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 TREASURY'S RENEWED MOTION TO QUASH

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INTRODUCTION

The motion to quash before the Court ought to be, and ultimately is, a simple motion to resolve. Respondents, current and former salaried employees of the Delphi Corporation ("Delphi"), are also plaintiffs in a lawsuit filed in the Eastern District of Michigan (the "Michigan Court"), *Black v. PBGC*, Case No. 2:09-cv-13616, which challenges the 2009 termination of their pension plan (the "Salaried Plan" or the "Plan") by the Pension Benefit Guaranty Corporation ("PBGC").[1] In connection with that lawsuit, Respondents have served subpoenas upon the U.S. Department of the Treasury (the "Treasury"), seeking information that is plainly relevant to the lawsuit – in fact, it goes to the heart of Respondents' claim that the PBGC's termination of their Plan was not justified under the statutory criteria set forth in the Employee Retirement Income Security Act ("ERISA") but was instead the product of improper interference and pressure by the Treasury and the US Auto Task Force. The Michigan Court has repeatedly found such information to be relevant, and has permitted discovery to proceed apace on that issue.

While the law is well-settled that a party moving to quash bears a "heavy burden" on such a motion, and that it must demonstrate "extraordinary circumstances" in order to prevail, *Alexander v. FBI*, 186 F.R.D. 71, 75 (D.D.C. 1998), the Treasury makes no such showing. Instead, the Treasury, apparently desperate to avoid any scrutiny of what it did to procure the termination of Respondents' pension plan, seeks to cloak this simple inquiry under a cloud of complexity. Thus, it interjects a host of meritless objections, including a relevance objection that is contrary to the law of the case and the statutory text of ERISA's termination criteria; an

[1] References to the underlying litigation, *Black v. PBGC*, Case No. 2:09-cv-13616 (E.D. Mich.), are cited herein as *Black v. PBGC*, and references to filings in that court are styled as *Black v. PBGC*, Dkt. No. ___.

objection based on the supposed "burden" that every subpoena imposes (to locate and produce responsive documents); and an objection that the information Respondents seek is "unnecessary" in light of other available information, though it never alleges that the actual information sought from Treasury is available to Respondents from any of these other "sources." Finally, the Treasury seeks to evade complying with the subpoenas by making the remarkable claim that Respondent's supposedly lack standing to pursue a lawsuit that has now been pending for more than four years in the Michigan Court. All of these contentions lack merit, and most have, in one form or another, already been rejected by the Michigan Court when raised there by the PBGC.

The Treasury has attempted to side-step its burden on this motion by asking this Court to second guess decisions already made by the Michigan Court, hoping to achieve here what the PBGC could not achieve there. There are many words that might be used to describe this strategy, with "desperate" and "frivolous" being the first to come to mind. Most importantly, however, the arguments underlying the Treasury's motion are meritless, and its tactics are unreasonably delaying and complicating the progression of *Black v. PBGC* in the Michigan Court. Respondents respectfully request that this Court put an end to the Treasury's stonewalling and order compliance with Respondents' subpoenas forthwith.

FACTUAL AND PROCEDURAL BACKGROUND

The focus of Respondents' lawsuit (*Black v. PBGC*) is the PBGC's termination of the Salaried Plan, which was purportedly accomplished via an "agreement" with the Plan's administrator, Delphi, in connection with a broad settlement reached between Delphi, GM, and the PBGC. Respondents allege in Count One of *Black v. PBGC* that this agreement itself was unlawful because ERISA requires the PBGC to apply for a termination decree from a United States district court, and that such a decree may issue only upon a finding by the court that a 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). Counts Two and Three of Respondents' complaint allege additional procedural infirmities with the PBGC's termination-by-agreement.[2] Respondents further allege in Count Four of *Black v. PBGC* that the PBGC could not have satisfied ERISA's statutory requirements for termination had it actually sought court approval because the PBGC could not have carried its burden to show that the Salaried Plan needed to be terminated for any of the statutorily permissible reasons. *See Black v. PBGC*, Dkt. No. 145, ¶ 56.

At the time the Salaried Plan was terminated in 2009 it was, compared to other large pension plans at that time, a relatively well-funded pension plan, and there were a number of viable alternatives to termination that a court might have considered in lieu of termination, the most likely (though not only) option being a reassumption of the Salaried Plan by GM. Because the PBGC had significant liens and claims over Delphi assets essential to GM's supply-chain, the PBGC had significant leverage to negotiate a GM reassumption, and in fact the PBGC had, for a time, been actively advocating for this result. Respondents allege that the PBGC relented in its efforts to ensure the Plan's continued viability, and acquiesced in the Plan's termination, not because of anything related to its statutory role under ERISA, but as a result of pressure imposed

[2] In Count Two, Respondents allege that, even if ERISA allows a termination-by-agreement with a plan administrator, the law is well-settled that any actions undertaken by a plan administrator in connection with a plan termination are fiduciary in nature, and therefore may only be valid if done in accordance with ERISA's duties of loyalty and prudence. *See Black v. PBGC*, Dkt. No. 145, ¶ 43, citing 29 U.S.C. §§ 1002(21)(A),1104(a). In Count Three, Respondents allege that even if ERISA allows for a termination-by-agreement with a conflicted fiduciary, the Constitution does not. *See id.*, ¶ 52.

by the Treasury and the related Auto Task Force to support their efforts to restructure the auto industry in general and GM in particular.

Respondents' lawsuit was filed over four years ago in the Michigan Court. In that time, the Michigan Court has denied two dispositive motions filed by the PBGC, expressly on the grounds that discovery was necessary for the resolution of Respondents' claims against the PBGC. Nonetheless, the PBGC (and the Treasury) resisted any discovery for approximately one year.[3] Respondents accordingly moved to compel, which was effectively granted by order of the Michigan Court on September 1, 2011 (the "September 1, 2011 Order"). *Black v. PBGC*, Dkt. No. 193. In the September 1, 2011 Order, Judge Tarnow defined the scope of discovery in *Black v. PBGC*, stating that:

> 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."

Id. at 3-4.

In entering this Order, the Michigan Court determined that the most efficient way to proceed was to permit Respondents to take discovery on their substantive claim (Count Four) alleging that the PBGC could not meet the statutory criteria for termination (the "Termination Inquiry"), and then to address the remaining statutory and constitutional questions posed by Counts One through Three, if necessary, after discovery.

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[3] As the Treasury notes in its Renewed Motion to Quash, it was for a time a party to *Black v. PBGC*. *See* Pet.'s Br. at 4. While a party to *Black v. PBGC*, the Treasury argued to the Michigan Court that Respondents should not be allowed *any* discovery in the case, even from the PBGC. *See, e.g., Black v. PBGC*, Dkt. No. 188.

Despite the fact that the Michigan Court first ordered *Black v. PBGC* into discovery in the fall of 2010, the PBGC fought to avoid producing a single document in discovery for another two years by asserting meritless objections in the Michigan Court as to the scope and relevance of Respondents' discovery requests -- objections that are virtually identical to the objections now asserted by the Treasury. Time and again the Michigan Court rejected those objections, with the end result that the PBGC has been forced to abandon its frivolous objections and comply with discovery, though slowly and reluctantly, and only after forcing Respondents to litigate three Rule 37 motions to compel, three Rule 72 objections, and two motions for reconsideration. Nonetheless, the Treasury seeks to undermine those discovery rulings here by asking this Court to redefine the scope of relevance in *Black v. PBGC*. This is plainly inappropriate.

As described in more detail below, discovery from the Treasury is critical to the Termination Inquiry. During the time in question, the Treasury exercised *de facto* control over GM by virtue of its loans and investments in the company, and it took over negotiations on GM's behalf with a number of interested third-parties, including Delphi, Delphi's unions and debtor-in-possession (DIP) lenders, and potential acquirers of Delphi, like Platinum Equity and Federal Mogul. Moreover, notwithstanding the obvious conflicts of interest, the Treasury was also "negotiating" with the PBGC on GM's behalf over the fate of Delphi's pension plans, with the end result that Treasury was able to induce the PBGC to waive its liens and claims over the Delphi pension plans and acquiesce to the plans' termination.

Because the Treasury played a key role in these issues, and documents and witnesses within the Treasury's control are uniquely relevant to the § 1342(c) Termination Inquiry, the Michigan Court will be unable to make in informed judgment on the Termination Inquiry absent discovery from the Treasury. Accordingly, in January 2012, Respondents served the Treasury

with a subpoena pursuant to Fed. R. Civ. P. 45, asking the Treasury to produce documents received, produced or reviewed by just three former Treasury officials that are directly relevant to Respondents' claims in *Black v. PBGC* (the "Document Subpoena"). DE 1 at ECF pp. 223-31.[4]

The Treasury moved to quash the Document Subpoena on February 17, 2012 (DE 1) (the "First Motion to Quash"), on the grounds that it is supposedly unreasonably cumulative, duplicative, and burdensome in light of the documents' potential benefits to Respondents.

