UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES DEPARTMENT OF THE TREASURY, **Petitioner,** **v.** **PENSION BENEFIT GUARANTY CORPORATION,** **Interested Party,** **v.** **DENNIS BLACK, *et al.*,** **Respondents.**	**No. 1:12-mc-00100-EGS** **REPLY IN SUPPORT OF PETITIONER'S MOTION TO QUASH**

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[1] Exs. A-L were filed with the memorandum in support of Petitioner's motion to quash.

PRELIMINARY STATEMENT

Respondents Dennis Black, Charles Cunningham, Kenneth Hollis, and Delphi Salaried Retired Association have subpoenaed certain documents from petitioner U.S. Department of the Treasury (Treasury). The documents that Respondents have subpoenaed are of alleged relevance to their claims in *Black v. Pension Benefit Guarantee Corporation (PBGC)*, No. 2:09-cv-13616 (E.D. Mich.). As is shown below, the discovery that Respondents seek by means of their subpoena is unreasonably cumulative and duplicative, notwithstanding the contentions of Respondents to the contrary. In addition, the burden that compliance with Respondents' subpoena will place on Treasury outweighs any benefit that Respondents are likely to derive from the subpoena. For both of these reasons, the subpoena should be quashed.

THE STATUTORY SCHEME

PBGC is authorized by 29 U.S.C. § 1342(a) to "institute proceedings under [§ 1342] to terminate a [pension] plan whenever it determines" that any of the following circumstances exist:

> (1) the plan has not met the minimum funding standard required under section 412 of Title 26, or has been notified by the Secretary of the Treasury that a notice of deficiency under section 6212 of Title 26 has been mailed with respect to the tax imposed under section 4971(a) of Title 26, (2) the plan will be unable to pay benefits when due, (3) the reportable event described in section 1343(c)(7) of this title has occurred, or (4) 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.

If PBGC determines, after issuing notice to the plan administrator, that the plan should be terminated, it may,

> upon notice to the plan administrator, 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 [PBGC insurance] fund.

29 U.S.C. § 1342(c)(1). However, "no pre-termination court adjudication is required when PBGC and the plan administrator agree to terminate." *In re Jones & Laughlin Hourly Pension Plan*, 824 F.2d 197, 199 (2d Cir. 1987). As § 1342(c)(1) thus provides:

> If [PBGC] and the plan administrator agree that a plan should be terminated and agree to the appointment of a trustee without proceeding in accordance with the requirements of this subsection (other than this sentence) the trustee shall have the power described in subsection (d)(1) of this section and, in addition to any other duties imposed on the trustee under law or by agreement between [PBGC] and the plan administrator, the trustee is subject to the duties described in subsection (d)(3) of this section.[1]

STATEMENT OF FACTS

In 2009, PBGC made a series of determinations with respect to the Delphi Retirement Program for Salaried Employees (Delphi Salaried Plan), a pension plan maintained by Delphi Corporation (Delphi). First, PBGC determined that the plan should be terminated pursuant to 29 U.S.C. § 1342(a)(1) because "the Plan has not met the minimum funding standard required under section 412 of the Internal Revenue Code." Ex. B ¶ H.[2] Second, PBGC determined that the plan should be terminated pursuant to 29 U.S.C. § 1342(a)(2) because "the Plan will be unable to pay benefits when due." *Id*. Third, PBGC determined that the plan should be terminated pursuant to 29 U.S.C. § 1342(a)(4) because "PBGC's possible long-term loss with respect to the Plan may reasonably be expected to increase unreasonably if the Plan is not terminated." *Id*. Based on these determinations, PBGC entered into an agreement with Delphi that terminated the

[1] Respondents argue that "a pension plan may only be terminated by the PBGC pursuant to a court order and decree." Mem. Opp'n Mot. U.S. Treas. Quash 1-2. However, this argument ignores both *Jones & Laughlin* and the plain language of § 1342(c)(1).

[2] References to exhibits are to Treasury's exhibits to this motion. A table of exhibits appears at p. iii, *supra*.

plan pursuant to 29 U.S.C. § 1342(c) effective July 31, 2009, and named PBGC trustee of the plan.[3] *Id*. ¶¶ 1-3.

