

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

FEB 17 2012

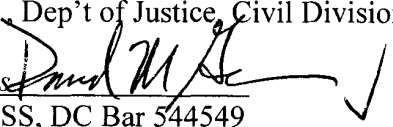
Clerk, U.S. District and
Bankruptcy Courts

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| <hr/> |) | No. |
| DENNIS BLACK, CHARLES |) | |
| CUNNINGHAM, KENNETH HOLLIS |) | MOTION TO QUASH OF U.S. |
| and DELTA SALARIED RETIREES |) | DEPARTMENT OF THE TREASURY |
| ASSOCIATION, |) | |
| |) | |
| Plaintiffs, |) | |
| |) | Case: 1:12-mc-00100 |
| v. |) | Assigned To : Sullivan, Emmet G. |
| |) | Assign. Date : 2/17/2012 |
| PENSION BENEFIT GUARANTY |) | Description: MISCELLANEOUS |
| CORPORATION, |) | |
| |) | |
| Defendants. |) | |
| <hr/> |) | |

The U.S. Department of the Treasury (Treasury) hereby moves to quash plaintiffs' subpoena to Treasury dated January 4, 2012. The grounds for Treasury's motion are set forth in the memorandum submitted herewith. Counsel for plaintiffs advises that he opposes the relief that Treasury hereby seeks.

Respectfully submitted,

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Dated: February 17, 2012

No fee
Req.

CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2012, the within motion, the memorandum in support of the motion, the exhibits to the motion, and the proposed order were served on the following by e-mail and by first-class mail, postage prepaid:

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s/ David M. Glass

A handwritten signature in black ink, appearing to read "David M. Glass", written over a horizontal line.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

| | | |
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| DENNIS BLACK, CHARLES |) | |
| CUNNINGHAM, KENNETH HOLLIS, |) | MEMORANDUM IN SUPPORT OF |
| and DELTA SALARIED RETIREES |) | THE MOTION TO QUASH OF U.S. |
| ASSOCIATION, |) | DEPARTMENT OF THE TREASURY |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | |
| |) | |
| PENSION BENEFIT GUARANTY |) | |
| CORPORATION, |) | |
| |) | |
| Defendant. |) | |
| <hr/> |) | |

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PRELIMINARY STATEMENT

The Delphi Retirement Program for Salaried Employees (Delphi Salaried Plan) was a defined benefit pension plan maintained by Delphi Corporation (Delphi) for certain of its salaried employees. In 2009, Delphi terminated the Delphi Salaried Plan by agreement with the Pension Benefit Guaranty Corporation (PBGC). In *Black v. PBGC*, No. 2:09-cv-13616-AJT-MKM (E.D. Mich.), the termination of the plan is contested by three of the participants in the plan and an organization of participants. By subpoena from this Court dated January 4, 2012, plaintiffs have asked the U.S. Department of the Treasury (Treasury) to produce certain documents.¹ As is shown below, the discovery that plaintiffs seek by means of their subpoena is unreasonably cumulative and duplicative. In addition, the burden that compliance with the subpoena will place on Treasury outweighs any benefit that plaintiffs are likely to derive from the subpoena. For both of these reasons, the subpoena should be quashed.²

STATEMENT OF FACTS

A. PBGC

“PBGC is a federal agency and wholly-owned corporation of the U.S. Government which administers the nation’s pension plan insurance program established by [the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*].” *Sara Lee Corp. v. Am. Bakers Ass’n Ret. Plan*, 512 F. Supp. 2d 32, 34 (D.D.C. 2007). “PBGC’s purpose is to ensure that retirees receive pension benefits they have earned, even if their employer has terminated their pension plan or is otherwise unwilling or unable to pay.” *Id.* at 34-35. “When a pension plan

¹ As discussed below, Treasury is a former defendant in *Black*.

² This motion to quash constitutes the response of Treasury to plaintiff’s subpoena under 31 C.F.R. § 1.11(g)(1). By filing this motion, Treasury does not intend to waive any objection,
Continued.

covered by Title IV [of ERISA] terminates without sufficient assets to pay all of its promised benefits, PBGC typically becomes trustee of the plan and pays participants their benefits up to statutory limits.” *Id.* at 35.

