IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM IN OPPOSITION TO THE MOTION OF U.S. TREASURY TO QUASH

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PRELIMINARY STATEMENT

Respondents Dennis Black, Charles Cunningham, Kenneth Hollis, and the Delphi Salaried Retiree Association (referred to hereafter as "Plaintiffs"), plaintiffs in *Black, et al. v. Pension Benefit Guaranty Corporation*, Case No. 09-13616, (E.D. Mich. filed Sept. 14, 2009) (hereinafter "*Black*"), submit this memorandum of law in support of their opposition to the motion of the United States Department of the Treasury ("Treasury") to quash Plaintiffs' subpoena to Treasury (the "Subpoena"). Plaintiffs respectfully request that this Court deny the pending motion to quash and direct Treasury to comply with Plaintiffs' subpoena because (1) the documents Plaintiffs are seeking are highly relevant to Plaintiffs' claims in *Black*; (2) Treasury has failed to show that the requests are unreasonably duplicative or burdensome; and (3) to the extent that the Subpoena places an unreasonable burden on Treasury (which it does not), the proper remedy would be to modify the Subpoena, not to quash it.

STATEMENT OF FACTS

The Plaintiffs are current and former salaried employees of the Delphi Corporation ("Delphi"); all are participants in a retirement pension plan, previously sponsored by Delphi and before that General Motors Corporation ("GM"). In a pending lawsuit in Michigan, which is referred to as the *Black* litigation, the Plaintiffs challenge the August 2009 distress termination of their defined benefit pension plan, the Delphi Retirement Program for Salaried Employees (the "Salaried Plan" or the "Plan") by the Pension Benefit Guaranty Corporation ("PBGC"). That termination affected the livelihood of over 20,000 participants in the Plan, depriving them of over $500 million in promised benefits. Because a pension plan's termination can have such dire consequences for participants in terminated plans, the Employee Retirement Income Security Act ("ERISA") requires that a pension plan may only be terminated by the PBGC pursuant to a court

adjudication and decree, *see* 29 U.S.C. § 1342(c), upon a finding by the court that the plan need be terminated in order to "protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the [PBGC insurance] fund." *Id*. § 1342(c)(1).

Despite this requirement, the PBGC terminated the Plan without a hearing, pursuant to nothing more than an "agreement" between Defendant and the Plan's administrator, Delphi. Plaintiffs contend that this termination-by-agreement rendered the termination procedurally infirm, but that, more troubling still was that the termination was also substantively infirm, as it was done not for statutorily permissible reasons, but rather because doing so was seen as the most expedient method of accomplishing the policy goals of the Treasury Department, which exercised *de facto* control of, and influence over, PBGC through, *inter alia*, Treasury's position on the PBGC Board of Directors. Plaintiffs allege that the PBGC's actions in terminating the Salaried Plan were the result of political pressure, imposed by the Treasury Department and the related Auto Task Force, as part of their efforts to restructure the auto industry in general and General Motors Corporation ("GM") in particular.

"GM and Delphi have a complex history arising from their interdependent relationship. Delphi consisted of divisions and subsidiaries of GM until GM's divestiture of Delphi in 1999." *See* Ex. A, Declaration of Randall Pappal ¶ 5. From the time of the spin-off, through the time of the Salaried Plan's termination, Delphi was GM's largest component parts supplier. *Id*. "Consequently, if Delphi ever cease[d] shipping even a small fraction of production parts to GM, the GM plants relying on such shipments may run out of inventory of such parts and have to shut down within a matter of days." *Id*. ¶ 7. "In short, a prolonged cessation in the supply of parts from Delphi to GM would have [had] a devastating effect on GM, its ability to reorganize, and

the communities that depend on employment by GM and its community of parts suppliers." *Id.* ¶ 11.

In 2005 Delphi entered bankruptcy. While Delphi was in bankruptcy, GM spent "billions of dollars and incur[red] billions of dollars of additional liabilities primarily to protect its supply base by supporting Delphi." Ex. B, Declaration of Rick Westenberg ¶ 6. One form of additional liability incurred was pension liability. In September 2008, GM agreed to assume over $1 billion in Delphi pension liabilities associated with Delphi's pension plan for its hourly employees. Ex. C. As a result of this pension transfer, the PBGC released over $1 billion worth of liens it had asserted on Delphi assets. *Id.* Nonetheless, so long as Delphi's pension plans were in danger, Delphi assets (*i.e.*, the plants upon which GM depended upon to provide it with parts) were subject to PBGC liens. These PBGC liens were a major threat to GM's supply, and resolution of Delphi's pension obligations, and the associated PBGC liens, was one of the last major hurdles to resolving Delphi's bankruptcy. Ex. D at 9. As late as March 20, 2009, Delphi believed that the "likely" resolution of these issues would be a consensual re-assumption by GM, eliminating all PBGC liens. *Id.*

