UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PETITIONER'S OPPOSITION TO RESPONDENTS' RENEWED MOTION TO COMPEL

INTRODUCTION

The Delphi Retirement Program for Salaried Employees (Delphi Salaried Plan) was a pension plan maintained by Delphi Corporation for certain of its employees, including respondents Dennis Black, Charles Cunningham, and Kenneth Hollis and certain members of respondent Delphi Salaried Retiree Association. ECF No. 1, Ex. B at 1, Ex. E ¶¶ 5-6. Underfunded according to respondents by approximately $2 billion, ECF No. 21-2 ¶ 2, and thus lacking sufficient assets in respondents' judgment to satisfy its benefit liabilities, *id.* ¶ 39, the Delphi Salaried Plan was terminated effective July 31, 2009, by agreement between Delphi and interested party Pension Benefit Guaranty Corporation (PBGC). ECF No. 1, Ex. B at 2.

Title IV of the Employee Retirement Income Support Act of 1974 (ERISA), 29 U.S.C. § 1301 *et seq.*, "establish[ed] an insurance program to meet the problem of [pension] plans terminated without assets sufficient to cover vested benefits." *Page v. PBGC*, 968 F.2d 1310, 1311 (D.C. Cir. 1992). PBGC is required under Title IV "'to provide for the timely and uninterrupted payment of pension benefits [within specified dollar limitations] to participants and beneficiaries under plans [covered by Title IV].'" *Id.* (quoting 29 U.S.C. § 1302(a)(1)). The termination of the Delphi Salaried Plan permitted PBGC to comply with the requirements of Title IV by beginning the payment of an estimated $2.1 billion from its own resources to cover the unfunded guaranteed liability of the plan. ECF No. 1, Ex. G, Att. C, Enc. ¶ 10. The termination of the plan has thus enabled PBGC to reduce to the extent permitted by Title IV the losses that certain participants in the plan have suffered, *see* ECF No. 70, Mem., at 15, because of the underfunding of the plan by Delphi. "Breathing life into the adage that no good deed goes unpunished," *Willson v. Comm'r*, 805 F.3d 316, 318 (D.C. Cir. 2015), respondents have commenced nonetheless an action against PBGC, *Black v. PBGC*, No. 2:09-cv-13616-AJT-MKM (E.D. Mich.) (*Black*), in which they challenge the validity of the termination of the plan and ask that the termination be set aside. ECF No. 70, Mem. at 1, 18; ECF No. 1, Ex. E, Prayer ¶ D.

Respondents issued petitioner U.S. Department of the Treasury (Treasury) a third-party subpoena in *Black* dated January 4, 2012, requesting three categories of documents. ECF No. 1, Ex. J, Att. A at 5-6. Treasury has responded to the subpoena by producing more than 6,000 documents comprising more than 70,000 pages. ECF No. 50-4 ¶ 2. It has also withheld 63 documents pursuant to the presidential communications privilege. ECF No. 45 at 4. Although the Court upheld Treasury's assertion of the privilege, the Court ordered Treasury to produce the

documents on the ground that respondents had demonstrated a need for them sufficient to overcome the privilege. *Id.* at 10-11; ECF No. 44 at 1. The Court's order was vacated by memorandum and judgment of the D.C. Circuit, and the case remanded to this Court with instructions to "balance the public interests at stake and more thoroughly analyze whether [respondents] demonstrated a need [for the documents] sufficient to overcome the privilege." *Treasury v. Black*, 2017 WL 6553628, at 2 (D.C. Cir. Dec. 8, 2017) (*Treasury*).

Although previously disavowing a central premise of the claims in *Black*,[1] respondents nonetheless continue to litigate *Black* and now have moved for an order compelling Treasury to produce 61 of the 63 documents covered by the presidential communications privilege. ECF No. 70, Mem. at 4 n.2. The need for the documents that respondents articulate in moving to compel the production of the documents is that the documents will help them substantiate

[1] Respondents' lead argument in *Black* is that "the PBGC's termination of the [Delphi] Salaried Plan via an agreement with the Plan's administrator, Delphi . . . was unlawful because [29 U.S.C. § 1342(c)(1)] requires the PBGC to apply for a termination decree from a United States district court." ECF No. 70, Mem. at 18-19. This argument provided the rationale for the court's decision in *Black* to "conduct a *de novo* review of the PBGC's decision to terminate the Plan," ECF No. 15-4 at 5; *see id.* at 4, and thus paved the way for extensive third-party discovery of which respondents' motion to compel is but the latest part. *See* ECF No. 70 at 20-21. The court in *Black* has never ruled, however, on the validity of the argument.

