UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| CENTER FOR AUTO SAFETY,<br><br>Plaintiff,<br><br>v.<br><br>U.S. DEPARTMENT OF TREASURY, et al.<br><br>Defendants. | ) | Civ. No. 11-1048 (BAH) |

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiff Center for Auto Safety moves for summary judgment in this case under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, on the grounds that Defendant Department of Treasury has not met its burden of proof that all of the information at issue in this case is exempt from disclosure under Exemption 4 of FOIA, 5 U.S.C. § 552(b)(4). In support of this motion, Plaintiff submits the accompanying memorandum of law, a Statement of Material Facts as to Which There is no Genuine Issue, Exhibits A - II, the Declarations of Joan Claybrook and Clarence Ditlow, and a proposed order.

Respectfully Submitted,

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Date: January 20, 2015

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| CENTER FOR AUTO SAFETY,<br><br>Plaintiff,<br><br>v.<br><br>U.S. DEPARTMENT OF TREASURY, et al.<br><br>Defendants. | ) | Civ. No. 11-1048 (BAH) |

**PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE AND PLAINTIFF'S RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS**

Pursuant to Local Rule 7.1(h), Plaintiff the Center for Auto Safety ("The Center" or "CFAS") hereby submits its statement of material facts as to which there is no genuine issue, in support of the Center's motion for summary judgment. In opposition to Defendants' motion for summary judgment, the Center also responds to Defendants' statement of material facts as to which there is no genuine issue.

**A. Plaintiff's Statement of Material Facts As to Which There Is No Genuine Issue.**

1. By letter dated June 8, 2009, the Center for Auto Safety submitted a request to the Department of Treasury under the Freedom of Information Act ("FOIA") for "[all] e-mail correspondence since January 1, 2009, in any way related to the Chrysler and General Motors bankruptcies, the events preceding those bankruptcies, and the federal government's roles in and deliberations concerning those matters." *See* Plaintiff's Ex. ("CFAS Ex.") R.

2. The Department of Treasury continues to withhold from the Center 452 documents and parts of 90 additional documents at the request of the General Motors Company

(the "new" GM), and Treasury continues to withhold from the Center 284 documents in whole or part at the request of Chrysler Group LLC (the "new" Chrysler). *See* Defendants' Memorandum Of Points And Authorities In Support Of Joint Motion For Summary Judgment, ECF No. 36 (hereinafter "Def. Br.") at 7-8.

3. General Motors Corporation (the "old" GM) and the "new" GM are separate and distinct companies. *See*, *e.g.*, GM Opening Br., CFAS Ex. D, at 10.

4. Chrysler Corporation (the "old" Chrysler) and the "new" Chrysler are separate and distinct companies. *See, e.g.*, Cochrane Decl. at 3 n.1 ("Chrysler Group LLC is *a separate entity and is not responsible for the obligations of Old Carco*, except for those that were specifically assumed.") (emphasis added).

5. Treasury contends that all of the information that has been withheld from the Center is exempt from disclosure under Exemption 4 of FOIA, 5 U.S.C. § 552(b)(4), because it constitutes "commercial or financial information obtained from a person" that is "confidential." *See* Def. Br.; Exhibit D to Declaration of Laura Fitzpatrick, ECF No. 36-2; Exhibit A to Declaration of Louann Van Der Wiele, ECF No. 36-3.

6. Treasury contends that all of the information that has been withheld from the Center is "confidential" because disclosure of any such information is likely to "impair the Government's ability to obtain necessary information in the future" within the meaning of *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Def. Br. at 24-25.

7. Treasury contends that all of the information that has been withheld from the Center is also "confidential" because disclosure of any such information is likely to "cause

substantial harm to the competitive position of the person from whom the information was obtained," within the meaning of *Nat'l Parks*, *supra*. Def. Br. at 14-24.

8. Treasury has withheld all of the information at issue in this case on the ground that disclosure of such information is likely to cause either the "new" GM or the "new" Chrysler "substantial competitive injury." Def. Br. at 14-24.

9. Both the old GM and the old Chrysler are bankrupt. *See* GAO Report, CFAS Ex. F, at 7.

10. Some of the information that has been withheld from the Center pertains to the old GM, and some of the information pertains to the old Chrysler. *See, e.g.*, GM VI Doc. No. 93 ("2007 Financial Statements"); Chrys. VI at 11 ("May 31, 2009 email chain regarding issues related to Oldco"); *id.* at 28 ("May 17, 2009 email . . . regarding the wind down budget for Oldco"); *id.* at 60 ("old Carco LLC Liquidation Budget"); *id.* at 61 ("presentation regarding 'Old Carco LLC'"); *id.* ("Summary Costs to Confirm Plan of Liquidation"); CFAS Ex. X.

11. As part of the Section 363 Sale that resulted in the creation of the "new" GM, which was approved by the Bankruptcy Court, the "new" GM was not required to assume certain liabilities that were left with the old GM. *See* First Amendment to Amended and Restated Master Sale and Purchase Agreement, *In re Motors Liquidation Co.*, No. 09-50026 (Bankr. S.D.N.Y. June 30, 2009), ECF No. 2774; *In re General Motors Corp.*, 407 B.R. 463 (Bankr. S.D.N.Y. 2009).

12. As part of the Section 363 Sale that resulted in the creation of the "new" Chrysler, which was approved by the Bankruptcy court, the "new" Chrysler was not required to assume certain liabilities that were left with the old Chrysler. *See* Chrysler Master Transaction

Agreement, CFAS Ex. P at 5, § 2.06; *In re Chrysler LLC, et al.*, 405 B.R. 84 (Bankr. S.D.N.Y. 2009).

13. Some of the information that has been withheld from the Center concerns the liabilities that were left behind with the old GM and the old Chrysler. *See, e.g.*, Chrys. VI at 16 ("email chain regarding product liability"); *id.* at 75 ("Document regarding 'Warranty/Product Liability Issues'"); *id.* at 17 (email exchange "discussing Chrysler's budget for environmental expenses"); GM VI at Doc. No. 455 ("Portions of presentation regarding strategies, recommendations and options in connection with benefit obligations in connection with 363 Sale; includes liability amounts"); Nos. 458-59 (same); *see also* Wilson Testimony at 103, CFAS Ex. M (the Auto Team "actually *had an active debate with our team about the product liability associated with cars purchased before June 1st, but with accidents and claims occurring post-closing*") (emphasis added); *see also* Redacted emails, attached as CFAS Ex. Y (with subject line "Product Liability").

14. Lawyers for the "new" Chrysler and the "new" GM created the *Vaughn* Indices upon which the government relies in this case to carry its burden of proof. *See* Exhibit D to Fitzpatrick Decl., ECF No. 36-2; Exhibit A to Van Der Wiele Decl., ECF No. 36-3.

15. Some of the records that have been withheld from the Center were authored by individuals that worked for Treasury at the time the records were created:

> *See, e.g.*, **GM VI** at Doc. No. 514 ("Email chain *between Matthew Feldman* [of the Auto Task Force] and Robert Osborne"); Doc. No. 521 ("Email chain between *Matthew Feldman*, Rick Westernberg and Harry Wilson"); Doc. No. 524 ("Email chain between Walter Borst, *Matthew Feldman*, Ray Young, and Harry Wilson"); Doc. No. 526 (same); Doc. No. 529 ("Email from *Matthew Feldman* to Rick Westenberg and Harry Wilson"); Doc. No. 537 ("Email from *Brian Osias* [Auto Task Force advisor] to Walter Borsi"); *see also Overhaul* at 82 (identifying Brian Osias as a member of the Auto Task Force team); **Chrys. VI** Bates Range HHR-DOT2-00119592 ("April 21-22, 2009 email chain between, *inter alia*, Chrysler, *the Treasury* . . . regarding revisions to a DIP [Debtor In

Possession] term sheet"); *id.* at 3 ("June 3 and June 8, 2009 email chain between Chrysler, *the Treasury*, and Capstone regarding product liability issues"); *id.* at 6 ("April 22, 2009 email chain" including emails of "*Ron Bloom*" and "*Brian Deese* [Auto Task Force members]; *id.* at 13, Bates Range HHR-DOT2-00155388 and HHR-DOT2-00155393 (withholding "the entire text of the April 20, 2009 email from *Paul Nathanson* [Task Force advisor] to Robert Manzo; *see also Overhaul* at 103 (identifying Paul Nathanson as a Task Force staff); Chrys. VI at 17 ("July 2-3, 2009 email chain between *Brian Osias*" and others); *id.* at 20-21, Bates Range HHR-DOT2-00153431 ("April 8, 2009 email exchange between Robert Manzo and *Matthew Feldman* regarding issues related to Section 363 of the Bankruptcy Code," including "the numbered points of *Matthew Feldman's email* of 20:25"); *id.* at Bates Range HHR-DOT2-27-00342767 ("May 15, 2009 email exchange between *Brian Osias*" and others); *id.* at 28, Bates Range HHR-DO-00342947 ("May 15, 2009 *email from Brian Osias* to Robert Manzo and John Rooney discussing Chrysler's DIP financing needs); *id.* at 28, HHR-DOT2-00343725 ("May 17, 2009 email exchanged between Robert Manzo, John Rooney and *Matthew Feldman*"); *id.* at 31, HHR-DOT2-00346934 ("May 21, 2009 email chain concerning Chrysler's borrowing request from the Treasury"); *id.* at HHR-DOT2-00347619 ("May 24, 2009 email chain regarding Chrysler's borrowing request"); at 25, HHR-DOT2-00348806 ("May 30, 2009 *email from Brian Osias* . . . regarding Chrysler's cash needs during June 2009"); *id.* at 42 ("April 7, 2009 email exchange between *Ron Bloom* and Tom Lasorda"); *id.* at 47 ("May 2, 2009 email exchange between Bob Nardelli, *Matt Feldman and Ron Bloom* regarding request for information").

16. Most of the information that has been withheld from the Center was required by Treasury as part of its decision concerning whether to provide federal funding to GM and Chrysler under the Troubled Asset Relief Program ("TARP"). *See*, e.g., Def. Br. at 4 (acknowledging that the Loan Agreement provided that "GM *shall provide upon Treasury's request*, 'information, documents, records or reports with respect to . . . corporate affairs, conditions, operations, financial or otherwise'") (emphasis added); *id.* (acknowledging that the Chrysler loan agreement contained similar mandatory language); *see also* Declaration of Kathleen Cochrane, ECF No. 36-1. ¶ 36 ("Both GM and Chrysler *were required to provide to Treasury certain documents pursuant to the Loan and Security Agreement[s*]") (emphasis added).

17. The Department of Treasury has broad subpoena power. *See* 18 U.S.C. § 3486.

18. Treasury provided billions of dollars to Chrysler under TARP. *See* CFAS Ex. B, CFAS Ex. H, CFAS Ex. I, CFAS Ex. II.

19. Treasury provided tens of billions of dollars to GM under TARP. *See* CFAS Ex. B; CFAS Ex. C, CFAS Ex. I, CFAS Ex. II.

20. In support of Chrysler's request that the Bankruptcy Court approve its § 363 Sale, Chrysler's then Vice President and Chief Financial Officer, Ronald Kolka, testified by affidavit that "Chrysler is seeking approval from this Court to consummate *the only sale transaction that preserves this company as a going concern and averts a liquidation of historic proportions*." Affidavit of Ronald E. Kolka In Support of First Day Pleadings, ECF No. 23 (Bankr. S.D.N.Y.) (April 30, 2009), CFAS Ex. N at ¶ 4 (emphasis added). He also testified that "*[i]f the proposed transaction*, designed to effect an alliance with the Italian automobile manufacturer, Fiat S.p.A. ('Fiat'), is rejected and Chrysler liquidates, *it will mean the end of an iconic, 83-year old American car company . . .*," *id.*, and that the TARP financing "*is the only funding available to support the Fiat Transaction*." *Id.* at ¶ 12 (emphasis added).

21. In support of GM's request that the Bankruptcy Court approve its § 363 Sale, GM's then Chief Executive Officer, Fritz Henderson, testified by affidavit that "there simply is *no* viable alternative to the 363 Transaction to preserve the going concern value of the GM business and the employment opportunities and related benefits of that business," and that "[t]here is *no other sale, or even other potential purchasers, present or on the horizon*." Affidavit of Frederick A. Henderson, ECF No. 21, *In Re General Motors Corp*. (Bankr. S.D.N.Y.) (June 1, 2009), CFAS Ex. O , at ¶ 5 (first emphasis in original; second emphasis added). Mr. Henderson also stated that "[i]n the face of the global meltdown of the financial

markets, and a liquidity crisis unprecedented in GM's 100 year history, *there is only one way to maximize the value and permit the survival of GM's business* and save hundreds of thousands of jobs associated not only with GM, but also its vast supplier and dealer networks: these chapter 11 cases and the *prompt approval of the 363 Transaction*," and that "[t]he only other alternative is the liquidation of [GM's] assets." *Id.* (emphasis added). Mr. Henderson also informed the Bankruptcy Judge that "[a]fter exploring numerous options, including seeking out potential sources of financing (both public and private) and strategic alliances, it became evident that . . . "[t]here are *no* other sources with either the financial wherewithal or willingness to provide such financing.") *Id.* at ¶ 15 (emphasis in original).

22. Based in part on information and testimony provided by Mr. Kolka and Mr. Fitzpatrick, the Bankruptcy Courts approved each of the proposed § 363 Sales. *See In re Chrysler LLC, et al.*, 405 B.R. 84 (Bankr. S.D.N.Y. 2009) (decision of the Bankruptcy Court approving Chrysler's Section 363 Sale to Fiat); *In re General Motors Corp.*, 407 B.R. 463 (Bankr. S.D.N.Y. 2009).

23. In a November 5, 2014 submission to the Bankruptcy Judge in which the "new" GM seeks not to be held accountable for a "fraud on the court" with regard to facts allegedly not disclosed to the Judge when he approved the § 363 Sale, the company told the Judge that, with respect to the federal government's agreement to provide GM with TARP funding:

> [T]he U.S. Treasury drew a line in the sand: New GM would assume only those liabilities that the U.S. Treasury decided were commercially necessary for New GM's success. In particular, U.S. Treasury did not agree that New GM would assume successor liability claims, pre-[bankruptcy] petition accident claims, economic loss claims relating to Old GM vehicles and parts, and various claims predicated on Old GM's conduct.

Opening Brief by General Motors LLC On Threshold Issues Concerning Its Motions To Enforce The Sale Order and Injunction at 2, *In re Motors Liquidation Co*., No. 09-50026 (Bankr. S.D.N.Y. Nov. 5, 2014) ECF No. 12981, CFAS Ex. D).

24. Treasury has withheld some of the information at issue based on concerns by the "new" GM and "new" Chrysler regarding how their "customers" would use such information. *See* Fitzpatrick Decl., ECF No. 36-2, ¶ 13; Van Der Wiele Decl., ECF No. 36-3, ¶ 8.