At this time, Treasury had, by virtue of its loan covenants with GM, become the final arbiter in terms of deciding whether GM could continue to offer financial support to Delphi. Treasury informed both Delphi and GM that there would be no additional financial support to Delphi, in any form, absent a "global solution." *See* Ex. E, Feldman Dep. at 135:4-8 ("I think our position has always been the same, which is if Delphi wanted funding from General Motors, there needed to be a signed deal that could lead to emergence from Chapter 11."). In connection with this desire to reach a global solution, the Treasury took the lead in vetting offers from

Delphi, the DIP Lenders, Platinum Equity, and Federal Mogul in deciding what form a new or reorganized Delphi would ultimately take. *See generally*, Ex. F, Declaration of John D. Sheehan.

There could of course be no global solution that would secure GM's supply while Delphi assets were subject to the threat of PBGC liens, *see* Ex. B ¶ 15 ("neither GM nor Parnassus (nor presumably any other potential purchaser) is willing to purchase the assets (or shares in the non-debtor affiliates that own the assets) while they are subject to the threat of the PBGC liens."); *see also* Ex. E at 204:24-205:7 ("If I understand, if there could not have been a consensual resolution with the PBGC, and it would have taken 3 months to terminate the pension plan, would have had -- you would have had to weigh that delay in Delphi emergence against whatever economic benefits you had against -- in not taking the liability."). To that end, the Auto Task Force and the PBGC had multiple meetings, beginning as early as March 2009.

One Treasury official, Matthew Feldman (one of the three Treasury custodians covered by the Subpoena at issue), has admitted that he "acted as sort of facilitator and intermediary between the PBGC and General Motors regarding Delphi's pensions." Ex. E at 155:23-25.[1] Mr. Feldman stated that, prior to ever discussing the Delphi pension issue with officials at GM, Treasury entered into discussions with the PBGC that "centered around trying to reach an agreement where the salaried Delphi plans would be terminated and General Motors would assume the hourly pension plans." *Id*. at 156:14-18; 158:24-159:04. Eventually the PBGC negotiated the Salaried Plan's termination with Mr. Feldman and his colleague Harry Wilson (also one of the three Treasury custodians specified in the Subpoena). *See* Ex. G (in which GM

[1] Plaintiffs have received information through informal interviews indicating that Mr. Feldman's role was far greater than that, although that information has yet to be confirmed through a production of Treasury's documents.

inquires of Treasury regarding the settlement it has reached with the PBGC, and asking what, from Treasury's perspective, is required of GM).

THE MICHIGAN COURT'S DISCOVERY ORDER

Plaintiffs' challenge to the Plan's termination is at bottom a substantive one: Plaintiffs allege that the termination was not justified under the statutory standards set forth in ERISA but was instead done for extraneous reasons of expediency, by an agency that was placed under extreme pressure by officials in the Treasury Department. More specifically, Plaintiffs argue that termination of the Plan did not satisfy the termination criteria set forth in 29 U.S.C. § 1342 under either subsection (a), which establishes the PBGC's authority to institute a plan termination, or subsection (c), which lays out the three criteria a court must look to in deciding whether a plan need be terminated. This argument is detailed more extensively in other places, most notably Plaintiffs' brief in opposition to the PBGC's motion for summary judgment, and also Plaintiffs' supplemental brief in support of their motion for a preliminary injunction. See Docket Nos. 47 & 94.[2]

Plaintiffs' lawsuit also includes several procedural challenges to termination as well. In Count One, Plaintiffs allege that a pension plan can be terminated under the applicable ERISA provision, 29 U.S.C. § 1342(c), only upon adjudication by a United States district court. Count Two avers that if the fourth sentence of § 1342(c) does allow for termination by agreement, then the plan administrator, who is a plan fiduciary by definition, may only agree to such a termination if the plan administrator acts consistent with the duties of prudence and loyalty it owes to Plan participants prescribed by 29 U.S.C. § 1104. Because the facts as alleged by Plaintiffs do not support a finding that the plan administrator's agreement was in accordance

[2] Docket references are to the Docket in *Black*.

with § 1104, the termination was improper. In Count Three, Plaintiffs allege that, if a pension plan may actually be terminated under ERISA pursuant to nothing more than an agreement between the PBGC and a conflicted plan administrator acting without regard to the interests of plan participants, with no hearing or other procedural protections, § 1342(c) is unconstitutional because it allows for a taking of property without due process of law. All of these arguments are fleshed out in greater detail in Plaintiffs' brief in opposition to the PBGC's motion to dismiss. *See* Docket No. 36.