PBGC is authorized to “institute proceedings” to terminate a pension plan “whenever it determines” that “the plan has not met the minimum funding standard required under [ERISA]”; that “the plan will be unable to pay benefits when due”; that a distribution of a proscribed type has been made from the plan; or that “the possible long-run loss of [PBGC] with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.” 29

U.S.C. § 1342(a). If PBGC “determine[s] that [a] plan should be terminated” it may

apply to the appropriate United States district 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 [insurance] fund [maintained by PBGC].

Id. § 1342(c)(1). “If [PBGC] and the plan administrator agree [without court involvement] that a plan should be terminated and agree to the appointment of a trustee,” the trustee shall have certain prescribed powers and duties. *Id.*

B. The Termination of the Delphi Salaried Plan

“Delphi was a global supplier of mobile electronics and transportation systems that began as part of [General Motors Corporation (GM)] and was spun off as an independent company in 1999.” Ex. A at 3.³ During the period of its existence, Delphi established or acquired six defined benefit pension plans, including the Delphi Salaried Plan. *Id.* at 3, 5. “Over the period 2001 to

based upon claim of privilege, to the production of any document responsive to the subpoena.

³ References to exhibits are to the exhibits to this motion. A table of exhibits appears at p. iii, *supra*.

2005, Delphi suffered large losses, and the company filed for Chapter 11 bankruptcy in October 2005, although it continued to operate.” *Id.* at 4. “From 2006 to 2009, PBGC filed liens [against Delphi’s assets] on behalf of the Delphi plans in response to Delphi’s failing to contribute to its plans in the amounts required by the statutory minimum funding standards.” *Id.* at 22.

“Beginning in the fall of 2008, economic conditions deteriorated throughout the auto industry, affecting both Delphi and GM.” Ex. A at 4. “GM’s deteriorating financial condition in the fall of 2008 led the company to seek assistance from Treasury through the Automotive Industry Financing Program.” *Id.* at 4-5. “As a condition of receiving this assistance, GM was required to develop a restructuring plan to identify how the company planned to achieve and sustain long-term financial viability.” *Id.* at 5. “In April and May 2009, Treasury worked with GM to develop a restructuring plan through the Presidential Task Force on the Auto Industry [Auto Task Force] and its staff.” *Id.* “On July 1, 2009, GM filed for bankruptcy and sought the approval of the bankruptcy court for the sale of substantially all of the company’s assets to a new entity,” General Motors Company (New GM). *Id.* The sale of assets took place in July 2009. *Id.*

By order dated July 30, 2009, the court overseeing the Delphi bankruptcy approved a plan for the resolution of that bankruptcy. *In re Delphi Corp.*, 2009 WL 2482146, at *20 (Bankr. S.D.N.Y.). The plan approved by the court called for Delphi to sell most of its assets to a United Kingdom limited partnership (New Delphi) and to sell certain of its remaining assets to New GM. *See* Ex. A at 5. Finding that the sale could not go forward so long as Delphi remained liable to PBGC for unpaid pension contributions, the court approved an agreement between Delphi and PBGC (Delphi - PBGC Settlement Agreement) to resolve that liability. *Delphi*, 2009 WL 2482146, at *19. Under the Delphi - PBGC Settlement Agreement, “PBGC received a membership interest in [N]ew Delphi, which gave it rights to some of the initial profit

distributions from post-bankruptcy Delphi.” Ex. A at 24. “In exchange, PBGC released \$205 million in liens on Delphi’s foreign assets” and “released Delphi controlled group members from any potential further PBGC claim that might arise against them under any circumstance.” *Id.* By separate agreement, New GM paid PBGC “\$70 million in cash” as further consideration for the release of the liens. *Id.*

In approving the Delphi - PBGC Settlement Agreement, the court held that “clear grounds exist under Section 4042 of ERISA, 29 U.S.C. § 1342, for the PBGC to initiate involuntary terminations of the [Delphi] Pension Plans [and] for the Debtors to enter into termination and trusteeship agreements with the PBGC.” *Delphi*, 2009 WL 2482146, at *19. By agreement dated as of August 10, 2009 (Delphi - PBGC Termination Agreement), Delphi and PBGC terminated the Delphi Salaried Plan effective July 31, 2009, and named PBGC trustee of the plan. Ex. B

¶¶ 1-3. One of the recitals to the Delphi - PBGC Termination Agreement provided:

PBGC has issued to the Company a Notice of Determination under 29 U.S.C. § 1342(a)(1), (2) and (4) that the Plan has not met the minimum funding standard required by [ERISA], the Plan will be unable to pay benefits when due, PBGC’s possible long-run loss with respect to the Plan may reasonably be expected to increase unreasonably if the Plan is not terminated, and that the Plan should be terminated pursuant to 29 U.S.C. § 1342(c).

