UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

U.S. DEPARTMENT OF THE TREASURY, **Petitioner,** **v.** **PENSION BENEFIT GUARANTY CORPORATION,** **Interested Party,** **v.** **DENNIS BLACK, *et al.*,** **Respondents.**	**No. 1:12-mc-00100-EGS** **PETITIONER'S OPPOSITION TO RESPONDENTS' MOTION TO COMPEL**

TABLE OF CONTENTS

TABLE OF CASES

Page

TABLE OF DOCKET ENTRIES

ECF No. 32-3	Letter Kathleen Cochrane to Michael N. Khalil (Mar. 31, 2015)
ECF No. 32-4	Email David Glass to Michael N. Khalil (June 1, 2015)
ECF No. 32-5	Email Kathleen Cochrane to Michael N. Khalil (June 10, 2015)
ECF No. 33-1	Letter Michael N. Khalil to David Glass (June 12, 2015)

TABLE OF EXHIBITS

PRELIMINARY STATEMENT

Respondents Dennis Black, Charles Cunningham, Kenneth Hollis, and Delphi Salaried Retirees Association have moved for an order compelling petitioner U.S. Department of the Treasury (Treasury) to produce the material it has withheld from 866 documents pursuant to one or more of the following privileges: the deliberative process privilege, the presidential communications privilege, the attorney-client privilege, or the work product doctrine. ECF No. 30 at 1; ECF No. 30-1 at 1-22; *see* Ex. A ¶ 2 n.1 (noting the release of`51 documents from which material has previously been withheld).[1] Because respondents have not shown that they are entitled to the material that Treasury has withheld under any of the privileges upon which it relies, their motion to compel should therefore be denied.[2]

STATEMENT OF FACTS

A. GENERAL MOTORS CORPORATION (GM)

In the fall of 2008, the United States "[stood] on the precipice of the most serious financial crisis since the Great Depression." 154 Cong. Rec. H10703 (Oct. 2, 2008) (statement of Rep. Slaughter). GM, "the nation's largest automobile manufacturer," "was in the midst of a severe liquidity crisis, and its ability to continue operations grew more and more uncertain with each passing day." *In re Gen. Motors*, 407 B.R. 463, 476-77 (Bankr. S.D.N.Y. 2009). "No party other than Treasury conveyed its willingness to loan funds to GM and thereby enable it to

[1] A table of docket entries cited in this memorandum appears at p.v, *supra*. Except as otherwise noted, references to exhibits are to the exhibits to this memorandum. A table of those exhibits appears at p.vii, *supra.*

[2] Respondents seek an order in the alternative compelling Treasury to provide the Court with all of the documents from which contested withholdings have been made so that the Court may conduct an "*in camera* review" of those documents. ECF No. 30 at 1. Their motion to compel can and should be denied without any "*in camera* review" of any documents. Any such review should be limited, moreover, to "a sample of the contested documents." *See FTC v. Boerhinger Ingelheim Pharm.*, 778 F.3d 142, 146 (D.C. Cir. 2015).

continue operating." *Id.* at 477. "As a result, in November 2008, GM was compelled to seek financial assistance from the U.S. Government." *Id.*

"The U.S. Government understood the draconian consequences of the situation – one that affected not just GM, but also [Chrysler LLC (Chrysler)], and to a lesser extent Ford." *Gen. Motors*, 407 B.R. at 477. What concerned the government was the possibility of "a systemic failure throughout the domestic automotive industry and the significant harm to the overall U.S. economy that would result from the loss of hundreds of thousands of jobs and the sequential shutdown of hundreds of ancillary businesses if GM had to cease operations." *Id.* (footnote omitted). To address that concern, Treasury and GM "entered into a term loan agreement on December 31, 2008 that provided GM up to $13.4 billion in financing on a senior secured basis." *Id.* Chrysler obtained financing of its own by similar agreement entered into on January 2, 2009. Ex. B at 9.

GM and Chrysler were required by their loan agreements "to submit viability plans designed to achieve and sustain [their] long-term viability, international competitiveness, and energy efficiency." Ex. B at 9. They submitted those plans in February 2009. *Id.* On February 15, 2009, the President announced the creation of the Presidential Task Force on the Auto Industry (Auto Task Force), a group of 10 agency heads co-chaired by Timothy F. Geithner, Secretary of the Treasury, and Lawrence H. Summers, Director of the National Economic Council (NEC) and Assistant to the President for Economic Policy. *Id.* at 10 & n.29; Ex. C ¶ 8. "[E]stablished in 1993 to advise the President on U.S. global and economic policy," NEC "resides within the Office of Policy Development and is part of the Executive Office of the President." Ex. D.

A group known as the Auto Team "provided staff level support for the [Auto Task Force]." ECF No. 1, Ex. K ¶ 4. The Auto Team consisted of 14 individuals, two of whom were employed by NEC and 12 of whom were employed by Treasury. ECF No. 21-4 at 3. One of the members of the Auto Team, Matthew A. Feldman, "served as the principal restructuring attorney for the Auto Team." ECF No. 1, Ex. K ¶ 4.

"The Auto Team worked on a variety of auto industry related issues." ECF No 1, Ex K ¶ 5. Its responsibilities included evaluating the viability plans submitted by GM and Chrysler "and negotiating the terms of any further assistance." Ex A at 10. The Auto Team "report[ed] to the [Auto Task Force] and its co-chairs, who then report[ed] up to the President." *Id.* at 11.

On March 30, 2009, "the President announced that the viability plan proposed by GM was not satisfactory, and didn't justify a substantial new investment of taxpayer dollars." *Gen. Motors*, 407 B.R. at 478-79. "But rather than leaving GM to simply go into liquidation," "the President indicated that the U.S. Treasury would extend to GM adequate working capital for a period of another 60 days to enable it to continue operations." *Id.* at 479. "And as GM's largest secured creditor, the U.S. Treasury would negotiate with GM to develop and implement a more aggressive and comprehensive viability plan." *Id.*

During the next 60 days, the Auto Team worked with interested parties to develop a plan under which GM would declare bankruptcy and sell "the bulk of its assets" and "*some*, but not all, of [its] liabilities" to General Motors Company (New GM), "a purchaser sponsored by [Treasury]." *Gen. Motors*, 407 B.R. at 473, 496; ECF No. 1, Ex. A at 5. The implementation of the plan began on June 1, 2009, when GM filed its "chapter 11 petition," *Gen. Motors*, 407 B.R. at 479, and ended on July 10, 2009, when GM sold the prescribed assets and liabilities to New GM. *See* ECF No. 1, Ex. A at 5.