The PBGC sought to dispose of these claims through a motion to dismiss Counts One through Three (the "Motion to Dismiss"), and a motion for summary judgment on Count Four (the "Summary Judgment Motion"). On September 24, 2010, the Court held a hearing on the PBGC's two dispositive motions. By Order dated September 27, 2010, both motions were denied, without prejudice. Docket No. 147. All four Counts survived because the Court found that discovery was necessary for their resolution.

Nonetheless, the PBGC resisted any discovery for approximately one year. Plaintiffs accordingly moved to compel, which was effectively granted by order of the district court on September 1, 2011. Ex. H. In its September 2011 order, Judge Tarnow entered a Scheduling Order defining the scope and timing to govern discovery in *Black*. The court stated:

> In terms of addressing the scope of discovery for purposes of entering a scheduling order—The Court's initial focus, keeping the above case law in mind, is on Count 4 and whether termination of the Salaried Plan would have been appropriate in July 2009 if, as Plaintiffs contend, Defendants were required under 29 U.S.C. § 1342(c) to file before this court "for a decree adjudicating that the plan must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund."

Ex. H at 3-4. In other words, the Michigan court determined that the most efficient way to proceed was to permit Plaintiffs to take discovery on their substantive claim alleging that their

Plan was terminated for reasons other than the ones permitted by ERISA, and then to answer any remaining legal questions once the Court had permitted development of the facts. Obviously, if discovery bolsters the claim that the Plan was terminated for reasons outside of those permitted by ERISA, or if it shows that alternatives other than termination were available in July 2009 (both subjects of the Subpoena), then the Michigan court will be forced to grapple with the statutory consequences. By contrast, if discovery does not substantiate the claim, the Michigan court may "avoid constitutional and statutory questions raised within the Second Amended Complaint in an exercise of judicial restraint" by simply determining that, even if Plaintiffs' legal positions are correct, their claims in the end cannot be proven, making it "irrelevant whether ERISA and the Due Process Clause require that a hearing be held" prior to the PBGC's termination of a pension plan. *Id*.

Even after this order, however, the PBGC continues to resist discovery. In the six months since the Michigan court's order, the PBGC has refused to comply with any discovery requests, and has produced only three pages in addition to those it initially included in the administrative record. *See* Ex. I to Mot. to Quash of U.S. Dep't of Treasury, at 1-4. Plaintiffs were accordingly forced to file an additional motion to compel (Ex. I), which remains pending and will be argued tomorrow before a magistrate judge in the Eastern District of Michigan. Other discovery from Third Parties has been more fruitful – Delphi and several other entities are complying in good faith with Plaintiffs' document subpoenas – but to date the government entities (Treasury and PBGC) have refused to provide any discovery beyond that which they have chosen to place in the public record. The Subpoena challenged here by Treasury is designed precisely to remedy this deficiency.

ARGUMENT

I. THE DOCUMENTS REQUESTED BY PLAINTIFFS IN THE SUBPOENA ARE RELEVANT

"It has long been recognized that '[u]nder the broad sweep of Rule 26(b)(1) of the Federal Rules of Civil Procedure, a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved.'" *United States v. All Assets Held at Bank Julius Baer & Co.*, 276 F.R.D. 396, 398 (D.D.C. 2011) (quoting *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1348-49 (D.C. Cir. 1984)). "The burden of proving that a subpoena is oppressive is on the party moving to quash." *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 403 (D.C. Cir. 1984) (citation omitted). "'The burden is particularly heavy to support a "motion to quash as contrasted to some more limited protection."' *Id.* at 404 (quoting *Westinghouse Elec. Corp. v. Burlington*, 351 F.2d 762, 766 (D.C. Cir. 1965)). *See also Heat & Control, Inc. v. Hester Indus., Inc.*, 785 F.2d 1017, 1025 (Fed. Cir. 1986) ("The burden of proving that a subpoena is oppressive is on the party moving to quash and is a heavy one."). This burden is not diminished just because the subpoena is directed to the government as a non-party, and in fact "the paramount interests of the Government in having justice done between litigants in the Federal courts militates in favor of requiring a great effort on its part to produce any documents relevant to a fair termination of this litigation." *Freeman v. Seligson*, 405 F.2d 1326, 1337-38 (D.C. Cir. 1968) (internal quotation omitted).

The Michigan Court has stated that it will seek to resolve the case by reviewing dispositive motions as to whether, under Count 4, termination of the Salaried Plan would have been appropriate in July 2009 if, as Plaintiffs contend, Defendants were required under 29 U.S.C. § 1342(c) to file before this court "for a decree adjudicating that the plan must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the

financial condition of the plan or any unreasonable increase in the liability of the fund." Ex. H at 7. Put another way, was termination of the Salaried Plan accomplished in compliance with the standards set forth in ERISA because PBGC properly determined it was necessary (a) to protect the interests of the participants; (b) to avoid any unreasonable deterioration of the financial condition of the plan; or (c) to avoid any unreasonable increase in the liability of the fund?