Id. ¶ H.

By letter dated August 9, 2010, certain members of Congress posed the following question to the Government Accountability Office (GAO): “What precipitated PBGC’s decision to terminate the [Delphi] plans and what role did Treasury play in this decision, if any?” Ex. C at 1.

Answering that question by report dated December 2011, GAO said:

PBGC’s decision to terminate the Delphi [defined benefit] plans was precipitated by Delphi’s inability to fund or maintain its plans and by the threat of increased losses from Delphi’s impending loan default and possible liquidation. Treasury, as GM’s primary lender in bankruptcy, played a significant role in helping GM resolve the Delphi bankruptcy to arrive at the “best resolution” from GM’s

perspective. However, with regard to GM's decisions regarding the assumption of Delphi's plans and top-up agreements, Treasury played an advisory role only, according to GM and Treasury officials. Similarly, according to PBGC officials, PBGC independently decided to terminate the Delphi plans. The documents we reviewed, including GM and Delphi SEC filings and PBGC internal records, are consistent with these statements.

Ex. A at 10.

At a hearing on June 22, 2011, Rep. Michael R. Turner (R-Ohio) posed the following questions to PBGC: "Did the Treasury Department initiate the discussions with the PBGC regarding the Delphi Salaried Pension plans?" and "Did the Treasury Department authorize, approve, or consent to the PBGC terminating the Delphi Salaried workers pension plans?" Ex. D at 1-3. By letter to Rep. Turner dated November 9, 2011, PBGC answered "No" to both of these questions and said:

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. * * * * PBGC made the decision to initiate termination of the Delphi Pension Plans. The Treasury Department played no role in that decision.

Id. at 2-3.

C. *Black*

Black was commenced on September 14, 2009, as a four-count action brought solely against PBGC. A fifth count against New GM, Treasury, the Auto Task Force, three officials of Treasury, and certain fictitious defendants was added to *Black* by first amended complaint filed November 5, 2009.⁴ By order dated March 12, 2010, the fifth count was dismissed as to New

⁴ Plaintiffs alleged in the fifth count that their rights under the First and Fifth Amendments were violated by certain commitments of New GM to pay supplemental pension benefits to certain participants in the Delphi Hourly-Rate Plan, a defined benefit pension plan maintained by Delphi for certain of its hourly employees. *See* First Am. Compl. ¶ 60; 2d Am. Compl. ¶ 60.

GM. ECF No. 129.⁵ By order dated September 2, 2011, the fifth count was dismissed as to Treasury, the Auto Task Force, and the three officials of Treasury. ECF No. 192.

The four counts that remain for adjudication in *Black* are Counts 1 - 4. In Count 1, plaintiffs allege that Delphi - PBGC Termination Agreement is invalid because PBGC is required by 29 U.S.C. § 1342(a) and (c) to obtain a court order in order to terminate a pension plan. Ex. E ¶ 39. In Count 2, plaintiffs allege that the Delphi - PBGC Termination Agreement is invalid because Delphi did not execute the agreement in its capacity as a fiduciary. *Id.* ¶ 44. In Count 3, plaintiffs allege that the Delphi - PBGC Termination Agreement is invalid because the participants in the Delphi Salaried Plan were not given notice of the termination of the plan or an opportunity for a pre-termination hearing. *Id.* ¶ 52. In Count 4, plaintiffs allege that the termination of the Delphi Salaried Plan is invalid because “PBGC cannot satisfy the standards for termination of the [Delphi Salaried Plan] under 29 U.S.C. § 1342(a) and (c) with the current termination terms it has negotiated and put in place.” *Id.* ¶ 56.

In November 2009, PBGC moved to dismiss Counts 1 - 3. In January 2010, PBGC moved for summary judgment as to Count 4. In support of its motion for summary judgment, PBGC filed an administrative record of more than 5,800 pages. ECF No. 52 - 91. PBGC has described the administrative record as “containing all records relating to the termination decision.” Ex. F at 8.