On March 5, 2012 Respondents filed their opposition (DE 6) to the Treasury's motion, in which they detailed at length why the Document Subpoena is appropriate and indeed necessary to their claims in light of the Michigan Court's September 1, 2011 Order. Respondents also described in their opposition why the Treasury's unsubstantiated arguments alleging that the Subpoena was unduly cumulative, duplicative or burdensome were of no moment.

On April 2, 2012 the Treasury filed a reply in support of its motion to quash (DE 10), where it modified its earlier relevance arguments by suggesting that this Court grant disregard the law of the case as stated in Judge Tarnow's September 1, 2011 Order by ignoring the scope of discovery as stated there. Additionally, the Treasury's reply urged this Court to undermine the last four years of rulings by the Michigan Court by disregarding that court's decision to deny the PBGC's dispositive arguments on Counts One through Three, and to instead reach a contrary decision on Respondent's substantive claims in addressing the Treasury's motion to quash. The Treasury also noted in its reply that, on March 9, 2012 (DE 10 at 4), the PBGC had been ordered by Magistrate Judge Majzoub of the Michigan Court to "'produce full and complete responses'"

[4] References to filings in this Court are cited using the designation "DE _."

to Respondents' document requests, and that the PBGC had filed objections to that order to Judge Tarnow. (citation omitted).

On May 17, 2012 this Court entered a minute order stating that:

> Upon review of the motion to quash, the response, and the reply thereto, it appears to the Court that a threshold issue in this matter is whether the court in the underlying action has permitted discovery regarding the factors enunciated in 29 U.S.C. 1342(c). In light of the fact that this precise issue is ripe for resolution before Judge Tarnow, the judge in the underlying action, the Court hereby STAYS this matter pending Judge Tarnow's resolution of PBGC's Objections to Magistrate Judge's Order of March 9, 2012 Granting Plaintiffs' Motion to Compel Discovery, Case 09-13616 (E.D. Mich.), Doc. No. 209. Plaintiffs are directed to notify this Court of Judge Tarnow's decision within five calendar days after it issues. This Order is subject to reconsideration for good cause shown. Any motion for reconsideration shall be filed by no later than May 31, 2012.

On August 13, 2013, Respondents filed a motion in this Court to lift the stay (DE 11), arguing that its continued imposition was no longer appropriate. Respondents also noted that the Treasury's arguments as to burden failed to account for a document production that Treasury had likely made to SIGTARP in connection with SIGTARP's audit of the Treasury's involvement in the Delphi pension issues, s*ee* DE 11 at 3-4, and that its relevance arguments asked the Court to reject the "law of the case," *id*. at 8-16.

On August 21, 2013, Respondents served the Treasury with a second subpoena (the "Deposition Subpoena"), asking the Treasury to produce one or more deponents competent to testify as to the communications of Matthew Feldman and Harry Wilson with the PBGC, GM, the Delphi DIP Lenders, Federal Mogul, Platinum Equity, the National Economic Council, and the Executive Office of the President that related to the GM- Delphi relationship, the Delphi pension plans, and the release, waiver or discharge by the PBGC of its liens and claims relating to the Delphi pension plans. *See* DE 13-4.

On August 23, 2013, Respondents filed with this Court a supplemental memorandum in support of their motion to lift the stay (DE 13), in which Respondents noted, *inter alia*, that they

had served the Treasury with the Deposition Subpoena, and that the previously mentioned SIGTARP Report had been completed.

On September 4, 2013, the Court entered a minute order stating that:

> MINUTE ORDER granting [14] the U.S. Dept of the Treasury's unopposed motion for extension of time. Treasury shall file a renewed motion to quash by no later than September 16, 2013. Treasury shall also file its response to [11] respondents' motion to lift the stay by no later than that same date. In view of the foregoing, Treasury's initial [1] Motion to Quash is hereby denied without prejudice to refilling.

On September 16, 2013, the Treasury filed a renewed motion to quash (the "Renewed Motion to Quash") (DE 15), asking the Court to quash both the Document Subpoena and the Deposition Subpoena (collectively, the "Subpoenas"). In its Renewed Motion to Quash, the Treasury asserts the same grounds as in the First Motion to Quash, and adds an argument that Respondents lack standing to pursue their claims against the PBGC in *Black v. PBGC*.

ARGUMENT

I. THE SUBPOEANAS SEEK DISCOVERY THAT IS CLEARLY RELEVANT TO RESPONDENTS' CLAIMS

A. The Scope of Discovery Governing Respondents' Rule 45 Subpoenas Is Broad, and Covers, at a Minimum, Information Reasonably Calculated to Lead to Admissible Evidence on the § 1342(c) Termination Inquiry

Relevance under Fed. R. Civ. P. 26 is to be "'construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.'" *Jewish War Veterans of the United States of America, Inc. v. Gates*, 506 F. Supp. 2d 30, 41-42 (D.D.C. 2007) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978); s*ee also Black v. PBGC*, Dkt. No. 193 at 3 ("Since 'discovery itself is designed to help define and clarify the issue,' the limits set forth in Rule 26 must be 'construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case.'") (emphasis in original) (quoting *Conti v. Am.*

Axle & Mfg., Inc., 326 F. App'x 900, 904 (6th Cir. 2009)).[5] "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

"The same broad scope of discovery set out in Rule 26 applies to the discovery that may be sought pursuant to Rule 45." *AF Holdings LLC v. Does*, 286 F.R.D. 39, 46 (D.D.C. 2012) (citing *Watts v. S.E.C.*, 482 F.3d 501, 507 (D.C. Cir. 2007)); Advisory Committee Note on 1946 Amendments to Fed. R. Civ. P. 45 ("The added last sentence of amended [Rule 45](d)(1) properly gives the subpoena for documents or tangible things the same scope as provided in Rule 26(b).")); s*ee also Jewish War Veterans*, 506 F. Supp. 2d at 41-42 (applying Rule 26's "broad" standards in considering a Rule 45 Subpoena directed against third-party members of the United States Congress, and further noting that the broad standards were particularly applicable in cases where "as here, the court making the relevance determination has jurisdiction only over the discovery dispute.").

As noted above, the Michigan Court has authorized discovery on all four counts of Respondents' complaint, and specifically held that discovery should focus on the § 1342(c) Termination Inquiry.[6] Put another way, had an Article III court held a *de novo* hearing in July

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[5] *Accord Food Lion, Inc. v. United Food & Commercial Workers Int'l Union*, 103 F.3d 1007, 1012 (D.C. Cir. 1997) ("Generally speaking, 'relevance' for discovery purposes is broadly construed."); *United States v. All Assets Held at Bank Julius Baer & Co.*, 276 F.R.D. 396, 398 (D.D.C. 2011) ("[i]t 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.'") (quoting *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1348-49 (D.C. Cir. 1984)).

[6] *See Black v. PBGC*, Dkt. No. 193, noting that that the Michigan Court will seek to resolve the case by reviewing dispositive motions as to whether upon a *de novo* review, termination of the Salaried Plan would have been appropriate in July 2009 if, as Respondents contend, the PBGC had been required under 29 U.S.C. § 1342(c) to seek "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." *Id.* at 7. This ruling is the "law of the

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2009, would it have found that termination of the Salaried Plan was unavoidable? Accordingly, information will be facially relevant so long as it reasonably calculated to lead to the discovery of admissible evidence on the Termination Inquiry, *i.e.*, whether the Salaried Plan had to be terminated in July 2009 to avoid any unreasonable increase in the liability of the PBGC's insurance fund, or whether there were viable alternatives to the Plan's termination.

B. The Treasury Had Extensive Involvement in the Back-Room Negotiations and Determinations as to Whether There Were Viable Alternatives to the PBGC's Termination of the Salaried Plan

Respondents contend that there were a number of viable alternatives to termination that would have prevented the PBGC from prevailing on the Termination Inquiry. As described in detail below, the information sought from the Treasury through the Subpoenas is directly relevant to this question.

1. The GM-Delphi Relationship

Delphi consisted of divisions and subsidiaries of GM until GM's divestiture of Delphi in 1999." *See* DE 6-2 (Declaration of R. 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

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case." "The doctrine [of the law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. This rule of practice promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.'" *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16 (1988) (alteration in original, citations omitted). While courts have the power to revisit such prior decisions, "as a rule courts should be loath to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Id.* at 817 (quoting *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983) (citation omitted).

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." DE 6-3 (Declaration of R. Westenberg), ¶ 6.

2. The PBGC

Title IV of ERISA established the PBGC to administer a mandatory government pension insurance program. The PBGC's insurance guarantee is funded entirely by premiums the PBGC collects from plan sponsors. While the PBGC receives no federal appropriations, it is not wholly unconnected to the Federal Executive branch. For example, the PBGC is governed by a three-person board of directors that comprises the Secretaries of Labor, Treasury and Commerce. In order to help protect against unnecessary pension terminations, the PBGC may assert liens and claims against pension plan sponsors (and those companies within the sponsor's control group) to cover any missed contributions or even to cover the full amount of a plan's underfunding. *See* 29 U.S.C. §§ 1362, 1368.