Although arguing in *Black* that § 1342(c)(1) "requires the PBGC to apply for a termination decree from a United States district court," respondents told the court the exact opposite in *In re Delphi Corp.*, No. 1:05-bk-44481 (Bankr. S.D.N.Y.), the Delphi bankruptcy proceeding. Represented by two of the same individuals who represent them in *Black* and who represent them here, respondents told the court in *Delphi* a mere two months before they commenced *Black* that "PBGC may . . . terminate a plan under § 1342 outside of a formal district court adjudication and adversarial process" by doing precisely what PBGC did in the case of the Delphi Salaried Plan: entering into an agreement with "the plan administrator . . . to terminate the plan . . . and . . . appoint[] . . . a trustee." ECF No. 21-2 ¶ 35. Leaving no doubt about their position, respondents referred the court in *Delphi* to the appellate decision recognizing the authority of PBGC to "reach[] an agreement with the plan administrator and effect what is known as a 'summary termination.'" *Id.* ¶ 29 (citing *Jones & Laughlin Hourly Pension Plan v. LTV Corp.*, 824 F.2d 197 (2d Cir. 1987)).

> one of *Black's* key allegations . . . that the termination [of the Delphi Salaried Plan] occurred as the result of politics, with Treasury having impermissibly pressured the PBGC to acquiesce in the Plan's termination as part of Treasury's political goals in restructuring the auto industry in general, and GM [General Motors] in particular.

Id., Mem.at 4. Respondents also argue that a "balancing of the public interests . . . supports disclosure" of the documents. *Id.*, Mem. at 3.

Respondents have no need for the 61 documents because nothing in any of them states, or even suggests, that Treasury pressured PBGC to terminate the Delphi Salaried Plan, much less that it did so to facilitate the restructuring of GM or any other member of the auto industry. Even apart from that reason, respondents have not demonstrated the requisite showing of need, nor should be relieved of that burden based on the erroneous suggestion that a lesser standard applies under the circumstances of this case. Respondents' motion to compel the production of the documents should therefore be denied.

ARGUMENT

I. NOTHING IN ANY OF THE 61 DOCUMENTS STATES, OR EVEN SUGGESTS, THAT TREASURY PRESSURED PBGC TO TERMINATE THE DELPHI SALARIED PLAN.

The presidential communications privilege "is qualified, not absolute, and can be overcome by an adequate showing of need." *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997). A "specific need standard" with "two components" applies to any attempt to overcome the privilege. *Id.* at 754. These components require the party seeking to overcome the privilege "[to] demonstrate: first, that each discrete group of the subpoenaed materials likely contains important evidence; and second, that this evidence is not available with due diligence elsewhere." *Id.*

Seeking to make the showing that the first component requires, respondents argue that they have a need for the 61 documents sufficient to overcome the protection afforded to the documents by the presidential communications privilege because the documents are "likely to contain important evidence" that

> the PBGC relented in its efforts to ensure the Plan's continued viability, and acquiesced in the Plan's termination, not because of anything related to its statutory role under ERISA, but as a result of pressure imposed by Treasury to support its efforts to restructure the auto industry in general and GM in particular.

ECF No. 70, Mem. at 18, 20. Respondents' argument is baseless because, in fact, nothing in any of the 61 documents states, or even suggests, that Treasury pressured PBGC to terminate the Delphi Salaried Plan, much less that it did so to facilitate the restructuring of GM or any other member of the auto industry.

That assertion is substantiated by Treasury's undersigned counsel's careful re-examination of the documents at issue. By email dated January 11, 2018, respondents' lead counsel advised Treasury's undersigned counsel that respondents intended to file a motion on remand to compel the production of some or all of the documents covered by the presidential communications privilege. Ex. A hereto ¶ 2. Treasury's undersigned counsel thereafter conducted a search in Relativity of all 63 of the documents, using the following search string:

> (Delphi or PBGC or "Pension Benefit Guaranty Corporation" or SRP or HRP or Salaried) or ((pension or house or Joe) w/25 (Snowbarger or Menke or Sheehan or greentarget or "DIP" or Elliott or "Silver Point" or lien)).

Id. Treasury had been authorized by the stipulation and order approved November 4, 2014, to use this search string to find documents responsive to respondents' subpoena dated January 4, 2012. *Id.*; *see* ECF No. 29 ¶ 2. Guided by each appearance in the 63 documents of any of the terms in the search string, Treasury's undersigned counsel re-reviewed all of the documents in full, except those that were duplicates of other such documents. Ex. A hereto ¶ 2.