25. Treasury has withheld some of the information at issue based on concerns by the "new" GM and "new" Chrysler regarding how "employees" and "unions" would use such information. *See* Fitzpatrick Decl., ECF No. 36-2, ¶ 13; Van Der Wiele Decl., ECF No. 36-3, ¶ 8.

26. Treasury has withheld some of the information at issue based on concerns by the "new" GM and "new" Chrysler that entities, other than auto manufacturers, would use such information. *See* Fitzpatrick Decl., ECF No. 36-2, ¶ 13; Van Der Wiele Decl., ECF No. 36-3, ¶ 8.

27. Treasury has withheld some of the information at issue based on requests for confidentiality made by the "new" GM and the "new" Chrysler during the negotiations over the loan agreements under which Treasury agreed to provide the companies with TARP funding. *See* Def. Br. at 4.

28. All of the information at issue that was withheld from the Center was generated by or provided to Treasury between January - August 2009. *See* CFAS Ex. R;

Voluntary Stipulation of Partial Settlement and Proposed Order for Further Proceedings (Dec. 16, 2011) at 1-2, ECF No. 12.

29. The restructuring plans prepared by Chrysler and GM in February 2009 contained detailed financial information and projections. *See* CFAS Ex. E (GM), CFAS Ex. Z (Chrysler).

30. The February 2009 restructuring plans submitted to Treasury by Chrysler and GM are publicly available. *See* CFAS Ex. E (GM), CFAS Ex. Z (Chrysler).

31. The document entitled "Obama Administration New Path to Viability for GM & Chrysler," CFAS Ex. X, is listed in the final Chrysler *Vaughn* Index as a document that the "new" Chrysler wants withheld from the Center under Exemption 4 because, according to the "new" Chrysler, it "contains detailed discussion of Chrysler's financial condition at the time when it was negotiating its partnership with Fiat and its lending agreement with the U.S. Treasury Department." *See* Chrysler VI at 71.

32. The document entitled "Obama Administration New Path to Viability for GM & Chrysler," CFAS Ex. X, was withheld by Treasury for several years on the ground that, if publicly disclosed, this document was likely to cause the "new" Chrysler "substantial competitive injury." *See* "Initial" *Vaughn* Index prepared by Chrysler, ECF No. 21-3, at 182, Document No. HHR-DOT2-00004091.

33. Despite the fact that Chrysler continues to list the document entitled "Obama Administration New Path to Viability for GM & Chrysler," CFAS Ex. X, as being withheld under Exemption 4, Treasury has released this document to Plaintiff. *See* CFAS Ex. X.

34. The document entitled "Obama Administration New Path to Viability for GM & Chrysler," CFAS Ex. X, was drafted by individuals who worked for the federal government at the time the document was prepared. *See* CFAS Ex. X.

35. The "new" GM's and "new" Chrysler's monthly sales figures, by model of car, are published on the internet by *Automotive News*. *See* http://www.autonews.com/article/20090608/DATACENTER/906059957/ *u-s-car-sales-may-ytd. Such information is also available for other months and years. See, e.g.,* http://www.autonews.com/section/datacenter11.

36. Some of the same information being withheld in this case has been disclosed in filings with the Securities and Exchange Commission. *See*, *e.g.*, 10-K Form, CFAS Ex. AA (requiring comprehensive summary of company's financial performance, including company history, organizational structure, executive compensation, equity, subsidiaries, and *audited financial statements*); GM 2009 10-K (April 7, 2010), CFAS Ex. BB, at 52-53 (detailing the "Delphi Master Disposition Agreement"); *id.* at 25-26, 51-52 (describing GM's plans for reducing dealerships and the methods used to evaluate individual dealers); *id.* at 115-16, 122-27, 147, 181, and 282 (detailing historical and projected financial operating information budgets, and forecasts for costs, plans, and strategies for the future); *id.* at 3, 47, 52, 81, 87, 89, and 283-84 (discussing the Opel restructuring activities); Chrysler 2011 10-K, CFAS Ex. CC, at 3-6, 57-58, 107, 153, 172-73 (detailing budgetary information and strategies for the future); *id.* at 135-55, 41, 57, 59, 119, 123, 202 (discussing tax and legal liability matters); *id.* at 3-6, 51-52, 104, 153 (discussing product strategy, manufacturing costs and relationships with suppliers).

37. Information that is similar in kind to the information that has been withheld in this case has been disclosed in filings with the Securities and Exchange Commission. *See*, *e.g.*, 15 U.S.C. §§ 78m and 78o(d); *see also* 10-K Form, CFAS Ex. AA (requiring comprehensive summary of company's financial performance, including company history, organizational structure, executive compensation, equity, subsidiaries, and *audited financial statements*); GM 2009 10-K (April 7, 2010), CFAS Ex. BB, at 52-53 (detailing the "Delphi Master Disposition Agreement"); *id.* at 25-26, 51-52 (describing GM's plans for reducing dealerships and the methods used to evaluate individual dealers); *id.* at 115-16, 122-27, 147, 181, and 282 (detailing historical and projected financial operating information budgets, and forecasts for costs, plans, and strategies for the future); *id.* at 3, 47, 52, 81, 87, 89, and 283-84 (discussing the Opel restructuring activities); Chrysler 2011 10-K, CFAS Ex. CC, at 3-6, 57-58, 107, 153, 172-73 (detailing budgetary information and strategies for the future); *id.* at 135-55, 41, 57, 59, 119, 123, 202 (discussing tax and legal liability matters); *id.* at 3-6, 51-52, 104, 153 (discussing product strategy, manufacturing costs and relationships with suppliers).

38. Information that was withheld for years from the Center and only released by Treasury in July 2014 had already been disclosed in SEC filings. *Compare*, *e.g.*, GM VI Doc. No. HHR-DOT2-00030511 ("Top Q&A Memo regarding GM viability plan") (April 26, 2009), CFAS Ex. DD, (originally withheld in full/released on July 31, 2014) (discussing "dealer reductions," the "four core U.S. brands," the "objective to make us a leaner, faster, more customer-focused organization going forward," UAW VEBA negotiations," the "Canadian CAW negotiations," and the sale of Saab) *with*

GM's 2009 10-K, CFAS Ex. BB, at 43-44 (discussing these same initiatives and the goal of a "substantially more accelerated and aggressive restructuring plan," the UAW VEBA negotiations and Canadian CAW negotiations ), *see also* GM's "8-K" SEC filings (Aug. 18, 2009) (Sept. 17, 2009)(Oct. 23, 2009), CFAS Ex. EE , and GM's "10-Q" SEC filings (Apr. 7 at 8-9, 93, 106-12 and May 17, 2010 at 5-6, 39-42, 53, 56), CFAS Ex. FF (discussing the same issues); *compare also, e.g.*, GM Document HHR-DOT2-00089702 (May 1, 2009), CFAS Ex. GG (originally withheld in full/released on July 31, 2009) (Draft "Key Stockholders Agreement and Registration Rights Agreement Provisions (for 363 Sale Transaction)) *with* GM 2009 10-K, CFAS Ex. BB (containing over a hundred references to the 363 Sale, including a detailed discussion of the Stockholders Agreement, *id.* at 288-89, and a *draft* of that document, *id.* at Exhibit K).

39. Financial information about the old Chrysler and old GM has been publicly disclosed in various governmental and legislative reports, including but not limited to GM CRS, CFAS Ex. C; Chrysler CRS, CFAS Ex. H; Special Inspector General for the Troubled Asset Relief Program, Report No. 14-001, *Treasury Significantly Loosened Executive Pay Limits Resulting in Excessive Pay for Top 25 Employees at GM and Ally (GMAC) When the Companies Were Not Repaying TARP in Full and Taxpayers Were Suffering Billions of Dollars in Losses* (2014), CFAS Ex. Q; GAO Report, CFAS Ex. F.

40. The terms of the loan agreement between the old Chrysler and Treasury have been publicly disclosed. *See* Loan Agreements, CFAS Exhs. V, W.

41. Terms and provisions underlying the § 363 Sales that were approved by the Bankruptcy Courts have been publicly disclosed. *See*, *e.g.*, Motion of Debtors for Entry of an Order, *In re General Motors Corp*., No. 09-50026 (Bankr. S.D.N.Y. June 1, 2009), ECF No. 64 (disclosing GM's global assets and liabilities as of 2009); *id.* at 16-26 (discussing GM's primary funding sources and disclosing details concerning GM's loan and credit facilities); Consolidated List of Creditors Holding 50 Largest Unsecured Claims for Voluntary Petition (Chapter 11) at 1-10, *In re Chrysler, LLC*, No. 09-50002 (Bankr. S.D.N.Y. Apr. 30, 2009), ECF No. 1 (listing Chrysler's fifty largest unsecured creditors according to the company's financial records as of April 30, 2009 and the amounts of the creditors' claims).

42. The circumstances leading to Chrysler and GM requesting financial relief from the federal government, the federal government's response to those requests, and the strategies employed by Treasury, and its Auto Task Force, in deciding to provide billions of dollars in TARP funding to both Chrysler and GM, and in advising those companies to undergo restructuring, are recounted by Steven Rattner in his 2010 book, *Overhaul: An Insider's Account of the Obama Administration's Emergency Rescue of the Auto Industry* (2010), CFAS Ex. A.[1]

43. Treasury has never ascertained which of the information that has been withheld from the Center is included in Mr. Rattner's book, CFAS Ex. A. *See* Cochrane Decl., ECF No. 36-1.

[1] The page numbers cited in Plaintiff's memorandum are for the paperback version of Mr. Rattner's book, a copy of which has been provided to the Court with Plaintiff's courtesy copy of the book.

**B. The Center's Response to Defendants' Statement of Material Facts as to Which There is No Genuine Issue.**

1 - 11. The Center does not dispute the facts set forth in these paragraphs.

12. This entire paragraph is a statement of law to which no response is required. To the extent that any of this information is considered *factual* information by the Court, it is all denied. *See* Memorandum In Support Of Plaintiff's Motion for Summary Judgment (and Exhibits cited therein).

13. The Center disputes this statement. *See* Memorandum In Support Of Plaintiff's Motion for Summary Judgment, at 23-24, 26-28 (and Exhibits cited therein); *see also* CFAS Ex. X; CFAS Ex. DD, CFAS Ex. GG.

Respectfully Submitted,

_____/s/_____

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Date: January 20, 2015

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**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

This is a case under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to obtain information about "the biggest industrial bailout in American history" – the U.S. government's decision in 2009 to provide more than $80 billion in "rescue" funds to General Motors Corporation and Chrysler Corporation so that these companies could avoid financial ruin. *See* Steven Rattner, *Overhaul: An Insider's Account of the Obama Administration's Emergency Rescue of the Auto Industry* 42 (2010) (hereinafter "*Overhaul"*), CFAS Exhibit ("Ex.") A. Although the taxpayers paid for this extremely extravagant bailout with money from the Troubled Asset Relief Program ("TARP"), most of the negotiations between the Treasury Department's Auto Task Force and the automobile companies were conducted behind closed doors. And, although many have praised the decision to bail out the auto industry as crucial to the country's economic stability, others question why the U.S. taxpayers were required to prop up companies that were on the brink of financial destruction due in part to their own deficient management decisions.[1]

Most significant for this case, in exchange for the bailout funds the "new" GM and Chrysler were allowed to leave behind certain "liabilities" – *including the need to compensate consumers injured by defective cars manufactured by General Motors and Chrysler.* Rather, those and other "liabilities" – i.e., hundreds of millions of dollars in environmental damages – were left with the "old" companies that are now *bankrupt* and hence without the necessary funds to compensate the victims of such accidents and incidents and their families.[2]

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[1] *See, e.g.,* Mark J. Roe & David Skeel, *Assessing the Chrysler Bankruptcy*, Harvard John M. Olin Discussion Paper Series (Paper No. 645, 2009), *available at* http://www.law.harvard.edu/programs/olin_center/papers/pdf/Roe_645.pdf; Robert Marko, *Road Closed: The Inequitable Treatment of Pre-Closing Products Liability Claimants Under The Auto Industry Bailout*, CFAS Ex. B, 4 Brook. J.Corp. Fin. & Com. L. 353 (2010).

[2] *See* Bill Canis & Baird Webel, Cong. Research Serv., R41978, The Role of TARP Assistance in the Restructuring of General Motors 9-10 (2013) ("GM CRS"), CFAS Ex. C ("*Many expensive liabilities were*

This case – in which the venerable public interest group the Center for Auto Safety ("CFAS" or "the Center") has requested access to the e-mail exchanges between the auto companies and Treasury concerning these matters – seeks to shed light on the government's role in these crucial decisions. Thus, this case serves what the Supreme Court has recognized is "the basic purpose" of FOIA – "'*to open agency action to the light of public scrutiny*.'" *U.S. Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 772 (1989) (emphasis added). Indeed, according to a recent filing with the Bankruptcy Court by the "new" GM, Treasury *insisted* that the companies leave consumers in the lurch *as a condition of receiving billions of dollars in taxpayer funds*. Thus, in a recent submission to the Bankruptcy Judge in which GM seeks not to be held accountable for a "fraud on the court" with regard to facts not disclosed to the Judge when he approved the deal between GM and the government, the "new" GM stated that before agreeing to fork over billions of dollars in rescue funds:

> [*T*]*he U.S. Treasury drew a line in the sand*: *New GM would assume only those liabilities that the U.S. Treasury decided were commercially necessary for New GM's success*. In particular, *U.S. Treasury did not agree that New GM would assume successor liability claims, pre-[bankruptcy] petition accident claims, economic loss claims relating to Old GM vehicles and parts, and various claims predicated on Old GM's conduct*.

Opening Brief by General Motors LLC On Threshold Issues Concerning Its Motions To Enforce The Sale Order and Injunction at 2, *In re Motors Liquidation Co*., No. 09-50026 (Bankr. S.D.N.Y. Nov. 5, 2014) ECF No. 12981, CFAS Ex. D (hereinafter "GM Opening Br.") (emphasis added).[3]

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*jettisoned.* Left with Old GM were environmental liabilities estimated at $350 million for polluted properties, including Superfund sites; certain tort liability claims, including those for some product defects and asbestos; and contracts with suppliers with whom New GM would not be doing business.") (emphasis in original).

[3] In fact, Treasury *rejected* GM's original plan that would have *retained* all such liabilities. *See* GM, *2009-2014 Restructuring Plan* (February 17, 2009), CFAS Ex. E, at Appendix L; *see also infra* at 7 (Treasury rejected the companies' February 2009 proposed restructuring plans).

In response to the Center's June 8, 2009 request for access to the requested information, the Treasury Department first tried to erect a barrier to access by refusing even to process the request unless the Center paid the government almost $35,000, in violation of FOIA's fee waiver provision for public interest groups. Thus, it was only after the Center filed this case and moved for summary judgment on that issue that the government relented and finally began processing the Center's request in the beginning of 2012.