B. DELPHI CORPORATION (DELPHI)

"Delphi was a global supplier of mobile electronics and transportation systems that began as part of GM." ECF No. 1, Ex. A at 3. It was "spun off as an independent company in 1999." *Id.* At or about the time of the spin off, Delphi established two defined-benefit pension plans "with assets and liabilities transferred from their GM counterparts." *Id.* One of the pension plans, the Delphi Hourly-Rate Plan (Delphi Hourly Plan), covered certain of Delphi's hourly employees. *See id.* The other pension plan, the Delphi Retirement Program for Salaried Employees (Delphi Salaried Plan), covered certain of Delphi's salaried employees. *Id.*

The spin-off of Delphi required the approval of certain labor unions, including the United Auto Workers (UAW), the International Union of Electrical Workers (IUE), and the United Steel Workers (USW). *See* ECF No. 1, Ex. A at 3-4. To obtain that approval, GM entered into agreements with UAW, IUE, and USW (Benefit Guarantee Agreements) to provide supplemental pension benefits to certain employees of Delphi represented by UAW, IUE, or USW if the Delphi Hourly Plan were frozen or terminated. *See id.* at 4.

"Over the period 2001 to 2005, Delphi suffered large losses, and the company filed for Chapter 11 bankruptcy in October 2005, although it continued to operate." ECF No. 1, Ex. A at 4. Problems continued after that, *see id.*, and the Delphi Salaried and Hourly Plans were frozen, respectively, as of September and November 2008. ECF No. 21-3 at 5. "As Delphi was a major auto supplier, the Auto Team worked on many matters that directly and indirectly involved Delphi, but did not otherwise involve pensions." ECF No. 1, Ex. K ¶ 5.

By notice dated July 20, 2009, PBGC advised Delphi of its determination under 29 U.S.C. § 1342(c) that the termination of the Delphi Salaried Plan was necessary "to avoid any unreasonable increase in the liability of the PBGC insurance fund." ECF No. 15-2. By

agreement between PBGC and Delphi dated as August 10, 2009, the Delphi Salaried Plan was terminated effective July 31, 2009. ECF No. 1, Ex. B ¶¶ 1-2. Delphi's other pension plans were terminated at or about the same time. ECF No. 1, Ex. A at 5.

"[A]s a matter of reality, [New GM] need[ed] a properly motivated workforce to enable [it] to succeed." *Gen. Motors*, 407 B.R. at 512. For that reason, the agreement by which GM's assets and liabilities were sold to New GM required New GM to honor "all employment-related obligations and liabilities under any assumed employee benefit plan relating to employees that were covered by the UAW collective bargaining agreement." *Id.* at 481. These obligations and liabilities included the GM-UAW Benefit Guarantee Agreement. *See* ECF No. 1, Ex. A at 17.

In addition, New GM "[had] reason to want to resolve Delphi's bankruptcy, given [its] reliance on Delphi for parts." ECF No. 1, Ex. A at 17. IUE and USW "still represented part of Delphi's workforce" and thus "needed to give their consent to finalize the sale of assets in Delphi's bankruptcy." *Id.* To obtain that consent, New GM entered into an agreement with IUE and USW following its commencement of operations that required New GM, among other things, to honor the GM-IUE and GM-USW Benefit Guarantee Agreements. *Id.* at 18.

"In October 2009, after 4 years in bankruptcy, Delphi completed its reorganization when . . . a United Kingdom limited partnership . . . purchased most of Delphi's assets and [New GM] purchased 4 other Delphi sites." ECF No. 1, Ex. A at 5. Delphi became DPH Holdings Corp., "an entity set up to sell or dispose of any remaining assets." *Id.*

C. *BLACK V. PBGC*, NO. 2:09-CV-13616-AJT-MKM (E.D. MICH.) (*BLACK I*)

Respondents are an organization of participants in the Delphi Salaried Plan and three participants in the plan. ECF No. 1, Ex. E ¶¶ 5-6. *Black I* was commenced by respondents in

September 2009. Because respondents are the plaintiffs in *Black I*, they refer to themselves in this action as "plaintiffs." ECF No. 30 at 1.

Proceedings in *Black I* are governed by the second amended complaint in that case. Filed in August 2010, the second amended complaint contains two discrete claims. The first claim is a claim against PBGC. ECF No. 1, Ex. E, headings preceding ¶¶ 38, 42, 51, 54. Respondents allege in that claim that the termination of the Delphi Salaried Plan was wrongful because PBGC may not terminate a pension plan except by court order; because Delphi did not execute the agreement terminating the plan in its capacity as a fiduciary; because the participants in the plan were not given notice of the termination of the plan or an opportunity for a pre-termination hearing; and because "PBGC cannot satisfy the standards for the termination of the [plan] under 29 U.S.C. § 1342(a) and (c)." *Id.* ¶¶ 39, 44, 52, 56.

The second claim, dismissed in 2011, was a claim against Treasury, the Auto Task Force, the Secretary of the Treasury, two members of the Auto Team, Steven L. Rattner and Ron A. Bloom, and 50 John Does (collectively, Treasury Defendants). ECF No. 1, Ex. E heading preceding ¶ 57. Respondents alleged in that claim that the commitments of New GM to honor the GM-UAW, GM-IUE, and GM-USW Benefit Guarantee Agreements violated the First Amendment and the equal protection component of the Fifth Amendment because of their allegedly having been entered into for "political reasons – on the basis of affiliation with a particular union or unions – and not on the basis of any relevant extenuating circumstances." *Id.* ¶¶ 59, 60.

By memorandum opinion and order dated September 1 and filed September 2, 2011, the court held that none of respondents' "factual allegations . . . allow[ed] the Court to infer that the specific decision to provide the top-ups [of pension benefits] to certain retirees was made on the

basis of associational choices and the political speech associated with those choices." ECF No. 10-7 at 14. Holding, to the contrary, that respondents relied on nothing more than "'naked assertion[s] devoid of further factual enhancement'" to support their claim against Treasury Defendants, the court dismissed that claim pursuant to *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), for failure to state a claim upon which relief could be granted. *Id.* at 13, 14.