Based on this careful reexamination of the subject documents, Treasury's undersigned counsel determined that no material contained in any of the 63 documents states, or even suggests, that "the termination [of the Delphi Salaried Plan] occurred as the result of politics, with Treasury having impermissibly pressured the PBGC to acquiesce in the Plan's termination as part of Treasury's political goals in restructuring the auto industry in general, and GM in particular."[2] Ex. A hereto ¶ 4; *see* ECF No. 70, Mem. at 4. Moreover, no material in any of the 63 documents states, or even suggests, that the termination of the plan was anything other than fully justified under 29 U.S.C. § 1342, the statutory provision governing the termination of pension plans. Ex. A hereto ¶ 4. On that basis alone, it is clear that respondents cannot make a "showing of need" for any of the 63 documents sufficient to overcome the protection afforded the documents by the presidential communications privilege; and that respondents' motion to compel the production of 61 of the 63 documents should be denied.[3]

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[2] Treasury's undersigned counsel determined that the term "HRP" does not appear in any of the 63 documents, nor does any of the terms in the search string containing a proximity connector. Ex. A hereto ¶ 3. Appearances in the documents of the terms "Salaried" and "SRP" refer solely to personnel of General Motors or Chrysler, not personnel of Delphi. *Id.* The term "PBGC" appears in three of the documents but the term "Pension Benefit Guaranty Corporation" does not appear in any of them. *Id.* References to Delphi appear in 39 of the documents, other than the documents that are duplicates of each other. *Id.* Treasury's undersigned counsel used these references to look for material in the documents dealing with the Delphi pension plans. *Id.* Material dealing with the Delphi pension plans, PBGC, or both appears in seven of the documents, Doc. Nos. 627, 763-767, and 770. *Id.* Doc. No. 627 is the oldest of the seven documents, followed in chronological order by Doc. Nos. 770, 764, 763, 765, 767, and 766. *Id.* Doc. Nos. 765 and 767 are duplicates of each other. *Id.* The amount of material in the seven documents that deals with the Delphi pension plans, PBGC, or both totals approximately five pages because Doc. Nos. 627 and 770 deal mainly with other things and Doc. Nos. 763, 765, and 767 are brief email strings. *Id.*

[3] The Court can verify the findings and conclusions of Treasury's undersigned counsel by conducting its own review of any or all of the 63 documents on an *in camera, ex parte* basis. Ex. A hereto ¶ 5. Treasury's undersigned counsel has prepared two sets of materials to facilitate the Court's review of the documents. *Id.* Either or both of these sets of materials will be made available to the Court upon request. *Id.* The first set of materials consists of the seven

That result is also warranted because respondents would not be entitled to remedial relief in *Black* even if the documents contained evidence that Treasury pressured PBGC to terminate the Delphi Salaried Plan. PBGC is authorized in any case in which it determines that a pension plan should be terminated for any of certain enumerated reasons to apply for a court order "adjudicating that the plan must be terminated in order to protect the interests of the participants or to avoid an unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the [insurance] fund [established under Title IV]." 29 U.S.C. § 1342(c)(1). Respondents therefore argue that they have a need for the 61 documents sufficient to overcome the protection afforded the documents by the presidential communications privilege because the documents will help them substantiate the exertion of the alleged pressure. *See id.* at 21.

But whether PBGC could have obtained a court order is a question whether the statutory criteria were satisfied. *See* 29 U.S.C. § 1342(c)(1). And the underlying decision by PBGC to apply for an order under § 1342(c)(1) would not have been subject to judicial review because "'a court would have [had] no meaningful standard against which to judge [PBGC's] exercise of discretion' in deciding how to enforce the statutory provisions." *See Ass'n of Irritated Residents v. EPA*, 494 F.2d 1027, 1030 (D.C. Cir. 2007) (quoting Heckler *v. Chaney*, 470 U.S. 821, 830

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documents that contain material dealing with the Delphi pension plans, PBGC, or both. *Id.* The documents in this set of materials are arranged in chronological order for purposes of context. *Id.* All portions of the documents that deal with anything other than the Delphi pension plans or with PBGC have been redacted to expedite the review of those portions of the documents that deal with either or both of those subjects. *Id.* The second set of materials consists of a complete set of the 63 documents from which nothing has been redacted. *Id.* Each appearance in any of the documents of any of the terms contained in the search string prescribed by the stipulation and order approved November 4, 2014, is highlighted, as is contextual material adjacent to each appearance of the terms. *Id.* A sheet is included for each document identifying the terms in the search string as they appear in the document. *Id.*