By order dated September 27, 2010, the court denied without prejudice the motions of PBGC to dismiss and for summary judgment. ECF No. 147. By order dated September 1, 2011, the court authorized discovery as to Counts 1 - 4 and ordered “[a]ll discovery related to [those counts] to be served in time to be completed by April 30, 2012.” ECF No. 193 at 3, 7. By the same order, the court held that the appropriate standard of review for Count 4 was “*de novo*

⁵ ECF references are to the ECF docket in *Black*.

review of the PBGC's decision to terminate the Plan," not "review limited to the administrative record." *Id.* at 5.

C. The FOIA Requests⁶

By FOIA request dated October 19, 2009, plaintiffs' counsel asked PBGC to produce the following materials "concern[ing] the [Delphi Salaried Plan]":

All agendas, meeting minutes, and correspondence relating to the General Motors/PBGC Waiver and Release Agreement (attached hereto).

All agendas, meeting minutes and correspondence covering the Delphi/PBGC settlement agreement (attached hereto).

A list of all meetings (date, location, subject, participants) concerning the Delphi pensions with the following parties: Delphi, General Motors (New and Old), Auto Task Force, U.S. Treasury Department, Bankruptcy Court SDNY, White House Staff, Department of Labor, Labor Unions.

Ex. G, Att. B, at 1. By letters dated January 8, January 28, and April 9, 2010, PBGC produced more than 1,000 pages of records responsive to this request, with redactions pursuant to FOIA Exemptions 5 and 6, 5 U.S.C. § 552(b)(5) - (6). *Id.*, Att. B, at 3-5.

By FOIA request dated June 28, 2010, plaintiffs' counsel asked PBGC to produce 15 additional categories of material "concern[ing] the [Delphi Salaried Plan]."⁷ Ex. G, Att. C, at 1-3.

⁶ FOIA is the Freedom of Information Act, 5 U.S.C. § 552. Subject to certain limitations, FOIA requires "each agency, upon a request for records" to "make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A).

⁷ The 15 categories were: (1) "A copy of all actuarial reports concerning the Plan that the PBGC has received since January 1, 2005"; (2) "A copy of all correspondence the PBGC has received from Watson Wyatt concerning the Plan since January 1, 2005"; (3) "A copy of all data sources the PBGC relied upon in calculating the Plan's liabilities and assets as reported in the Administrative Record, pages[] AR19, AR26, AR 34 and AR62. At a minimum, this should include a copy of the following data sources referenced on page AR26 of the Administrative Record: '10/01/07 AVR,' '12/31/08 PBO,' and '10/01/08 demographic information prepared by Watson Wyatt Worldwide'"; (4) "A description and explanation of any assumptions relied upon in arriving at the Plan's liabilities and assets as reported in the Administrative Record, pages

Continued.

By letters dated July 28, August 24, September 22, and November 4, 2010, and April 14, 2011, PBGC produced more than 4,000 pages of records responsive to this request, with redactions pursuant to FOIA Exemptions 2, 3, 4, 5, 6, and 7(E), 5 U.S.C. 552(b)(2) - (6) & (7)(E). *Id.*, Att. C, at 12, 14, 16, 18-21.