Obviously, the most damning finding on this score would be for Plaintiffs to show that PBGC was completely oblivious to statutory considerations but was instead guided in its decision to terminate the Plan by the desire of Treasury Department officials to save GM and Delphi by any means possible. Similarly, any evidence that there were viable alternatives to plan termination in July 2009 (*e.g.*, the potential that an entity other than GM might sponsor the Salaried Plan) would also be highly relevant to the statutory inquiry. Documents within the Treasury's control are directly relevant to these questions. The PBGC has summed up the Treasury's involvement in the case in an April 17, 2009 memo:

> According to Treasury, the parties are in discussions, and negotiations are expected to commence on April 17, 2009. Treasury's interest in the negotiations is GM's role in the resolution, as GM requires ongoing support in the form of existing and prospective loans from Treasury. Because Delphi is still GM's largest supplier, Treasury is trying to weigh the benefits of additional GM investments in Delphi against the risks if the supply of parts from Delphi is interrupted.
>
> One element of the Delphi negotiations is a pension solution. As described earlier, Delphi contends it cannot emerge with the Plans ongoing. Delphi has proposed that GM assume the [Salaried Plan] and the remainder of the [Hourly Plan], GM contends it cannot afford the Plans, and that covenants in the Treasury loan agreement prevent GM from taking on new pension liabilities.
>
> Based on discussions with Treasury, GM assumption of the [Hourly Plan] is still a possibility. If a Treasury resolution is reached that includes assumption of either of the Plans, PBGC can hold the notice of determination ("NOD"), if it has not yet been issued, or rescind the NOD, pending GM assumption.

See Ex. J at 5 (AR000033) (Apr. 17, 2009 PBGC Memorandum). As noted above, the PBGC negotiated the Salaried Plan's termination directly with the Treasury. Ex. G.

Plaintiffs' Subpoena focuses on the three individuals at the Treasury most likely to have been involved in Delphi matters, and asks the Treasury to produce all documents and things (including e-mails or other correspondence, spreadsheets, reports, analyses, snapshots, funding estimates, proposals or offers) received, produced or reviewed by those individuals related to (1) Delphi; (2) the Delphi Pension Plans; or (3) the release and discharge by the Pension Benefit Guaranty Corporation of liens and claims relating to the Delphi Pension Plans. The Treasury concedes that (1) it wanted to facilitate the termination of the Salaried Plan[3]; (2) that it reviewed GM's business plan for its underlying financials to determine the appropriate level of GM support to Delphi's plans[4]; and (3) that GM could not consent to any financial resolution of Delphi's pension issues without Treasury's consent.[5] Under these facts, the Michigan Court will not be able to effectively judge whether GM's assumption of the Salaried Plan was or was not a viable option without reviewing the Treasury's documents related to Delphi, the Delphi Pensions, and the PBGC's liens. Similarly, because Treasury was involved in vetting all the bids from prospective purchasers of Delphi assets, Treasury is also in the unique position of being the repository for information related to ascertaining whether some other entity might have been in a position to assume the Salaried Plan's liability.

The Treasury argues that "any benefit that plaintiffs will derive from the subpoena is likely to be limited." Mot. to Quash of U.S. Dep't of Treasury ("Treas. Mot.") at 14 (Feb. 17,

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[3] Ex. E at 155:23-25.

[4] *Id*. at 183:12 -185:05.

[5] *Id*. at 29:10-15.

2012). Treasury chiefly relies on the GAO's finding that "'PBGC independently decided to terminate the Delphi plans'" and that the role that Treasury played in the termination of the plans was 'an advisory role only.'" *Id*. at 15 (citation omitted). The Treasury's reliance on the GAO reports "findings" to demonstrate that the Treasury's documents would be of limited value is misplaced, given that none of the documents that Plaintiffs are seeking was ever reviewed by the GAO. Indeed, the GAO's findings as to the Treasury's involvement were based on the assertions of GM and Treasury officials. *See* Ex. A to Treas. Mot. at 10 (" . . .Treasury played an advisory role only, according to GM and Treasury officials."). The only Treasury documents reviewed by GAO in its audit were "publicly available documents," including those filed in the *Black* litigation. *Id*. at 2. In fact, many of the GAO's findings seem to be taken directly from assertions made in those filings. *See, e.g*. *id*. at 15-16 ("In a legal brief, Treasury has asserted that the department did not dictate what should be done with the Delphi pensions and that Treasury agreed with GM's decisions."). The Treasury should not be able to hide behind a report prepared purely from the public record and Treasury's own unsupported assertions as a basis for preventing discovery of *heretofore non-public* materials. And yet that is precisely what Treasury proposes to do.