Black was commenced on September 14, 2009. Suing PBGC, Respondents allege in *Black* that the termination of the Delphi Salaried Plan violated the Due Process Clause of the Fifth Amendment and the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq*. Ex. E ¶¶ 39-56. For relief, Respondents ask that the termination of the plan be set aside. *Id*., Prayer ¶ D.

PBGC has filed a 5,037-page administrative record in *Black*.[4] *See* Mem. Opp'n Mot. U.S. Dep't Treas. Quash (Resp't Mem.) at 14 n.6 (so acknowledging). In addition, PBGC has produced more than 5,000 pages, concerning the Delphi Salaried Plan, in response to the requests of Respondents' counsel under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. *Id*. at 15 (so acknowledging).

In September and October 2011, Respondents served PBGC with 17 requests for production in *Black*. Alleging that PBGC's responses were inadequate, Respondents moved in December 2011 to compel further responses.

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

> All documents and things (including e-mails or other correspondence, spreadsheets, reports, analyses, snapshots, funding estimates, proposals, or offers)

[3] Respondents allege that the Delphi Salaried Plan was sponsored by General Motors before it was sponsored by Delphi. Mem. Opp'n Mot. U.S. Treas. Quash at 1. Respondents are mistaken. The Delphi Salaried Plan was established by Delphi "with assets and liabilities from [its] GM counterpart[]," Ex. A at 3, but was never sponsored by GM.

[4] Treasury alleged in the memorandum in support of its motion to quash that the administrative record contained "more than 5,800 pages." Mem. Supp. Mot. Quash U.S. Dep't Treas. at 6. Treasury assumed in making that allegation that the pages of the administrative record that had been filed under seal were numbered consecutively and were numbered separately from the pages filed on the public record. As Respondents indicate, *see* Mem. Opp'n Mot. U.S. Treas. Quash at 13-14 & n.6, both assumptions were unwarranted.

> received, produced, or reviewed by [three former Treasury officials, Matthew Feldman, Steven Rattner, and 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 [PBGC] of liens and claims relating to the Delphi Pension Plans.

Ex. J at 5-6. The subpoena bears the caption in *Black* but was issued from this Court.[5]

On February 17, 2012, Treasury moved this Court for an order quashing Respondents' subpoena. On March 5, 2012, Respondents filed an opposition to Treasury's motion. By order dated March 9, 2012, the U.S. District Court for the Eastern District of Michigan, Mona K. Majzoub, Mag. J., directed PBGC to "produce full and complete responses" within 90 days to 16 of Respondents' 17 requests for production. Ex. M at 2. On March 23, PBGC appealed the order of Magistrate Judge Majzoub to District Judge Arthur J. Tarnow.

ARGUMENT

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

"Discovery requests must be evaluated in light of the claim or defense. Without a claim, there cannot be discovery." *Adams v. City of Chicago*, 2011 WL 856589, at *2 (N.D. Ill. Mar. 9, 2011). In this case, Respondents summarize their claims in *Black* by saying the following:

> Respondents' challenge to the [Delphi Salaried Plan's] termination is at bottom a substantive one[.] * * * * More specifically, [Respondents] 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.

Resp't Mem. at 5. Notwithstanding the claims that Respondents purport to make in *Black*, the Delphi Salaried Plan was terminated by agreement between PBGC and Delphi, not by court

[5] The date of the subpoena is the date following the date upon which Respondents filed the reply in support of their motion to compel. The closeness of the two dates suggests that the subpoena was conceived as a fallback in case the motion to compel was denied.

order. Ex. B ¶ 1. For that reason, the grounds enumerated in § 1342(c) for the termination of a pension plan by court order have no applicability to *Black*. Instead, the sole matter at issue in *Black* is whether PBGC was justified in determining that the termination of the Delphi Salaried Plan was appropriate under 29 U.S.C. § 1342(a)(1), (a)(2), and (a)(4). *See id.* ¶ H. PBGC has stated that it has "already produced to [Respondents] an Administrative Record containing all documents related to the termination decision." Ex. F at 8. In addition, PBGC has stated that it "has given [Respondents] all documents supporting its decision to terminate the Delphi Salaried Plan." Ex. N at 9. Because PBGC has given those documents to Respondents, no justification exists for Respondents' subpoena to Treasury.

Respondents make a series of arguments to try to establish a justification for their subpoena. For the following reasons, none of their arguments is persuasive.