AR19, AR26, AR34 and AR62, as well as an explanation of how these assumptions were used in calculating the Plan's liabilities and assets"; (5) "All reports, correspondence, memorandum[s], spreadsheets or other documents concerning the value, estimated or otherwise, of the 'Waterfall Participation' and 'Waterfall Right' as those terms are used in the PBGC - GM Waiver and Release Agreement"; (6) "All reports, correspondence, memorandum[s] or documents discussing whether the grounds for termination of the Plan should include 'protections of the interests of participants'"; (7) "All documents, data sources, statements, worksheets, memorandum[s] and assumptions relied upon in the 'final statutory lien calculation done prior to the termination of the [] Plan [sic], which showed a total lien of \$195.9 million.' See Exhibit A to this request, declaration of Neela Ranade"; (8) "All documents, data sources, statements, worksheets, memorandum[s], and assumptions relied upon by Ms. Ranade in her declaration in ¶ 10 of Exhibit A, that the PBGC estimates [']it will pay \$2.1 billion from its own resources to cover the unfunded guaranteed liability'"; (9) "All reports, memorandum[s], correspondence, worksheets, statements or documents concerning the Plan assets that the PBGC assumed when it became statutory trustee of the Plan. This information should include, at a minimum, a breakdown of the disposition of the assets, by allocation and worth, as of the date of trusteeship"; (10) "All reports, memorandum[s], correspondence, worksheets, statements, accountings or documents discussing the disposition of the Plan's former assets as of May 1, 2010"; (11) "All memorandum[s], correspondence, worksheets, statements or documents concerning PBGC recoveries as to the Plan"; (12) "All memorandum[s], correspondence or documents discussing the Plan, the Delphi Salaried Retiree Association, or the Delphi Bankruptcy proceedings, case No. 05-44481 (Bankr. S.D.N.Y.). For purposes of this request number 12, we are requesting information generated between October 1, 2009 and June 28, 2010"; (13) "All memorandum[s], correspondence, or other documents discussing whether the supplemental payments by General Motors LLC to participants in the Delphi Hourly-Rate Plan conflict with any PBGC policies or procedures, including the PBGC's policy regarding follow-on plans"; (14) "All organizational charts identifying personnel, both permanent and contract, by name, title and reporting relationship for the time period January 1, 2009 to July 1, 2010"; and (15) "All internal operating rules, procedures and policy statements related to: (a) plan terminations; (b) valuation of plans [sic] assets and liabilities; (c) asserting, releasing and executing liens; (d) communications with pension plan sponsors." Ex. B, Att. C, at 1-3.

D. The Request for Production

By request for production dated September 23, 2011, plaintiffs asked PBGC to produce 14 categories of additional material.⁸ Ex. H at 8-11. By response dated October 20, 2011, PBGC

⁸ The 14 categories were: (1) "All documents and things identified in your responses to Plaintiffs' First Set of Interrogatories to you"; (2) "All documents and things received, produced or reviewed by the PBGC between January 1, 2006 and December 31, 2009 (including, but not limited to, documents received from Delphi) related to Delphi or the Delphi Pension Plans"; (3) "All documents and things (including, but not limited to, communications, spreadsheets, funding assumptions, snapshots, memoranda, as well as all other documents and things) received, produced or reviewed by the PBGC since January 1, 2006 related to financial involvement by GM with the Delphi Pension Plans, including, but not limited to, GM's assumption of some or all of the liability for any of the Delphi Pension Plans (and the cost of such an assumption), potential funding of any of the Delphi Pension Plans by GM, or the payment of supplemental pension benefits to Delphi Pension Plan participants by GM"; (4) "All documents and things received, produced or reviewed by the PBGC since [sic] January 1, 2006 and December 31, 2009 related to the potential assumption of liability for any of the Delphi Pension Plans by an entity other than Delphi"; (5) "All documents and things received, produced or reviewed by the PBGC between January 1, 2006 and December 31, 2009 related to the ability of Delphi to maintain the Delphi Pension Plans"; (6) "All documents and things received, produced or reviewed by the PBGC since January 1, 2006 related to liens involving the Delphi Pension Plans, both asserted and assertable by the PBGC, including, but not limited to, valuation of those liens, communications related to the release or waiver of those liens, and the identity of assets subject to those liens"; (7) "All documents and things received, produced or reviewed by the PBGC since January 1, 2006 related to the value of Delphi or the value of Delphi's assets"; (8) "All documents and things you received from the Federal Executive Branch or produced to the Federal Executive Branch, since January 1, 2009, related to Delphi or the Delphi Pension Plans, including, but not limited to, documents related to the termination of the Delphi Pension Plans, the assumption of any liability associated with the Delphi Pension Plans by GM, PBGC liens on Delphi assets, recoveries related to the Delphi Pension Plans, the Waiver and Release Agreement, and the Delphi - PBGC Settlement Agreement"; (9) "All documents and thing you received from GM or produced to GM, since January 1, 2006, related to Delphi or the Delphi Pension Plans, including, but not limited to, documents related to the termination of the Delphi Pension Plans, PBGC liens on Delphi assets, recoveries related to the Delphi Pension Plans, the Waiver and Release Agreement, and the Delphi - PBGC Settlement Agreement"; (10) "All documents and things related to the Waiver and Release Agreement"; (11) "All documents and things related to the Delphi - PBGC Settlement Agreement"; (12) "All documents and things received, produced or reviewed by the PBGC since January 1, 2006 related to the PBGC's potential or actual liability for any benefit payments under Delphi's Pension Plans"; (13) "All documents and things received, produced or reviewed by you since January 1, 2009 related to potential PBGC recoveries in connection with the Delphi Pension Plans, including, but not limited to, the estimates of the potential recovery for each claim and the value the PBGC assigned to such claims in the valuation of the Salaried Plan's assets"; and (14)

