alexander*, 186 F.R.D. at 121) by invoking the deliberative process privilege. Of course, the fact that

[5] Or more precisely, these waiver principles *did* apply in the attorney-client privilege context. Since *In re Sealed Case* was decided, the Federal Rules of Evidence have been amended to limit subject matter waivers in the attorney-client privilege context as well. *See* Fed. R. Evid. 502.

government officials were willing to provide this testimony in the first place may be better viewed as strong evidence that no deliberative process privilege ever applied. But if the Court concludes that the Treasury's internal discussions on all subjects related to General Motors presumptively fall within the deliberative process privilege, it should find that the Treasury's repeated discussion of these matters, under oath and without objection or restriction, waived whatever privilege that existed.

II. THE PRESIDENTIAL COMMUNICATIONS PRIVILEGE DOES NOT APPLY, OR IT CAN OTHERWISE BE OVERCOME

The Treasury, now supported by the affidavit of Deputy Counsel to the President, Jennifer M. O'Connor (the "O'Connor Declaration"), also claims that 63 documents are protected by the presidential communications privilege. As noted above, the affidavit is untimely and need not be considered by the Court. *See supra* at 4-7. However, as explained below, even considering the O'Connor Declaration, the Treasury has failed to meet its burden, as the Treasury rests its entire privilege determination on the status of Lawrence Summers, but fails to explain why documents not sent or received by him should be covered by the privilege, fails to identify which documents received by Mr. Summers were actually solicited by him, and fails to identify which relevant decisions the President made upon the advice of Mr. Summers.

In addition, Plaintiffs also show below that the Treasury fails to engage in a serious analysis of Plaintiffs' need for the documents even if the documents are covered by the privilege. The Treasury brushes off Plaintiffs' central theory of the case as "rank speculation," and irrelevant to "issues that are expected to be central to the trial." DE 35 at 24 (internal quotation marks omitted). However, the Treasury fails to distinguish the case law set forth in Plaintiffs' Motion to Compel, including *Sun Oil Co. v. United States*, 514 F.2d 1020 (Ct. Cl. 1975), and

Dellums v. Powell, 561 F.2d 242 (D.C. Cir. 1977), which are directly on point and fully support Plaintiffs' position.

For these reasons, as more fully explicated below, the Court should grant Plaintiffs' Motion to Compel with respect to those documents Treasury is withholding based on the presidential communications privilege.

A. The Privilege Is Inapplicable Because Few Documents Obviously Informed Presidential Decision-making

The presidential communications privilege most obviously covers documents reviewed by the President himself. There are only two documents that very apparently would have been seen by the President – Items 612 and 778 (HHR-DOT2-00004007 & 00079625, respectively), which refer to drafts of Presidential remarks. Plaintiffs concede that these two documents are covered by the privilege.

But the Treasury also seeks to withhold the remaining 61 documents because they are allegedly materials "'that were authored by or solicited and received by the President or senior presidential advisors and staff, including Lawrence H. Summers.'" DE 35 at 22 (quoting Ex. C thereto ¶ 8). Treasury's argument is flawed for a number of reasons. First, many of the documents do not even reference Mr. Summers or any other readily identifiable senior presidential advisor. The D.C. Circuit has emphasized that "the privilege should not extend to staff outside the White House in executive branch agencies." *In re Sealed Case*, 121 F.3d at 752. It has also stated that the privilege's reach "do[es] not extend to agency documents that are not submitted for Presidential consideration," for example, "documents . . . [that] undergo various stages of intermediate review before . . . recommendations are submitted for consideration by the President and his immediate White House advisors." *Judicial Watch, Inc. v. Dep't of Justice*,

365 F.3d 1108, 1112, 1115 (D.C. Cir. 2004). Therefore, documents that did not reach either the President or Mr. Summers cannot be covered by the privilege.

For example, there is an internal memorandum authored by Treasury – with no addressee identified – "regarding recommendation, timeline, and rationale for strategy to position GM for success." Item 94 (UST-BL-017608). Another withheld document is between Steven Rattner, Michael Tae and Secretary Geithner, which is described as an "[i]nformation memorandum discussing decisions relating to Treasury's potential ownership of GMAC." Item 634 (HHRDOT2-00011861). There is no indication that these or numerous other Treasury Department-authored documents made their way to the President or his immediate White House advisors, including Mr. Summers.[6] As a result, none of these documents are covered by the presidential communications privilege.

The vast majority of the other documents withheld under the privilege do appear to have been sent to Mr. Summers. Yet there is no assertion in the log or the O'Connor Declaration that Mr. Summers *solicited* the documents. This may seem like a trivial point, but the D.C. Circuit's rule is clear – communications must be either "authored or solicited and received," *In re Sealed Case*, 121 F.3d at 752, not just "authored or received," by an immediate presidential advisor or his staff. If everything a presidential advisor or his staff received was automatically covered by the privilege, vast swaths of government communications could be hidden from public view merely by regularly copying such people on emails. But in the same way that a client cannot make a document privileged merely by sending it to his or her lawyer, the President should not

[6] *See also* Items 72 (UST-BL-016291), 67 (UST-BL-016284), 1223 (HHR-DOT2-00190637), 766 (HHR-DOT2-00116410), 944 (HHR-DOT2-0009195), 638 (HHR-DOT2-00015271), 358 (UST-BL-044500), 779 (HHR-DOT2-00079626), 619 (HHR-DOT2-00005028); 275 (UST-BL-038439), 771 (HHR-DOT2-00078923), and 610 (HHR-DOT2-00004005).

be allowed to make secret matters of national importance merely by conjuring up a Task Force to deal with it and having everyone copy the Task Force chairs and their staff on emails. *See id*. ("The presidential communications privilege should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decision-making by the President."). This is particularly true in this electronic age when copying someone on an email costs nothing. The Treasury has had ample time to identify those documents specifically solicited by Mr. Summers and has not done so despite the clarity in the case law.