1. As a threshold matter, Respondents argue that their subpoena is justified because the administrative record is incomplete. Resp't Mem. at 14. However, the alleged incompleteness of the administrative record is a matter for Respondents to resolve with PBGC, not through third-party discovery. In addition, Respondents have not established the incompleteness of the administrative record. As evidence of the record's alleged incompleteness, Respondents refer to the alleged contention of PBGC that "the administrative record need only include information that supports its decision (rather than all information it had before it while making that decision)." Resp't Mem. at 14. However, this allegation ignores PBGC's representation that "[the] Administrative Record contain[s] all documents related to the termination decision." Ex. F at 8. As further evidence of the record's alleged incompleteness, Respondents refer to the alleged absence from the record of "any correspondence exchanged between PBGC and the U.S. Treasury Department." Resp't Mem. at 14. However, the alleged absence of such

correspondence is not evidence of the record's incompleteness. Instead, it is confirmation of the representation of PBGC, *see* Ex. D at 3, that Treasury played "no role" in the decision of PBGC to terminate the Delphi Salaried Plan. As still further evidence of the record's alleged incompleteness, Respondents refer to the alleged absence from the record of any documents "purporting to justify [PBGC's] decision to terminate the plan in August 2009." *Id*. However, PBGC made its decision to terminate the Delphi Salaried Plan in April 2009, not in August 2009. *See* Ex. O at 1-3. PBGC did not execute that decision until August 2009 because "Delphi's DIP lenders agreed to provide PBGC five-days written notice prior to exercising their right of foreclosure." Ex. P at 3. Accordingly, the administrative record is not incomplete because it does not contain any records from the "post-April period." *See* Resp't Mem. at 14.

2. Making a different argument, Respondents allege that their subpoena is justified because "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." Resp't Mem. at 2. Accordingly, the evidence that Respondents hope to obtain by means of their subpoena is "damning" evidence that "PBGC was completely oblivious to the 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." *Id*. at 9. However, the "damning" evidence that Respondents hope to obtain by means of their subpoena is irrelevant to their claims in *Black*. Section 1342(a) states: "The corporation [PBGC] may institute proceedings under this section to terminate a plan whenever it determines that [any of certain enumerated circumstances exists]." Where, as in the case of § 1342(a), "prosecutorial discretion is at issue, the matter is presumptively committed to agency discretion by law." *Drake*

v. FAA, 291 F.3d 59, 71 (D.C. Cir. 2002). For that reason, it is irrelevant whether Treasury exerted pressure of any kind on PBGC to terminate the Delphi Salaried Plan so long as the plan merited termination under one or more of the subdivisions of § 1342(a). Respondents' subpoena to Treasury should therefore be quashed.

In addition, the Federal Rules of Civil Procedure do not "unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (discussing Fed. R. Civ. P. 8). For that reason, an order denying discovery is not an abuse of discretion "if [the] plaintiff is 'unable to offer anything but rank speculation to support' her claim and if discovery 'would amount to nothing more than a fishing expedition.'" *Reshard v. LaHood*, 358 F. App'x 196, 197 (D.C. Cir. 2009) (quoting *Bastin v. Fed. Nat'l Mortg. Ass'n*, 104 F.3d 1392, 1396 (D.C. Cir. 1997). In this case, Respondents point to two things to substantiate their allegation that Treasury exerted pressure on PBGC to terminate the Delphi Salaried Plan: the presence of the Secretary of the Treasury on the PBGC board of directors and the "multiple meetings" between the Auto Task Force and PBGC that allegedly took place "beginning as early as March 2009." Resp't Mem. at 2, 4. However, the Government Accountability Office (GAO) has found 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. Respondents respond to those findings by alleging that "[t]he only Treasury documents reviewed by GAO in its audit were 'publicly available documents,' including those filed in the *Black* litigation." Resp't Mem. at 11 (quoting Ex. A at 2). However, the "publicly available documents" that GAO reviewed included the same "Treasury officials' depositions" to which Respondents point to show that Treasury exerted pressure on PBGC to terminate the Delphi Salaried Plan. Ex. A at 2; *see* Resp't Mem. at 3, 4 & 10 nn.3-5. The fact

that GAO concluded after reviewing those depositions that Treasury was not responsible for the termination of the Delphi Salaried Plan makes it difficult for Respondents to allege otherwise.