(1985) (explaining that decisions to enforce statutory provisions are generally excluded from review for this reason).[4]

Finally, because the Supreme Court has "insist[ed] that privileged presidential communications should not be treated as just another source of information," *Sealed Case*, 121 F.3d at 755 (citing *United States v. Nixon*, 418 U.S. 683 (1974) (*Nixon*)), the demonstration of need for documents covered by the privilege must include a showing that the evidence allegedly contained in documents "is not available with due diligence elsewhere." *Sealed Case*, 121 F.3d at 754. Respondents' argument that "[t]he information sought here is not available with due diligence elsewhere," ECF No. 70, Mem. at 33, is undercut by their admission that "[t]he communication between the Auto Task Force and PBGC on Delphi issues took place almost exclusively through two individuals, Joe House at the PBGC, and the Auto Team's Matt Feldman." *Id.*, Mem. at 27. Respondents already have taken the deposition of Mr. House. *See id.*, Mem. at 27-28. They plan to take the deposition of Mr. Feldman, *see* ECF No. 73 at 5, and thus can question him about "[t]he communication between the Auto Task Force and PBGC on Delphi issues." *See* ECF No. 70, Mem. at 27. Respondents did not need the 61 documents to take the deposition of Mr. House and likewise do not need them to take the deposition of Mr. Feldman.

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[4] A court is empowered by the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706, to "review final agency actions, including an agency's promulgation of a rule." *Ass'n of Irritated Residents*, 494 F.2d at 1030. "Excluded from [the] court's review, however, are agency actions that are 'committed to agency discretion by law.'" *Id.* (quoting 5 U.S.C. § 701(a)(2)). "Enforcement actions are generally within this exclusion, because 'a court would have no meaningful standard against which to judge the agency's exercise of discretion' in deciding how to enforce the statutory provisions." *Id.* (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)).

Respondents complain that Mr. House was unable at his deposition to answer questions about the minutiae of his conversations with Mr. Feldman. *See* ECF No. 70, Mem. at 28. Mr. Feldman similarly may be unable to recall all the details of his conversations with Mr. House but presumably will be able to say whether Treasury "pressured the PBGC to acquiesce in the Plan's termination as part of Treasury's political goals in restructuring the auto industry in general, and GM in particular." *Id.*, Mem.at 4. The testimony of Mr. Feldman, therefore, is the only additional discovery that respondents need in this case, assuming that that they need any additional discovery.

II. RESPONDENTS' BURDEN IS NOT LESSENED BECAUSE OF THE CIRCUMSTANCES OF THIS CASE.

The D.C. Circuit has explained that where, as here, "the presidential communications privilege has been established, the standard for overcoming the privilege 'balance[s] the public interests served by protecting the President's confidentiality in a particular context with those [public interests] furthered by requiring disclosure.'" *Treasury*, 2017 WL 6553628, at *1 (quoting *Sealed Case*, 121 F.3d at 753). And, as this Court has acknowledged, the two-part assessment of need is the "standard for overcoming the [presidential communications] privilege" that the D.C. Circuit has said best reflects this balancing. ECF No. 45 at 10 (explaining that respondents must show both "(1) that the subpoenaed material likely contains evidence 'directly relevant to issues that are expected to be central to the trial[;]' and (2) that the evidence 'is not available with due diligence elsewhere'" (quoting *Sealed Case*, 121 F.3d at 745)).

Indeed, in this case, the court of appeals expressly acknowledged that respondents must "bear the burden" of making the two-part showing of need described in *In re Sealed Case*. *Treasury*, 2017 WL 6553628, at *2. But the court went on to observe that simply reciting the standard from *In re Sealed Case* or from *Dellums v. Powell*, 561 F.2d 242, 249 (D.C. Cir. 1977)

– as this Court did in its April 2017 decision – "does not account for how the public interests in this case differ from those presented in [those] prior decisions." *Id.* The court of appeals specifically noted that "'in the criminal context'"– as was the context for the *In re Sealed Case* decision – "'the need for information is much weightier' than the need in the civil context." *Treasury*, 2017 WL 6553628, at *2 (quoting *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 384 (2004), and citing *Sealed Case*, 121 F.3d at 743). The court also noted that "'[a]ssuming arguendo a former President may present a claim of presidential privilege'" – as was the context for the *Dellums* decision – "'[that assertion of privilege] is entitled to lesser weight than that assigned the privilege asserted by an incumbent President.'" *Id.* (quoting *Dellums*, 561 F.2d at 245).