However, five years since the Center first tried to shed light on the government's decisions to bail out the auto industry with tens of billions of dollars of taxpayer funds and leave consumers injured by defective cars with little recourse for their pain, suffering, and economic loss, the government insists that all of the remaining information at issue is exempt from disclosure under Exemption 4 of FOIA, as "confidential" commercial information. Thus, the government and intervenor "new" General Motors assert that disclosure of these documents will somehow "impair" the government's ability in the future to bail out with taxpayer funds *other* desperate industries on the verge of bankruptcy that have nowhere else to turn. Defendants additionally assert that disclosure of information provided to the government by the failing old companies on the verge of bankruptcy will somehow cause "substantial competitive injury" to the "new" General Motors and Chrysler because their competitors will be able to use this six-year-old information about how to rescue the failing *old* companies to obtain a "substantial" competitive advantage over the *new* companies.

However, as demonstrated below, because none of these arguments makes any sense – and the government certainly has failed to *prove* that any such dire consequences are likely to occur from disclosure – the government simply has failed to overcome FOIA's mandate for openness. Accordingly, Plaintiff is entitled to summary judgment, the government's motion for summary

judgment must be denied, and the Court should order the prompt disclosure of all of the remaining records at issue.[4]

## BACKGROUND

To place this case in context and demonstrate how Treasury has violated the basic tenets of FOIA law that apply here, it is necessary to provide the Court with the background of this case and the procedural history to date.

### A. The U.S. Government's Bailout of Chrysler and General Motors

#### 1. The Circumstances Leading to the Bailout

Although most of the U.S. automakers experienced declining sales during 2007-2009, as the economy slipped into a recession, Chrysler and General Motors ("GM") were experiencing particularly severe declines in sales, "resulting in significant financial losses and necessitating the use of billions of dollars of borrowed money or cash reserves to keep operating." U.S. Gov't Accountability Office, GAO 10-151, *Troubled Asset Relief Program: Continued Stewardship Needed as Treasury Develops Strategies for Monitoring and Divesting Financial Interests in Chrysler and GM* 1 (2009), CFAS Ex. F ("GAO Report"). The immediate crisis that brought these two companies to bankruptcy was a loss of financial liquidity as the banking system's credit sources froze "and neither company had enough internal reserves to weather the economic storm." GM CRS at 1, CFAS Ex. C; *but see also Ramifications of Auto Industry Bankruptcies: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 1 (2009) (Remarks by Representative Conyers)

[4] Should the Court disagree that Plaintiff is entitled to summary judgment based on the current record, alternatively either the Plaintiff will need to take discovery to probe the bases for Defendants' conclusory assertions of harm, *see* Declaration of Clarence M. Ditlow, or the Court should conduct an *in camera* review of a sample of the records at issue. *See, e.g.*, *Spirko v. Postal Serv.*, 147 F.3d 992, 996 (D.C. Cir. 1998).

("*The lack of consumer confidence in American cars is largely what drove this industry into bankruptcy.*") (emphasis added).[5]

In December 2008, "the chief executive officers of Chrysler and GM testified before Congress that *without federal assistance, their companies would likely run out of the cash needed to keep operating*." GAO Rep. at 1(emphasis added). As later summarized by Steven Rattner, lead adviser to the President's Auto Task Force – and later dubbed the "car czar" because of his role as the main architect of the eventual bailout – "General Motors, the second-largest industrial company of the largest economy on earth, was on the verge of bankruptcy and *had come to the government, hat in hand*." *Overhaul* at 20 (emphasis added); *see also* Declaration of Kathleen Cochrane ¶30, ECF No. 36-1, ("Steven Rattner and Ron Bloom were named by the President to lead the Auto Team."). However, although legislation that would have provided such financial assistance to the auto companies passed the House of Representatives, it did not survive the Senate. *See* Bill Canis & Baird Webel, Cong. Research Serv., R41940, TARP Assistance for Chrysler: Restructuring and Repayment Issues at I (2012) ("Chrysler CRS"), CFAS Ex. H. Rather, the Senate opposed the bailout on the grounds that the automakers "*brought their near-bankruptcy on themselves by not retooling for an energy efficient era, reducing their competitiveness.*" Kimberly Amadeo, *Auto Industry Bailout (GM, Ford, Chrysler)* (Dec. 21, 2014), CFAS Ex. I (emphasis added).

[5] In sharp contrast, Ford Motor Co. was able to survive because it had the foresight to borrow the necessary operating costs well in advance of the 2008-2009 financial lending collapse. *See, e.g.,* Bill Vlasic, *Choosing Its Own Path, Ford Stayed Independent*, N.Y. Times, Apr. 8, 2009, http://www.nytimes.com/2009/04/09/business/09ford.html?pagewanted=all&_r=0, CFAS Ex. G; *see also* S. Rattner, *Overhaul* at 313 (explaining that as a result of management foresight, "Ford not only weathered the crisis without bankruptcy, but as the market began to turn in early 2010, the company became solidly profitable," and that "*[i]n fact, in the second quarter, Ford reported net income of $2.6 billion, while [new] GM – notwithstanding its larger size and the bankruptcy scrubbing of $65 billion of liabilities – earned $1.3 billion*.") (emphasis added).

The companies then prevailed upon the Bush Administration in its final months in office to use funding from the "Troubled Asset Relief Program" ("TARP") to keep the companies afloat. *Id.* TARP was a $700 billion taxpayer funded program established as part of the Emergency Economic Stabilization Act, Pub. L. No. 110-343, 122 Stat. 3765, enacted by Congress in October 2008, to stabilize the tumultuous U.S. financial system. *See id.*; *see also generally*, *Judicial Watch, Inc. v. U.S. Dep't of Treasury*, 796 F. Supp. 2d 13, 19 (D.D.C. 2011).

The Bush Administration used TARP to provide the automakers and two auto financing companies with nearly $25 billion in loans, and told the automakers to submit "viability plans" in order to obtain any additional aid. Chrysler CRS at i. In February 2009 President Obama established a Presidential Auto Task Force comprised of cabinet members and expert advisers to review the plans and determine whether the companies should receive additional TARP funds that would allow them to avoid bankruptcy. *See*, *e.g.,* Detroit News (Feb. 21, 2009), CFAS Ex. J; White House Press Release (March 30, 2009), CFAS Ex. K. The Task Force was co-chaired by Treasury Secretary Timothy Geithner and White House National Economic Council Director Larry Summers. *Id.* However, senior policy aides, including Rattner and others, handled most of the day-to-day work. *Id.*[6]

As President Obama explained to the American public, "the federal government provided General Motors and Chrysler with emergency loans to prevent their sudden collapse at the end of last year – *only on the condition that they would develop plans to restructure*." *Id.* (emphasis added). However, in March 2009, stating that neither viability plan submitted by the companies "goes far enough to warrant the substantial new investments that these companies are requesting,"

[6] *See, e.g..,* GM CRS Report at 4 n.14 ("On a day-to-day basis, the task force was managed for most of 2009 by Steven Rattner, and in 2010 by Ron Bloom.").

*id.*, President Obama gave Chrysler thirty days and GM sixty days to come up with better plans "in an effort to avert bankruptcy," Chrysler CRS at i, and "qualify for more U.S. government aid," GM CRS at 6-7.

**2. Use of the § 363 Sale to Avoid Liquidation**

Absent agreements with all creditors regarding the restructuring designed under these new viability plans, both companies were compelled to file for bankruptcy – Chrysler, on April 30, 2009; GM on June 1, 2009. *See* Chrysler CRS at i, 6-7; GM CRS at 7.[7] However, concerned that actually going "bankrupt" would severely hurt the companies' images in the eyes of consumers, and to resolve the matter as quickly as possible and avoid the normal rules that apply to Chapter 11 bankruptcy proceedings – in which the parties negotiate over the terms of the reorganization plan and *each class of creditors or shareholders votes on whether to approve the plan* – the Administration, through the work of the Task Force, structured both the Chrysler and GM bankruptcies as "§ 363 Sales" under the Bankruptcy Code. *See*, *e.g.*, *Overhaul* at 27 (explaining that GM's chief executive "was convinced that, *while consumers might fly on bankrupt airlines, they would never buy cars from a bankrupt automaker because of the need for warranty coverage and concerns about resale value*") (emphasis added). Using the § 363 route would allow the companies to sell their assets to other entities without having to actually declare bankruptcy.[8]

[7] *See also* Voluntary Petition (Chapter 11), *In re Chrysler, LLC*, No. 09-50002 (Bankr. S.D.N.Y. Apr. 30, 2009), ECF No. 1; Voluntary Petition (Chapter 11), *In re Motors Liquidation Co.*, No. 09-50026 (Bankr. S.D.N.Y. June 1, 2009), ECF No. 1.

[8] *See* 11 U.S.C. § 363(b); *In re Chrysler LLC*, 405 B.R. 84, 94 - 96 (Bankr. S.D.N.Y. 2009) (explaining that Section 363(b) of the Bankruptcy Code provides that a trustee or "debtor in possession" may sell . . . "other than in the ordinary course of business, property of the estate" and explaining the difference between a Section 363 Sale and the normal "statutory safeguards" that apply to regular bankruptcy proceeding); *see also* Roe & Skeel, *supra* n.1, at 6 ("Section 363 of the Bankruptcy Code authorizes the debtor to sell assets out of the ordinary course of business at any point in the bankruptcy case, upon obtaining the bankruptcy court's approval."); *Overhaul* at 60 ("Section 363 allows a bankrupt company to act quickly to transfer

As part of creating a "new" GM, the Obama Administration also fired GM's chairman and CEO, appointed new board members and named Frederick ("Fritz") Henderson as the new chairman and CEO "to emphasize to all stakeholders *the importance of changing the business model*." GM CRS at 4 (emphasis added); *see also Overhaul* at 91 (explaining that Wagoner "had to go . . . . *We did not know of another industrial company in history that had burned through so much cash as fast as GM had on his watch. It had vaporized $20 billion in twelve months and was in the process of burning through another $11 billion in the first quarter of 2009, all of which was now coming out of the pockets of taxpayers*.") (emphasis added).

Pursuant to the 363 Sales plan, Chrysler sold most of its assets to a new legal entity comprised of the United Auto Workers' retiree medical trust fund and the Italian car company Fiat, which undertook management of the new company. *See* Chrysler CRS at 7. To accomplish this deal, $10.9 billion was loaned to Chrysler through TARP. *Id.* at 8. As to GM, in exchange for more than $50 billion in TARP assistance, the U.S. Treasury received 60.8% of the new company, with the rest of the "new" GM held by the United Auto Workers retiree health care and trust fund, the governments of Canada and Ontario, and holders of "old" GM's bonds. *See* GM CRS at 1. As part of its creation as the "new" GM, GM closed plants, cut its hourly and salaried workforce, shed three brands, reduced debt, introduced new vehicles, and implemented changes to reduce retiree legacy costs. *Id.*[9]

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intact, valuable business units to a new owner" whereas "[t]he conventional bankruptcy process restructures the corporation as a whole.").

[9] The federal government has since sold all of its shares in both Chrysler and GM. *See Treasury Exits Investment in Chrysler Group LLC*, U.S. Dep't of the Treasury (July 2, 2011), http://www.treasury.gov/press-center/press-releases/Pages/tg1253.aspx ; *Treasury Sells Final Shares of GM Common Stock*, U.S. Dep't of the Treasury (Dec. 9, 2013), http://www.treasury.gov/press-center/press-releases/Pages/jl2236.aspx.

### 3. Consumer Objections to the § 363 Transactions

A coalition of individuals and consumer protection groups, including Plaintiff CFAS, filed with the Bankruptcy Court formal objections to the proposed 363 sales of both Chrysler and GM. As they explained in those objections, the most troubling aspect of the 363 transactions was that, in sharp contrast to at least what Chrysler was *publicly* stating, the 363 sales would allow the "new" companies to acquire the assets of the "old" companies *"free and clear" of certain liabilities, including the obligation to compensate consumers for pain, suffering, and economic loss resulting from defective vehicles manufactured by the "old" companies*. *See*, *e.g.,* Memorandum of Law in Support of Limited Objection, *In re General Motors Corp.*, No. 09-50026 (Bankr. S.D.N.Y. June 19, 2009), ECF No. 2050 (hereinafter "CFAS Objection Memorandum of Law").[10]

As the objectors explained:

> *More than 69 million GM passenger vehicles are on American roads today*. In 2007, according to the National Highway Traffic Safety Administration's Fatal Analysis Reporting System, 9,985 occupants of GM vehicles were killed in fatal accidents; and a total of 14,828 people were killed that year as a result of motor vehicle crashes involving GM vehicles. Many thousands more are injured each year in GM vehicles. *Many of these vehicles contain certain defects that have and will continue to be the subject of product liability lawsuits, including due to injuries and deaths* from crushed roofs, exploding "side saddle" gas tanks, and collapsing seat backs.

*Id.* at 1 (citations omitted) (emphasis added).

[10] Initial negotiations over the sale of assets belonging to Chrysler were premised on the plan that any newly created corporate entity would retain responsibility "under state law . . . for mechanical and design defects in vehicles that caused economic or personal injury." *See Ramifications of Auto Industry Bankruptcies: Hearing Before the H. Comm. on the Judiciary*, 111 Cong. 1 (2009) (Statement of Clarence M. Ditlow), CFAS Ex. L; *see also* Testimony of Task Force representative Harry Wilson, *In the Matter of General Motors Corp., et al.,* No. 09-50026 (S.D.N.Y.) (July 1, 2009), CFAS Ex. M, at 92 (admitting that if GM's efforts to restructure without the government's § 363 sale had been successful, the company would *not* have avoided liability for any products liability claims).

The objectors also provided examples of victims of defective cars whose claims and those of their families would be extinguished by the 363 Transactions designed by Treasury's Task Force, including people who were killed, paralyzed, or otherwise severely injured as a result of defective GM vehicles. *See*, *e.g.,* Limited Objection at 5-8, *In re General Motors Corp.*, No. 09-50026 (Bankr. S.D.N.Y. June 19, 2009), ECF No. 2041.[11] As the consumer objectors further explained, "[n]o business justification has been articulated . . . as to why the Purchaser is entitled" to "free and clear" relief, and "due process does not permit debtors and purchasers to use a Section 363 sale to extinguish future claims that have not yet accrued because the injuries on which they will be based have not yet occurred." CFAS Objection Memorandum of Law at 2.[12]

On the other hand, officials for both Chrysler and GM informed the Bankruptcy Judge that the 363 transactions as crafted, with the assistance of billions of taxpayer funds, were the companies' *only* hope of avoiding bankruptcy. Thus, Ronald Kolka, Executive Vice President and Chief Financial Officer for Chrysler, testified by affidavit that "Chrysler is seeking approval from this Court to consummate *the only sale transaction that preserves this company as a going concern and averts a liquidation of historic proportions*." Affidavit of Ronald E. Kolka In Support of First

[11] A coalition of State Attorney General also objected to the §363 Sales on this basis. *See*, *e.g.*, Joinder and Limited Objection of the States of Connecticut, Kentucky, Maryland, Minnesota, Missouri, Nebraska, North Dakota and Vermont, *In re: General Motors Corp*., Case No. 09-50026 (Bankr. S.D.N.Y. June 19, 2009), ECF No. 1926 (objecting to GM's motion to approve master sale and purchase agreement).