II. TREASURY'S OBJECTIONS ARE UNSUBSTANTIATED

A. The Treasury Must Overcome a Heavy Burden to Quash the Subpoena

As noted above, the Treasury has a heavy burden to overcome in showing that the Subpoena is oppressive. *Northrop Corp. v. McDonnell Douglas Corp*., 751 F.2d 395, 404 (D.C. Cir. 1984) (citation omitted). Moreover, "'[w]hat constitutes unreasonableness or oppression is, of course, a matter to be decided in the light of all the circumstances of the case . . .'" *Id*. at 403 (quoting 5A Moore's Federal Practice ¶ 40.05[2] n.44). Fed. R. Civ. P. 26(b)(2)(C)(iii) notes five factors that must be weighed against any claim of burden: (1) the needs of the case; (2) the

amount in controversy; (3) the parties' resources; (4) the importance of the issues at stake in the action; (5) and the importance of the discovery in resolving the action. Each factor is discussed below.

1. **The needs of the case**

As described above, the Michigan Court has determined that it needs additional discovery related to the question of whether the PBGC could have obtained a court decree adjudicating that the Salaried Plan needed to be terminated pursuant to the statutory termination criteria of 29 U.S.C. § 1342(c) for the case to proceed. Because the Treasury was involved in all aspects of Delphi's restructuring process at the time in question, including the negotiations pursuant to which the terms of the Salaried Plan's termination were discussed and finalized, discovery from it is necessary to the resolution of the case.

2. **The amount in controversy**

The PBGC estimates that Plan participants have lost approximately $539 million in benefits as a result of the Plan's termination. *See* Ex. J at 6 (AR000034). Such an alarming loss militates heavily in allowing discovery to move forward.

3. **The parties' resources**

Plaintiffs are retirees whose pensions have been reduced by the termination of the Plan. The Treasury Department has an operating budget for 2012 of approximately $14 billion and employs more than 100,000 worldwide. This factor obviously tilts strongly in Plaintiffs' favor.

4. **The importance of the issues at stake in the action**

It goes without saying that the issues at stake in this litigation are of great importance to the more than 20,000 participants in the Salaried Plan. However, the issues at stake arguably involve a much wider audience, as they go to the question of whether participants in ERISA plans have a right to a hearing before the government may terminate their pension plan, and

whether participants have a right to know whether impermissible factors were taken into account in the termination of the plan. The fact that these issues are of wide importance is underscored by the fact that both the General Accounting Office and the Office of the Special Inspector General for the Troubled Asset Relief Program ("SIGTARP") have conducted investigations into these issues (the SIGTARP investigation is ongoing), as well as the fact that Congress has, as the Treasury noted, held hearings on the issue.

5. **The importance of discovery in resolving the issues**

As noted above, the Michigan Court has determined that it needs additional discovery related to the question of whether the PBGC could have obtained a court decree adjudicating that the Salaried Plan needed to be terminated pursuant to the statutory termination criteria of 29 U.S.C. § 1342(c) for the case to proceed. Because the Treasury was involved in all aspects of Delphi's restructuring process at the time in question, including the negotiations pursuant to which the terms of the Salaried Plan's termination were discussed and finalized, discovery from it is necessary to the resolution of the case.

B. **The Treasury Has Not Met Its Burden Showing That the Subpoena Seeks Unreasonably Cumulative or Duplicative Information**

The Treasury argues that the information that Plaintiffs seek from it is unreasonably cumulative of information Plaintiffs have already obtained from the PBGC, and so, pursuant to Fed. R. Civ. P. 26(b)(2)(C), the motion should be quashed. In support of this argument, the Treasury points to the sheer volume of information that the PBGC has produced, and *presumes* on the basis of this number that the Subpoena must be duplicative. The presumption is in error.

The Treasury first argues that the Subpoena presumably seeks information duplicative of that contained in the PBGC's "administrative record of more than 5,800 pages 'containing all records relating to the termination decision.'" Treas. Mot. at 12 (citation omitted). Not only

does Treasury overestimate the size of the PBGC's administrative record[6], it completely ignores the content of that record. In the first place, the PBGC did not include any correspondence exchanged between PBGC and the United States Treasury Department in what it has chosen to label as the "record." The bulk of the page count 4,177 pages (83%) consists of four bankruptcy court filings of no clear relevance to the PBGC's decision-making, and 2,713 pages (over half the administrative record) come from *a single court filing from December 2007*. *See* Ex. K (Administrative Record Table of Contents). Amazingly, the PBGC's administrative record does not actually purport to justify its decision to terminate the plan in August 2009. To the contrary, the PBGC has argued that its termination decision was actually made in April 2009, and thus it need not include any record of the negotiations that took place between the PBGC and Treasury in the post-April period.[7] Moreover, the PBGC has argued that the administrative record need only include information that supports its decision (rather than all information it had before it while making that decision), and thus has (by design) excluded any information between itself and Treasury that does not support its decision. Thus, even communications between the Treasury and PBGC that took place prior to April 2009 were excluded from the administrative record – a point that the district court has consistently referenced as a factor in its decision to order factual development prior to resolution of Plaintiffs' legal claims.[8]