Continued.

advised plaintiffs that the sole documents relevant to their request were documents contained in the administrative record or in the public record of the court overseeing the Delphi bankruptcy. Ex. I at 2, 4. On December 6, 2011, plaintiffs filed a motion to compel further responses to their request. On December 22, 2011, PBGC filed an opposition to plaintiffs' motion. On January 3, 2012, plaintiffs filed a reply in support of their motion.

E. The Subpoena

By subpoena dated January 4, 2012, plaintiffs asked Treasury to produce the following:

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

"All documents and things received, produced or reviewed by the PBGC related to the Waterfall Right or the Waterfall Participation as those terms are defined in the Waiver and Release Agreement." Ex. H at 8-11.

Ex. J at 5-6. Messrs. Feldman, Wilson, and Rattner are former Treasury officials who were part of the group (Auto Team) that provided staff level support for the Auto Task Force. *See* Ex. K ¶ 4. Mr. Feldman served as the principal restructuring attorney for the Auto Team. *Id.*

ARGUMENT

PLAINTIFFS' SUBPOENA TO TREASURY SHOULD BE QUASHED.

Federal Rule of Civil Procedure 45(c)(1) contains an “undue burden” standard that “requires district courts supervising discovery to be generally sensitive to the costs imposed on third parties.” *Watts v. SEC*, 482 F.3d 501, 509 (D.C. Cir. 2007). Rule 45(c)(1) provides:

A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction – which may include lost earnings and reasonable attorney’s fees – on a party or attorney who fails to comply.

Federal Rule of Civil Procedure 26(b)(2)(C) supplements Rule 45(c)(1) by requiring district courts “to consider a number of factors relevant to the question of undue burden” *Watts*, 482 F.3d at 509. Made applicable to “[a]ll discovery” by Fed. R. Civ. P. 26(b)(1), Rule 26(b)(2)(C) provides:

On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative * * *; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

By using the “tools” of Rules 45(c)(1) and 26(b)(2)(C), “district courts in cases involving third-party subpoenas to government agencies or employees can adequately protect both the litigant’s right to evidence and the ‘government’s interest in not being used as a speakers’ bureau for private litigants.’” *Watts*, 482 F.3d at 509 (quoting *Exxon Shipping Co. v. Dep’t of the*

Interior, 34 F.3d 774, 780 (9th Cir. 1994)). However, any balancing of interests that a court conducts under Rules 45(c)(1) and 26(b)(2)(C) “must properly accommodate ‘the government’s serious and legitimate concern that its employee resources not be commandeered into service by private litigants to the detriment of the smooth functioning of government operations.’” *Id.* (quoting *Exxon*, 34 F.3d at 779).

In this case, the discovery that plaintiffs seek by means of their subpoena is unreasonably cumulative and duplicative. In addition, the burden that compliance with the subpoena will place on Treasury outweighs any benefit that plaintiffs are likely to derive from the subpoena. For both of these reasons, the subpoena should be quashed pursuant to Rules 45(c)(1) and 26(b)(2)(C).