In addition, the findings of GAO are confirmed by the answers that PBGC has given to the questions that Rep. Michael R. Turner has put to it. PBGC has stated in those answers that "PBGC made the decision to terminate the Delphi Pension Plans" and 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." Ex. D at 2, 3. Because those answers are the representations of a federal agency to a member of Congress, they are entitled to great weight. In addition, Rep. Turner is a vocal critic of the termination of the Delphi Salaried Plan.[6] For that reason, the questions that Rep. Turner has put to PBGC are the equivalent of a set of interrogatories propounded by Respondents.[7]

At one time, Respondents alleged in *Black* that the decision of "New GM" to provide supplemental pension benefits to certain "union-affiliated Delphi retirees, but not to [Respondents]" violated the rights of Respondents under the First Amendment because, "[o]n information and belief, this discriminatory decision was the result of significant pressure by the United States, carried out in connection with government policies that were politically motivated." Ex. E ¶ 37. Based on that allegation, Respondents requested an order directing Treasury to "extend the top-up benefits to all Salaried Plan participants." *Id.* ¶ 61. By order dated September 2, 2009, the court dismissed Respondents' claim against Treasury because

[6] *See* Ex. Q at 2 (newspaper editorial stating that "Ohio Republican Rep. Michael Turner last month called attention to the glaring conflicts of interest that entangled Obama moneyman Tim Geithner's multiple meddling roles in screwing over the Delphi workers").

[7] Respondents allege that "Treasury chiefly relies on the GAO's finding[s]" to show that Treasury played no role in the termination of the Delphi Salaried Plan. Resp't Mem. at 11. In addition, Respondents characterize the answers that PBGC has given to Rep. Turner as "Treasury's own representations," not as PBGC's representations. *Id.* at 20. Both allegations are misleading.

Respondents had not pleaded any facts "that would allow this Court to infer that [Treasury had] infringed upon [Respondents'] First Amendment rights by making a decision to award top-ups based on associational choices" but relied instead on "'naked assertion[s] devoid of further factual enhancement." Ex. R at 13 (quoting *Iqbal*, 129 S. Ct. at 1949). In this case, the attempt of Respondents to subject Treasury to discovery is likewise based on their "'naked assertion[s]'" that certain actions were taken because of the alleged exertion of "political pressure" by Treasury. Respondents' subpoena should therefore be quashed.

3. Making a different argument, Respondents allege that their subpoena is justified because the court in *Black* "has determined that it needs additional discovery related to the question of whether PBGC could have obtained a court decree adjudicating that the Salaried Plan needed to be terminated." Resp't Mem. at 13. However, the court in *Black* has never held that third party discovery was necessary or appropriate, much less that Respondents' subpoena to Treasury was necessary or appropriate.

4. Making yet another argument, Respondents allege that their subpoena is justified because the subpoena may produce evidence that GM or "some other entity might have been in a position to assume the Salaried Plan's liability." Resp't Mem. at 10. However, § 1342(a) does not require PBGC to consider the possibility that "some entity" other than the sponsor of a pension plan may be willing and able to assume the pension plan's unfunded liability. Accordingly, it is irrelevant whether "alternatives other than termination were available in July 2009." *See id*. at 7.

5. Making still another argument, Respondents allege that their subpoena is justified because the documents that Respondents have obtained under FOIA do not include any "substantive communications between PBGC and Treasury." Resp't Mem. at 15. Even

assuming, *arguendo*, that any such communications exist, Respondents have asked PBGC to produce the following:

> All documents and things you received from the Federal Executive Branch [i.e., the Treasury Department, the Auto Task Force, the Labor Department, and the Executive Office of the President] or produced to the Federal Executive Branch, since January 1, 2009, related to Delphi 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.