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[6] In point of fact, the administrative record produced by the PBGC consists of 5,037 pages, *see* Ex. K (Oct. 16, 2009 cover letter from E. William Fitzgerald to A. Shelley).

[7] The Michigan Court rejected this argument, noting that even if some decision had been made on April 21, 2009, the termination decision at issue in Plaintiffs' Complaint was made in July 2009. *See* Ex. L at 62:09-63:13.

[8] While still a defendant in the *Black* litigation, Treasury filed a brief in opposition to Plaintiffs' motion to compel discovery from the PBGC (even though the motion sought no relief from Treasury), in which Treasury argued in support of exactly this point. *See* Docket No. 188 at 6 (arguing that "the administrative record that PBGC has filed should 'stop[] around April 21, 2009").

The Treasury also notes that PBGC has produced "more than 5,000 additional pages 'concerning the Delphi Salaried Plan,'" (Treas. Mot. at 12-13) and again, by reference to sheer volume alone, *presumes* that the information must be cumulative of the information requested in Plaintiffs' Subpoena. Again, this presumption is in error, as the FOIA responses are, like the PBGC's administrative record, devoid of substantive communications between PBGC and Treasury.[9] Acknowledging that its objection is based on its unsupported speculation that the PBGC has *presumably* already produced duplicative documents, the Treasury also argues that "[e]ven assuming, *arguendo*, that [such communications have not already been produced], plaintiffs can obtain those communications as easily from PBGC as they can from Treasury." *Id.* at 13. This argument is unavailing. First, while it is absolutely true that the document requests to the PBGC seek communications between it and Treasury, Plaintiffs have been unable to obtain such documents from PBGC, despite diligent attempts to do so. *See, e.g.*, Ex. I (Pls.' Second Motion to Compel to the PBGC). Moreover, there is no guarantee that the PBGC has maintained all those communications (no representations have been made by the PBGC about the completeness of its recordkeeping as to its communications with Treasury), and with each passing day, the likelihood that either PBGC or Treasury will maintain these communications in an easily accessible format becomes less and less likely. Indeed, Treasury already suggests that "some" records have been archived, requiring "time-consuming individual retrieval." Treas. Mot. Ex. K Mot. ¶ 6(a). Because Plaintiffs "cannot obtain [the requested information]

[9] To give a sense of the actual information contained within the FOIA responses, approximately 1,450 pages are copies of PBGC internal manuals, 1,213 pages are "Plan Payables Proof, Delphi Holdings Reports, Trial Balances, Purchase and Sales Reports, and Plan Valuation Summaries from July 2009 though [sic] May 2010," and 420 pages are actuarial documents received from Watson Wyatt. *See* Ex. M (Cover letters from PBGC FOIA officer describing FOIA disclosures). A great many are also redacted email chains, a small minority of which may have copied counsel for the Treasury (among others). *See, e.g*, Ex. N (April 9, 2010 FOIA disclosure).

elsewhere despite diligent attempts to do so through discovery in the underlying action," the motion to quash should be denied. *Plant Genetic Sys., N.V. v. Northrup King Co.*, 6 F. Supp. 2d 859, 862 (E.D. Mo. 1998).

One final point -- the Treasury argues that the subpoena is duplicative because "any communications between Treasury and PBGC that deal with the Delphi Salaried Plan are presumably included among the more than 10,000 pages that plaintiffs have already obtained from PBGC." Treas. Mot. at 13. As noted above, this presumption is in error. But moreover, it only addresses a subset of information sought from Treasury: communications between Treasury and PBGC. Thus, the Treasury does not object to producing the other responsive documents within its possession (*e.g.*, responsive internal documents or responsive communications with parties other than the PBGC) on this ground.

C. The Treasury Has Not Carried Its Burden of Demonstrating That the Subpoena Is Unreasonably Burdensome

The Treasury has failed to provide sufficient information necessary to judge the burden that would be imposed on the Treasury. In order to properly assess the burden, the Treasury must describe the precise nature of its burden. *See Linder v. Calero-Portocarrero*, 183 F.R.D. 314, 320 (D.D.C. 1998), *aff'd*, 251 F.3d 178 (D.C. Cir. 2001) (noting that the burden was sufficiently described where the movant noted a description of the amount of man-hours that would be required, the cost of the request, the staff available to process the request, any competing obligations on the staff, and the effect that processing the request would have on the agency). The Treasury has failed to provide this critical information.