3. The Proposal for GM Reassumption of the Delphi Pension Plans

While Delphi remained committed to maintaining its pension plans throughout its bankruptcy, it also recognized as the capital markets dried up in 2008 that it might require help from GM to maintain those plans going forward. Thus in 2008, Delphi proposed that GM re-assume the pension liabilities of its former employees. The PBGC was in favor of a GM reassumption and was in fact "cheerleading for the transfer, . . . utilizing [the PBGC's] liens overseas as potential leverage to get it done." DE 11-6 (D. Cann Dep. Tr.) at 67:6-14.

In September 2008, GM agreed to assume over $2 billion in Delphi pension liabilities associated with Delphi's pension plan for its hourly employees. DE 6-11 (Apr. 2009 Termination Memo) at 3. As a result of this pension transfer, the PBGC released over $1.2 billion worth of liens it had asserted on Delphi assets. DE 6-4 (Sept. 25, 2008 PBGC Press Release). Because the PBGC continued to possess the ability to assert liens and claims upon Delphi assets (*i.e.*, the plants that made the parts GM depended upon) to the extent the Delphi pension plans were underfunded, the resolution of Delphi's pension obligations, and the associated PBGC liens and claims, were a major threat to GM's supply and were one of the last major hurdles to resolving Delphi's bankruptcy. DE 6-5 (Mar. 20, 2009 Presentation) at 9.

4. Treasury's Investment in GM and the Creation of the Auto Task Force

In December 2008, GM sought and received billions of dollars in emergency secured financing from the U.S. Government, through the Treasury Department. DE 13-2 (SIGTARP Report) at 4. During this time, Delphi continued to press GM to re-assume the Delphi pension plans and consistently described a GM reassumption of the Salaried Plan as a "preferred" and "likely outcome." *See* e.g., DE 6-5 (Mar. 20, 2009 Presentation) at 9. On January 26, 2009, the heads of GM and Delphi engaged in an email exchange in which Delphi's CEO, Rod O'Neal wrote to GM' CEO (Fritz Henderson) that:

> We must find a pension plan solution in which GM participates. Your team has said that GM will not be permitted to address (or does not intend to address) legacy obligations relating to Delphi's [Salaried Plan] . . .This does not make sense to us because, for example, if there is a distressed pension termination, *both GM and Delphi have been told by the PBGC that it will assert liens against Delphi ROW [rest of the world assets] and will sue GM for what the PBGC has told us it views as GM's prior unlawful follow-on plan at the time that the pension plans were split and transferred to Delphi*. We will not be able to sort out a solution where GM takes the keep sites and the DIP lenders take the rest of the world without a pension solution that, among other matters, eliminates any contingent PBGC claims and related PBGC liens both in the US and in the rest of the world.

Jan. 26, 2009 email [Bates 110224-041076] (attached here as Ex. A) at 3 (emphasis added).

On February 15, 2009, the President appointed the Auto Task Force to oversee the administration's efforts to support and stabilize the domestic automotive industry. In a memo dated a few days prior to the Auto Task Force's creation, Compass Advisors, one of the PBGC's bankruptcy advisors, noted that the PBGC was still engaged in a "full court press to convince GM and Government officials that the 414(L) transfer [of Delphi pensions back to GM] is in everyone's best interest [as] GM doesn't need two classes of employees and should provide pensions to all retirees." DE 11-5 (Feb. 13, 2009 Memo from Compass Advisers to PBGC) at 8 (PBGC-BL-0184878).

5. The Treasury's Efforts to Secure a "Global Solution" for Delphi

In the spring of 2009, the Treasury hired three individuals, Matthew Feldman, Steve Rattner, and Harry Wilson, to serve on the "Auto Team," at Treasury, which provided staff level support for the Auto Task Force. *See* DE 15-7 (Declaration of R. Desai) at ¶ 4. Mr. Ratner was appointed to lead the Auto Team, with Mr. Wilson and Mr. Feldman reporting to him. "What followed was the Auto Team's direct involvement in the decisions affecting GM. Treasury's Auto Team used their financial leverage as GM's only lender to significantly influence the decisions GM made during the time period leading up to and through GM's bankruptcy." DE 13-2 (SIGTARP Report) at 8. Indeed, "the Auto Team used their leverage as GM's largest lender to influence and set the parameters for GM to make decisions." *Id*. at 11. According to SIGTARP, "[t]he Auto Team specifically pressed GM to be less generous in relation to Delphi and pensions." *Id*. at 13.

Treasury also informed both Delphi and GM that there would be no additional financial support to Delphi, in any form, absent a "global solution." *See* DE 6-6 (M. Feldman Dep. Tr.) 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 order to achieve its global solution, the Treasury took the lead in vetting offers from Delphi, Delphi's DIP Lenders, Platinum Equity, and Federal Mogul in deciding what form a new or reorganized Delphi would ultimately take. *See generally*, DE 6-7 (Declaration of J. 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. S*ee* DE 6-3 (Westenberg Declaration), ¶ 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* DE 6-6 (M. Feldman Dep. Tr.) 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."). Thus, arriving at a global solution meant dealing with Delphi's pension plans and the PBGC's associated liens and claims.

6. The Treasury's "Negotiations" with the PBGC and Others, and the PBGC's Reversal on GM Reassumption

The Auto Team took over negotiations with the PBGC on GM's behalf. One of Treasury's perceived objectives in these negotiations was "induc[ing] PBGC to waive alleged 'rest of world' liens against Delphi's non-debtor affiliates . . . ." *See* Delphi Mediation Submission (attached here as Ex. B) at Bates 110224-050597. However, the shift in negotiating partner was problematic for the PBGC, as the Treasury was wearing "at least" three conflicting hats: (1) through its Auto Team, it was the agency charged with restructuring the auto industry; (2) as a PBGC board member, it was one of three agencies charged with providing oversight and direction to the PBGC; and (3) as a major competing creditor in the Delphi bankruptcies that, as

the chief lender to GM, would ultimately decide whether GM would be permitted to fund a reassumption of the Delphi pension plans. *See, e.g.*, DE 11-7 (V. Snowbarger Dep. Tr.) at 39:6-12, 62:13-63:2. Interestingly, GM perceived a benefit to Treasury taking the lead on dealing with the PBGC "because it was 'Government agency to Government agency' and *Treasury would get a better deal for GM*." DE 13-2 (SIGTARP Report) at 14 (emphasis added).

The communication between the Auto Task Force and the PBGC on Delphi issues took place almost exclusively through two individuals, Joe House at the PBGC, and the Auto Team's Matt Feldman. *See, e.g.*, DE 11-7 (V. Snowbarger Dep. Tr). at 47:16-19; DE 11-8 (J. House Dep. Tr.) at 118:4-19. Mr. Feldman has stated that he began these discussions with a clear agenda -- "to reach an agreement where the salaried Delphi plans would be terminated and General Motors would assume the hourly pension plans." DE 6-6 (M. Feldman Dep. Tr.) at 158:24-159:4.

While the PBGC had previously been engaged in a "full court press" to have GM assume the Salaried Plan, once the Treasury took over negotiating for GM, the PBGC took on a much more submissive role in those negotiations, eventually abandoning its advocacy of a GM reassumption of the Salaried Plan altogether. And notwithstanding the PBGC's earlier enthusiasm for GM reassumption, its statutory mandate to try to preserve pension plans, the significant leverage it wielded over GM via its liens and claims, and its realization that Treasury held the key to securing financing for the Salaried Plan, the PBGC, apparently, stopped treating its interactions with Treasury as a negotiation. As the PBGC's negotiator admitted, "the word 'negotiation' doesn't really describe the nature of the liasing. It was much more of a -- a coordination exercise." DE 11-8 (J. House Dep. Tr). at 12:4-7. When asked specifically about the PBGC's efforts to persuade the Treasury to fund the Delphi plans, Mr. House was clear that

such advocacy was not a part of his mandate. *See id*. at 45:6-8 ("I don't have a recollection of trying to persuade Treasury of anything.").

On May 26-27, 2009, the Delphi bankruptcy court ordered certain key stakeholders in the Delphi bankruptcy to participate in mediation; Delphi, the PBGC, GM, the Auto Task Force, and Delphi's DIP lenders were among the attendees. A few days after the mediation concluded, Delphi announced its belief that the PBGC would terminate the Salaried Plan. Respondents believe that the Treasury played the determinative role in shaping this outcome. Indeed, shortly before the mediation took place, Delphi officials stated their understanding that the PBGC and Treasury had reached an agreement in principle about how Delphi's pensions should be handled. *See* DE 11-9 (May 13, 2009 PBGC email chain). When asked about this email, Mr. House admitted his memory of these events was poor, and also acknowledged that he and Mr. Feldman were engaged in conversations at the same time frame (May 12-13), the substance of which he could not recall. DE 11-8 (J. House Dep. Tr.) at 139:18-140:20. Moreover, on May 22, 2009 (the Friday just prior to the start of the mediation), Mr. Feldman emailed Mr. House to request another one of their off-the-record phone conversations, this time to discuss the upcoming mediation in light of a conversation that Mr. Feldman had just had with the Delphi mediator. *See* DE 11-10 (May 22, 2009 email). Mr. House could not recall the substance of this conversation either. *See* DE 11-8 (J. House Dep. Tr.) at 141:17-19.