Ex. H at 9. By order dated March 6, 2012, Magistrate Judge Majzoub directed PBGC to "produce [a] full and complete response[]" to above request. Ex. M at 2. PBGC has appealed the order of Magistrate Judge Majzoub to Judge Tarnow. By affirming that order, Judge Tarnow will require PBGC to produce the "substantive communications between PBGC and Treasury" that purportedly have been withheld from Respondents. By reversing that order, Judge Tarnow will hold that Respondents have no entitlement to those communications. Under either scenario, Respondents' subpoena should be quashed.[8]

6. Making yet a further argument, Respondents allege that their subpoena is justified because the termination of the Delphi Salaried Plan "affected the livelihood of over 20,000 participants in the Plan, depriving them of over $500 million in promised benefits." Resp't Mem. at 1. This allegation is baseless. Even assuming, *arguendo*, that Respondents' figures are correct, what "affected the livelihood of over 20,000 participants in the Plan" was not the termination of the Delphi Salaried Plan but the fact that the insolvency of Delphi made the termination of the plan appropriate under § 1342(a). ERISA is "the statutory regime enacted to

[8] Respondents allege that they have "no guarantee" that PBGC has maintained all of the alleged "substantive communications." Resp't Mem. at 15. However, the lack of any such guarantee does not provide a justification for Respondents' subpoena. At most, it suggests that compliance with the subpoena should be postponed until PBGC produces whatever communications it has.

redress the 'great personal tragedy' of the outright loss of pension benefits by ensuring all benefits up to pre-set limits." *Jones & Laughlin*, 824 F.2d at 201 (quoting *Textile Workers Pension Fund v. Std. Dye & Finishing*, 725 F.2d 843, 847-48 (2d Cir. 1984)). For that reason, the participants in the Delphi Salaried Plan have been helped, not harmed, by the termination of the Delphi Salaried Plan and its placement under the trusteeship of PBGC.[9]

7. Making an additional argument, Respondents allege that their subpoena is justified because "the issues at stake [in *Black*] arguably involve a much wider audience" than the parties in *Black*. Resp't Mem. at 12. However, "a lawsuit is about deciding the particular rights of these parties arising out of these events, not about discovery for its own sake." *Adams*, 2011 WL 856859, at *3. Accordingly, Respondents' subpoena is unjustified regardless of the breadth, if any, of the public's interest in *Black*.[10]

8. Making a final argument, Respondents allege that their subpoena is justified because Treasury has "an operating budget for 2012 of approximately $14 billion and employs more than 100,000 worldwide." Resp't Mem. at 12. However, "discovery under Rules 26 and 45 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.'" *Watts v. SEC*, 482 F.3d 501, 509 (D.C. Cir. 2007) (quoting *Exxon Shipping Co. v. Dep't of the Interior*, 34 F.3d 774, 779 (9th Cir. 1994)).

[9] "PBGC estimates that it will pay $2.1 billion from its own assets to cover the unfunded guaranteed liability" of the Delphi Salaried Plan. Ex. G, Att. C, Encl. ¶ 10. Those funds will not be available to the participants in the plan if, as Respondents ask in *Black*, the termination of the plan is set aside.

[10] To demonstrate the breadth of the public's interest in *Black*, Respondents refer to an audit being conducted by the Special Inspector General for the Troubled Asset Relief Program (SIGTARP). Resp't Mem. at 13. However, the SIGTARP audit does not involve the termination of the Delphi Salaried Plan. Instead, it involves "Treasury's role in GM's decision to provide top-ups for certain hourly workers, including whether the Administration or Treasury pressured GM to provide additional funding for the hourly plan." Ex. A at 2 n.4.

Accordingly, the fact that Treasury possesses substantial resources does not provide a justification for Respondents' subpoena.

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

"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). This burden is "heavy," *id.*, but not insurmountable. Where, as here, government records are subpoenaed, "[w]hether compliance with a requested search would be unduly burdensome depends on the volume of material requested, the ease of searching for the requested documents in the form presented, and whether compliance threatens the normal operations of the responding agencies." *Linder v. Calero-portecarrero*, 183 F.R.D. 314, 320 (D.D.C. 1998) (citation omitted).

In this case, Treasury bases its claim of undue burden on the declaration of Rachana A. Desai, an Attorney Advisor in Treasury's Office of Financial Stability. Ms. Desai states:

> In order to search for documents responsive to [Respondents'] subpoena, Treasury would be required to engage in at least the following time-consuming and unduly burdensome steps:
>
> a. Identify and segregate all emails, which Mr. Feldman, Mr. Rattner and Mr. Wilson received, produced or reviewed. This process would require searches of the relevant Outlook email mailboxes. Some records are archived and 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.
>
> b. Identify and segregate the electronic and hardcopy documents that Mr. Feldman, Mr. Rattner or Mr. Wilson received, produced or reviewed. Treasury maintains over 15,000 electronic Auto Team related documents on its computer system and over 28 boxes of Auto Team hard copy files. Once identified, these documents would have to be searched one by one for those related to any of [Respondents'] broad requests. Adding further burden to this review, the "properties" of each electronic document would have