In an effort to reduce the burden on the Treasury, Plaintiffs specifically limited their subpoena to the three individuals most likely to have discoverable information. By limiting the request to three custodians, the amount of time to search for responsive emails should be *de-*

minimis, in that the search will only involve three email custodians. The Treasury does not actually dispute this, but does state that "[s]ome records" have been archived, and that such archived records "would require time-consuming individual retrieval by a member of Treasury's technology team who must perform this process using the one available computer that is equipped with the retrieval software." Treas. Mot. Ex. K ¶ 6(a). This vague assertion cannot sustain Treasury's claim of burden. In the first place, the declarant's failure to quantify the number of emails that have been archived, or the amount of man hours that would be required to retrieve such e-mails, makes it impossible to estimate the actual burden of this retrieval process. Similarly, the Treasury fails to explain why the retrieval software necessary for this process could not be placed on an additional computer. Finally, whatever burden this search would entail has to be balanced against the benefit of the discovery to the needs of the case, which, as described above, is high.

There are similar problems with the Treasury's assertions regarding the electronic documents in Treasury's possession. Treasury's declarant notes that there are over 15,000 electronic Auto Team related documents on its computer system, and states that "[o]nce identified, these documents would have to be searched one by one for those related to any of plaintiffs' broad requests." *Id*. Again, the Treasury has failed to precisely identify the burden such a request would place on Treasury by stating how many man-hours would be required, the cost involved, the staff available to process the request, any competing obligations on the staff, and the effect that processing the request would have on the agency. Nor has Treasury offered any explanation as to why the document management system it employs could not be utilized to narrow the universe of responsive documents. Assuming, *arguendo*, that a universe of 15,000 electronic documents would entail a high burden on Treasury to review (which Plaintiffs

dispute), Treasury could utilize Boolean search terms to cull down the 15,000 electronic Auto Team documents to those having to do with the terms identified in the Subpoena. Regarding the universe of hard copy documents in the Auto Team's possession, the Treasury has failed to explain why those documents have not been kept in some organized fashion amendable to search. Surely the Treasury is not contending that every hard copy document in the Auto Team's possession was conceivably related to the Delphi matters, or that the Auto Team failed to employ any sort of document management filing in its storage of those hard copy documents. Finally, once Treasury has narrowed the universe of documents to those likely to contain responsive documents, whatever burden this entails must be balanced against the important benefits Treasury's responsive documents would yield to the discovery in *Black*.

The Treasury also argues that its motion to quash is justified because "[m]any of the responsive documents are likely to be covered by the deliberative process privilege, and many of the communications to and from Mr. Feldman and much of his work product is likely to be covered by the attorney-client privilege." Treas. Mot. at 14. Where a government agency seeks to quash a subpoena on grounds of oppression, and that "claim of oppressiveness is in large part based on its assertion that many of the documents sought by the subpoena will be privileged, and therefore not subject to compelled production, it must adequately demonstrate that applicable privileges would in fact protect these documents." *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 403 (D.C. Cir. 1984). The Treasury has failed to meet this burden.

As a threshold matter, the Treasury has failed to follow the procedural requirements necessary to invoke the deliberative process privilege. Assertion of the 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 declaration offered by the Treasury fails all three requirements. First, the declaration offered by the Treasury does not establish that the declarant, Ms. Desai, is the "head of the department" in question (the Office of Financial Stability). Rather, the declarant identifies herself as "an Attorney Advisor" within that office. While the D.C. Circuit does not require "an affidavit from the very pinnacle of agency authority[,]" it does require that the "head of the appropriate regional division" personally consider the documents in question to "achieve the necessary deliberateness in assertion of the deliberative process . . . privilege[]." *Id.* at 1135-36. Moreover, Ms. Desai does not claim to have personally reviewed any of the responsive documents in question; rather she asserts that "[m]any of the documents covered by plaintiffs' requests *may* be communications between Treasury and PBGC officials, which *likely* will be protected by the deliberative process privilege." Treas. Mot. Ex. K ¶ 8 (emphasis added). Again, "[t]he procedural requirements are designed to 'ensure that the privileges are presented in a deliberate, considered, and reasonably specific manner.'" *Landry*, 204 F.3d at 1135. Ms. Desai's conclusory supposition as to why some responsive documents would "likely" qualify under the deliberative process protection falls far short of the "detailed specification" required by the protection. *Id.* In short, the Treasury has a heavy burden to overcome in justifying its motion to quash, and the declaration it has offered is plainly insufficient to support its claim that this privilege will apply.[10]