D. TREASURY'S PRIVILEGE CLAIMS

Notwithstanding the dismissal of their claim against Treasury Defendants, respondents asked Treasury by subpoena of this Court dated January 4, 2012 (Document Subpoena) to produce three categories of documents allegedly relevant to their claim against PBGC in *Black I*. ECF No. 1, Ex. J, Att. A at 5-6. By stipulation and protective order dated November 4, 2014, respondents agreed that Treasury would be deemed to have complied in full with the Document Subpoena if it did the following three things:

> (1) conducted an electronic search of the "Outlook" mailboxes of three members of the Auto Team, Matthew A. Feldman, Steven L. Rattner, and Harry J. Wilson, using the search string "(Delphi or PBGC or 'Pension Benefit Guaranty Corporation' or SRP or HRP or Salaried) or ((pension or house or Joe) w/25 words of (Snowbarger or Menke or Sheehan or greentarget or 'DIP' or Elliot or 'Silver Point' or lien))";
>
> (2) conducted a manual search of the documents that Treasury had produced to the Special Inspector General for the Troubled Asset Relief Program "for documents relating to Delphi, the Delphi Pension Plans, or the release and discharge by PBGC of liens and claims relating to the Delphi Pension Plans"; and
>
> (3) "produce[d] to Counsel all non-privileged portions of all documents responsive to the Document Subpoena located as a result of those searches."

ECF No. 29 ¶ 2.

On March 30, 2015, Treasury completed its production of documents under the stipulation and protective order. ECF No. 32-3 at 1. More than 3500 documents were produced without redaction. *See* ECF No. 31 at 5. Twelve hundred seventy-three documents or portions

of documents were withheld pursuant to claim of privilege under one or more of the following privileges: the deliberative process privilege, the presidential communications privilege, the attorney-client privilege, or the work product doctrine. Ex. E at 1-219.

By email dated June 1, 2015, Treasury sent respondents a portion of its privilege log. ECF No. 32-4. On June 10, 2015, Treasury sent respondents the remainder of its privilege log. ECF No. 32-5. The privilege log contains the date of each document from which material has been withheld; states whether the document is an email or an attachment to an email; identifies the author, addressees, and carbon-copy recipients of the document if the author, addressees, and carbon-copy recipients are identified in the document (they are not identified in certain of the attachments to emails, e.g., Doc. No. 779); states which privilege or privileges is asserted with respect to the document; gives the reason for the assertion of privilege; and states whether the document is withheld in its entirety or in part. E.g., Ex. E at 1.

By letter dated June 12, 2015, respondents declared Treasury's privilege log to be "inadequate on its face" and asked Treasury to produce, within seven days, "a declaration or affidavit from an agency official, with the requisite authority, to establish the procedural elements of the deliberative process privilege, and from the White House, formally invoking the presidential communications privilege." ECF No. 33-1 at 2, 5. A litigant is not required "to formally invoke its privileges in advance of the motion to compel." *In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997). Treasury therefore declined to produce declarations in support of its claims of privilege until and unless a motion to compel was filed. *See* ECF No. 30 at 18.

E. RESPONDENTS' MOTION TO COMPEL

Respondents filed their motion to compel on July 9, 2015. A copy of Treasury's privilege log was filed as an exhibit to the motion. ECF No. 30-2. Another version of the privilege log, reformatted for legibility, is filed as Ex. E to this memorandum.

Declarations in support of Treasury's claims of privilege are also filed with this memorandum. *See* Exs. A & C. The timely filing of those declarations, *see Sealed Case*, 121 F.3d at 741, moots the arguments based on the lack of such declarations that respondents make in support of their motion to compel. *See* ECF No. 30 at 3, 18, 25-26. In addition, the preparation of those declarations has resulted in changes to the rationales upon which Treasury has based its withholdings from 13 documents and has resulted in the release of 51 documents. *See* Ex. A ¶¶ 2 n.1, 11 n.2, 17 n.4, 25 n.11; Ex. C ¶ 5.

ARGUMENT

RESPONDENTS HAVE NOT SHOWN THAT THEY ARE ENTITLED TO THE MATERIAL THAT TREASURY HAS WITHHELD UNDER ANY OF THE PRIVILEGES UPON WHICH IT RELIES.

Respondents characterize the withholdings that Treasury has made under the deliberative process privilege as the "main issue" presented by their motion to compel. ECF No. 30 at 6. Respondents also challenge certain withholdings that Treasury has made under the presidential communications privilege, the attorney-client privilege, and the work product doctrine. *Id.* at 25, 33, 37. Respondents have not shown, however, that they are entitled to the material that Treasury has withheld under any of the privileges upon which it relies. Their motion to compel should therefore be denied.

I. RESPONDENTS HAVE NOT SHOWN THAT THEY ARE ENTITLED TO THE MATERIAL THAT TREASURY HAS WITHHELD UNDER THE DELIBERATIVE PROCESS PRIVILEGE.

"The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news." *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8-9 (2001). The object of the deliberative process privilege is thus to "enhance 'the quality of agency decisions' . . . by protecting open and frank discussion among those who make them within the Government." *Id.* at 9 (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-51 (1975)). "For the [privilege] to apply, the [withheld] material must be 'predecisional' and 'deliberative.'" *Loving v. Dep't of Defense*, 550 F.3d 32, 38 (D.C. Cir. 2008) (quoting *Sealed Case*, 121 F.3d at 737). The privilege thus "protects from disclosure documents that would reveal an agency's deliberations prior to arriving at a particular decision." *McKinley v. FDIC*, 756 F. Supp. 2d 105, 114 (D.D.C. 2010) (Sullivan, J.); *accord Def. of Wildlife v. U.S. Dep't of the Interior*, 314 F. Supp. 2d 1, 18 (D.D.C. 2004). "To show that a document is predecisional, the agency need not identify a specific final agency decision; it is sufficient to establish 'what deliberative process is involved and the role played by the documents at issue in the course of that process.'" *Dent v. Exec. Office for U.S. Attys.*, 926 F. Supp. 2d 257, 268 (D.D.C. 2013) (Sullivan, J.) (quoting *Heggestad v. U.S. Dep't of Justice*, 182 F. Supp. 2d 1, 7 (D.D.C. 2000)).