[12] *See also* Objection of Tort Claimants and Consumer Organizations [to Chrysler 363 Sale] at 2, No. 09-50002, ECF No. 1197 (Bankr. S.D.N.Y. May 19, 2009) (the proposed 363 sale "would leave both Consumers and Personal Injury Victims without recourse against the products' manufacturer, the entity which is best situated to address their complaints in a fair and reasonable manner); *id.* at 3 ("[t]hese results are not appropriate as to current claimants, . . . let alone those individuals who are certain to suffer injury and losses in the future as a result of defects in the Debtors' vehicles . . . .").

Day Pleadings at ¶ 4, *In re Chrysler LLC*, No. 09-50002 (Bankr. S.D.N.Y. Apr. 30, 2009), ECF No. 23, CFAS Ex. N (emphasis added).[13]

GM provided similar testimony in support of its 363 transaction. Fritz Henderson, GM's Chief Executive Officer, testified that "there simply is *no* viable alternative to the 363 Transaction to preserve the going concern value of the GM business and the employment opportunities and related benefits of that business," and that "[t]here is *no other sale, or even other potential purchasers, present or on the horizon*." Affidavit of Frederick A. Henderson at ¶ 5, *In re General Motors Corp*., No. 09-50026 (Bankr. S.D.N.Y. June 1, 2009), ECF No. 21, CFAS Ex. O (second emphasis added). Thus, Mr. Henderson stressed "[i]n the face of the global meltdown of the financial markets, and a liquidity crisis unprecedented in GM's 100 year history, *there is only one way to maximize the value and permit the survival of GM's business* and save hundreds of thousands of jobs associated not only with GM, but also its vast supplier and dealer networks: these chapter 11 cases and the *prompt approval of the 363 Transaction*," and that "[t]he only other alternative is the liquidation of [GM's] assets." *Id.* (emphasis added).[14]

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[13] *See also id.* ("*If the proposed transaction*, designed to effect an alliance with Italian automobile manufacturer, Fiat S.p.A. ('Fiat'), is rejected and Chrysler liquidates, *it will mean the end of an iconic, 83-year-old American car company . . . .*") (emphasis added). Indeed, Chrysler's Chief Financial Officer stressed that the TARP financing "*is the only funding available to support the Fiat Transaction*." *Id.* at ¶ 12 (emphasis added).

[14] Indeed, Mr. Henderson explained to the Court that "[a]fter exploring numerous options, including seeking out potential sources of financing (both public and private) and strategic alliances, it became evident that . . . [t]here are *no* other sources with either the financial wherewithal or willingness to provide such financing."). *Id.* at ¶¶ 14-15; *see also id.* at ¶ 14 ("[I]n light of the ongoing economic crisis, the Company would not be able to achieve an effective out-of-court restructuring and *the only viable option was the 363 Transaction.*") (emphasis added); *id.* ("[i]t has been widely known . . . that assets and businesses of the Company have been available for sale, yet *no offers have been received at a level necessary to sustain the Company's operations and assure it [sic] viability, other than the U.S. Treasury-sponsored 363 Transaction*. Indeed, in light of the Company's substantial secured indebtedness totaling approximately $27 billion, *the only entity that has the financial wherewithal and is qualified to purchase the assets – and the only entity that has stepped forward to make such a purchase – is the U.S. Treasury-sponsored Purchaser*.") (emphasis added).

In light of such desperate pleas, not surprisingly, the Bankruptcy Judges approved both 363 Sales, for Chrysler on June 1, 2009, and for GM on July 1, 2009, with the final "closing dates" for the transactions as June 10, 2009 and July 10, 2009, respectively.[15] As Mr. Rattner succinctly summarizes in his 2010 book, "Treasury would have to extend its financing or GM would be forced to liquidate. *This was the financial equivalent of putting a gun to the head[] of the bankruptcy judge . . . .*" *Overhaul* at 251 (emphasis added).

While GM's § 363 Agreement was amended to provide that the new company would assume liability for product liability claims arising out of accidents or incidents occurring *on or after* the company emerged from the proceeding (July 10, 2009), *see* First Amendment to Amended and Restated Master Sale and Purchase Agreement, *In re Motors Liquidation Co.*, No. 09-50026 (Bankr. S.D.N.Y. June 30, 2009), ECF No. 2774, the new company was nevertheless allowed to purchase the old company's assets "free and clear" of all other liabilities arising from accidents or incidents that occurred *prior* to that date, as well as purely *economic* injuries resulting from consumers owning defective cars purchased prior to the emergence of the "new" company. *Id.* Similarly, the "new" Chrysler was allowed to purchase the assets of the "old" Chrysler "free and clear" of all liabilities caused by defective products manufactured or sold by the "old" companies after the final closing date for the transaction (June 10, 2009), regardless of when such accidents or incidents occurred. *See supra*, n.15 (docket entries citing closing dates).[16] Thus, in June 2009

[15] *See In re Chrysler LLC*, 405 B.R. at 84 (decision of the Bankruptcy Court approving Chrysler's Section 363 Sale to Fiat); *In re General Motors Corp.*, 407 B.R. 463 (S.D.N.Y. 2009) (approving 363 Sale for GM); *see also In re Old Carco LLC,* 492 B.R. 392, 396 (S.D.N.Y. 2013) (verifying that the "closing date" for Chrysler's sale was June 10, 2009); *In re Motors Liquidation Co.*, 439 B.R. 339, 340 (S.D.N.Y. 2010) (explaining that the "closing date" for GM's transaction was July 10, 2009).

[16] *See also* Master Transaction Agreement Among FIAT S.p.A., New Carco Acquisition LLC, Chrysler LLC and the Other Sellers Identified Herein (April 30, 2009), *available at*

and July 2009, respectively the "new" Chrysler and GM "emerged from the bankruptcy process with substantially less debt and with streamlined operations." *See* GAO Report, CFAS Ex. F, at 7. The "old" companies, other the other hand, "which retained very few assets but *most of the liabilities*, *remain in bankruptcy*." *Id.* (emphasis added).

Thus, as explained by the government's declarant in this case, a *new* entity – "Chrysler Group LLC" – "purchased the principal operating assets and assumed *certain liabilities* of Old Carco, formerly known at Chrysler LLC, and its principal domestic subsidiaries." Cochrane Decl. at 3 n.1, ECF No. 36-1 (emphasis added). As she further explains, "Chrysler Group LLC is *a separate entity and is not responsible for the obligations of Old Carco*, except for those that were specifically assumed." *Id.* (emphasis added). As she similarly explains, "[a] newly formed entity, General Motors Company (New GM), purchased most of the assets of Old GM . . . (now known as Motors Liquidation Company)." *Id.* at ¶ 27.

All told, between the TARP money provided under both the Bush and Obama Administrations, the auto industry was loaned approximately $80 billion. *See Treasury Sells Entire Ally Financial Stake, Taking Total Recovery to $19.6 Billion and Closing Auto Rescue Program*, U.S. Dep't of the Treasury (Dec. 19, 2014), http://www.treasury.gov/press-center/press-releases/Pages/jl9727.aspx, CFAS Ex. II. While the new companies have since paid back much of that money, they have not been required to return all of it. *See* Chrysler CRS at i (explaining that the "New Chrysler has no legal responsibility to make

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http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/automotive-programs/Documents/mta.pdf, CFAS Ex. P at 5, Section 2.06 ("Purchaser shall purchase, acquire and accept from the Sellers . . . all of the Sellers' right, title and interest in, to and under the Purchased Assets as of immediately prior to the Closing . . . free and clear of any other interest in the Purchased Assets to the extent provided in the Sale Order.").

up the [$1.3 billion] shortfall"); *see also* Special Inspector General Report (Sept. 24, 2014), CFAS Ex. Q, at 5 ("taxpayers have suffered billions of dollars in losses on [the GM] TARP investments").

**B. The Center's FOIA Request and Treasury's Denial of a Fee Waiver**

In an effort to shed light on the government's role in this matter, on June 8, 2009 – immediately after the Chrysler 363 Sale was approved but before the GM 363 sale had been approved – the Center submitted a FOIA request to the Department of Treasury for "[a]ll e-mail correspondence since January 1, 2009, in any way related to the Chrysler and [GM] bankruptcies, the events preceding those bankruptcies, and the federal government's role in and deliberations concerning those matters." *See* FOIA Request, CFAS Ex. R.[17] Relying on FOIA's public interest waiver provision, the Center requested a waiver of all fees and costs associated with processing its request, *id.*, which was denied by the Treasury Department.

Meanwhile, on August 27, 2009, Chrysler informed Congress that, consistent with the approach taken by General Motors, *see supra* at 12, the "new" Chrysler would accept product liability claims on vehicles manufactured by "Old Carco" before June 10, 2009 "that are involved in accidents on or *after* that date." *See* Letter to Senator Durbin from John Bozzella (Aug. 27, 2009), CFAS Ex. S (emphasis added). Accordingly, Treasury subsequently agreed to interpret the

[17] The Center specified that its request included, but was not limited to, all email generated or received by six specific members of the Auto Task Force: Brian Deese, Special Assistant to the President for Economic Policy and the only full-time staff member of the Task Force; Ed Montgomery, Director of Recovery for Auto Communities and Workers and a member of the Task Force; Ron Bloom, Senior Advisor to the Secretary of the Treasury and member of the Task Force; Steven Rattner, Counselor to the Secretary of the Treasury and lead auto advisor (known in the industry as the "car czar"); Matthew Feldman, Chief Legal Advisor to the Task Force; and Timothy Geithner, Secretary of the Treasury and member of the Task Force. *Id.*

Center's FOIA request as encompassing all responsive records generated between January 1 and August 27, 2009.[18]

On October 31, 2011, the Center moved for summary judgment on the fee waiver issue, ECF No. 9, and on December 16, 2011, the parties filed a voluntary stipulation of partial settlement and proposed order for further proceedings. *See* ECF No. 12. Pursuant to that stipulation, Treasury agreed to grant the Center a waiver of the fees associated with its FOIA request and to begin processing that request on a rolling basis, and the Center agreed to withdraw its motion for summary judgment. *See* ECF No. 12. Over the years as the agreed-upon process played out, the Center substantially narrowed the scope of the records it seeks and Treasury released many responsive documents or parts thereof. *See* Def. Br. at 5-8.

According to the government, "GM continues to request FOIA protection for 452 documents in whole and another 90 partially redacted documents," for a total of 542 documents at issue either in whole or in part. *See* Def. Br. at 7, ECF No. 36. In addition, "Chrysler continues to request FOIA protection for 284 documents in whole or part." Def. Br. at 8. With the filing of its motion for summary judgment on October 29, 2014, the agency also filed the "final" *Vaughn* Indices for the documents at issue, which were prepared *not* by the Department of Treasury, but by lawyers for Chrysler and GM. *See* Exhibit A to Declaration of Louann Van Der Wiele, ECF No. 36-3, (Chrysler *Vaughn* Index); Exhibit D to Declaration of Laura Fitzpatrick, ECF No. 36-2.

[18] *See* Voluntary Stipulation of Partial Settlement and Proposed Order for Further Proceedings (Dec. 16, 2011) at 1-2, ECF No. 12.

### C. The Delphi Ignition Problem as an Example of How Consumers Have Been Harmed by the Government Bailouts

Meanwhile, while this case has been pending, circumstances have unfolded that graphically demonstrate the significance of the Center's concern about the government's role in requiring the "new" Chrysler and GM to leave behind potential liabilities vis-à-vis consumers who have been both physically and economically injured by defective products manufactured by the "old" GM and Chrysler – i.e., the fact that millions of cars manufactured by GM have defective ignition switches, manufactured by Delphi Corporation, which, during the time of the restructuring of the company, was GM's "largest supplier," Def. Br. at 16. *See Hearing on "The GM Ignition Switch Recall: Why Did It Take So Long?" Before the H. Comm. On Energy and Commerce*, 113th Cong. 1-2 (2014).[19]

If the ignition switch is bumped or jarred while the car is being driven, the car can suddenly turn off or shift to "accessory" mode, causing the vehicle to stop functioning and disabling the power steering, brakes, and airbag system. *See Hearing on GM Ignition Switch Recall*, 1-2; H. Stout & B. Vlasic, *G.M. Ordered a Half-Million Replacement Switches 2 Months Before Recall*, N.Y. Times (Nov. 10, 2014), http://www.nytimes.com/2014/11/11/business/gm-ordered-replacement-ignition-switches-months-before-recall.html?_r=0. As a result of the defect, at least 112 consumers have been in serious accidents, nearly half of which resulted in fatalities. *See* GM

[19] *Available at* http://democrats.energycommerce.house.gov/index.php?q=hearing/hearing-on-the-gm-ignition-switch-recall-why-did-it-take-so-long-subcommittee-on-oversight-a. *See also U.S. Department of Transportation Announces Record Fines, Unprecedented Oversight Requirements in GM Investigation*, U.S. Dep't of Transp. (May 16, 2014), http://www.dot.gov/briefing-room/us-department-transportation-announces-record-fines-unprecedented-oversight ("The GM recall covers the 2005-2010 Chevrolet Cobalt, 2007-2010 Pontiac G5, 2003-2007 Saturn Ion, 2006-2011 Chevrolet HHR, 2006-2010 Pontiac Solstice and 2007-2010 Saturn Sky vehicles.").

Ignition Compensation Claims Resolution Facility, *Detailed Overall Program Statistics* 1 (2014), CFAS Ex. T.[20]

On February 7, 2014, "new" GM announced that it would recall certain vehicles to replace the ignition switch, and under pressure from the National Highway Traffic Safety Administration ("NHTSA"), the number of recalled vehicles has now ballooned to over 2,190,900. *U.S. Department of Transportation Announces Record Fines, supra* n.19; General Motors, *Ignition Recall Safety Information Frequently Asked Questions*.[21] Moreover, based on an investigation commissioned by the Board of Directors of the "new" GM, it is now well documented that the "old" GM knew about this defect for many years – and long before it consummated its 363 Sale on July 1, 2009.[22] In fact, NHTSA has since fined the new GM $35 million for failing to report the vehicle safety defect in a timely manner, *see U.S. Department of Transportation Announces Record Fines, supra*, and GM has set up a "victim compensation" fund for *some* of the individuals injured or killed as a result of this defect. *See The GM Ignition Switch Recall: Investigation Update Before the Subcomm. on Oversight and Investigations, H. Comm. on Energy and Commerce*, 113th Cong. 66-67 (2014).[23] However, because of its "free and clear" § 363 purchase, the "new" GM is

[20] A*vailable at* http://www.gmignitioncompensation.com/docs/ProgramStatistics.pdf.

[21] *Available at* http://www.gmignitionupdate.com/faq.html#L5 (last visited Dec. 22, 2014).