[10] The Treasury's vague assertion that "many of the communications to and from Mr. Feldman and much of his work product is likely to be covered by the attorney-client privilege[,]" *see* Treas. Mot. at 14, fails for many of the same reasons. Again, "[t]he party claiming privilege has the burden to establish its existence." *Friedman v. Bache Halsey*, 738 F.2d 1336, 1342 (D.C. Cir. 1984) (citing *Black v. Sheraton Corp. of Am.*, 564 F.2d 531, 547 (D.C. Cir. 1977)). No privilege log has been produced, nor has Treasury

(footnote continued on next page)

Moreover, leaving aside the procedural shortcomings noted above, Treasury's own representations as to the nature of its interactions with the PBGC on these matters preclude it from asserting the deliberative process privilege. In order for an inter-agency communication to fall within the deliberative process privilege, it must reflect "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decision and policies are formulated." *Dep't of Interior v. Klamath Water Users Ass'n*, 532 U.S. 1, 8 (2001) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)). However, the Treasury asserts in its motion that (1) "'neither the Treasury Department nor the Auto Task Force had a role in authorizing, approving or consenting to the termination of the Delphi Salaried Plan'; that the PBGC 'made the decision to initiate termination of the Delphi Pension Plans'; and that Treasury 'played no role in that decision.'" Treas. Mot. at 15. And Mr. Feldman testified under oath that, in connection with Delphi matters, "that the Treasury and the Auto Team should act in a commercially responsible manner," Ex. E at 19:21-22, to ensure the "sanctity of supply, speed of emergence, minimization of costs, [and] no funding until there was a clear path to emergence. Those were our principles and goals." *Id.* at 48:24 – 49:03. Given these admissions, there is no plausible way that any communications concerning Delphi between the PBGC and Treasury could qualify as part of pre-decisional deliberative communications. Where a communication comes from an entity "pressing its own view of its own interest in its communications with the [agency]" that communication falls outside the deliberative process privilege. *Klamath*, 532 U.S. at 14. Again, according to both the PBGC and Treasury, the two were engaged in negotiations over the amount of contributions GM would be required to

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offered any concrete reason to suspect that the responsive documents might be covered by the attorney work product privilege.

contribute to resolve the Delphi pension issues, in order to secure the release by the PBGC of its liens on Delphi assets and other claims against GM. Thus, taking the agencies at their word, in relating to each other, the Treasury and PBGC each had "their own, albeit entirely legitimate, interests in mind." *Id*. at 12. In short, "the dispositive point is that [where] the apparent object of the [entity's] communications is a decision by an agency of the Government to support a claim by the [entity] that is necessarily adverse to the interests of competitors" the communication is not subject to the deliberative process privilege. *Id*. at 14.

Finally, the deliberative process privilege is not absolute. *See Dowd v. Calabrese*, 101 F.R.D. 427, 431 (D.D.C. 1984). "Its validity depends in particular circumstances upon a balancing of the public interest in nondisclosure with the need for the information as evidence." *Id*. (citing *United States v. Am. Tel. & Tel.*, 524 F. Supp. 1381, 1386 n.14 (D.D.C. 1981)). "Among the factors to be considered when the balance is struck are the relevance of the document, alternative means of proof, and the presence of allegations of governmental misconduct." *Id*. (citation omitted). Here, governmental misconduct is at the heart of Plaintiffs' allegations. Therefore, even assuming, *arguendo*, that the Treasury could demonstrate that some responsive documents might be covered by the deliberative process privilege, that privilege should be overcome.

III. IF THE COURT DOES FIND THE SUBPOENA UNDULY BURDENSOME, THE SUBPOENA SHOULD BE MODIFIED

A court "must carefully examine the circumstances presented to it and, when appropriate, consider the possibility of modifying the subpoena rather than quashing." *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 403 (D.C. Cir. 1984); *see also Westinghouse Elec. Corp. v. Burlington*, 351 F.2d 762, 766 (D.C. Cir. 1965) ("The burden is particularly heavy to support a 'motion to quash as contrasted to some more limited protection.'") (quoting *Horizons*

Titanium Corp. v. Norton Co., 290 F.2d 421, 425 (1st Cir. 1961)). While Plaintiffs took great care in drafting the Subpoena to present the least possible burden to Treasury when balanced with the needs of the litigation, Plaintiffs of course cannot ascertain that burden without a more precise explanation from Treasury. To the extent the Court finds Plaintiffs' Subpoena unduly burdensome, Plaintiffs submit that the proper result would by a modification of the Subpoena rather than outright quashing.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the pending motion to quash, and direct the Treasury to comply with Plaintiffs' Subpoena.

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Respectfully submitted,

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