In this case, respondents allege that they are entitled to the material that Treasury has withheld under the deliberative process privilege because the withheld material does not come within the scope of the privilege; because the privilege has been waived with respect to the withheld material; because respondents' alleged need for the material overcomes the privilege; and because the misconduct in which Treasury allegedly has engaged also overcomes the

privilege. ECF No. 30 at 8, 10, 12, 16-17, 24. For the following reasons, respondents are mistaken on all counts.[3]

A. THE MATERIAL THAT TREASURY HAS WITHHELD UNDER THE DELIBERATIVE PROCESS PRIVILEGE COMES WITHIN THE SCOPE OF THE PRIVILEGE.

Respondents allege that the material that Treasury has withheld under the deliberative process privilege does not come within the scope of the privilege because "government officials have steadfastly denied that the Treasury played *any* part in the [Delphi Salaried Plan's] termination, or in any aspect of the resolution of the Delphi pension issues." ECF 30 at 8. This allegation is without merit because the relevant question is not whether "Treasury played [a] part in the [Delphi Salaried Plan's] termination" but whether the withheld material is "'predecisional' and 'deliberative.'" *See Loving*, 550 F.3d at 38 (quoting *Sealed Case*, 121 F.3d at 737). The withheld material meets both of these criteria.

The withheld material falls into four categories. Ex. A ¶ 11. The first category consists of "[d]raft slides and presentations and related deliberations on Chrysler and GM bankruptcy considerations." *Id*. This material "relate[s] to various aspects of Treasury's decisions to provide taxpayer funding to both GM and Chrysler in 2009 in connection with the restructuring of those two companies." *Id.* ¶ 12.

The second category consists of "[d]eliberations regarding substantive responses to congressional or press inquiries and prepared public statements." Ex. A ¶ 11. This material "reflect[s] Treasury discussions regarding possible public statements and responses to congressional or press inquiries concerning issues related to the GM, Chrysler, and Delphi

[3] The material that Treasury withholds under the deliberative process privilege includes material withheld from four documents, Doc. Nos. 205, 443, 662, and 1151, for which, because of oversight, "no privilege was asserted on the privilege log." Ex. A ¶ 11 n.2. A fifth document for which no privilege was asserted, Doc. No. 1090, has been released. *Id.* ¶ 2 n.1.

reorganizations." *Id.* ¶ 13. The material within this category was "used to develop articulations of Treasury policies regarding the GM, Chrysler, and Delphi restructurings at a time when such policies were still being developed." *Id.*

The third category consists of "[d]eliberations and materials shared with or related to PBGC discussions." Ex. A ¶ 11. This material consists of "inter-agency draft statements, emails and spreadsheets reflecting Treasury and PBGC deliberation on issues related to GM and Delphi pension obligations." *Id.* ¶ 14. The material within this category "neither represent[s] a complete and accurate record of all of the information considered nor reflect[s] any statement of agency policy or final decision." *Id.*

The fourth category consists of "[i]nternal deliberations regarding financing, cash flows, or other restructuring considerations related to GM's key supplier Delphi." Ex. A ¶ 11. This material "reflect[s] internal communications, drafts, slides and other documents that may have been considered by members of the Auto Team as Treasury provided high-level strategic advice to GM about Delphi." *Id.* ¶ 15.

The material within all of these categories "relate[s] to sensitive discussions regarding Treasury's policies with respect to the administration of taxpayer money, including the funds used to support GM and Chrysler, as well as Treasury's broader role in preserving financial stability and protecting the U.S. economy." Ex. A ¶ 10. These discussions "include deliberations over, among other things, potential restructuring of the auto industry, evaluation and consideration of internal restructuring proposals from GM and Chrysler and external restructuring and investment proposals from other companies, and advising GM on broad strategic issues affecting its restructuring." *Id.* Such material is "'predecisional' and 'deliberative,'" *see Loving*, 550 F.3d at 38 (quoting *Sealed Case*, 121 F.3d at 737), because it

was "created before the final adoption of an agency policy or position" and "reflects the consultative process leading up to the formulation of an agency policy or position." *Id.* ¶ 9. The material thus comes within the scope of the deliberative process privilege and is entitled to its protection.

As to certain of the material that Treasury has withheld, respondents rely on *Starr International Co. v. United States*, No. 11-779C, slip. op. at 9 (Fed. Cl. Nov. 6, 2013), for the proposition that "edits to garden-variety press releases do not qualify as deliberations because the question of how to communicate the Government's policies is not itself a policy decision." ECF No. 30 at 24. That reliance is misplaced because the deliberative process privilege "protect[s] materials that concern individualized decisionmaking," not merely "the development of generally applicable policies," *Hinckley v. United States*, 140 F.3d 277, 284 (D.C. Cir. 1998); because "[i]nternal communications regarding how to respond to media and Congressional inquiries have repeatedly been held to be protected under the deliberative process privilege," *Judicial Watch v. Consumer Fin. Prot. Bureau*, 60 F. Supp. 3d 1, 9 (D.D.C. 2014) (Sullivan, J.); and because "draft press releases and related correspondence" have also been held to be protected under the privilege. *Alexander v. FBI*, 186 F.R.D. 154, 166 (D.D.C. 1999).

Respondents also allege that certain of the material that Treasury has withheld does not come within the scope of the privilege because GM and Silver Point Capital are identified in the Treasury privilege log as the authors of the documents from which the withholdings were made. ECF No. 30 at 24. This argument is without merit because the documents to which respondents refer are "drafts being circulated internally at Treasury or between Treasury, its advisors, and/or the PBGC featuring substantive edits from Auto Team members, Treasury's advisors . . . or PBGC officials." Ex. A ¶ 16. The misidentification of GM and Silver Point Capital as the

authors of the documents resulted from metadata "indicating that those entities may have been the original source of the documents." *Id.*

Respondents also argue that certain of the material that Treasury has withheld under the deliberative process privilege does not come within the scope of the privilege because the material consists of emails between Matthew A. Feldman of the Auto Team and Philip Quinn of the Treasury Office of Financial Institutions. ECF No. 30 at 39; Ex. A ¶ 26. This argument is without merit because the Office of Financial Institutions works on PBGC matters as they relate to the PBGC Board, of which the Secretary of the Treasury is a member. Ex. A ¶ 26. The Board "is advised of significant matters" but "does not make individual case decisions relating to pension plan terminations." *Id.* "Such decisions lie solely with the PBGC Director." *Id.* For that reason, "the communications at issue between Mr. Quinn and Mr. Feldman would not have been prohibited," *id.*, and thus are entitled to protection under the deliberative process privilege.