[22] *See* Anton R. Valukas, *Report to Board of Directors of General Motors Company Regarding Ignition Switch Recalls* 54 (2014) (hereinafter "Valukas Report"), CFAS Ex. U (documenting GM's knowledge of the problem during the 2004 production of another model); *id.* at 85 (in 2005 GM internally investigates the problem in response to negative media coverage); *id.* at 103 (litigation of fatalities caused by the defect begin in 2006); *id.* at 128 (more fatalities occur in 2008 resulting in more litigation); *id.* at 131 (in 2009 GM continues internal investigation of the problem at the same time it is requesting federal funding to avoid bankruptcy).

[23] *Available at* http://docs.house.gov/meetings/IF/IF02/20140618/102345/HHRG-113-IF02-Transcript-20140618.pdf.

refusing to compensate potentially millions of consumers and their families that may be injured because of this defect – whose cars have now been recalled, but whose claims are *not* part of GM's "victim compensation" program, and others who have been injured, but because the accidents occurred *before* the recalls were announced, no longer have all of the evidence they need to prove that the defect caused the accident.[24] Moreover, GM has set a deadline of January 31, 2015 for filing any claims that *are* covered by the program. GM Ignition Compensation, *GM Ignition Compensation Claims Resolution Facility Announces an Extension of the Claims Filing Deadline*, Nov. 17, 2014.[25]

The "new" GM is also refusing to compensate *any* of the millions of consumer affected by the defect for the lost *economic* value of their cars. *See*, *e.g.*, Amanda Bronstad, *GM Hit With Recall Class Action for 30 Million Consumers*, The National Law Journal, Oct. 15, 2014.[26]

Further, in response to several class action lawsuits brought by owners of the defective cars, *see supra* n.26, GM is asserting that the § 363 sale is an absolute "shield" for a "substantial portion of Old GM's liabilities." *See* GM Opening Br. at 43 ("New GM agreed to assume responsibility for

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[24] *See GM Announces Six Safety Recalls*, General Motors (June 30, 2014), http://media.gm.com/media/us/en/gm/news.detail.html/content/Pages/news/us/en/2014/Jun/0630-recall.html (GM announced the recall of 7.6 million more vehicles with defective ignition switches for 1997 to 2014 model years); *GM Proactively Announces Four New Recalls*, General Motors (June 13, 2014), http://media.gm.com/media/us/en/gm/news.detail.html/content/Pages/news/us/en/2014/Jun/0611-recall.html (GM announced the recall of an additional 511,528 cars); *see also* GM Ignition Compensation Claims Resolution Facility, *Detailed Overall Program Statistics* 1 (2014), CFAS Ex. T (noting that 783 claims were submitted without the necessary documentation, and 757 claims ruled to be deficient for lack of evidence).

[25] *Available at* http://www.gmignitioncompensation.com/.

[26] *Available at* http://www.nationallawjournal.com/id=1202673512726?slreturn=20141122163738; *see also* Consolidated Class Action Complaint Against New GM For Recalled Vehicles Manufactured by Old GM and Purchased Before July 11, 2009, *In re: General Motors LLC Ignition Switch Litigation*, Civ. No. 14-MD-2543 (S.D.N.Y. Oct. 14, 2014); Consolidated Complaint Concerning All GM-Branded Vehicles That Were Acquired July 11, 2009 Or Later, *In re General Motors LLC Ignition Switch Litigation*, Civ. No.14-MD-2543 (S.D.N.Y. Oct. 14, 2014).

(a) post-sale accidents and distinct incidents involving Old GM vehicles causing personal injury, loss of life or property damage, and (b) Lemon Law claims. At the same time, *New GM refused any further modifications with respect to other vehicle owner liabilities*.") (emphasis added). Furthermore, in a recent submission to the Bankruptcy Judge who approved the § 363 Sale, the "new" GM has asked the court to issue an order enjoining the class actions from going forward and enjoining any further claims for lost economic injury based on the "free and clear" language of the approved § 363 transaction.[27] As explained *supra* at 2, as part of that filing, GM stressed to the Bankruptcy Judge that it was the U.S. government's decision to "*draw a line in the sand*," and require the "new" GM as a condition of receiving the government bailout to "assume *only those liabilities that the U.S. Treasury decided were commercially necessary for New GM's success*." *See* GM Opening Br., CFAS Ex. D, at 2 (emphasis added).

The Delphi ignition debacle is only *one* example of the way in which consumers were left without recourse because of the government's bailout of GM and Chrysler. As explained by one report:

> The class of pre [bankruptcy] petition and pendency product liability claimants left with no meaningful recovery against Old Chrysler is roughly two-fifths the size of Old GM's correlative class. Using estimates derived primarily from historical averages, *GM's class consists of roughly 2000 people, 500-600 of whom are likely to have serious claims, with a potential liability of GM of between $1 billion and $2 billion.* This puts *Chrysler's affected claimant class at roughly 800 people, with 200 to 250 being serious claims, resulting in $400 million to $800 million in potential liability. Using the most liberal estimates, the total liability for both companies could fall between $3 billion and $4 billion with the class of claimants being between 2800 and 3000 people.*

[27] *See* Motion of General Motors LLC Pursuant to 11 U.S.C. §§ 105 and 363 to Enforce the Court's July 5, 2009 Sale Order and Injunction at 5, *In re Motors Liquidation Co*., Case No. 09-50026 ( Bankr. S.D.N.Y. Apr. 21, 2014).

Robert Marko, *Road Closed: The Inequitable Treatment of Pre-Closing Products Liability Claimants Under The Auto Industry Bailout*, *supra*, CFAS Ex. B (internal citations omitted) (emphasis added).[28]

## ARGUMENT

### Introduction

Before turning to the specific reasons why Treasury has failed to meet its burden of proof here, it is important to review some of the basic tenets of FOIA law.

FOIA was enacted "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S. Rep. No. 89-813, at 38 (1965); *see also Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989); *Dep't of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976). Thus, "the basic purpose" of the FOIA is "to open agency action to the light of public scrutiny." *Reporters Comm. For Freedom of the Press*, 489 U.S. at 772, (quoting *Dep't of the Air Force v. Rose*, 425 U.S. at 372).

The Act requires each federal agency to make non-exempt records "promptly available to any person" upon request, 5 U.S.C. § 552(a)(3)(A)(ii), and vests jurisdiction in the district courts "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld." 5 U.S.C. § 552(a)(4)(B). The agency wishing to withhold a requested record has the burden of proving that the record is exempt, and the Court must decide the matter *de novo*. *Id.*; *Reporters Comm. For Freedom of the Press*, 489 U.S. at 755. Moreover,

[28] For example the Tennessee Supreme Court upheld a jury award of $20 million in punitive damages and $7.5 million in compensatory damages for the wrongful death of a two-year-old boy killed by a collapsing seat in a Chrysler minivan, *Flax v. Daimler Chrysler Corp.*, 272 S.W. 3d 521 (Tenn. 2008), but because the U.S. Supreme Court denied cert shortly *after* Chrysler filed for bankruptcy, 129 S.Ct. 2433 (2009), the filing of bankruptcy nullified the award. *See* Mike Spector, *Car Bailouts Left Behind Crash Victims,* Wall St. J., May 27, 2011, http://www.wsj.com/articles/SB10001424052748704889404576277200705491950.

"[c]onsistent with the Act's goal of broad disclosure," *Dep't of Justice v. Tax Analysts*, 492 U.S. at 151, all of the exemptions to the Act are to be "narrowly construed." *Dep't of the Air Force v. Rose*, 425 U.S. at 361. Therefore where an agency fails to meet its burden of proof that an exemption applies to the withheld information, summary judgment should be entered for the requester. *Id.*; *see also, e.g., Public Citizen Health Research Group v. FDA*, 185 F.3d 898, 906 (D.C. Cir. 1999) (summary judgment for the requester is appropriate because the agency's "[c]onclusory and generalized allegations of substantial competitive harm . . . cannot support an agency's decision to withhold requested documents").

Moreover, as the Court of Appeals for this Circuit long ago recognized in the landmark FOIA case, *Vaughn v. Rosen*, 484 F.2d 820, 824 (D.C. Cir. 1973), because the agency alone knows what responsive records exist and their contents, "[t]his lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution." Thus, the Court of Appeals held:

> [i]t is vital that some process be formulated that will (1) assure that a party's right to information is *not submerged beneath governmental obfuscation and mischaracterization*, and (2) permit the court system effectively and efficiently to *evaluate the factual nature of disputed information*.

*Id.* at 826 (emphasis added). Therefore, in *Vaughn*, the Court held that an agency must provide the requester with a complete description of each record that has been withheld, together with a detailed justification explaining how each such record is exempt from disclosure under the claimed exemption. *Id.*

Furthermore – and of great significance for *this* case, where the government has withheld hundreds of records in *their entirety* – the FOIA specifically requires agencies to disclose all segregable non-exempt information. 5 U.S.C. § 552(b). As the Court of Appeals has explained,

because "[t]he focus in the FOIA is *information, not documents*," an agency "cannot justify withholding an entire document simply by showing that it contains *some* exempt material." *Public Citizen Health Research Grp. v. FDA*, 185 F.3d at 907 (*quoting Schiller v. NLRB*, 964 F.2d 1205, 1209-10 (D.C. Cir. 1992). This "segregability" requirement "applies to all . . . documents and all exemptions in the FOIA." *Id.* at 1209 (*quoting Center for Auto Safety v. EPA*, 731 F.2d 16, 21 (D.C. Cir. 1984). Thus, as this Court has recognized, "a district court has an *'affirmative duty' to consider whether the agency has produced all segregable, non-exempt information*." *Public Citizen v. U.S. Dep't of Health and Human Servs.*, 975 F. Supp. 2d 81, 94 (D.D.C. 2013) (emphasis added); *see also Stolt-Nielsen Transp. Group LTD v. United States*, 534 F.3d 728, 733-735 (D.C. Cir. 2008) ("Before approving the application of a FOIA exemption, the district court *must make specific findings of segregability regarding the documents to be withheld*.") (internal citations omitted) (emphasis added).

As demonstrated below, Treasury has violated all of these well-established tenets of FOIA law.

## I. THE AGENCY HAS FAILED TO PROVIDE ITS OWN INDEPENDENT DETERMINATION THAT ALL OF THE WITHHELD INFORMATION IS EXEMPT FROM DISCLOSURE.

To begin with, although Treasury bears the burden of proof here, instead of making any *independent* determination of whether the withheld information properly falls within the coverage of Exemption 4, the agency has instead deferred to the "new" auto companies' self-serving claims that all of the withheld material may be withheld from the Center. Thus, Treasury conspicuously failed to provide its *own Vaughn* Index, sworn to by the appropriate agency official, which describes each withheld document or deletion from a document, with a detailed explanation of why the *government* has determined that such information is exempt under Exemption 4 of FOIA. *See,*

*e.g.*, *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987); *Judicial Watch v. U.S. Dep't of Treasury*, 796 F. Supp. 2d at 23. Instead, in support of its motion for summary judgment, Treasury has submitted *Vaughn* Indices *prepared by lawyers for the new auto companies themselves.* *See* Exhibit D to Declaration of Laura Fitzpatrick, ECF No. 36-2 (GM *Vaughn* Index); Exhibit A to Declaration of Louann Van Der Wiele, ECF No. 36-3 (Chrysler *Vaughn* Index).[29]

Thus, although the government wrongly asserts that "courts should generally defer to an agency's prediction of competitive harm from disclosure," Def. Br. at 11 – a proposition that applies only in "*reverse FOIA cases*," where the standard of review is *not de novo*[30] – here, the government would have this Court defer to the predictions of harm proffered *by the companies themselves*, which are clearly guided by their own self-interests rather than the public's right to the fullest disclosure possible. Indeed, while an *agency's declarations* are generally "accorded a presumption of good faith," in FOIA cases, *see, e.g., SafeCard Servs. Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991), that presumption certainly does *not* apply to declarations provided by non-governmental submitters of the information that seek to have it withheld from the public.

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[29] *See also* Def. Br. at 6 (asserting that "GM judiciously applied the strict *National Parks* Test to all of the documents to evaluate whether they contained confidential information"); *id.* at 7 (explaining that GM conducted the "reassessment" of what would be withheld as reflected in the final *Vaughn* Index); *id.* at 7-8 (explaining that Chrysler likewise made the decisions about what would be withheld from the Center and prepared the *Vaughn* Index for the withheld information).

[30] Thus, *United Technologies Corp. v. U.S. Dep't of Defense*, 601 F.3d 557, 563 (D.C. Cir. 1979), upon which Defendants rely for this statement, *see* Def. Br. at 11, is a "reverse FOIA" case where the submitter of the information at issue sued the agency over the agency's determination to *release* the information. However, in such cases, the court applies the "arbitrary and capricious/abuse of discretion" standard that governs all cases brought pursuant to the Administrative Procedure Act, 5 U.S.C. § 706(2). *See also*, *e.g., Jurewicz v. USDA*, 741 F.3d 1326, 1330-31 (D.C. Cir. 2014) (explaining that the standard of review in a reverse FOIA case is "[u]nlike a typical FOIA case, *in which a court would undertake its own analysis of the interests at stake*") (citations omitted) (emphasis added).

Therefore, because the government itself has failed to provide the Court with the agency's own sworn declaration concerning the information that remains at issue, with a detailed justification as to why such information is exempt from disclosure under Exemption 4, the agency simply has failed to meet its burden of proof here. Thus, as this Court succinctly articulated in another Exemption 4 case, while the agency may allow the submitters of the information an opportunity to contend that the requested information is "potentially exempt from disclosure," "*the final determination must be left up to the agency*." *Public Citizen v. U.S. Dep't of Health and Human Servs.*, 975 F. Supp. 2d at 113 (citing 5 U.S.C. § 552(a)) (emphasis added).[31]

## II. THE MANUFACTURERS' *VAUGHN* INDICES ARE RIDDLED WITH DEFICIENCIES.

The *Vaughn* Indices prepared by the auto companies suffer from many other obvious deficiencies. Many of the descriptions of documents do not identify authors, or even whether the authors were industry representatives or government officials (whose email communications do *not* qualify as information "obtained from a person," *see infra* at 27-28), *see, e.g.,* GM *Vaughn* Index ("GM VI"), Doc. Nos. 2, 10, 11, 12, 17, 18, 20, 59, 60, 81, 141, 169, 196 (describing "email chain" without identifying authors); Chrysler *Vaughn* Index ("Chrys. VI") at 29, 31, 33, 34, 35, 38, 39, 50, 51, 52, 58 (referring to "email" exchanges and "presentations" without identifying authors), and in many cases the *Vaughn* Indices provide names of individuals without identifying *who* these people are. *See, e.g.*, Chrys. VI at 2 ("email from John E. Mazey" and "Peter Chadwick"); GM VI, Doc.

[31] Moreover, the government's declarant – who has been in her position for only *four months*, *see* Cochrane Decl. ¶ 1 – admits that she has no personal knowledge of the documents at issue in this case. *See id.* at ¶2 (her statements about the documents are "based on information Treasury personnel and [unidentified] *others who have worked on plaintiff's FOIA request have provided to me*." (emphasis added). *But see* Fed. R. Civ. P. 56(c) (affidavits submitted in support of motion for summary judgment "must be made on personal knowledge").