I. THE DISCOVERY THAT PLAINTIFFS SEEK BY MEANS OF THEIR SUBPOENA IS UNREASONABLY CUMULATIVE AND DUPLICATIVE

By order dated September 1, 2011, the court authorized plaintiffs to conduct discovery as to Counts 1 - 4. *See* ECF No. 193 at 3, 7. Despite the breadth of the court’s authorization, plaintiffs allege that “the scope of discovery in this case * * * *should ‘focus’ on* * * * Count 4.” Ex F at 2 (plaintiffs’ emphasis; internal quotation marks omitted). In Count 4, plaintiffs allege that “[t]he PBGC cannot satisfy the standards for termination of the [Delphi Salaried Plan] under 29 U.S.C. § 1342(a) and (c).” Ex. E ¶ 56. In terminating the Delphi Salaried Plan, the “standards for termination” upon which PBGC relied were those of 29 U.S.C. § 1342(a), i.e., that “the Plan has not met the minimum funding standard required by [ERISA], the Plan will be unable to pay benefits when due, [and] PBGC’s possible long-run loss with respect to the Plan may reasonably be expected to increase unreasonably if the Plan is not terminated.” Ex. B ¶ H. PBGC has filed an administrative record of more than 5,800 pages “containing all records relating to the termination decision.” Ex. F at 8; *see* ECF No. 52 - 91. In addition, PBGC has complied with the FOIA requests of plaintiffs’ counsel by producing more than 5,000 additional pages “concern[ing]

the [Delphi Salaried Plan].” Ex. G, Att. B, at 1, 3-5 & Att. C, at 1, 12, 14, 16, 18, 20. 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. Even assuming, *arguendo*, that they are not, plaintiffs can obtain those communications as easily from PBGC as they can from Treasury. Under these circumstances, the discovery that plaintiff seek from Treasury by means of their subpoena is “unreasonably cumulative [and] duplicative.” *See* Rule 26(b)(2)(C). For that reason, the subpoena should be quashed.

II. THE BURDEN THAT COMPLIANCE WITH PLAINTIFFS’ SUBPOENA WILL PLACE ON TREASURY OUTWEIGHS ANY BENEFIT THAT PLAINTIFFS ARE LIKELY TO DERIVE FROM THE SUBPOENA.

To locate material responsive to plaintiffs’ subpoena, Treasury will be required to identify and segregate all e-mails that Matthew Feldman, Harry Wilson, or Steven Rattner received, produced, or reviewed during the period that each served on the Auto Team. Ex. K ¶ 6(a). Locating these e-mails will require searches of the relevant Outlook mailboxes. *Id.* Any e-mails that have been archived will need to be retrieved, document by document, by a member of the Treasury technology team using retrieval software. *Id.* Treasury has but one available computer equipped with this software. *Id.*

In addition, Treasury will be required to identify and segregate all electronic and hard copy documents that Messrs. Feldman, Wilson, or Rattner received, produced, or reviewed during the period that each served on the Auto Team. Ex. K ¶ 6(b). Treasury maintains over 15,000 Auto Team documents on its computer system and over 28 boxes of Auto Team hard copy files. *Id.* All of these boxes and electronic documents will need to be searched for documents potentially responsive to plaintiffs’ subpoena. *Id.* The “properties” of each electronic document

will need to be reviewed individually to determine whether the author of the document was Mr. Feldman, Mr. Wilson, or Mr. Rattner. *Id.* Treasury will not be able to determine whether a particular electronic document was reviewed by any of those individuals unless the document so states. *Id.* Similarly, Treasury will not be able to determine whether a particular hard copy document was authored or reviewed by any of those individuals unless the document or file folder so states. *Id.* Based upon previous search experiences, Treasury estimates that the universe of potentially-responsive documents may exceed 25,000, with a page count many multiples of that number. *Id.* ¶7.

Once the universe of potentially-responsive e-mails, electronic documents, and hard copy documents has been identified and segregated, a Treasury attorney familiar with the subject matter will need to review each document, page by page, for responsiveness. Ex. K ¶ 6(c). Any material determined to be responsive will need to be reviewed by Treasury attorneys, line by line, to protect and preserve privileged material. *Id.* ¶ 6(d). Many 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. *See id.* ¶ 7.

In contrast to the burden that plaintiffs' subpoena will place on Treasury, any benefit that plaintiffs will derive from the subpoena is likely to be limited. Plaintiffs allege that the subpoena is justified because

the Treasury Department was actively engaged in seeking to resolve issues associated with Delphi's pension plans, in negotiating the terms of the salaried plan's termination with the PBGC, in approving the amount of financial investment that [New GM] was allowed to make in Delphi-related investments (among which were investments related to Delphi's pension plans), in negotiations involving the resolution of the PBGC's liens asserted and assertable on behalf of Delphi's pension plans, in determining the timing and manner in which Delphi would emerge from bankruptcy (and the manner in which Delphi's

liabilities would be addressed), in negotiating with Delphi's lenders, and in evaluating potential acquirers of Delphi and/or its units.