B. TREASURY HAS NOT WAIVED THE DELIBERATIVE PROCESS PRIVILEGE WITH RESPECT TO THE MATERIAL IT HAS WITHHELD UNDER THE PRIVILEGE.

The "voluntary disclosure" of material covered by the attorney-client privilege "'waives the privilege, not only as to the specific communication disclosed but often as to all other communications relating to the same subject matter.'" *Sealed Case*, 121 F.3d at 741 (quoting *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982)). "But this all-or-nothing approach has not been adopted with regard to executive privileges generally, or to the deliberative process privilege in particular." *Id.* "Instead, courts have said that release of a document only waives these privileges for the document or information specifically released, and not for related materials." *Id.*; *accord Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Justice*, 658 F. Supp. 2d 217, 235 (D.D.C. 2009) (Sullivan, J.). "This limited approach to waiver in the executive privilege context is designed to ensure that agencies do not forego voluntarily

disclosing some privileged material out of the fear that by doing so they are exposing other, more sensitive documents." *Sealed Case*, 121 F.3d at 741; *accord Citizens for Resp. & Ethics*, 658 F. Supp. 2d at 235.

In this case, respondents allege that Treasury has waived the deliberative process privilege with respect to the material it has withheld under the privilege because Auto Team member Matthew A. Feldman has "commented in detail" in "numerous statements, including to Congress," about "the decision-making process concerning the [Delphi Salaried Plan's] termination" and because Auto Team member Steven L. Rattner has published a book in which he "gives his account of the activities of the Auto Team, including those involving Delphi." ECF No. 30 at 10, 12. Any such waiver extends, however, solely to the "information specifically released" by Messrs. Feldman and Rattner. *See Sealed Case*, 121 F.3d at 741; *Citizens for Resp. & Ethics*, 653 F. Supp. 2d at 235. Respondents do not point to any withholding from any document for which information "specifically released" by Mr. Feldman or Mr. Rattner has caused the deliberative process privilege to be waived. Their waiver argument is thus unfounded.

C. RESPONDENTS HAVE NOT SHOWN THAT THEY HAVE A NEED FOR THE MATERIAL THAT TREASURY HAS WITHHELD UNDER THE DELIBERATIVE PROCESS PRIVILEGE THAT IS SUFFICIENT TO OVERCOME THE PRIVILEGE.

"'[T]he deliberative process privilege is a qualified privilege and can be overcome by a sufficient showing of need.'" *Hinckley*, 140 F.3d at 285 (quoting *Sealed Case*, 121 F.3d at 737). "Accordingly, once the elements of the privilege have been met, the burden shifts to the party opposing the privilege to establish that its need for the information outweighs the interest of the government in preventing disclosure of the information." *Cobell v. Norton*, 213 F.R.D. 1, 5 (D.D.C. 2003).

In this case, respondents allege that they have a "significant" need for the material that Treasury has withheld under the deliberative process privilege. ECF No. 30 at 13. They base that allegation on three things. First, they characterize "[t]he question before the Michigan Court" as the following: "[I]f the PBGC had gone to a court in July 2009 seeking a decree that the [Delphi Salaried Plan] must be terminated in order to avoid an increase to the liability of PBGC's insurance fund, would such a decree have been appropriate"? ECF No. 30 at 13. Second, they allege that the material that Treasury has withheld under the deliberative process privilege "potentially" may show the following things: (1) that "the PBGC's actions were the result of improper influence by the Treasury (or other executive officials)"; (2) that "a GM reassumption of the [Delphi Salaried Plan] was a viable possibility"; and (3) that "other potential acquirers of Delphi (and its assets) would have been amenable to assuming the Delphi pensions under the right circumstances." *Id.* at 6, 13. Third, they allege that they will be able to show that the issuance of a court order permitting the termination of the Delphi Salaried Plan would have been "unwarranted" if the material that Treasury has withheld under the deliberative process privilege shows these things.[4] *Id.* at 13.

Respondents' reasoning suffers from two flaws. First, discovery is unwarranted "when [it] would amount to 'nothing more than a fishing expedition' because [its proponent] is 'unable to offer anything but rank speculation.'" *Russell v. Harman Int'l Indus.*, 773 F.3d 253, 257 (D.C. Cir. 2014) (quoting *Bastin v. Fed. Nat'l Mortg. Ass'n*, 104 F.3d 1392, 1396 (D.C. Cir. 1997)). In this case, respondents "'offer nothing but rank speculation'" when they allege that the material that Treasury has withheld under the deliberative process privilege may contain the information

[4] GM never had any liability for the Delphi Salaried Plan. When respondents refer to the "possibility" of a "GM reassumption of the [Delphi Salaried Plan]," they thus refer to the possibility of New GM's assuming liability for the plan without any consideration for its doing so. At no time have respondents explained why a commercial enterprise like New GM would have had any reason to do so.

that they seek. The most they are able to say in support of that allegation is that certain of the material that Treasury has withheld comes from documents that deal with Delphi. ECF No. 30 at 13-15. That fact proves nothing because documents dealing with Delphi are what Treasury was required to search for and produce under the stipulation and protective order dated November 4, 2014. *See* ECF No. 28 ¶ 2.

Second, respondents have not shown that the information that they hope to obtain from the withheld material is relevant to their claims. PBGC is permitted to terminate a pension plan without "the necessity of a court adjudication" by entering into an agreement with the plan administrator. *In re Jones & Laughlin Hourly Pension Plan*, 824 F.2d 197, 200 (2d Cir. 1987); *see* ECF No. 21-2 at 13, 16 (brief of respondents so conceding). PBGC is also permitted to "apply to the appropriate United States district court for a decree adjudicating that [a pension plan] must be terminated in order . . . to avoid . . . any unreasonable increase in the liability of the [insurance] fund [maintained by PBGC]." 29 U.S.C. § 1342(c)(1). Whether a particular pension plan "must be terminated [by judicial decree] in order . . . to avoid . . . any unreasonable increase in the liability of the fund" is an economic question. Any influence exerted on PBGC to persuade it to apply for such a judicial decree is thus irrelevant to that question.

In addition, nothing in § 1342(c)(1) requires PBGC to demonstrate that no one exists who may be willing to assume liability for an underfunded pension plan in order to obtain "a decree adjudicating that the plan must be terminated in order . . . to avoid . . . any unreasonable increase in the liability of the fund." It therefore is irrelevant to respondents' claim against PBGC whether "a GM reassumption of the [Delphi Salaried Plan] was a viable possibility" or "other potential acquirers of Delphi (and its assets) would have been amenable to assuming the Delphi pensions under the right circumstances." Respondents thus have failed to show that they have

any need for the material that Treasury has withheld under the deliberative process privilege, much less any need that overcomes the privilege. Their motion to compel the production of that material should therefore be denied.