And it has been the Treasury's standard practice for the last six years to insist that the President made no decisions about the Delphi Plan. But now the Treasury wants to use the privilege to withhold, for example, "[c]ommunications regarding plan for Delphi bankruptcy." Item 84 (UST-BL—017597). Again, the Treasury cannot have it both ways, especially in the context of an issue that does not implicate a core, non-delegable presidential function. *Cf*. *In re Sealed Case*, 121 F.3d at 752 (focusing on the President's "exercise of his appointment and removal power, a quintessential and non-delegable Presidential power"); *Judicial Watch, Inc.*, 365 F.3d at 1116-17 (focusing on the President's non-delegable pardon powers).

The presidential communications privilege is a delicate balancing act: "The very reason that presidential communications deserve special protection, namely the President's unique powers and profound responsibilities, is simultaneously the very reason why securing as much public knowledge of presidential actions as is consistent with the needs of governing is of paramount importance." *In re Sealed Case*, 121 F.3d at 749. Here, where the President has forsaken all decision-making responsibility regarding the Delphi Plan, it is hard to imagine how the Treasury's withholding of documents pursuant to the privilege is "consistent with ensuring

that the confidentiality of the President's decisionmaking process is adequately protected." *Id*. at 752.

B. Plaintiffs Have Adequately Demonstrated that Their Needs Overcome the Qualified Privilege

The Treasury also fails to address the clear case law that supports Plaintiffs' argument that they have adequately met the needs test required to overcome the qualified privilege. Under the test noted in *Dairyland Power Cooperative v. United States*, 79 Fed. Cl. 659 (2007), Plaintiffs need only show that the documents sought are (1) "narrow and specific," (2) "highly relevant," (3) "admissible," and (4) "'not obtainable elsewhere.'" *Id*. at 667-68 (citation omitted). The Treasury, once more, only challenges the relevance prong; it contends, as noted earlier, that the documents are not relevant because Plaintiffs' theory of the case is "nothing but rank speculation." DE 35 at 24 (quotation marks omitted). But the Court has already declared that Plaintiffs' theory of the case is sufficiently substantial for purposes of discovery, and that is really all that Plaintiffs have to show.

This is exactly what the plaintiffs demonstrated in *Sun Oil Co. v. United States*, 514 F.2d 1020 (Ct. Cl. 1975), and the court, despite the "constitutional overtones" inherent in ordering disclosure of presidential communications, permitted the plaintiffs to develop facts to support their theory that "the President or someone on his White House staff turned their application down and did so for impermissible, extraneous, political, or other reasons." *Id*. at 1024, 1025. Similarly, in *Dellums v. Powell*, 561 F.2d 242 (D.C. Cir. 1977), the court permitted the plaintiffs to review President Nixon's "White House tapes" for evidence that might support the existence of a civil conspiracy of high-level government officers. *Id*. at 249 (internal quotation marks omitted). These two cases are directly on point and yet Treasury did not even acknowledge

them. Its failure to do so is telling, as the cases make clear that Plaintiffs have a right to develop facts to support their theory over and above the President's right to assert the privilege.

III. THE TREASURY HAS NOT CARRIED ITS BURDEN WITH REGARD TO THE CONTESTED DOCUMENTS THAT IT HAS WITHHELD ON ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT GROUNDS

The Treasury seeks to supplement the deficiencies in its privilege assertions with regard to the attorney-client privilege and work product protections by relying on the Rasetti Declaration. *See* DE 35 at 25-28 (citing Rasetti Declaration). As noted above, *see supra* 4-7, the Rasetti Declaration is untimely and should not be considered at this late date. Because the Treasury entirely relies on the Rasetti Declaration's post-hoc assertions to justify these contested withholdings, the Treasury has failed to meet its burden.

Even considering the untimely Rasetti Declaration, the Treasury has not met its burden to withhold these documents. For example, in their Motion to Compel, Plaintiffs noted that the Treasury seeks to withhold roughly seventeen documents that involve Matthew Feldman (the Treasury's chief negotiator with the PBGC) on the basis of the attorney-client privilege, without ever making the necessary showing to substantiate those withholdings. The Treasury now seeks to rely on the Rasetti Declaration to substantiate the Feldman attorney-client privilege assertions, quoting it for the proposition that "[n]o material involving Matthew A. Feldman, the principal restructuring attorney for the Auto Team, has been withheld except in cases where the 'content and context make clear that [Mr. Feldman] was providing legal advice.'" DE 35 at 25 (quoting Ex. A thereto ¶ 19). For the reasons noted above, *supra* 10-11, the assertion need not be credited, as it relies on the declaration of a declarant who has no personal knowledge of the substance of the declaration. *See* DE 35-1 ¶ 18 (noting that he has only reviewed a sample of the documents over which the Treasury asserts the attorney-client privilege). Similarly, the Treasury offers no response to Plaintiffs' observation that the Privilege Log's descriptions for 13 of the

challenged Feldman emails "are either conclusory in nature or suggest that no legal advice was, in fact, sought or received." DE 30 at 35-36 (comparing 13 privilege log descriptions involving Matthew Feldman, with numerous other privilege log entries that explicitly aver that the communication at issue is an "attorney-client communication").

Because the Treasury's justifications for asserting the attorney-client privilege and the work product protection are untimely and deficient, the Treasury should be ordered to produce the challenged documents.

Respectfully submitted,

August 31, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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