Respondents do not yet have direct testimony of what occurred at the mediation (though Mr. House has testified that the PBGC attendees passively "sat in a room and read books all day," s*ee id*. at 144:10-11, yet emails produced in the days after the mediation suggest that the *Treasury's Auto Team* -- not the PBGC -- put forward a detailed proposal at the mediation that would involve the PBGC initiating termination of the Delphi Salaried Plan, the reassumption by

GM of the Delphi Hourly Plan, and a settlement by the PBGC of all its liens and claims. *See, e.g.*, May 28, 2009 email chain from Delphi's counsel to Matt Feldman (attached here as Ex. C) (stating that the PBGC "needs to hear from you on what GM/UST plan to do with the HRP and SRP. . . in the event that GM takes the HRP and leaves behind the SRP, the PBGC will terminate the SRP and will waive ROW liens on the SRP if they can receive some reasonable settlement on the termination liabilities."); *see also* DE 11-8 (J. House Dep. Tr.) at 147:6-165:6; DE 11-11 (May 29, 2009 email chain).

Emails from GM officials to the Auto Task Force indicate that this solution was unilaterally reached by Treasury without GM's involvement. *See* DE 11-12 (June 2, 2009 email chain) (GM's Rick Westenberg asks Mr. Feldman whether the settlement with the PBGC has been finalized, and whether Mr. Feldman could provide GM with an "overview for how the hourly and salaried plans will be treated/addressed? Would it be appropriate/helpful to have GM involved in any discussions?" GM's Walter Borst goes on to note to the Auto Task Force's Harry Wilson that, prior to having any direct contact with the PBGC, he wants to understand where the Treasury has left it with the PBGC and what, from the Treasury's perspective "is expected from GM . . . and what isn't."). When asked about this settlement proposal, the PBGC's Mr. House could not remember how the proposal originated, or whether it was entirely a creation of Matt Feldman's. DE 11-8 (J. House Dep. Tr.) at 159:12-160:1.

Around this time, "GM came to the Auto Team because 'GM wanted to do something for the [Delphi] Salaried retirees.'" DE 13-2 (SIGTARP Report) at 28 (quoting Mr. Rattner) (alteration in original). Mr. Rattner informed GM's CEO, Fritz Henderson, that GM would not be permitted to do anything for the Salaried Plan participants because Mr. Rattner "thought there was nothing defensible from a commercial standpoint that could be done for the Delphi salaried

retirees." *Id*. This "commercially-reasonable standard doesn't exist other than through the auto team and through TARP. It's the marching orders that the Auto Task Force, who Mr. Summers and Mr. Geithner give to the auto team as to how they should be making decisions." DE 15-12 (Testimony before House Oversight Committee) at 44.

On June 30, 2009, Mr. House and his supervisor at the PBGC, Terry Deneen, were summoned to a meeting at the Treasury with Mr. Feldman and Mr. Wilson to be informed that the Treasury had decided not to fund a GM reassumption of either Delphi pension plan, leading the PBGC's acting director to note to others at the PBGC that "[d]ecisions have been made re Delphi." DE 11-13 (June 30, 2009 PBGC email chain). Mr. House described the significance of the Treasury's pronouncement in more detail, noting that they had "just returned from a meeting over at [Treasury]. It is now clear that the Delphi Hourly Plan will not be assumed by GM, *and thus we will be terminating/trusteeing that pension plan along with the Salaried and the four small plans*." DE 11-14 (June 30, 2009 PBGC email chain) at 2 (PBGC-BL-0170326) (emphasis added). The email makes clear that the decision was one made by the Treasury, with Mr. House noting that up until that point the Treasury's auto team had "consulted/deliberated exclusively amongst itself and [the White House/National Economic Council]." *Id*. at 1 (PBGC-BL-0170325). According to the email, Mr. Feldman would only inform GM of the Treasury's decision the next day. *Id*. at 1-2.

Over the next month, Mr. Feldman, Mr. Wilson and Mr. House proceeded to negotiate the details regarding the termination of the Delphi pension plans, and the recoveries that GM would provide to the PBGC in exchange for releasing its liens and claims associated with those plans. *See, e.g*., attached Ex. D (July 15, 2009 PBGC email chain discussing "Treasury/GM" Settlement offers). The Auto Team ultimately determined that the release of those liens and

claims was of sufficient "commercial necessity" that it agreed to a settlement with the PBGC in which the PBGC received over $660 million from GM. *See e.g.*, DE 11-6 (D. Cann Dep. Tr.) at 208.

On August 10, 2009, the PBGC and Delphi entered into a "termination and trusteeship agreement," purporting to authorize the PBGC to terminate the Plan and serve as statutory trustee as of as of July 31, 2009.

C. The Subpoenas Are Calculated to Lead to the Discovery of Relevant Evidence on the § 1342(c) Termination Inquiry

Had the PBGC gone to a court in July 2009 seeking a decree that the Salaried Plan must be terminated in order to avoid an increase to the liability of the PBGC's insurance fund, one of the first questions that the court would have asked is whether a GM reassumption of the Salaried Plan was a viable possibility. Similarly relevant to the Termination Inquiry would be information related to whether other potential acquirers of Delphi would have been amendable to assuming the Delphi pensions under the right circumstances.

The Treasury possesses information directly relevant to these questions. Again, and as noted above:

- Securing Delphi supply was a priority for GM and Treasury. *Infra,* 11.
- Because the PBGC's liens and claims were a threat to that supply, securing the release of these liens and claims was a priority for the GM and the Treasury. *Infra,* 12,14.
- The PBGC initially advocated for GM's reassumption of the Salaried Plan, utilizing its liens and claims as leverage. *Infra,*11-13.
- After the creation of the Auto Task Force, the Treasury took over responsibility for negotiating with the PBGC on GM's behalf. *Infra,*14.
- GM felt that Treasury would be able to get GM a better deal. *Infra,*15.
- Delphi perceived that one of the Treasury's principal objectives was to induce the PBGC to waive its liens. *Infra,* 14-15.

- After the Treasury began negotiating with the PBGC on GM's behalf, the PBGC inexplicably abandoned advocating for a GM reassumption of the Salaried Plan. *Infra*, 15-16.
- GM's CEO told the Auto Task Force that "G.M. wanted to do something for the salaried retirees." DE 13-2 (SIGTARP Report) at 28 (quoting Mr. Rattner).
- Mr. Rattner told Mr. Henderson that "there was nothing defensible [that Treasury would authorize] from a commercial standpoint." *Id*.
- The "commercially-reasonable" standard was manufactured by the auto team. As the Special Inspector General for TARP recently testified, "[t]he commercially-reasonable standard doesn't exist other than through the auto team and through TARP. It the marching orders that the Auto Task Force, who Mr. Summers and Mr. Geithner (ph) give to the auto team as to how they should be making decisions. And so there's no definition of it, or standard. It's just interpreted." DE 15-12 (Testimony Before House Oversight Committee) at 44.

Respondents' Document Subpoena seeks documents received, produced or reviewed by Messrs. Feldman, Wilson and Rattner in 2009 that are related to: (1) Delphi; (2) Delphi's pension plans; or (3) the PBGC's liens and claims relating to those plans. Respondents' Deposition Subpoena seeks a 30(b)(6) deponent or deponents to testify as to Messrs. Feldman's and Wilson's communications in 2009 relating to the GM-Delphi relationship; Delphi's pension plans, and the PBGC's liens and claims associated with the Delphi pension plans. Because Messrs. Feldman, Wilson and Rattner were (a) the key decision-makers on what GM actions were commercially reasonable; (b) the individuals responsible for "negotiating" with the PBGC; and (c) negotiating with other potential acquirers of Delphi, the documentary and testimonial evidence sought in the Subpoenas is facially relevant to the § 1342(c) Termination Inquiry, in that it will help establish whether GM reassumption of the Salaried Plan, or assumption by another potential Delphi acquirer, were viable options that should have been explored prior to termination.

As described above, the PBGC and Delphi both believed GM reassumption was a viable possibility, and the PBGC possessed significant leverage, in the form of its liens and claims, to make such reassumption commercially reasonable. Moreover, the recently released SIGTARP Report reveals that GM management was in favor of making financial arrangements on the Salaried Plan's behalf, and the only impediment to GM reassumption (or some other action by GM on the Salaried Plan's behalf) was the Auto Team's insistence that such action would not satisfy its ad-hoc definition of what was "commercially-reasonable." This information is obviously relevant to Respondents' claims generally, the § 1342(c) Termination Inquiry specifically, and is moreover unavailable to Respondents from any other source aside from the Treasury.

II. THE TREASURY'S LAUNDRY LIST OF OBJECTIONS LACK MERIT AND ARE PLAINLY INSUFFICIENT TO JUSTIFY THE HEAVY BURDEN NECESSARY TO QUASH THESE REASONABLE DISCOVERY REQUESTS

A. The Treasury's Conclusory Relevance Arguments Continue to Rely on a Rejection of the Law of the Case

Notwithstanding the above, the Treasury still argues that the discovery that Respondents seek through the Subpoenas is "irrelevant" to their claims. Pet.'s Br. at 17. The basis of this argument is its refusal to acknowledge the law of the case as stated in the Michigan Court's September 1, 2011 Order.