Nos. 189, 195, 200 ("document regarding message from Ken Cole to Congress"). Similarly, many of the entries do not identify the date of the document – which would be relevant to whether it pertains to the "old" or the "new" companies, *see infra* at 36. *See, e.g.*, GM VI, Doc. Nos. 16, 31, 35, 40, 464.[32]

Further, in many cases, the descriptions of the documents are far too cryptic to meet the government's burden of proof or provide the Center – or the Court – with any meaningful way to assess whether the information has been properly withheld. *See, e.g.*, GM VI, Doc. No. 37 ("Business issues List for DIP Term Sheet"); Doc. No. 106 ("7/2/09 Presentation regarding 363 Sale Outstanding Issues"); Doc. No. 127 ("Presentation regarding Revolver 7/13/09 Term Sheet - Key Terms and Conditions"); Doc. No. 129 ("7/15/09 Presentation GM Exit RC Follow-up items"); Doc. No. 503 ("Presentation regarding Discussion in connection with 363 Sale"); Chrys. VI at 54 ("December 5, 2008 report regarding 'Alliance Studies'"); *id.* at 57 ("April 2, 2009 document regarding "Project Tiger, Tasks and Issues Report for § 363 Sale Process"). Accordingly, the *Vaughn* Indices drafted by the auto companies simply cannot satisfy Treasury's burden of proof.

## III. THE AGENCY HAS FAILED TO DEMONSTRATE THAT ALL OF THE WITHHELD INFORMATION IS EXEMPT FROM DISCLOSURE UNDER EXEMPTION 4.

Treasury contends that *all* of the withheld information at issue is exempt from disclosure under Exemption 4 of FOIA, which applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4).

[32] These and other examples provided herein are merely *representative* of the various deficiencies discussed that appear throughout both *Vaughn* Indices.

However, as demonstrated below, the agency has failed to meet its burden of proof under this Exemption for several additional reasons.[33]

### A. Information Authored Or Generated By Treasury Or Its Advisers Does Not Qualify For Protection Under Exemption 4.

It is well established that to qualify for protection under Exemption 4, the information at issue must have been "obtained from a person," 5 U.S.C. § 552(b)(4), and that this does *not* include information authored or generated *by the government itself*. *See, e.g., Grumman Aircraft Eng'g Corp. v. Renegotiation Bd.*, 425 F.2d 578, 582 (D.C. Cir. 1970).[34] Here, because the Center's FOIA request covers emails "*generated* and/or received *by the Department of Treasury*" and certain government officials and Auto Task Force members, *see* FOIA Request, CFAS Ex. R (emphasis added), the request clearly encompasses information authored by government officials.

However, although the government included conclusory assertions in its declaration that there is "no reasonably segregable, non-exempt information" in the materials at issue, Cochrane Decl. ¶ 39 ," the agency has failed to demonstrate – or even address – why information *authored or*

[33] Although the Center made clear that it does not seek access to any *personal* information, the government's declarant nevertheless asserts that "records withheld by Treasury implicate Exemptions 4 *and 6 of the FOIA*," Cochrane Decl. ¶31 (emphasis added) – the latter covering personal privacy. *See* 5 U.S.C. § 552(b)(6). However, the Center has no interest in obtaining individuals' "cell phone information," *e.g.,* Chrys. VI at 20, nor is it interested in "the operations and performance of *individual dealers*," or "information related to *employee compensation and benefit matters*." *See* Def. Br. at 18.

[34] *See also Bd. of Trade v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 404 (D.C. Cir. 1982) (the phrase "obtained from a person" in Exemption 4 "restrict[s] the exemption's application to *data which have not been generated within the Government*") (emphasis added); *Soucie v. David*, 448 F.2d 1067, 1079 n.47 (D.C. Cir. 1971) ("[t]he exemption for confidential information is available *only with respect to information received from sources outside the Government*") (emphasis added); *S. Alliance for Clean Energy v. U.S. Dep't of Energy*, 853 F. Supp. 2d 60, 67 (D.D.C. 2012).

*generated by the government*, as opposed to the "old" or "new" companies, cannot be segregated and released. [35]

Indeed, one document that Chrysler identifies as being withheld in full, "Obama Administration New Path to Viability for GM & Chrysler," *see* Chrys. VI at 71, HHR-DOT2-00004091, was actually released to the Center by Treasury. *See* CFAS Ex. X. As evidenced by the document itself, it was written *entirely by the government* and is the government's explanation of (1) why the February 2009 Viability Plans submitted by both companies were inadequate; and (2) what actions the companies need to undertake to become viable (and warrant TARP funding). *Id.; see also* Testimony of Harry Wilson at 96, *In re General Motors Corp.*, No.

[35] *See, e.g:* **GM VI** at Doc. No. 514 ("Email chain *between Matthew Feldman* [of the Auto Task Force] and Robert Osborne"); Doc. No. 521 ("Email chain between *Matthew Feldman*, Rick Westernberg and Harry Wilson"); Doc. No. 524 ("Email chain between Walter Borst, *Matthew Feldman*, Ray Young, and Harry Wilson"); Doc. No. 526 (same); Doc. No. 529 ("Email from *Matthew Feldman* to Rick Westenberg and Harry Wilson"); Doc. No. 537 ("Email from *Brian Osias* [Auto Task Force advisor] to Walter Borsi"); *see also Overhaul* at 82 (identifying Brian Osias as a member of the Auto Task Force team);

**Chrys. VI** Bates Range HHR-DOT2-00119592 ("April 21-22, 2009 email chain between, *inter alia*, Chrysler, *the Treasury* . . . regarding revisions to a DIP [Debtor In Possession] term sheet"); *id.* at 3 ("June 3 and June 8, 2009 email chain between Chrysler, *the Treasury*, and Capstone regarding product liability issues"); *id.* at 6 ("April 22, 2009 email chain" including emails of "*Ron Bloom*" and "*Brian Deese* [Auto Task Force members]; *id.* at 13, Bates Range HHR-DOT2-00155388 and HHR-DOT2-00155393 (withholding "the entire text of the April 20, 2009 email from *Paul Nathanson* [Task Force advisor] to Robert Manzo; *see also Overhaul* at 103 (identifying Paul Nathanson as a Task Force staff); Chrys. VI at 17 ("July 2-3, 2009 email chain between *Brian Osias*" and others); *id.* at 20-21, Bates Range HHR-DOT2-00153431 ("April 8, 2009 email exchange between Robert Manzo and *Matthew Feldman* regarding issues related to Section 363 of the Bankruptcy Code," including "the numbered points of *Matthew Feldman's email* of 20:25"); *id.* at Bates Range HHR-DOT2-27-00342767 ("May 15, 2009 email exchange between *Brian Osias*" and others); *id.* at 28, Bates Range HHR-DO-00342947 ("May 15, 2009 *email from Brian Osias* to Robert Manzo and John Rooney discussing Chrysler's DIP financing needs); *id.* at 28, HHR-DOT2-00343725 ("May 17, 2009 email exchanged between Robert Manzo, John Rooney and *Matthew Feldman*"); *id.* at 31, HHR-DOT2-00346934 ("May 21, 2009 email chain concerning Chrysler's borrowing request from the Treasury"); *id.* at HHR-DOT2-00347619 ("May 24, 2009 email chain regarding Chrysler's borrowing request"); at 25, HHR-DOT2-00348806 ("May 30, 2009 *email from Brian Osias* . . . regarding Chrysler's cash needs during June 2009"); *id.* at 42 ("April 7, 2009 email exchange between *Ron Bloom* and Tom Lasorda"); *id.* at 47 ("May 2, 2009 email exchange between Bob Nardelli, *Matt Feldman and Ron Bloom* regarding request for information").

09-50026 (S.D.N.Y.) (July 1, 2009), CFAS Ex. M (explaining that "[a]s the purchaser" of the "new" GM, "representatives of the Treasury Department and their advisors" were the "*principal negotiators*" *for the "new" company*).[36]

However, because information generated by the government itself is *not* exempt under the plain language of Exemption 4, the government has failed to meet its burden of proof with respect to *any* of the withheld information, and any communications *by* government employees, as well as information generated by such individuals, that are included in the materials at issue must be released. *See also COMTEL v. FCC*, 945 F. Supp.2d 48, 57 (D.D.C. 2013) ("The FCC does not explain how all portions of a document originally prepared by its own staff can be considered 'obtained by a person.' While it is possible that the government relied on information from [an outside entity] to draft parts of the original version, *it seems unlikely, and the FCC has not met its burden to show, that this is true for the entire document*.") (emphasis added).[37]

### B. Treasury Has Also Failed To Meet Its Burden Of Proof That All Of The Withheld Information Is "Confidential."

Relying on the test set forth in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974), Treasury asserts that all of the information at issue is "confidential" because disclosure is "likely" *both* to "impair the Government's ability to obtain necessary information in the future" *and* to "cause substantial harm to the competitive position of the person

[36] As further demonstrated *infra* at 43, both of those Viability Plans are already publicly available.

[37] The agency's general statement that non-exempt information in the documents is "so inextricably intertwined with the exempt information that any further separation . . . would produce only incomplete, fragmented, unintelligible sentences and phrases . . . devoid of any meaning," Cochrane Decl. ¶ 39, also fails to address this specific issue – i.e., why information authored and/or generated *by the government* cannot be segregated from the materials at issue.

from whom the information was obtained." *Id.; see also* Def. Br. at 14.[38] However, as demonstrated below, the agency has failed to meet its burden of proof with respect to *either* prong of this test.

**1. Treasury Has Failed to Prove That Disclosure of the Withheld Material is Likely to Impair the Government's Ability to Obtain Necessary Information in the Future.**

Treasury has failed to demonstrate that disclosure of the any of the information at issue is likely to "impair the government's ability to obtain necessary information in the future," *Nat'l Parks,* 498 F.2d at 770. The agency makes the astonishing pronouncements – with no explanation or further proof – that if Treasury were to disclose the information at issue, "companies operating in competitive environments would be reluctant to *share* such information with Treasury in the future," and that "Treasury's ability to act as a lender would be hampered." Def. Br. at 24-25 (emphasis added). *See also* Cochrane Decl. ¶ 37. However, none of these conclusory statements is sufficient to meet the government's burden of proof. *See Public Citizen Health Research Group v. FDA*, 185 F.3d at 906 ("conclusory and generalized allegations . . . cannot support an agency's

[38] Because this Court ruled in another case that information submitted to obtain TARP funds is considered a *required* rather than *voluntary* submission, *see Judicial Watch, Inc. v. U.S. Dep't of Treasury*, 796 F. Supp. 2d at 35 n.8, Treasury cannot satisfy the more relaxed test for "confidential" information set forth in *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992) – i.e., where the submission is of a purely voluntary nature, the information is deemed "confidential" if is of a kind that is not "customarily" released to the public. *Id.* Although the government cryptically asserts in its brief that "some" of the information at issue "also qualifies under the *Critical Mass* test," Def. Br. at 12, it failed to make any such demonstration, and, accordingly that argument has been waived. *See also* Cochrane Decl. at 9 n.3 (stating that because "Treasury believes that all of the withheld information satisfies the stricter standard applied to mandatorily-submitted documents," the government is "therefore *litigat[ing] only based upon this standard*.") (emphasis added). In any event, there can be no legitimate dispute that under the circumstances of *this case,* GM and Chrysler had no option but to submit the requested information if they had any hope of receiving the requested TARP funds. *See Judicial Watch, Inc. v. U.S. Dep't of Treasury*, 796 F.Supp.2d at 35 n.8*; see also Pub. Citizen Health Research Group v. FDA*, 964 F. Supp. 413, 414 n.1 (D.D.C. 1997) (submissions necessary for obtaining federal approval to market a drug are *mandatory* submissions).

decision to withhold requested documents."). Moreover, in light of the circumstances at issue here, these statements simply defy reality.

To begin with, Treasury and GM have already *conceded* – as they must – that the information at issue in this case was *required* to be submitted to Treasury. *See supra* at 29, n.38; *see also*, *e.g.*, Def. Br. at 4 (acknowledging that the Loan Agreement provides that "GM *shall provide, upon Treasury's request*, 'information, documents, records or reports with respect to . . . corporate affairs, conditions, or operations, financial or otherwise'") (citations omitted) (emphasis added); *id.* (acknowledging that Chrysler's Loan Agreement contained similar language); *see also* Cochrane Decl. ¶ 36 ("Both GM and Chrysler *were required to provide to Treasury certain documents pursuant to the Loan and Security Agreement*[*s*]") (emphasis added). [39]

There can be no serious doubt that in any even remotely comparable situation that occurs in the future, a company seeking *taxpayer bailout funds to avoid bankruptcy* will provide Treasury with whatever information it *wants* or *needs* in exchange for such funds, and that such information will necessarily be as reliable as possible. For example, not surprisingly, the loan agreements executed by Treasury expressly provided that the "borrowers" of the money – here "old" GM and "old" Chrysler – must provide the government "*true and complete disclosure*" of all information "in connection with the negotiation, preparation or delivery" of the loan agreement and other "Program Documents," and ensure that such information does *"not contain any untrue statement of*

[39] Moreover, Treasury has broad subpoena powers and hence could always compel companies wishing to take advantage of federal funding programs comparable to TARP to provide whatever information is needed to make such decisions in the future. *See* 18 U.S.C. § 3486; *see also* Declaration of Joan Claybrook ¶ 18 ("as the head of an agency, I knew that the government could always obtain relevant information it needed from the auto companies simply by indicating that we would invoke the agency's subpoena power"). As Judge Huevelle of this Court has explained, "[g]enerally *there is no impairment when the government can compel disclosure of the information*." *Aquirre v. Securities and Exchange Comm'n.*, 551 F. Supp. 2d 33, 52 (D.D.C. 2008) (citing *Critical Mass Energy Project*, 975 F.2d at 878).

*material fact or omit to state any material fact*" necessary to complete the transaction, and that "[a]ll information . . . *will be true, complete and accurate in every material respect* . . . ." *See* Chrysler Loan Agreement (Jan. 14, 2009) (emphasis added), CFAS Ex. V, at § 5.12; GM Loan Agreement at § 6.12 (Jan. 16, 2009), CFAS Ex. W (similar language). [40]

Indeed, it should go without saying that any entity seeking to take advantage of a program designed to provide federal financial assistance would not risk losing that opportunity by providing unreliable information to the government. As this Court noted in a case involving the disclosure of other documents, "[i]t *strains credulity to believe that the specter of potential disclosure under the FOIA of certain information required to be submitted to the agency . . . would lead a pharmaceutical company to choose instead the risk of exclusion from federal drug reimbursement programs*." *Public Citizen v. U.S. Dep't of Health and Human Servs.*, 975 F. Supp. 2d at 112 (emphasis added); *see also Honeywell Technology Solutions, Inc. v. Dep't of the Air Force*, 779 F. Supp. 2d 14, 22 (D.D.C. 2011) ("the claim that [a company] would abjure the opportunity for a multi-million-dollar contract to avoid a FOIA disclosure strains credibility").