On remand, the court instructed this Court to address "the public interests at stake" by accounting for the ways in which the context here differs from such prior cases. Here, the underlying action is a civil case, not a criminal proceeding, and the privilege has been asserted on behalf of the Office of the President, not by a former President acting in his personal capacity. These distinctions from prior cases – highlighted by the court of appeals – suggest that a heightened standard should apply that would require respondents to make a particularly strong showing of need, beyond that which was required in *In re Sealed Case*. Respondents' contrary suggestion that a "less stringent" standard should apply is meritless. ECF No. 70, Mem. at 17. They purport to identify "five factors" that establish that the privileged status of the 61 documents at issue may be effectively disregarded. *Id.*, Mem. at 6. But these factors are without support in the case law, and cannot be reconciled with the purposes underlying the presidential communications privilege.

First, respondents claim that the privilege accorded to these materials must be "narrowly construed" because 60 of the 61 documents "did not involve the President himself." ECF No. 70, Mem. at 6. It is well established, however, that the presidential communications privilege applies to "communications authored or solicited and received by those members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate," *Sealed Case*, 121 F.3d at 752, not merely "those materials with which the President is 'personally familiar.'" *Id.* at 749. The privilege thus applies fully, as this Court held, to all 61 of the documents. ECF No. 45 at 4, 10.

Second, respondents urge that the documents are only weakly protected because none "implicate[s] national security or diplomatic concerns." ECF No. 70, Mem. at 8. The privilege applies, however, to any "'conversation[] that take[s] place in the President's performance of his official duties.'" *See Sealed Case*, 121 F.3d at 742 (quoting *Nixon v. Sirica*, 487 F.2d 700, 717 (D.C. Cir. 1973) (en banc)). The privilege thus applies to documents other than those that deal with "national security or diplomatic concerns." *See, e.g., Loving v. Dep't of Defense*, 550 F.3d 32, 40 (D.C. Cir. 2008) (upholding the application of the privilege to documents prepared for the President in connection with his review of a military death sentence); *Citizens for Resp. & Ethics in Wash. v. Dep't of Homeland Sec.*, 514 F. Supp. 2d 36, 48 (D.D.C. 2007) (upholding the application of the privilege to documents prepared to provide the President with advice and recommendations in the wake of Hurricane Katrina).

Third, respondents suggest that "public testimony has . . . been offered . . . on the subject [of] . . . the Delphi Salaried Plan and its termination." ECF No. 70, Mem. at 9. The approach of the attorney-client privilege "has not been adopted," however, "with regard to executive

privileges." *Sealed Case*, 121 F.3d at 741. "Instead, courts have said that [the] release of a document only waives these privileges for the document or information specifically released, and not for related materials." *Id.* The public testimony to which respondents refer thus places no limitation on the protection that the 61 documents enjoy under the presidential communications privilege even assuming, as is not necessarily the case, that the 61 documents "'relat[e] to the same subject matter'" as the public testimony. *See id.* (quoting *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982)).

Fourth, respondents observe that the 61 documents "are nearly a decade old." ECF No. 70, Mem. at 10. The presidential communications privilege is not defeated, however, by the mere passage of time. Though the privilege is "subject to erosion over time after an administration leaves office," the privilege "survives [an] individual President's tenure" because "the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 449, 451 (1977). Acting on behalf of the Office of the President, the Deputy Counsel to the President asserted the privilege with respect to the 61 documents by declaration dated August 6, 2015, reaffirming no significant erosion here. ECF No. 35-3 ¶ 4.

Finally, respondents claim that the privileged status of these 61 communications is easily overcome because the record lacks "[any] representation that President Obama personally invoked the privilege." ECF No. 70, Mem. at 12. But no such representation is required. *See, e.g., Citizens for Responsibility & Ethics in Washington v. Department of Homeland Security*, 514 F. Supp. 2d 36, 48 n.10 (D.D.C. 2007) (holding that "a member of the Homeland Security Council Staff, a component of the Executive Office of the President" is entitled to invoke the

privilege). The invocation of the privilege in this case by the Deputy Counsel to the President thus is sufficient.

CONCLUSION

Respondents' renewed motion to compel, ECF No. 70, should be denied for the foregoing reasons.

Respectfully Submitted,

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Dated: March 16, 2018

CERTIFICATE OF SERVICE

I hereby certify that I served the within memorandum and the exhibit to the memorandum on all counsel of record by filing them with the Court by means of its ECF system on March 2, 2018.

s/ *David M. Glass*