The Treasury argues that the information requested in the Subpoenas is irrelevant because Respondents have not demonstrated that ERISA places limits on when the PBGC may seek to initiate a termination under § 1342(c). *See id*. at 18 (arguing that "§ 1342(c) [does not] bar PBGC from seeking the termination of a plan unless termination is 'unavoidable'"; and that ERISA does not place "any limit on the discretion of PBGC to seek the termination of a plan."). But, again, it is not just *the PBGC's authority to seek a termination* (governed by § 1342(a)) that

matters in a termination proceeding, but also a court's determination as to whether a plan "must" be terminated under the § 1342(c) criteria. The Treasury simply ignores the fact that the Michigan Court has stated that it will conduct a *de novo* review as to whether *it* would have issued an order adjudicating that the Salaried Plan must be terminated under § 1342(c). *See Black v. PBGC*, Dkt. No. 193 at 3-4, 7. The Treasury similarly ignores that this is the law of the case, which should be followed absent an "extraordinary" showing by the Treasury. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988). Moreover, "the general policy favoring broad discovery is particularly applicable where, as here, the court making the relevance determination has jurisdiction only over the discovery dispute, and hence has less familiarity with the intricacies of the governing substantive law than does the court overseeing the underlying litigation . . . [i]n such situations, doubts regarding the relevance of requested information should be resolved in favor 'of permissive discovery.'" *Jewish War Veterans of the United States of Am., Inc. v. Gates*, 506 F. Supp. 2d 30, 42 (D.D.C. 2007) (citing *Flanagan*, 231 F.R.D. at 103).

The Treasury has not attempted to present an argument as to why this Court should disregard the law of the case, rather it has refused to acknowledge what the law of the case is. Ignoring the above quoted language, the Treasury argues, that "the order of Judge Tarnow does nothing more than quote the scope of permissible discovery as set forth in Fed. R. Civ. P. 26(b)(1) and state that 'the limits set forth in rule 26 must be construed broadly.'" Pet.'s Br. at 19. But, as Respondents have repeatedly noted, the September 1, 2011 Order does much more than state the general scope of discovery -- it specifically holds that the § 1342(c) Termination Inquiry is directly relevant to the litigation.

Respondents have demonstrated above, *infra,* 10-21, why the information sought is necessary to the court's *de novo* determination on the § 1342(c) Termination Inquiry, (*i.e.*, whether it would have adjudicated that the Salaried Plan "must" be terminated in order to protect plan participants, avoid a deterioration in the Plan's financial condition, or avoid an unreasonable increase in the PBGC's insurance fund). The Treasury has not attempted to dispute the relevance of the Subpoena to this question, but instead tries to rewrite Respondents' claims, and the Michigan Court's September 1, 2011 Order, to suit its own purposes (*i.e.*, to continue to hide its role in the termination of the Salaried Plan). This is plainly insufficient to justify the "heavy burden" on a motion to quash in a coordinate court. *See, e.g.*, *Hesco Bastion Ltd. v. Greenberg Traurig LLP*, No. 09-0357, 2009 U.S. Dist. LEXIS 124079, at *10-12 (D.D.C. Dec. 23, 2009) (noting that the normally heavy burden on a motion to quash is even greater "[w]here, as here, a subpoena was served in this district with respect to an action pending in another district," and that "'[the] court . . . should hence be cautious in determining relevance of evidence, and in case of doubt should err on the side of permissive discovery[,] since the court with jurisdiction of the discovery dispute 'generally has limited exposure to and understanding of the primary action.'") (alteration in original) (quoting *Flanagan v. Wyndham Int'l*, 231 F.R.D. 98, 103 (D.D.C. 2005)).

The Treasury also asserts that the Subpoenas should be quashed because Respondents were not authorized by the September 1, 2011 Order to seek discovery from third parties. This argument is similarly meritless. In the first place, nothing in the order implies that discovery was to be limited in any way and in fact, as the Treasury itself acknowledges, Judge Tarnow's Order specifically embraces Rule 26's "traditionally [] broad" definition of relevance. *See* Pet.'s Br. at 19. This relevance definition applies "[u]nless otherwise limited by court order." Fed. R. Civ. P. 26(b)(1). The Michigan Court has specifically rejected arguments aimed at limiting discovery in

the September 1, 2011 Order, and moreover, it did so fully aware that Respondents would seek discovery from Treasury, both because Plaintiffs had so noted in briefing to the Michigan Court (*Black v. PBGC*, Dkt. No. 172 at n.7), but also because the Treasury had so indicated in opposing Respondents' Motion to Compel discovery from the PBGC (*Black v. PBGC*, Dkt. No. 188 at 1 (Page ID #9411) ("Plaintiffs have advised Treasury Defendants that they intend to re-serve those discovery requests if their motion to compel is granted. For that reason, Treasury Defendants have a 'concrete and particularized' interest in the adjudication of Plaintiffs' motion to compel that gives them standing to contest it.").

Finally, the Treasury suggests that this Court should impose a stricter relevance standard in judging the Treasury's Motion to Quash because the Subpoenas seek evidence from a third-party. *See* Pet.'s Br. at 17. If such were the case, Rule 45 Subpoenas (which by definition apply only to third-parties) would always be judged under a more restrictive relevance standard than the one stated in Rule 26. However, as noted above, *infra,* 9, "[t]he same broad scope of discovery set out in Rule 26 applies to the discovery that may be sought pursuant to Rule 45." *AF Holdings LLC v. Does*, 286 F.R.D. at 46. Regardless, even under the impermissibly narrow scope of discovery advocated by the Treasury, the Subpoenas are appropriate as they seek information that is plainly relevant to the heart of their claims. *Infra*, 10-21.

For all these reasons, the Treasury's relevance objection should be denied.

B. The Treasury's Professed Burden Is Unexceptional, and Does Not Justify Quashing or Modifying the Subpoenas

In even the most routine case, "[t]he quashing of a subpoena is an extraordinary measure, and is usually inappropriate absent extraordinary circumstances." *Flanagan v*, 231 F.R.D. at 102 (citations omitted); *see also Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 403 (D.C. Cir. 1984) ("The burden of proving that a subpoena is oppressive is on the

party moving to quash."). It falls upon the moving party to bear the "*heavy burden* of showing *extraordinary circumstances* based on *specific facts* that would justify such an order." *Alexander v. FBI*, 186 F.R.D. 71, 75 (D.D.C. 1998) (internal quotation and citation omitted) (emphasis added). This burden is not diminished just because the subpoena is directed to the government as a third-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) (quoting *Westinghouse Elec. Corp. v. City of Burlington*, 351 F.2d 762, 767 (D.C. Cir. 1965)). While a court must be generally sensitive to the costs imposed on third-parties, "[l]imiting discovery and quashing subpoenas, however, 'goes against courts' general preference for a broad scope of discovery.'" *AF Holdings LLC v. Does*, 286 F.R.D. 39, 46 (D.D.C. 2012) (quoting *N.C. Right to Life, Inc. v. Leake*, 231 F.R.D. 49, 51 (D.D.C. 2005)).

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 . . . .'" *Northrop Corp.*, 751 F.2d at 403 (quoting 5A Moore's *Federal Practice* ¶ 40.05[2] n.44). In particular, a court must consider (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. Fed. R. Civ. P. 26(b)(2)(C)(iii).

In light of these factors, the Treasury's burden is truly great. Regarding the first factor, Respondents have already demonstrated, *infra,* 10-21, that the discovery sought is necessary to the resolution of this case. As for the second factor, the amount in controversy exceeds $500 million, DE 6-11(PBGC Apr. 17, 2009 Termination Memo) at 6 (AR000034).

Regarding the third factor (the parties' respective resources) the difference could not be more stark; Respondents are a collection of retirees (or soon-to-be retirees) whose pensions have been reduced, some by as much as 70%. In contrast, the Treasury has an operating discretionary budget for 2013 of approximately $12.5 billion and employs more than 100,000 worldwide. Indeed, there are relatively few entities in the world with more resources at their disposal than the United States Treasury.

As for the fourth factor (the importance of the issues at stake), 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 SIGTARP and the House Oversight and Government Reform Committee (the "House Oversight Committee") have conducted investigations into these issues (both of which were significantly hampered by the Treasury's obstinate refusal to cooperate absent threat of subpoena).

Finally, as stated in the Sept. 1, 2011 Order, the Michigan Court has stated that it will conduct a *de novo* inquiry on 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). 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.