Thus, none of the cases relied on by the government has any applicability here. *See* Def. Br. at 24-25. *Comstock International (U.S.A.), Inc. v. Export-Import Bank of the United States*, 464 F. Supp. 804 (D.D.C. 1979) and *Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19 (D.D.C. 2000), both involved disclosures of information to the Export-Import Bank of the United States in exchanges for bank loans. However, in finding that the government had met its

[40] Indeed, if the companies had *not* have provided accurate information, they would have risked being in *default* of the loan. *See, e.g.,* GM Loan Agreement at § 9.01(e) (explaining that GM would be in "default" of the loan agreement if "any representation . . . made or deemed made herein . . . shall *prove to have been false or misleading in any material respect*") (emphasis added); *see also* **Error! Main Document Only.**18 U.S.C. § 1001 (providing that "whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . falsifies, conceals, or covers up . . . a material fact" "shall be" fined or imprisoned for up to 5 years).

burden of proof that disclosure would "impair" the Bank's ability to obtain similar information in the future, the courts relied on the fact that the federal bank *competes* with banks in foreign countries where such information would *not* have to be disclosed, and thus disclosure would impair the Bank's ability to secure customers *who would go elsewhere for the desired funding*. *See Comstock,* 464 F. Supp. at 808; *Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d at 30. Here, of course, there is no such comparable situation. On the contrary, the record could not be clearer that securing federal funding was the companies' *only* hope of surviving – i.e., they *had no other source of funding to turn to in their desperate efforts to maintain financial viability. See supra* at 10-12. [41]

**2. Treasury has Failed to Demonstrate that Disclosure of the Withheld Information is Likely to Cause GM or Chrysler "Substantial Competitive Injury."**

Treasury also contends that every document and portion of a document withheld in this case is exempt from disclosure as "confidential" commercial information because disclosure of such information is likely to cause the "new" GM and the "new" Chrysler substantial competitive injury, *Nat'l Parks,* 498 F.2d at 770. However, as demonstrated below, the agency has also failed to meet its burden that release of the withheld information will harm the new companies because of "the affirmative use" of this information "by competitors" of those companies. *Public Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983); *accord*, *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1153-54 (D.C. Cir. 1987).

[41] In fact, the Task Force repeatedly *rejected* information provided by Chrysler and GM as not being of sufficient quality to justify providing the companies with the requested funding. *See* Chrysler CRS at i (explaining that "[t]he Obama Administration rejected Chrysler's initial viability plan as insufficient and gave the company 30 days to develop a new plan in an effort to avert bankruptcy") (emphasis added); GM CRS at 6 (explaining that the Administration "rejected" "Old GM's Viability Plan of February 2009, which was a U.S. Treasury requirement to obtain additional loans after the initial loan of December 2008"); *see also* CFAS Ex. X ("Obama Administration New Path to Viability for GM & Chrysler").

***a. Exemption 4 does not protect submitters from adverse reactions from entities that are not competitors.***

First, "[t]he important point for competitive harm in the FOIA context . . . is that it be *limited to harm flowing from the affirmative use of proprietary information by competitors*." *Pub. Health Research Group v. FDA*, 704 F.2d at 1291, n.30 (emphasis added). Thus, "[c]ompetitive harm should *not be taken to mean simply any injury to competitive position, as might flow from customer or employee disgruntlement* or from the *embarrassing publicity attendant upon public revelations* concerning, for example, illegal or unethical payments to government officials or violations of civil rights, environmental or safety laws." *Id.* (emphasis added); *see also Jurewicz*, 741 F.3d at 1331 (noting that "Exemption 4 . . . does not guard against mere embarrassment in the marketplace or reputational injury") (emphasis added).[42]

This aspect of the Exemption is particularly important here, where it appears that this is precisely the concern that may be motivating GM and Chrysler's withholding decisions. Indeed, in articulating GM's Exemption 4 position in her declaration, GM Attorney Laura Fitzpatrick candidly asserts that "GM operates in an extremely competitive environment *with respect to a wide range of constituencies, including* competitors, *suppliers, dealers,* ***customers (and potential customers)****, unions and employees regarding a wide range of matters*," and that the withheld "Confidential Information includes historical and projected Company financial, operating, and strategy information that ***each of the constituencies could, and likely would, use to its own***

[42] *See also United Technologies Corp.*, 601 F.3d at 565; *CNA Financial Corp.*, 830 F.2d at 1154 (concerns about "*adverse public reaction*" to released information are "unrelated" to the policy behind Exemption 4 which pertains only to the *"harm flowing from the affirmative use of proprietary information by competitors*") (emphasis added); *General Electric v. NRC*, 750 F.2d 1394, 1402-03 (7th Cir. 1984) ("While General Electric's competitors in the nuclear-reactor business would no doubt be delighted to be able to flag around to their customers a report in which GE criticizes its own reactor design, the competitive harm that attends any embarrassing disclosure is not the sort of thing that triggers exemption 4").

***advantage**, thereby causing substantial harm to the Company's commercial position if the Confidential Information were released.*" Fitzpatrick Decl. ¶ 13 (emphasis added); *see also* Van Der Wiele Decl. ¶ 8 (making similar argument for Chrysler).

However, regardless of whether such concerns about reactions of "customers," "potential customers," "unions," and "employees," may be valid, "*Exemption 4 does not protect against this species of harm*." *United Technologies Corp. v. U.S. Dep't of Defense*, 601 F.3d at 563 (emphasis added). Rather, the government must demonstrate that the new companies will be harmed by the "*affirmative use of proprietary information **by competitors***" if any of the information at issue is publicly disclosed. *Id.* at 563-64 (citations omitted) (emphasis added).

***b. Treasury has wrongfully withheld information based on the companies' requests for confidentiality.***

Second, the mere fact that "the TARP loans contained confidentiality clauses covering information that GM or Chrysler might provide to the government," Def. Br. at 4, is completely irrelevant to whether such information may be withheld under Exemption 4 when the government has already *conceded* that the information at issue was *not* "voluntarily" submitted. *See supra* at 29, n.38. It is well settled that the government may not trump the requirements of the Exemption by entering into "confidentiality" agreements. As the Court of Appeals long ago explained, "Congress has made clear both that the federal courts, and not the administrative agencies, are ultimately responsible for construing the language of the FOIA, and that *agencies cannot alter the dictates of the Act by their own express or implied promises of confidentiality*." *Public Citizen Health Res. Grp. v. FDA*, 704 F.2d at 1287.[43]

[43] In fact, the Loan Agreements, upon which the government and auto companies rely for this promise of confidentiality, *see, e.g.*, Fitzpatrick Decl. ¶ 15, acknowledge that the government cannot be foreclosed from disclosing information if required under FOIA. *See*, *e.g.,* Exhibit A to Fitzpatrick Decl. at § 8.15 (noting

***c. Treasury's assertions of competitive harm are too conclusory.***

Treasury's assertions of harm are far too conclusory to meet its burden of proof. *Public Citizen Health Research Group v. FDA*, 185 F.3d at 906. In fact, with one exception, Treasury conspicuously fails to demonstrate that disclosure of information in the categories invoked for GM would likely result in "*substantial*" competitive harm – the test that applies here. *Nat'l Parks*, 498 F.2d at 770. [44]

Thus, as to information falling into the categories "Transactions," "Dealer and Dealer Networks," "Compensation and Benefits," "Confidential Financial Data," and "European Operations and Opel," although Treasury makes general assertions that such information is "confidential" and could "be utilized to GM's direct competitive disadvantage," *see, e.g.*, Def. Br. at 20, it fails to explain how disclosure of any of this information would likely result in "substantial" competitive injury to GM.[45]

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that nothing shall prevent the Lender (the U.S. Gov't) "from disclosing any such information . . . (e) in response to any order of any court or other Governmental Authority or as may otherwise be required pursuant to any Requirement of Law" after providing the borrower the opportunity to object to such disclosure under FOIA); *see also* Chrysler Loan Agreement at § 8.15(a), CFAS Ex. V (acknowledging that the "Lender" (the U.S. Gov't) may disclose information provided by the "Borrower" if necessary "to follow applicable law and regulation," and that nothing in the confidentiality provision "shall be construed to limit the authority that [government entities] have under law").

[44] The government declarant's mere statement that "Treasury believes that GM and Chrysler have *credibly asserted*, as described in their declarations and *Vaughn* indices, that the release of all information withheld under Exemption 4 would cause substantial competitive harm to GM and Chrysler," Cochrane Decl. ¶ 37, cannot substitute for the agency actually *determining* that the withheld information is in fact exempt from disclosure. *See Vaughn v. Rosen*, 484 F.2d at 825 ("*The burden has been placed specifically by statute on the Government*.") (emphasis added).

[45] *See also*, *e.g., id.* at 15-16 (information about "transactions" is "fundamental to the operations, value, and marketplace goodwill of GM today, and in many ways fuels its competitive commercial positions" and "[t]his confidential information would harm the company if it was publically disclosed and available to be used by GM's competitors"); *id.* at 17 ("If any of GM's competitors *or others* with whom the company may negotiate were allowed to glean insights into how GM approaches such transactions, then GM's ability to negotiate favorable terms in other deals would be significantly and negatively impacted.") (emphasis added).

The only category as to which an assertion of "substantial" competitive injury is actually made in the government's brief is "Manufacturing and Operations." *See* Def. Br. at 19 (asserting that "[c]ombined with other publicly available data, this Confidential Information would provide GM's competitors and suppliers with critical, actionable insights related to GM's manufacturing costs, operations, and revenue, which would *substantially harm GM's position in the marketplace*.") (emphasis added). However, because the government does not explain how competitors or suppliers of this information would use the information to cause GM "substantial" competitive injury, the government has failed to meet its burden of proof with respect to this category as well.

The *Vaughn* Index prepared by GM fares no better in demonstrating how disclosure of any of this almost six-year-old information would cause "substantial competitive injury" to the *new* GM if disclosed. Indeed, each entry is accompanied by a boiler-plate statement that:

> This document was withheld under Exemption 4 of FOIA because it contains, consists of, or reflects confidential commercial and/or financial information obtained from a person, that was *voluntarily provided to the government*, that is *not customarily released to the public, and/or would likely cause substantial competitive harm if released.*

*See, e.g.*, GM VI Doc. No. 1. However, because as demonstrated *supra* at 29, n.38, such information was *not* voluntarily provided to the government, whether any such information is "not customarily released to the public" is not the test here, and the government must instead demonstrate with sufficient detail how disclosure of such information would cause the new GM "substantial competitive harm." *Nat'l Parks*, 498 F.2d at 770.[46]

[46] Indeed, Treasury has even allowed the companies to withhold their requests for confidentiality, *see, e.g.*, Chrys. VI at 53, Bates Range HHR-DOT2-00153630; GM VI , Doc. Nos. 42, 73, and it has also allowed them to withhold drafts of Congressional testimony, as well as drafts of remarks to the media. *See, e.g.,* GM Doc. Nos. 190-191 ("draft Henderson oral testimony"); GM Doc. No. 466 (undated "draft of Fritz

Likewise, the government has failed to demonstrate that disclosure of the extremely old information pertaining to Chrysler is likely to cause "*substantial* competitive injury" to the new Chrysler. Indeed, with one exception, the government's brief asserts that disclosure of the information pertaining to Chrysler would result in some "competitive harm," but fails to explain how such harm would be "substantial." *See*, *e.g.*, Def. Br. at 21-22 (asserting that disclosure of budgets, financial forecasts and sales projections "could be reviewed, analyzed and used by Chrysler's competitors to Chrysler's *competitive disadvantage*") (emphasis added); Def. Br. at 22-23 (disclosure of information about "operational cost details" would "*cause Chrysler competitive harm* by allowing its competitors to gain a competitive advantage by understanding Chrysler's internal decision-making process as to the overall strategy of the company") (emphasis added). While Chrysler's *Vaughn* Index actually uses the phrase "substantial competitive harm" throughout and reiterates that the information is currently "non-public," it also fails to demonstrate *how* each of the withheld documents and portions of such document likely would result in causing the new Chrysler "substantial" competitive harm.

***d. Additional factors demonstrate that Treasury has failed to meet its burden of proof.***

There are several additional factors that cast serious doubt on any claims of "substantial competitive injury" here.

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Henderson opening remarks to media regarding product and technology announcements"). Treasury has also allowed the companies to withhold numerous "email chain[s] with attorneys regarding strategy," although they have not claimed that any of the documents at issue are "privileged" within the meaning of Exemption 4, nor could they make such a claim when *all* of the documents were shared with members of the Task Force. *See, e.g.*, GM VI, Doc. Nos. 479 - 484; *United States v. Deloitte LLP*, 610 F.3d 129, 139-40 (D.C. Cir. 2010) ("[V]oluntary disclosure waives the attorney-client privilege . . . .").

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First, much of the information at issue concerns the "old" failing companies. And, while the Center concedes that the "new" companies face "actual competition," *Niagara Mohawk Power Corp. v. Dep't of Energy*, 169 F.3d 16 (D.C. Cir. 1999), the same cannot be said of the "old" GM and Chrysler which are currently both now bankrupt. Thus, while the government, GM, and Chrysler all conveniently refer in their briefs to both the "old" and "new" companies collectively as "GM" and "Chrysler," *see*, *e.g.,* Cochrane Decl. at 3 n.1 (explaining that "[f]or ease of reference" both the old and new Chrysler "are referred to as 'Chrysler' throughout this brief"), in fact, as explained *supra*, the purpose of the § 363 Transactions was to create completely "new" commercial entities. Therefore, the government has failed to demonstrate how release of six-year-old information about the "old" *failing – now bankrupt* – companies can possibly cause the "new" GM and Chrysler *any* competitive injury, let alone "substantial" competitive injury, as required. *Nat'l Parks*, 498 F.2d at 770.[47]

Indeed, in the current proceeding in Bankruptcy Court in which the "new" GM is trying to convince that Court not to hold it accountable for a "fraud on the court" for misrepresentations

[47] S*ee also*, *e.g.*, GM VI Doc. No. 93 ("2007 Financial Statements"); Chrys. VI at 11 ("May 31, 2009 email chain regarding *issues related to Oldco*") (emphasis added); *id.* at 28 ("May 17, 2009 email . . . regarding *the wind down budget for Oldco*") (emphasis added); *id.* at 60 ("*old Carco LLC Liquidation Budget*") (emphasis added); *id.* at 61 ("presentation regarding 'Old Carco LLC'"); *id.* ("Summary Costs to Confirm Plan of Liquidation"). *See* Claybrook Decl. ¶¶ 19-20; *see also*, *e.g.*, GM CRS at 4 (describing the "corporate culture" in which "Old GM's corporate executives had been . . . *out of touch with U.S. car buyers' preferences*") (emphasis added); Valukas Report at 226-257 (describing in great detail "old" GM's incompetence in handling the Delphi ignition switch problem as indicative of its failed corporate "culture"); *Overhaul* at 20, 55, 65, 67, 86, 111, 116, 183-190 (also describing the incompetence, deficiencies, mistakes, lack of foresight, unrealistic financial projections, and poor management of the "old" companies). Indeed, because the companies fail to differentiate between which information pertains to the "old" companies and which pertains to the "new" companies, the government's reliance on *Utah v. U.S. Dep't of Interior*, 256 F.3d 967, 970 (10th Cir. 2001), Def. Br. at 17, is also misplaced. Here, the government has failed to show how release of six-year-old information about the "old" failing companies would provide any *current* competitors an advantage in "undercutting prices, structuring their transactions, and marketing" as was demonstrated by detailed affidavits submitted in that case. *Utah v. U.S. Dep't of Interior*, 256 F.3d at 970.

made about GM's potential liability, particularly in light of the Delphi switch debacle, the company insists that it was "Old GM (***not*** New GM) [that] was the proponent of the [§ 363] Sale Motion and *had the burden of seeking its approval and complying with all due process requirements*." *See* GM Opening Br., CFAS Ex. D, at 10 (second emphasis added); *see also* Cochrane Decl. at 3 n.1 ("Chrysler Group LLC is *a separate entity and is not responsible for the obligations of Old Carco*, except for those that were specifically assumed.") (emphasis added).