D. RESPONDENTS HAVE NOT SHOWN THAT TREASURY HAS ENGAGED IN MISCONDUCT MATERIAL TO THEIR CLAIMS THAT IS SUFFICIENT TO OVERCOME THE DELIBERATIVE PROCESS PRIVILEGE.

Claims under the deliberative process privilege are subject to denial "'where there is reason to believe the documents sought may shed light on government misconduct.'" *Hinckley*, 143 F.3d at 285 (quoting *Sealed Case*, 121 F.3d at 738). "Allegations of government misconduct are 'easy to allege and hard to disprove,'" however. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 147, 175 (2004) (quoting *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998)). For that reason, "[t]he purpose of the deliberative process privilege would be defeated if all a party had to do was claim misconduct every time it did not like the outcome of a government decision or policy and [it] wanted access to the thought process." *Convertino v. U.S. Dep't of Justice*, 674 F. Supp. 2d 97, 105 (D.D.C. 2009). A litigant thus "cannot obtain otherwise-privileged records unless he provides actual evidence that could raise a reasonable inference of wrongdoing." *Touarsi v. U.S. Dep't of Justice*, 2015 WL 303637, at *5 (D.D.C. Jan. 23, 2015).

In this case, respondents allege that the Delphi Salaried Plan was terminated because of "political pressure" exerted on PBGC by Treasury and the Auto Task Force. ECF No. 30 at 17. They therefore allege that "government misconduct is at issue in this case" and ask that the deliberative process privilege be held inapplicable to the material that Treasury has withheld under the privilege. *Id.* at 16 (capitalization omitted).

In *Black I*, respondents alleged similarly that Treasury Defendants had taken actions for "political reasons." ECF No. 1, Ex. E ¶ 59. That allegation was dismissed because it was found

to be based on nothing more than "'naked assertion[s] devoid of further factual enhancement.'" ECF No. 10-7 at 13 (quoting *Iqbal*, 556 U.S. at 678). The allegation of misconduct that respondents make in this case is likewise based on nothing more than "'naked assertion[s] devoid of further factual enhancement.'" The sole support proffered for that allegation is the following:

> [Respondents'] lawsuit against the PBGC alleges such governmental misconduct, namely arbitrariness and the compromising of honest, effective government. [Respondents] challenge the PBGC's deliberations in relation to the [Delphi Salaried Plan] under 29 U.S.C. § 1342(a) and (c), alleging that those deliberations were improperly influenced, and indeed hijacked, by political pressure from the Treasury and the Auto Task Force. [Respondents] allege that, prior to the creation of the Auto Task Force, the PBGC was a staunch advocate for the continuation of the [Delphi Salaried Plan] via any means necessary, including a resassumption of the Plan by GM, and that the PBGC's abandonment of that advocacy was done at the behest of other governmental actors, in contravention of the PBGC's governing statute. [Respondents] believe that the Treasury intervened in these matters in order to gain political advantage for itself and the administration, by sacrificing the interests of this group or retirees (who were of little political relevance) in order to ensure for GM a quick and profitable emergence from bankruptcy.

ECF No. 30 at 16-17 (citation omitted).

This statement does not contain any "actual evidence that could raise a reasonable inference of wrongdoing" on Treasury's part. *See Touarsi*, 2015 WL 303637, at *5. Instead, the statement consists merely of a list of things that respondents "allege" and "believe." For that reason, the statement does not provide any support for respondents' allegation that the misconduct in which Treasury allegedly has engaged overcomes the deliberative process privilege. No credence should therefore be given to that allegation.

II. RESPONDENTS HAVE NOT SHOWN THAT THAT THEY ARE ENTITLED TO THE MATERIAL THAT TREASURY HAS WITHHELD UNDER THE PRESIDENTIAL COMMUNICATIONS PRIVILEGE.

The presidential communications privilege "is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United*

States v. Nixon, 418 U.S. 663, 708 (1974). The "'presumptive privilege for [p]residential communications' . . . preserves the President's ability to obtain candid and informative opinions form his advisors and to make decisions confidentially." *Loving*, 550 F.3d at 37 (quoting *Nixon*, 418 U.S. at 708). The privilege thus "'flow[s] from the nature of the enumerated powers' of the President" and is necessary to "provide '[a] President and those who assist him . . . [with] free[dom] to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.'" *Sealed Case*, 121 F.3d at 743 (quoting *Nixon*, 418 U.S. at 708) (alterations in the original).

The presidential communications privilege "protects 'communications directly involving and documents actually viewed by the President.'" *Loving*, 550 F.3d at 37 (quoting *Judicial Watch v. Dep't of Justice*, 365 F.3d 1108, 1114 (D.C. Cir. 2004)). The coverage of the privilege extends to communications "either authored or received in response to a solicitation by presidential advisers in the course of gathering information and preparing recommendations on official matters for presentation to the President." *Sealed Case*, 121 F.3d at 757. The coverage of the privilege also extends to "communications authored or solicited and received by those members of an immediate White House advisor's staff who have broad and significant responsibility for investigating and formulating the advice to be given to the President on a particular matter." *Id.* The privilege thus protects in its entirety "the President's personal decision-making process," including the gathering of information by White House staff that is relevant to that process. *See Judicial Watch*, 365 F.3d at 1118. Documents to which the privilege applies are shielded from disclosure "regardless of whether the documents are predecisional or not, and it covers the documents in their entirety." *Loving*, 550 F.3d at 37-38 (quoting *Sealed Case*, 121 F.3d at 744).

In this case, respondents seek the material that Treasury has withheld under the presidential communications privilege from 63 documents.[5] They allege in seeking that material that it does not come within scope of the privilege and that their alleged need for the material overcomes the privilege. ECF No. 30 at 28, 32. Neither of these allegations has merit.

A. THE MATERIAL THAT TREASURY HAS WITHHELD UNDER THE PRESIDENTIAL COMMUNICATIONS PRIVILEGE COMES WITHIN THE SCOPE OF THE PRIVILEGE.