Nonetheless, the Treasury argues that the Document Subpoena should be quashed because compliance with it "could" place an undue burden on the Treasury. Pet.'s Br. at 19. Because the movant bears such a heavy burden on a motion to quash, it may not rely on vague assertions of burden but must state, with specificity, why the burden is unreasonable in light of the facts of the case. For example, in *Linder v. Calero-Portocarrero*, 183 F.R.D. 314 (D.D.C. 1998), *aff'd*, 251 F.3d 178 (D.C. Cir. 2001), the court found that the movant met its burden where it specifically described 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. *Id.* at 320. Here, the Treasury does not describe *any* of the factors highlighted in *Linder*, instead stating generally that the Treasury "could be required to engage in," certain steps which it refers to as "time-consuming" and "unduly burdensome." Pet.'s Br. at 20. This is plainly insufficient. After all, any task is "time-consuming" and it is impossible to judge whether something is "unduly burdensome" unless one knows exactly how great the burden would be. Given the balancing that a court must engage in when considering a motion to quash, courts rightly require a movant to state its alleged burden with a greater degree of specificity than that put forward by the Treasury.

Even if the Treasury's lack of specificity were not fatal to its efforts (which, given the Treasury's heavy burden, it must be), the general steps the Treasury describes (locating potentially responsive documents, and then reviewing for relevance and privilege) are the same steps that any entity responding to a document subpoena would have to comply with. Simply arguing that some effort will be required to comply with a Rule 45 Subpoena is nowhere near the kind of "extraordinary" showing a litigant needs to make on a motion to quash; indeed, if such a showing were sufficient, no Rule 45 subpoena would ever be enforced. As described above, the

law is quite different. *Infra,* 25 - 26. Additionally, as noted above, the movant's burden must be judged on the particular circumstances of the case, according to the Fed. R. Civ. P. 26(b)(2)(C)(iii) factors discussed above, *infra*, 26-27. Again, the Petitioner here is no ordinary party, and if the Treasury Department, with its unparalleled resources, can evade having to comply with this limited Document Subpoena on grounds of burden, then these Rule 26 factors would have no meaning, and it would be difficult to envision a scenario where any Rule 45 subpoena could be enforced.

The fact is that, in an effort to reduce the burden on the Treasury, Respondents specifically limited their Document Subpoena in three important ways: (i) to the three individuals most likely to have discoverable information; (ii) to documents related to Delphi, its pension plans, or the PBGC's liens and claims associated with those pension plans; and (iii) to documents from 2009. While the Treasury attempts to portray these limitations as burdens (*see* Pet.'s Br. at 20), by limiting the Document Subpoena in this way, the amount of time to search for responsive emails and electronic documents should be *de-minimis*, in that searches by custodian or key words should be able to quickly and efficiently provide responsive results.[7]

Moreover, and assuming, *arguendo*, that the Document Subpoena as written is unreasonably burdensome in light of the circumstances of this case, a court "must carefully

[7] Relevant to this point is the D.C. Circuit's decision in *Westinghouse Electric Corp. v. City of Burlington*, 351 F.2d 762, 766 (D.C. Cir. 1965), which involved a Rule 45 document subpoena directed towards the Department of Justice. In *Westinghouse*, the district court granted the government's motion to quash, partly on the government's assertion that compliance with the subpoena could require a "page-by-page" search (a claim also made here by the Treasury). The D.C. Circuit reversed, noting that where a party has indicated a "willingness to accept some reasonable effort by the Government, that would be less than a page-by-page search," the court "should have sought some way to accommodate the interests of the defendants herein with the practical problems of searching the Government's voluminous files."). *Id.* As Respondents previously noted and note again here, they not only are willing to accept some sort of modified search, but would in fact expect it.

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. City of 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)). As Respondents have previously noted, and as the Treasury now concedes, prior to ever receiving the Document Subpoena or filing its First Motion to Quash, the Treasury had already assembled at least some documents relevant to Treasury's involvement in Delphi pension issues in responding to SIGTARP's inquiry. *See* DE 15-7 (Declaration of R. Desai), ¶ 8. Treasury would face no material burden in reproducing to Respondents what it has already produced to SIGTARP.[8] Similarly, Respondents have previously noted that the House Oversight Committee has issued a subpoena to the Treasury requesting "all records and communications referring or relating to retirement or pension benefits for General Motors Company and/or Delphi Corporation employees, sent or received by any employee of the U.S. Department of the Treasury, to or from: any employee of the President's Automotive Task Force; any employee of the United Auto Workers; any employee of the

[8] The Treasury, in typical fashion, argues that even this would entail a "substantial burden," because Treasury would now want to review the documents it has produced to SIGTARP for privilege. In the first place, if an ordinary privilege review could constitute an unreasonable burden, no document production would ever be reasonable. Moreover, it is hard to see how the Treasury has any privileges left to assert over documents it has already handed over to an independent investigatory agency. *See, e.g., Tenn. Laborers Health & Welfare Fund v. Columbia/HCA Healthcare Corp. (In re Columbia/HCA Healthcare Corp. Billing Practices Litig.)*, 293 F.3d 289 (6th Cir. 2002); *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981); *In re Pacific Pictures Corp.*, No. 11-71844, 2012 U.S. App. LEXIS 7643 (9th Cir. Apr. 17, 2012); *In re Qwest Commc'ns Int'l*, 450 F.3d 1179, 1197 (10th Cir. 2006); *Burden–Meeks v. Welch*, 319 F.3d 897, 899 (7th Cir. 2003); *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 686 (1st Cir. 1997); *Genentech, Inc. v. U.S. Int'l Trade Comm'n*, 122 F.3d 1409, 1416–18 (Fed. Cir. 1997); *Salomon Bros. Treasury Litig. v. Steinhardt Partners, L.P. (In re Steinhardt Partners, L.P.)*, 9 F.3d 230, 236 (2d Cir. 1993); *Westinghouse Elec. Corp. v. Rep. of Philippines*, 951 F.2d 1414, 1425 (3d Cir. 1991); *In re Martin Marietta Corp.*, 856 F.2d 619, 623–24 (4th Cir. 1988).

[PBGC]; any employee of [GM]; any employee of Delphi Corporation; any employee of DPH Holding Corporation; or any Public Official." (DE 11-15 at 1). The Treasury began producing responsive documents to the House Oversight Committee on September 6, 2013. DE 15-7, ¶ 10. Again, requiring the Treasury to produce to Respondents what it is already producing to the House Oversight Committee would not subject Treasury to any material burden.

While Respondents took great care in drafting the Subpoenas to present the least possible burden to Treasury, to the extent the Court finds Respondents' Document Subpoena unduly burdensome, rather than outright quashing, the proper result would by a modification of the Document Subpoena. To that end, one possibility to consider is modifying the Document Subpoena to encompass the productions that the Treasury has already made to SIGTARP, and is in the process of making to the House Oversight Committee. While it is not clear that these document productions would produce all of the relevant data that Respondent need in connection with their action against the PBGC, such a modification would certainly address Treasury's burden arguments.[9]

With regard to the Deposition Subpoena, the Treasury argues that responding to it would be unreasonably burdensome because there is apparently no one currently at Treasury who would be competent to testify as to the relevant communications Messrs. Feldman and Wilson had during their time at Treasury. Given the visibility and importance of the issues Messrs.

[9] The Treasury objects that not all the documents produced to SIGTARP and the House Oversight Committee would be responsive to the Document Subpoena, thus requiring Treasury to review for responsiveness prior to producing to Respondents. DE 15 at 21-22 and n.13. However, what Respondents here propose is a modification to the Document Subpoena to specifically cover these productions to SIGTARP and the House Oversight Committee. Thus, no additional responsiveness review would be required. Nor could there be any credible objection that the information produced to SIGTARP or the House Oversight Committee falls outside of the "broad" scope of discovery under the Federal Rules, given the tailored inquiries of those two bodies.

Feldman and Wilson were tasked with, Respondents find it hard to believe that the Treasury does not have some individual competent to testify as to their communications in 2009. Respondents find it even harder to believe that the Treasury does not have some mechanism in place to compel these individuals to cooperate with a deposition inquiring about their actions while they were employed by the Treasury, especially given that the Treasury's *Touhy* regulations, which Treasury insists apply to these Subpoenas, specifically contemplate deposition testimony by former employees. *See* 31 C.F.R. § 1.11(d). Nevertheless, if it is the Treasury's position that it cannot produce these former Auto Team members to testify about the issues specified in the Deposition Subpoena, and further that it is otherwise incompetent to testify about the communications these individuals undertook with respect to the Delphi issues, then Respondents will withdraw the Deposition Subpoena and reissue Rule 45 subpoenas to Messrs. Feldman and Wilson directly.

C. The Subpoenas Do Not Seek Information Otherwise Available to Respondents

The Treasury's last objection to Subpoenas is that they are unnecessary in light of the "tremendous amount of information already available to Respondents from sources other than Treasury." Pet.'s Br. at 23. To judge by the tenor of the Treasury's motion, one might expect that the Treasury has been completely transparent about the actions it undertook in 2009 related to the Delphi pension plans. Indeed, the Treasury would have this Court believe that all the information that Respondents could need to litigate their claims has either already been provided

to them by the PBGC, or else is available to them at their local library by reviewing such authoritative sources as Mr. Rattner's autobiography.[10] This is, frankly, laughable.