Certainly with respect to email exchanges pertaining to the *liabilities* that were left behind with the "old" companies, the new companies cannot demonstrate that the disclosure of such information will somehow cause the "new" companies "substantial" *competitive* harm, and neither they nor the government have made any such showing.[48] The companies – and Treasury – cannot have it both ways – they cannot insist that the "new" companies are *separate and distinct* from the "old" companies as to liabilities and other transactions that occurred in their prior incarnations, and yet claim the protection of Exemption 4 with respect to "substantial competitive harm" that will befall the "new" companies if information about such liabilities and other transactions is revealed to the public.

Second, even if the information at issue arguably pertains to the companies as newly constituted in the summer of 2009, to the extent that such information is *general* in scope, its release cannot possibly cause those new entities "substantial" competitive injury. For example, the

[48] *See*, *e.g.,* Chrys. VI at 16 ("email chain regarding product liability"); *id.* at 75 ("Document regarding 'Warranty/Product Liability Issues'"); *id.* at 17 (email exchange "discussing Chrysler's budget for environmental expenses"); GM VI at Doc. No. 455 ("Portions of presentation regarding strategies, recommendations and options in connection with benefit obligations in connection with 363 Sale; includes liability amounts"); Nos. 458-59 (same); *see also* Wilson Testimony at 103, CFAS Ex. M (explaining to the Bankruptcy Judge that the Auto Team "actually *had an active debate with our team about the product liability associated with cars purchased before June 1st, but with accidents and claims occurring post-closing*") (emphasis added); *see also* Redacted emails, attached as CFAS Ex. Y(with subject line "Product Liability").

document entitled "Obama Administration New Path to Viability for GM & Chrysler" – which, according to Chrysler's *Vaughn* Index has been withheld in full because it "contains *detailed discussion of Chrysler's financial condition* at the time when it was negotiating its partnership with Fiat and its lending agreement with the U.S. Treasury Department," *see* Chrysler VI at 71, but in fact has been released – contains extremely general information about why Treasury rejected the companies' February 2009 Viability Plans and what steps the new companies must take to become financially viable in the future. *See* CFAS Ex. X[49]

Further, even with respect to more detailed financial projections, as explained by Joan Claybrook, former head of NHTSA, car companies rarely make such projections for more than five years in advance because of the many inevitable market and other variables that affect such plans, including fluctuations in the country's economy; rapid changes in technology, manufacturing processes, and design strategies; and significant changes in applicable regulatory regimes and requirements. *See* Claybrook Decl. ¶ 22 ("[m]uch has changed since that information was generated, and, in my experience, the auto companies rarely plan for more than five years in the future because of the many market, manufacturing, and regulatory variables that inevitably affect such plans"). Indeed, for similar reasons, GM's own "Viability Plan" submitted in February 2009t in the company's attempt to obtain more TARP funding did not include projections beyond five years. *See* GM, *2009-2014 Restructuring Plan*, *supra*,

[49] *See id.* at 1 ("The plans submitted by GM and Chrysler on February 17, 2009 did not establish a path to viability without the need for future government assistance. In their current form, they are not sufficient to justify a substantial new investment of taxpayer resources."); *id.* at 3 ("A Chrysler/Fiat alliance could lead to Chrysler manufacturing fuel-efficient vehicles using Fiat's technology while benefitting from the managerial expertise of Fiat senior leadership that successfully led a turnaround in Fiat over the past five years"). *See also* Claybrook Decl. ¶23 (explaining that disclosure of information contained in the companies' February 2009 Viability Plans will not cause either the new GM or the new Chrysler "substantial" competitive injury).

CFAS Ex. S. Thus, the government has failed to explain how *any* of this stale information would be of any use to a competitor of the "new" companies, let alone cause them "substantial" competitive injury. *See, e.g., Jurewicz v. U. S. Dep't of Agriculture*, 741 F.3d at 1331 (reverse FOIA case upholding agency's determination to release information that was "stale").[50]

Third, the government spends a considerable amount of time explaining how *Delphi* would be competitively injured if certain information were released, *see* Def. Br. at 15-17; *see also* GM VI, Doc. Nos. 201 - 391 (documents concerning Delphi). However, GM simply is not in a position to assert such harm on behalf of another company. *See Nat'l Parks*, 498 F.2d at 770 (the government must prove that disclosure of the information at issue would cause "substantial competitive injury" to "*the person from whom it was obtained*") (emphasis added).

Fourth, as the government itself is forced to concede, *much* of the same or similar information it seeks to withhold in this case is *already* public in one form or another. *See* Def. Br. at 19 (admitting that "*certain overall structural cost projections had been previously disclosed in Old GM's Viability Plan dated February 17, 2009 and subsequent public securities filings*") (emphasis added). Indeed, anyone can obtain access to detailed production, sales, cost, assets, liabilities, and other financial information about the "old" companies simply by reading the two

[50] For the same reason, none of the cases relied on by the government is applicable here – they all involved *current* data that could be affirmatively used by a competitor to the substantial competitive disadvantage of the submitter. *See*, *e.g., Nat'l Parks and Conserv. Ass'n v. Kleppe*, 547 F.2d 673, 676 (D.C. Cir. 1976) (finding that detailed financial information required to be provided to the National Park Service "on a continuing basis" was exempt under Exemption 4); *Gulf & Western Indus. v. U.S.*, 615 F.2d 527, 530 (D.C. Cir. 1979) (disclosure of the "actual" costs, rates, and cost data of one company would allow its competitors to "accurately calculate Norris' future bids and its pricing structure); *Island Film, S.A. v. Dep't of Treasury*, 869 F. Supp. 2d 123, 134 (D.D.C. 2012) (information regarding *present* "business operations, confidential contacts, and financial and expense data" was exempt from disclosure).

"Viability Plans" they submitted to Treasury in February 2009 in their efforts to secure continued TARP funding. *See* CFAS Ex. E (GM); CFAS Ex. Z (Chrysler).[51]

Much of the information Treasury seeks to withhold here, and extremely similar information, is also publicly disclosed in GM and Chrysler's annual 10-K and other filings required by the Securities and Exchange Commission.[52] Indeed, we now know based on the documents that were released by Treasury in July 2014 that information withheld for *years* from the Center on the grounds that its disclosure would cause GM and Chrysler "*substantial* competitive injury" was required to be disclosed in SEC filings.[53]

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[51] *See Chrysler Restructuring Plan for Long-Term Viability: Executive Summary* (Feb. 17, 2009), CFAS Ex. Z, *available at* http://www.media.chrysler.com/dcxms/assets/attachments/Chrysler_Restructuring_Plan_Summary.pdf; GM, *2009-2014 Restructuring Plan*, *supra*.

[52] *See* 15 U.S.C. §§ 78m and 78o(d); *see also* 10-K Form, CFAS Ex. AA (requiring comprehensive summary of company's financial performance, including company history, organizational structure, executive compensation, equity, subsidiaries, and *audited financial statements*); GM 2009 10-K (April 7, 2010), CFAS Ex. BB, at 52-53 (detailing the "Delphi Master Disposition Agreement"); *id.* at 25-26, 51-52 (describing GM's plans for reducing dealerships and the methods used to evaluate individual dealers); *id.* at 115-16, 122-27, 147, 181, and 282 (detailing historical and projected financial operating information budgets, and forecasts for costs, plans, and strategies for the future); *id.* at 3, 47, 52, 81, 87, 89, and 283-84 (discussing the Opel restructuring activities); Chrysler 2011 10-K, CFAS Ex. CC, at 3-6, 57-58, 107, 153, 172-73 (detailing budgetary information and strategies for the future); *id.* at 135-55, 41, 57, 59, 119, 123, 202 (discussing tax and legal liability matters); *id.* at 3-6, 51-52, 104, 153 (discussing product strategy, manufacturing costs and relationships with suppliers).

[53] *Compare*, *e.g.*, GM VI Doc. No. HHR-DOT2-00030511 ("Top Q&A Memo regarding GM viability plan" (April 26, 2009), CFAS Ex. DD, (originally withheld in full/released on July 31, 2014) (discussing "dealer reductions," the "four core U.S. brands," the "objective to make us a leaner, faster, more customer-focused organization going forward," UAW VEBA negotiations," the "Canadian CAW negotiations," and the sale of Saab) *with* GM's 2009 10-K, CFAS Ex. BB , at 43-44 (discussing these same initiatives and the goal of a "substantially more accelerated and aggressive restructuring plan," the UAW VEBA negotiations and Canadian CAW negotiations ), *see also* GM's "8-K" SEC filings (Aug. 18, 2009) (Sept. 17, 2009)(Oct. 23, 2009), CFAS Ex. EE , and GM's "10-Q" SEC filings (Apr. 7 at 8-9, 93, 106-12 and May 17, 2010 at 5-6, 39-42, 53, 56), CFAS Ex. FF (discussing the same issues); *compare also, e.g.*, GM Document HHR-DOT2-00089702 (May 1, 2009), CFAS Ex. GG (originally withheld in full/released on July 31, 2009) (Draft "Key Stockholders Agreement and Registration Rights Agreement Provisions (for 363 Sale Transaction)) *with* GM 2009 10-K, CFAS Ex. BB (replete with over a hundred references to the 363 Sale, including a detailed discussion of the Stockholders Agreement, *id.* at 288-89, and a *draft* of that document, *id.* at Exhibit K).

Further, GM's and Chrysler's monthly sales figures are published on the internet by *Automotive News*. *See U.S. Car Sales, May & YTD*, Automotive News, http://www.autonews.com/article/20090608/DATACENTER/906059957/*u-s-car-sales-may-ytd* (last visited Jan. 15, 2015),[54] and much of the companies' financial and other information leading up to, and in the wake of, the § 363 Sales is also set forth in various Congressional and other governmental reports.[55] And, of course, much of this information was required to be filed in support of the § 363 Transactions prior to approval by the Bankruptcy Court.[56]

Finally, much of this information – including the specific *strategies employed in restructuring each of these companies* – is recounted in detail in Steven Rattner's 2010 book *Overhaul: An Insider's Account of the Obama Administration's Emergency Rescue of the Auto Industry*, (2010), CFAS Ex. A, which was published a year *after* the bailouts occurred. Indeed, in

[54] Thus, for example, anyone willing to pay *Automotive News*' subscription fee could easily find out that in May 2009, Chrysler sold 3,679 Chrysler 300's, 58 Crossfires, 1,276 PT Cruisers and 1,977 Sebrings while its Dodge division sold 2,512 Avengers, 2,991 Calibers, 2,695 Challengers, 4,082 Chargers, 8 Magnums and 44 Vipers. General Motors' Buick division sold 1,758 LaCrosse's and 3,307 Lucerne's while its Saturn division sold 647 Astra's, 2,235 Aura's, 2 Ions, and 353 Sky's. *Id.* Such information is also available for other months and years. *See, e.g., Automotive News Data Center*, Automotive News, http://www.autonews.com/section/datacenter11 (last visited Jan. 15, 2015).

[55] *See* GM CRS at 2-8; Chrysler CRS at 4-8; Special Inspector General for the Troubled Asset Relief Program, Report No. 14-001, *Treasury Significantly Loosened Executive Pay Limits Resulting in Excessive Pay for Top 25 Employees at GM and Ally (GMAC) When the Companies Were Not Repaying TARP in Full and Taxpayers Were Suffering Billions of Dollars in Losses* (2014), CFAS Ex. Q (detailing compensation of GM officers and employees for 2010 - 2013).

[56] *See*, *e.g.*, [General Motors] Motion of Debtors for Entry of an Order, *In re General Motors Corp*., No. 09-50026 (Bankr. S.D.N.Y. June 1, 2009), ECF No. 64 (disclosing GM's global assets and liabilities as of 2009); *id.* at 16-26 (discussing GM's primary funding sources and disclosing details concerning GM's loan and credit facilities); [Chrysler] Consolidated List of Creditors Holding 50 Largest Unsecured Claims for Voluntary Petition (Chapter 11) at 1-10, *In re Chrysler, LLC*, No. 09-50002 (Bankr. S.D.N.Y. Apr. 30, 2009), ECF No. 1 (listing Chrysler's fifty largest unsecured creditors according to the company's financial records as of April 30, 2009 and the amounts of the creditors' claims).

light of *this* inescapable fact, Treasury simply has not demonstrated – and cannot demonstrate – that release of *any* of this six-year-old historical information is likely to cause either of the "new" companies "*substantial* competitive harm." *See* Claybrook Decl. ¶ 24; *see also, e.g., Jurewicz,* 741 F.3d at 1331 (upholding agency's determination that information was not commercially sensitive "because similar information is already in the public domain").

## CONCLUSION

For all of the foregoing reasons, the government has failed to establish that *any* of the information that has been withheld from the Center is exempt from disclosure under FOIA. Accordingly, and because, as the Special Inspector General for TARP explained to Congress "[t]ransparency is [] important because *taxpayers who shouldered the burden and risk of TARP have an absolute right to know how these funds were spent, and the decision making behind TARP spending*," the government's motion for summary judgment should be denied, the Center's motion should be granted, and the government should be ordered to immediately disclose all of the withheld materials. *See Hearing Before the Subcomm. on TARP, Fin. Servs. And Bailouts of Pub. And Private Programs of the H. Comm. On Oversight and Gov. Reform*, 112 Cong. 2 (2012), CFAS Ex. HH (Written Testimony of the Honorable Christy Romero, Special Inspector General for the Troubled Asset Relief Program) (emphasis added).[57]

[57] Alternatively, the Center should be permitted to take discovery in this case, *see* Declaration of Clarence M. Ditlow submitted pursuant to Fed. R. Civ. P. 56(d), and/or the Court should conduct an *in camera* inspection of some or all of the records at issue.

Respectfully Submitted,

_____/s/_____

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