Respondents allege that the material that Treasury has withheld under the presidential communications privilege does not come within the scope of the privilege because Treasury has not shown that the material "implicate[d] presidential decisionmaking" or was authored or solicited by "the President or his immediate advisors [who] were involved in the pension decisions." ECF No. 30 at 26, 28. Respondents take too narrow a view of the privilege. The scope of the presidential communications privilege is not limited to communications dealing with any specific subject but extends instead to any "official matter[]." *See Sealed Case*, 121 F.3d at 757. In this case, the material that Treasury has withheld under the presidential communications privilege consists of "memoranda, drafts of presidential speeches, and electronic mail communications, including, in some cases, attachments, that relate to the President's decision as to how the United States should address the financial distress of several of its large automobile corporations and protect the country from the potential consequences of their bankruptcy." Ex. C ¶ 7. That material forms "part of the President's personal decision-making process," *see Judicial Watch*, 365 F.3d at 1118, and, for that reason, comes within the scope of the privilege.

[5] Respondents allege that they seek the material that Treasury has withheld under the presidential communications privilege from 66 documents. ECF No. 30 at 31. Treasury no longer relies on the privilege to withhold material from three of those documents, Doc. Nos. 634, 771, and 779. Ex. C ¶ 5.

The material that Treasury has withheld under the privilege is also protected by the privilege because it has been withheld from documents authored or received in response to a solicitation by immediate presidential advisors or "authored or solicited and received by those members of an immediate White House advisor's staff who have broad and significant responsibility for investigating and formulating the advice to be given to the President on a particular matter." *See Sealed Case*, 121 F.3d at 757. The material that Treasury has withheld thus consists of communications among the Auto Task Force or the Auto Team and the White House "that were authored by or solicited and received by the President or senior presidential advisors and staff, including Lawrence H. Summers." Ex C ¶ 8. The material also consists of "communications that summarize or otherwise reflect communications with the President or that contain information provided to White House officials." *Id.* "At the time of these communications, Dr. Summers was the chief White House advisor to the President on the development of and implementation of economic policy." *Id.* ¶ 9. "In that capacity, he led the President's daily economic briefing." *Id.* "As co-chairman of the Auto Task Force, [he] advised the President on decisions relating to the United States' actions in response to the bankruptcy and restructuring of, among other companies, General Motors Corporation." *Id.*

The material that Treasury has withheld under the presidential communications privilege "thus reflect[s] or disclose[s] information, views, and advice exchanged among the President, his senior advisors, and the Auto Task Force or Auto Team and [was] part of the process that informed the President's determinations as to what actions the United States should take with respect to the financial collapse of General Motors and other U.S. automobile companies." *Id.* ¶ 10. The material therefore comes within the scope of the presidential communications privilege and is protected from disclosure by it.

B. RESPONDENTS HAVE NOT SHOWN THAT THEY HAVE A NEED FOR THE MATERIAL THAT TREASURY HAS WITHHELD UNDER THE PRESIDENTIAL COMMUNICATIONS PRIVILEGE THAT IS SUFFICIENT TO OVERCOME THE PRIVILEGE.

The presidential communications privilege is qualified, not absolute, but is "more difficult to surmount" than the deliberative process privilege. *Sealed Case*, 121 F.3d at 746. A party seeking to overcome the privilege must "always provide a focused demonstration of need, even when there are allegations of misconduct by high level officials." *Id.* To make the required showing, the party seeking to overcome the privilege must show that the withheld material "is directly relevant to issues that are expected to be central to the trial." *Id.* at 754. As respondents acknowledge, ECF No. 30 at 28, a party seeking to overcome the privilege in a civil case must make an even more persuasive demonstration of need than that required in *Sealed Case*, a criminal case. As the Supreme Court has said: "The distinction *Nixon* drew between criminal and civil proceedings is not just a matter of formalism . . . . The need for information for use in civil cases, while far from negligible, does not share the urgency or significance of the criminal subpoena requests in *Nixon*." *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 384 (2004); *cf. Senate Select Comm. on Pres. Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (holding that a congressional committee must show that material is "demonstrably critical" to the functions of the committee to overcome the presidential communications privilege).

In this case, respondents allege that they have a need for the material that Treasury has withheld under the presidential communications privilege because certain of that material comes from documents dealing with Delphi. ECF No. 30 at 32. Respondents also allege that they have a need for the material that Treasury has withheld under the presidential communications privilege because they allege in this case "that the [Delphi Salaried Plan] did not need to be

terminated, and that the Treasury or the White House impermissibly pressured the PBGC to terminate [the plan] for unlawful, impermissible, or political reasons." ECF No. 30 at 32.

These allegations fall short of the showing of need that respondents must make. Respondents "'offer nothing but rank speculation'" when they allege that the material that Treasury has withheld under the presidential communications privilege is likely to show that Treasury or the White House pressured PBGC to terminate the Delphi Salaried Plan or, if they did, that they did so for "unlawful, impermissible, or political reasons." *See Russell*, 773 F.3d at 257 (quoting *Bastin*, 104 F.3d at 1396). Respondents also point to nothing suggesting that the issuance of a court order permitting the termination of the Delphi Salaried Plan would have been unwarranted under 29 U.S.C. § 1342(c)(1) "to avoid . . . any unreasonable increase in the liability of the [insurance] fund [maintained by PBGC]"even assuming, *arguendo*, that Treasury or the White House placed any such pressure on PBGC. Respondents thus fail to show that the material that Treasury has withheld under the presidential communications privilege "is directly relevant to issues that are expected to be central to the trial" in *Black I*. *See Sealed Case*, 121 F.3d at 754. Their motion to compel should therefore be denied because of their failure to make the "focused demonstration of need" that overcoming the privilege would require. *See id.* at 746.

III. RESPONDENTS HAVE NOT SHOWN THAT THAT THEY ARE ENTITLED TO THE MATERIAL THAT TREASURY HAS WITHHELD UNDER THE ATTORNEY-CLIENT PRIVILEGE.

"The attorney-client privilege protects confidential communications made between clients and their attorneys when the communications are for the purpose of securing legal advice or services." *In re Lindsey*, 158 F.3d 1263, 1267 (D.C. Cir. 1998). In this case, respondents seek

the material that Treasury has withheld under the attorney-client privilege from 47 documents.[6] ECF No. 30-1 at 1-3. Respondents seek that material because, they contend, Treasury has not shown that the withheld material involves communications with attorneys or, if it does, that the material involves communications with attorneys in which legal advice was offered. *Id.* at 34, 36.