In reality, for the last four years the Treasury has been engaged in singular effort to obscure its role in these issues. It has actively opposed Respondents' every attempt to obtain discovery, not only from itself, but even from the PBGC. *See, e.g., Black v. PBGC*, Dkt. No. 188 (Treasury's Opposition to Respondents' Motion to Compel Discovery from the PBGC). Similarly, the Treasury stonewalled Congressional requests for documents for years, only agreeing to produce the documents once the House Oversight Committee issued a subpoena. *See* DE 11-15 at 1 (noting that the Treasury had ignored previous document requests dating back to January 2010 prior to the House Oversight Committee issuing its document subpoena). Moreover, the SIGTARP Report, referred to above, "was very much delayed by the refusal of four auto team members [including Messrs. Rattner, Feldman and Wilson] to be interviewed by [SIGTARP]" DE 15-12 at ECF p. 25. In short, the Treasury has done everything in its power to obscure its role in the resolution of Delphi's pension plans. While SIGTARP eventually obtained the documents it sought, and Congress is in the process of obtaining those documents, those disclosures are not public, and Respondents have no access to them. Thus, the idea that there is an "extraordinary" amount of information available to Respondents that would obviate their need for discovery is plainly false.

As noted above, the Treasury's burden on this objection is "heavy." *Infra,* 25. In order to meet this burden, the Treasury must show that the Subpoenas are unreasonable because their enforcement would result in the Treasury having to produce information that is duplicative or

[10] Given the tenor of the Treasury's Motion to Quash, Respondents are a little surprised that the Treasury has not also referred them to transcripts of Mr. Rattner's appearances on MSNBC's "Morning Joe," or his Twitter feed, for useful information.

cumulative of information already in Respondents' possession or available to them through other means, and moreover, that such duplication is unreasonable in light of the facts and circumstances of the case. *See, e.g., Travelers Rental Co. v. Ford Motor Co.*, 116 F.R.D. 140, 145 (D. Mass. 1987) (approving discovery that "is somewhat duplicative and cumulative," but in light of "the nature of the inquiry at issue," not "*unreasonably* so") (emphasis in original). The Treasury has not, and cannot, make such a showing.

Again, through the Document Subpoena, Respondents seek documents received, produced or reviewed by just three former Treasury officials that are directly relevant to Respondents' claims in *Black*. The Treasury's principal argument here is that any responsive documents the Treasury could produce would be duplicative of documents that Respondents have already received from the PBGC as the PBGC responded to Plaintiffs' Request for Production No. 8, which sought documents exchanged between the PBGC and other federal agencies. Treasury argues that the PBGC has produced "thousands of pages responsive to RFP Category 8," and that the "immensity" of the PBGC's production "and the overlap between RFP Category 8 and respondents' subpoenas to Treasury leave little need for Treasury to respond to either of those subpoenas." Pet.'s Br. at 23-24.

This objection flows partly from the Treasury's continued efforts to mischaracterize Respondents' claims against the PBGC and the scope of discovery in this case. Rejecting the law of the case, the Treasury posits that the only claim Respondents can bring in *Black v. PBGC* concerns whether the PBGC's determination to seek to terminate the Salaried Plan was justified, and further argues that since the PBGC had great discretion in making its decisions, Respondents are entitled to no discovery beyond documents that go to the propriety of the PBGC's determinations. *See generally id.* at 18. Thus, the Treasury wants to limit the universe of

relevant documents to those in the PBGC's possession -- in essence turning this into an administrative record review. But, as noted above, this is wrong. Judge Tarnow has allowed discovery on a broader question, namely whether, under a *de novo* review, the PBGC would have been able to convince him by a preponderance of the evidence that the Salaried 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's insurance]." *Black v. PBGC*, Dkt. No. 193, at 5-7 (quoting 29 U.S.C. § 1342(c)).

Under the standard laid out in the September 1, 2011 Order, information in the PBGC's possession is just part of the universe of relevant information. Because of the unique role that the Treasury played in the GM and Delphi restructurings, and the critical role that the Delphi pension plans (and the associated PBGC liens and claims) played in those restructurings, the universe of relevant responsive documents in Treasury's possession should stretch beyond its email communications with the PBGC. As noted above, at the time the Plan was terminated, the Treasury was directly negotiating the future of Delphi with a number of players besides the PBGC, including GM, Delphi, Delphi's DIP Lenders, Federal Mogul, Platinum Equity, and various unions. Moreover the Auto Team was deliberating amongst itself and various White House officials as to what to do in relation to the Delphi plans. DE 11-14 at 1 (PBGC-BL-0170325) ("Feldman says that up to now, UST auto has consulted/deliberated exclusively amongst itself and [the White House/National Economic Council]."). Documents relating to these negotiations and deliberations will be directly relevant to the § 1342(c) determination, either going to the question of whether GM reassumption of the Salaried Plan was a viable option, or whether some other potential acquirer of Delphi could be persuaded to assume the Salaried Plan.

To take the GM reassumption example, as noted above, SIGTARP has concluded that it was the Treasury's Auto Team that made the determination as to what financial commitments GM could make in connection with Delphi, and that ultimately Mr. Rattner overruled GM's CEO, who wanted to "do something" for the Salaried Retirees, on the basis of Mr. Rattner's ad-hoc definition of what was "commercially defensible." DE 15-12 at ECF p. 43. Respondents have also noted that the record is devoid of any explanation as to why the Auto Team determined that GM's reassumption of the Salaried Plan would not have been "commercially defensible" in exchange for the release of the PBGC's liens and claims, which the PBGC had by virtue of the Salaried Plan's underfunding. Documents related to the Treasury's ad-hoc "commercial necessity" standard, the determinations of GM and Treasury about whether to commit financial resources to the Salaried Plan, and the justifications for those determinations, are all critically relevant to the § 1342(c) determination. Yet, the Treasury does not suggest that the PBGC had access to these documents, and it certainly does not (and cannot) suggest that the PBGC (or any party other than the Treasury) has or would be willing to make that information available to Respondents.

In short, while it is true that that the PBGC has certainly produced some (and hopefully most) of the email correspondence between it and the Treasury, such information is only a part of the relevant responsive documents in the Treasury's possession. Accordingly, Treasury has not met its burden to justify quashing the Document Subpoena on grounds that the information sought is "unnecessary."

Regarding the Deposition Subpoena, Respondents note that the right to conduct a deposition is a fundamental part of the discovery process, and "it is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an

order would likely be in error." *Travelers Rental Co*., 116 F.R.D. at 144. As with the Document Subpoena, the Treasury's objections to the Deposition Subpoena rely on exaggerating the information actually available to Respondents, and inappropriately minimizing the scope of discovery in this case authorized by Judge Tarnow.

Here, Respondents seek to depose the Treasury as to the substance of Messrs. Feldman's and Wilson's relevant communications in 2009 with, *inter alia*, the PBGC, Delphi, GM, the Delphi DIP Lenders, Federal Mogul, Platinum Equity, the National Economic Council, and the Executive Office of the President. Regarding the Treasury's communications with the PBGC, it is true that Respondents have had the opportunity to depose certain PBGC officials about those interactions. It is also true that the PBGC has stated that those interactions were conducted exclusively through Mr. House, who has stated his inability to recall the substance of almost all those interactions. *See* DE 11 at 19-20 and n.10 (noting that there are approximately 60 instances in Mr. House's deposition transcript where he states an inability to recall events related to the Delphi plans). Respondents are clearly entitled to question Messrs. Wilson and Feldman about their interactions with the PBGC to see if their recollection is any greater than Mr. House's.

Moreover, like the Document Subpoena, the Deposition Subpoena concerns communications with many parties besides the PBGC. While the Treasury may be able to point to a few references in available material that covers these non-PBGC communications, such passing references are no substitute for an actual deposition. Nor is it any response to note that Messrs. Wilson and Feldman have previously sat for depositions in the GM and Delphi bankruptcies. Those depositions were conducted by other parties with conflicting priorities, who had no interest in inquiring into Respondents' concerns generally, or their claims in *Black v. PBGC*. Similarly, while Messrs. Feldman and Wilson did respond to questioning from the

House Oversight Committee, this questioning was no substitute for a deposition conducted by Respondents' counsel. Again, while the Court "should not be timid in invoking" limits to discovery "in the appropriate case, . . . considerable deference should be given to counsel's good-faith judgment as to the needs of his case." *Travelers*, 116 F.R.D. at 146.

In sum, the Subpoenas do not seek information that is unreasonably cumulative or duplicative of information available to Respondents. The Renewed Motion to Quash should be denied on this ground as well.

D. The Treasury's Standing Argument is Frivolous and Relies on a Rejection of the Law of the Case

Respondents have previously addressed all of the above objections in responding to Treasury's First Motion to Quash. Perhaps realizing that those arguments have little prospect for success, Treasury raises an additional argument in its Renewed Motion to Quash, that Respondents lack standing to litigate their claims against the PBGC in *Black v. PBGC*, and so are not entitled to conduct any discovery with respect to those claims, in this or any other court. *See* Pet.'s Br. at 13-16. The Treasury asserts that, because standing is jurisdictional, this is an appropriate time and place to raise the issue, notwithstanding that the Treasury is a third-party, and that this Court does not have jurisdiction over the underlying action. *See id.* 14 n.11. While there may be rare cases where an issuing court should consider jurisdictional challenges on run-of-the-mill discovery motions, such as where "it is 'apparent from the face of the complaint' that respondents lacks standing," *id.* at 13-14 (quoting *Cady v. Anthem Blue Cross Life & Health Ins. Co.*, 583 F. Supp. 2d 1102, 1107 (N.D. Cal. 2008)), the circumstances before this Court are a far cry from such a case.