> to be individually reviewed to determine whether Mr. Feldman, Mr. Rattner, or Mr. Wilson authored the document. * * * *
>
> c. Once the universe of possibly relevant document is identified and segregated, a Treasury attorney familiar with the subject matter would need to review each document page by page to determine if the contained information is responsive to any of [Respondents'] broad requests.
>
> d. Thereafter, Treasury attorneys would need to review each document line by line to determine whether the document contains any material protected by the attorney-client privilege, the deliberative process privilege or other applicable privileges.

Ex. K ¶ 6.

Respondents argue that Treasury's showing of undue burden is unpersuasive because the declaration of Ms. Desai does not "quantify the number of emails that have been archived" or provide certain other information that Respondents deem significant. Resp't Mem. at 17. However, Ms. Desai states in her declaration that, "[b]ased on previous search experiences, the universe of documents we will need to review for potential responsiveness is likely to exceed 25,000 documents, with a page count many multiples of this number." Ex. K ¶ 7. By so stating, Ms. Desai makes it clear that compliance with Respondents' subpoena will place a huge burden on Treasury.

Respondents also argue that Treasury's showing of undue burden is unpersuasive because "Boolean search terms" could be used to "cull the 15,000 electronic Auto Team documents to those having to do with the terms identified in the Subpoena." Resp't Mem. at 18. Even assuming, *arguendo*, that Treasury has the capacity to conduct Boolean searches of the "15,000 electronic Auto Team documents," the use of Boolean search terms to search those documents would not relieve Treasury of the burden of having to review the documents, page by page and line by line, once they had been culled. *See* Ex. K ¶ 6(c)-(d). Accordingly, the proposed use of

"Boolean search terms to cull the 15,000 electronic Auto Team documents" would not lighten Treasury's burden substantially even assuming, *arguendo*, that it would lighten Treasury's burden at all.

As a further matter, Respondents argue that Treasury's showing of undue burden is unpersuasive because Ms. Desai has not explained why "the universe of hard copy documents in the Auto Team's possession" has not been kept "in some organized fashion amendable [sic] to search." Resp't Mem. at 18. However, the documents that Respondents seek are documents "received, produced, or reviewed" during the period January 1 - December 31, 2009. Ex. J at 5-6. Treasury had no reason to anticipate in 2009 that a private litigant would ask it in 2012 to conduct a search for those documents. Neither did it have any obligation to maintain its files in a manner that would facilitate such a search.

As yet another matter, Respondents argue that Treasury's showing of undue burden is unpersuasive because the declaration of Ms. Desai does not support the allegation of Treasury that "[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." Mem. Supp. Mot. Quash U.S. Dep't Treas. at 14 (quoted in Resp't Mem. at 18). However, Treasury made that allegation for the sole purpose of explaining why "[a]ny material determined to be responsive will need to be reviewed by Treasury attorneys, line by line, to protect and preserve privileged material." *Id*. Accordingly, Treasury had no need to show that any particular piece of responsive material was subject to claim of privilege, and made no attempt to do so.

Making a different argument, Respondents allege that it makes no difference whether compliance with Respondents' subpoena will subject Treasury to undue burden because any such

burden must be balanced against the alleged value of the responsive documents to Respondents' case in *Black*. Resp't Mem. at 18. For the reasons set forth above, however, the responsive documents have no value to Respondents' case in *Black*. For that reason, their subpoena should be quashed.

Making a final argument, Respondents ask that their subpoena be modified if it is held to be unduly burdensome, not quashed in its entirety. Resp't Mem. at 22. However, Respondents do not propose any specific modifications to their subpoena, much less any modifications that would make the subpoena less burdensome. Respondents' request should therefore be denied.[11]

CONCLUSION

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

Respectfully submitted,

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Dated: April 2, 2012

[11] Any modification of Respondents' subpoena should begin by taking into consideration the extent to which compliance with the subpoena will be rendered superfluous by any further production of documents that PBGC is ordered to make in *Black*.

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2012, I served the within memorandum and the associated exhibits on all counsel of record by filing them with the Court by means of its ECF system.

s/ *David M. Glass*