Respondents are mistaken on both counts. Two law firms served as outside counsel to the Auto Team: Cadwalader, Wickersham & Taft LLP (Cadwalader) and Sonnenschein Nath & Rosenthal LLP (Sonnenschein). Ex. A ¶ 17. Legal advice to members of the Auto Team was also provided by "internal Treasury attorneys." *Id.* The Department of Justice represented Treasury in the bankruptcy proceedings involving GM, Chrysler, and Delphi that took place in 2009. *Id.* All of the withholdings under the attorney-client privilege that respondents contest "involve confidential communications between a lawyer from Cadwalader, Sonnenschein, the Department of Justice, or a Treasury internal attorney and Auto Team personnel in the performance of the lawyer's official duties." *Id.* ¶ 18. In addition, all of those withholdings "feature an attorney providing legal advice" or "include a request from a Treasury employee or from the agency to inside or outside counsel seeking to protect the interests of the agency, by, for example asking for an opinion on the law, seeking legal services, or requesting assistance in a legal proceeding." *Id.* No material involving Matthew A. Feldman, the principal restructuring attorney for the Auto Team, has been withheld except in cases where "the content and context make clear that [Mr. Feldman] was providing legal advice." *Id.* ¶ 19. The material that Treasury

[6] Respondents allege in their memorandum that they seek the material that Treasury has withheld under the attorney-client privilege from 27 documents, ECF No. 30 at 33, but allege in Ex. 1 to their memorandum that they seek the material that Treasury has withheld under the privilege from 48 documents. ECF No. 30-1 at 1-3, 14-17. Treasury no longer relies on the attorney-client privilege to withhold material from one of the 48 documents, Doc. No. 242. Ex. A ¶ 17 n.4.

has withheld under the attorney-client privilege thus comes within the scope of the privilege and is entitled to protection under the privilege.

IV. RESPONDENTS HAVE NOT SHOWN THAT THAT THEY ARE ENTITLED TO THE MATERIAL THAT TREASURY HAS WITHHELD UNDER THE WORK PRODUCT DOCTRINE.

The work product doctrine "protects written materials lawyers prepare 'in anticipation of litigation.'" *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998) (quoting the predecessor of Fed. R. Civ. P. 26(b)(3)(A)). "Originally a creature of the common law, Federal Rule Civil Procedure 26(b)(3) now 'codifies the work-product doctrine.'" *Feld v. Fireman's Fund Ins. Co.*, 991 F. Supp. 2d 242, 247 (D.D.C. 2013) (quoting *Upjohn Co. v. United States*, 449 U.S. 383 (1981)).

In this case, respondents seek the material that Treasury has withheld under the work product doctrine from 16 documents.[7] Respondents allege in seeking that material that the material does not come within the scope of the work product doctrine and that their alleged need for the material overcomes the doctrine. *Id.* at 38-39, 40. Neither allegation is persuasive.

A. THE MATERIAL THAT TREASURY HAS WITHHELD UNDER THE WORK PRODUCT DOCTRINE COMES WITHIN THE SCOPE OF THE DOCTRINE.

Respondents allege that the withholdings under the work product doctrine that they seek do not come within the scope of the doctrine because Treasury has not shown that "attorney[s] were involved in the production of the document[s]" from which those withholdings were made or that the withholdings were prepared in response to "pending or anticipated litigation." ECF No. 30 at 38, 39. These allegations are without merit. The Chrysler and GM bankruptcy

[7] Respondents allege in Ex. 1 to their memorandum that they seek the material that Treasury has withheld under the work product doctrine from 16 documents, ECF No. 30-1 at 4, 13, but allege in their memorandum that they seek the material that Treasury has withheld under the doctrine from 21 documents. ECF No. 30 at 38 (19 documents), 39 (2 other documents). Treasury no longer relies on the work product doctrine to withhold material from 5 of the 21 documents, Doc. Nos. 220, 238, 607, 1052, and 1211. Ex. A ¶ 25 n.11.

proceedings took place, respectively, from April 30 to June 10, 2009, and from June 1 to July 10, 2009. Ex. A ¶ 23. Those proceedings were anticipated months prior to their commencement. *Id.* The withholdings under the work product doctrine that respondents seek are withholdings from documents "created or reviewed by Cadwalader, Department of Justice, or internal Treasury attorneys" in anticipation of the Chrysler or GM bankruptcy proceedings. *Id.* Those withholdings therefore come within the scope of the work product doctrine and are entitled to protection under it.

B. RESPONDENTS HAVE NOT SHOWN THAT THEY HAVE A NEED FOR THE MATERIAL THAT TREASURY HAS WITHHELD UNDER THE WORK PRODUCT DOCTRINE THAT IS SUFFICIENT TO OVERCOME THE PRIVILEGE.

"[A] party's ability to discover work product often turns on whether the withheld materials are fact work product or opinion work product." *FTC v. Boehringer Ingelheim Pharm.*, 778 F.3d 142, 153 (D.C. Cir. 2015). "A party generally must make an 'extraordinary showing of necessity' to obtain opinion work product." *Id.* (quoting *In re Sealed Case*, 676 F.2d 793, 811 (D.C. Cir. 1982)). "By contrast, '[t]o the extent that work product contains relevant, nonprivileged *facts*,' the work product doctrine 'merely shifts the standard presumption in favor of discovery and requires the party seeking discovery to show adequate reasons why the work product should be subject to discovery.'" *Id.* (quoting *Sealed Case*, 676 F.2d at 809).

In this case, respondents allege that they have a need for material that Treasury has withheld under the work product doctrine and further allege that their need for that material is "significant enough to overcome the protection" of the doctrine. ECF No. 30 at 40. Respondents do not indicate, however, whether the work product that they seek is fact work product or opinion work product. In addition, their showing of need is limited to their incorporating by reference the showings of need that they attempt to make with respect to the

material that Treasury has withheld under the deliberative process privilege and the presidential communications privilege. *Id.* Those showings, as demonstrated above, are unpersuasive. *See* Points I(C) & II(B). They thus provide no basis for an order compelling the production of any of the material that Treasury has withheld under the work product doctrine.

CONCLUSION

For the foregoing reasons, respondents' motion to compel should be denied.

Respectfully Submitted,

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Dated: August 21, 2015

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2015, I served the within memorandum and the exhibits to the memorandum on all counsel of record by filing them with the Court by means of its ECF system.

s/ *David M. Glass*