Black v. PBGC has been in litigation for four years, with active oversight from Senior District Court Judge Tarnow and Magistrate Judge Majzoub throughout. During the four years

of litigation, the Michigan Court has held three hearings and one settlement conference, reviewed multiple rounds of briefings on multiple dispositive motions, and issued at least twelve substantive orders and/or decisions (not including administrative orders). During this time, the PBGC has offered up a variety of arguments as to why Respondents' claims should fail, including the redressability arguments that the Treasury seeks to re-litigate here. *See Black v. PBGC*, Dkt. No. 107 at 2-3 (arguing, inter alia, that "[i]f the termination were determined to be improper for any reason, the Plan would no longer be terminated, PBGC would no longer be the Plan's statutory trustee, and accordingly, PBGC would no longer have the legal authority to pay any benefits to the Plan participants."). And, contrary to the Treasury's assertion that "Judge Tarnow has never addressed, or been asked to address, whether respondents have standing to litigate Counts 1-4 of *Black [v. PBGC*]," Judge Tarnow specifically rejected the PBGC's redressability arguments. *See Black v. PBGC*, Dkt. No. 122 at 2-3 ("The Court declines to accept Defendant's position that Plaintiffs cannot obtain any relief in this lawsuit if the Court concludes that the PBGC acted improperly").[11]

Because Judge Tarnow has already expressly found that he has the ability to redress these claims, his ruling on this issue should be treated as the law of the case. *Christianson*, 486 U.S. at 817. Moreover, because any contrary ruling by this Court would necessarily call into question the last four years of proceedings before the Michigan Court, the Treasury's standing argument is especially inappropriate, as "'[c]omity dictates that courts of coordinate jurisdiction not review, enjoin or otherwise interfere with one another's jurisdiction.'" *Exxon Corp. v. U.S. Dep't of Energy,* 594 F. Supp. 84, 90 (D. Del. 1984) (quoting *Brittingham v. Comm'r*, 451 F.2d

[11] Respondents note that the Treasury was still a party in *Black v. PBGC* at the time this Order was entered. To the extent the Court desires more detail on the redressability of Respondents' claims, Respondents respectfully refer the Court to *Black v. PBGC*, Dkt. No. 110-2 at 6-8 (Page ID #6788-90).

315, 318 (5th Cir. 1971)). *See also Tate v. Werner*, 68 F.R.D. 513, 520 (E.D. Pa. 1975) (dismissing second action "where any relief in this [c]ourt would possibly conflict with, and at least would circumscribe the flexibility of any relief determination [in the other case].").

Moreover, even if Judge Tarnow had not already ruled on this issue, and even if it were appropriate for this Court to undertake a standing analysis in a case that has been in active litigation in another court for over four years, the Treasury's standing arguments are facially meritless.

In order to demonstrate standing, a plaintiff must adequately establish an injury-in-fact, causation, and redressability. *Sprint Commc'ns Co. v. APCC Servs.*, 554 U.S. 269, 273-274 (2008) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). "At bottom, 'the gist of the question of standing' is whether [plaintiffs] have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness.'" *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962). The Treasury concedes that Respondents have suffered an injury through the termination of their pension plan, but denies that this injury is "fairly traceable" to the PBGC's allegedly unlawful conduct, or that it could be redressed through the lawsuit. *See* Pet.'s Br. at 14.

On the causation issue, the Treasury offers the truly novel argument that Respondents' injury was caused not by the PBGC, but by the fact that Delphi pension plans were underfunded. *Id*. This argument is preposterous. First, as a factual matter, the Salaried Plan was actually well-funded according to the congressionally-mandated standard by which the funding of on-going plans is measured. Indeed, on June 30, 2009 (the same day that the Treasury informed the PBGC that GM would not be re-assuming either Delphi pension plan), Delphi's actuary, Watson Wyatt, completed its certification of the Adjusted Funding Target Attainment Percentage (AFTAP) for

the Salaried Plan. *See* attached Ex. E (June 30, 2009 AFTAP Certification). The AFTAP showed the Plan to be funded at 85.62% using ongoing (as opposed to termination) liability assumptions. By comparison, the funded status of the 100 largest defined benefit pension plans in 2009 was 81.7%. *See* attached Ex. F (DeGrandis Declaration) at 3.

Leaving aside the factual fallacies inherent in the PBGC's argument, it also fails to present a coherent legal theory. Again, the injury that Respondents complain of in their lawsuit against the PBGC is the PBGC's allegedly unlawful termination of their pension plan. The Treasury's causation argument is basically that, even if the termination was unlawful, the PBGC (according to the Treasury) had a good reason for terminating the Salaried Plan, and so Respondents must lack standing. The argument defies the well-settled law of causation. The injury complained of -- the PBGC's termination of the Salaried Plan -- is of course fairly traceable to the PBGC. Whether that action was justified under ERISA is the subject of the suit and the focus of Respondents' discovery. Moreover, as noted above, the Salaried Plan's funding was consistent with that of the other hundred largest plans in the US in 2009. If such a funding level was sufficient to "cause" a plan termination, there would be almost no pension plans left ongoing in this country. It is not the level of the Plan's underfunding, but the PBGC's actions terminating the Salaried Plan, that Respondents challenge in *Black v. PBGC*, and they clearly have standing to do so.

As for the Treasury's redressability argument, Congress has specifically authorized any plan participant "adversely affected by any action of the [PBGC] . . . [to] bring an action against the [PBGC] for appropriate equitable relief in the appropriate court." 29 U.S.C. § 1303(f)(1). Respondents' complaint challenges the PBGC's termination of the Salaried Plan, and seeks equitable relief from the PBGC to undue the effects of that termination. "[T]he fact that

[requested] relief takes the form of a money payment does not remove it from the category of traditionally equitable relief." *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1880 (2011) (finding that "equitable" relief under ERISA can include monetary relief to make the injured party whole and the disgorgement of ill-gotten gains by a wrongdoer. Indeed, equitable relief is a particularly flexible form of relief, and "[t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case." *Carter-Jones Lumber Co. v. Dixie Distrib. Co.*, 166 F.3d 840, 846 (6th Cir. 1999) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)).

In this case, there is ample room for an equitable solution, as Judge Tarnow has already held. For instance, when the PBGC illegally terminated the Salaried Plan, the PBGC received over $ 660 million from GM in return for releasing liens and claims associated with the Delphi pension plans, and an additional $53 million in exchange for its unsecured bankruptcy claims. *See* DE 11-6 (D. Cann Dep. Tr.) at 208-210. Moreover, by assuming trusteeship of the Salaried Plan as of July 30, 2009, the PBGC took control of the Salaried Plan's assets, which the PBGC valued in excess of $2.7 billion as of that day. July 2009 was, however, the bottom of the market, and as a result of the PBGC's investment returns from those assets, they should now be worth more than $4.3 billion.[12] Consequently, whether Judge Tarnow were to order the PBGC itself to operate the Plan as if it had never been illegally terminated, were simply to order the transfer of the funds ill-gotten by the PBGC in the first instance (plus the proceeds received by

[12] The PBGC invests the assets of trusteed plans in its "trust fund," which, according to the PBGC's annual reports, earned investment results of 14.3%; 11.6%; 3.6%; and 15.5% in 2009 through 2012 respectively. *See* PBGC FY 2010 Annual Report at 32; PBGC FY 2011 Annual Report at 33; and PBGC FY 2012 Annual Report at 37. The PBGC Annual Reports are available at: http://www.pbgc.gov/res/annual-reports.html. Applying those returns to the Salaried Plan's assets, and factoring in recent market results, the value of the Plan's assets should now exceed $4.3 billion.

the PBGC since then) back to the Plan's beneficiaries or to another fiduciary acting in their interests, or to order other relief aimed at making the Plan's beneficiaries whole or at the PBGC's relinquishment of its ill-gotten gains, Respondents injuries can be redressed in full or in part.[13]

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the Treasury's Renewed Motion to Quash, and direct the Treasury to comply with Respondents' Subpoenas.

Dated: October 25, 2013

Respectfully submitted,

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[13] These equitable solutions rest on an order from Judge Tarnow referencing the specific monies the PBGC has obtained that relate to the Salaried Plan, as opposed to other funds held by the PBGC unrelated to the Salaried Plan. In any event, as noted above, the PBGC is a self-funded government corporation that receives no federal funding. *Infra,* 11. Thus, contrary to the Treasury's basic premise, there is no chance that "payments of money from the Federal Treasury" would be implicated were the Michigan Court to grant relief from the PBGC. Pet.'s Br. at 16.

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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