Ex. L, Sub-Exhibit A ¶ 7. However, PBGC has told a Member of Congress, Rep. Turner, that “[n]either 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 PBGC “made the decision to initiate termination of the Delphi Pension Plans”; and that Treasury “played no role in that decision.” Ex. D at 2, 3. In addition, GAO has found on the basis of its own inquiry 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.” Ex. A at 10. Because of the limited role that Treasury played in the termination of the Delphi plans, plaintiffs are unlikely to obtain anything from their subpoena that will help them show that the Delphi Salaried Plan ought not to have been terminated because PBGC erred in finding that “the Plan [had] not met the minimum funding standard required by [ERISA], the Plan [would] be unable to pay benefits when due, [and] PBGC’s possible long-run loss with respect to the Plan [might] reasonably be expected to increase unreasonably if the Plan [were] not terminated.” Ex. B ¶ H. For that reason, “the burden or expense of [plaintiffs’ subpoena] outweighs its likely benefit.” *See* Rule 26(b)(2)(C).

In addition, the subpoena is drafted in such a way as to make it all but certain that its burden will “outweigh[] its likely benefit.” The subpoena asks Treasury to produce

[a]ll documents and things * * * received, produced, or reviewed by [Messrs. Feldman, Wilson, or Rattner] between January 1, 2009 and December 31, 2009 related to: (1) Delphi; (2) the Delphi Pension Plans; or (3) the release and discharge by [PBGC] of liens and claims relating to the Delphi Pension Plans.

Ex. J at 5-6. By making a generalized request for documents related to “Delphi,” “the Delphi Pension Plans,” and “the release and discharge by [PBGC] of liens and claims relating to [those plans]” the subpoena asks Treasury to locate and produce vast numbers of documents having

nothing to do with the sole issue presented by Count 4, i.e., whether “PBGC can[] satisfy the standards for termination of the [Delphi Salaried Plan] under 29 U.S.C. § 1342(a) and (c).” *See* Ex. E ¶ 56. “Judges are trusted to prevent ‘fishing expeditions.’” *Cuomo v. Clearing House Ass’n*, 129 S. Ct. 2710, 2719 (2009). In this case, the subpoena that plaintiffs have served on Treasury is nothing more than that.

GAO has found that “PBGC’s decision to terminate the [Delphi pension plans] was precipitated by Delphi’s inability to fund or maintain its plans and by the threat of increased losses from Delphi’s impending loan default and possible liquidation.” Ex. A at 10. Despite PBGC’s production of more than 10,000 pages dealing with the Delphi Salaried Plan and its termination, plaintiffs have yet to point to anything suggesting that Delphi would have been able to “fund or maintain” the Delphi Salaried Plan, or that PBGC did not face “increased losses from Delphi’s impending loan default and possible liquidation.” *See id.* “Discovery must have an end point, and ‘the decision to cut off discovery is committed to the management skills of the district court.’” *Stevo v. Frasor*, 662 F.3d 880, 886 (7th Cir. 2011) (quoting *K.F.P v. Dane Cnty.*, 110 F.3d 516, 520 (7th Cir. 1997)). “Where a party has had an ‘adequate opportunity to investigate,’ prejudice in this context requires something more than the absence of the smoking gun the party was looking for.” *Id.* (quoting *Searls v. Glasser*, 64 F.3d 1061, 1068 (7th Cir. 1995)). In this case, the absence of the “smoking gun” for which plaintiffs are looking provides no justification for a subpoena that will “‘commandeer[]’ the employee resources of Treasury “‘into service by [a] private litigant[] to the detriment of the smooth functioning of [Treasury’s] operations.’” *See Watts*, 482 F.3d at 509 (quoting *Exxon*, 34 F.3d at 779). Plaintiffs’ subpoena to Treasury should therefore be quashed.

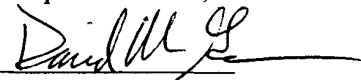
CONCLUSION

For the foregoing reasons, Treasury's motion to quash should be granted.

Respectfully submitted,

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Dated: February 17, 2012