IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

RESPONDENTS' RENEWED MOTION TO COMPEL

Pursuant to the Court's Minute Order of February 1, 2018, Respondents hereby respectfully move for an order compelling the production of 61 documents that the Petitioner United States Department of Treasury has withheld under the Presidential Communications Privilege. The grounds for this motion are set forth in the accompanying memorandum.

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RESPONDENTS' MEMORANDUM IN SUPPORT OF
THEIR RENEWED MOTION TO COMPEL

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INTRODUCTION & BACKGROUND

As the Court is aware, this ancillary proceeding was initiated six years ago when Petitioner, the U.S. Department of Treasury ("Treasury"), moved to quash Respondents' subpoena requesting the production of a narrow universe of documents relating to Treasury's involvement in the 2009 termination of Respondents' pension plan by the Pension Benefit Guaranty Corporation ("PBGC"). Respondents are retired salaried employees of the Delphi Corporation ("Delphi") and an association of retired salaried employees of Delphi; they are also plaintiffs in a lawsuit filed in the Eastern District of Michigan (the "Michigan Court"), styled as *Black v. PBGC*, Case No. 2:09-cv-13616 ("*Black*").

The Court denied Treasury's motion to quash in 2014. *See* ECF Nos. 26 and 27. Since then, this Court "has expended considerable judicial resources in evaluating Treasury's various claims of privilege over those documents, conducting an *in camera* review of hundreds of documents across multiple rounds of briefing." ECF No. 53 at 1. During the process, the Court noted that Treasury had "miserably failed" in justifying its assertions of the deliberative process privilege, "essentially wast[ing]" the Court's time, ECF No. 42 at 12, and later observed that it "had some very serious concerns about whether the government's proceeding in good faith or not." ECF No. 61 at 4:10-11 (Hr'g Tr. May 16, 2017). The Treasury's dilatory behavior was especially concerning because the *Black* proceedings had been stayed since July 2015 to allow for the resolution of the Treasury's privilege claims. *See* Stipulated Order, *Black v. PBGC*, No. 2:09-cv-13616 (E.D. Mich. July 23, 2015) ECF No. 274.

On April 13, 2017, the Court resolved the last of those privilege claims and, *inter alia*, ordered Treasury to produce 63 documents that it had asserted were protected under the

presidential-communications privilege.[1] ECF No. 45. While finding that the 63 documents were covered by the presidential-communications privilege, the Court also held that, under the needs standards articulated in *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997) ("*In re Sealed Case*"), and *Dellums v. Powell*, 561 F.2d 242 (D.C. Cir. 1977) ("*Dellums*"), Respondents had made an adequate showing of need to overcome the privilege and require disclosure. ECF No. 45 at 10-11. In support of its determination, the Court observed that Treasury had failed to "substantively engage in the needs analysis or attempt to distinguish the cases upon which Respondents rely," and stated that, "for substantially the same reasons advanced by Respondents," the Court was "persuaded that Respondents have made 'at least a preliminary showing of necessity for information that is not merely demonstrably relevant but indeed substantially material to their case.'" *Id*. at 11 (quoting *Dellums*, 561 F.2d at 249).

Treasury appealed the Court's disclosure orders, arguing, among other things, that the Court "signally failed to apply the correct standard," Brief of Appellant at 12, *U.S. Dep't of Treasury v. Black*, No. 17-5142 (D.C. Cir. Aug. 28, 2017)) Doc. #1690332, and arguing that the Court "failed to execute its responsibilities under governing law in ordering disclosure." *Id*. at 15. Following multiple rounds of briefing and oral argument, the Court of Appeals determined that the record was inadequate for appellate review. Judgment & Memorandum at 1, *U.S. Dep't of Treasury v. Black*, No. 17-5142 (D.C. Cir. Dec. 8, 2017)) Doc. #1708057 ("Dec. 8 Order"). Noting that district court rulings on document subpoenas are generally reviewed only for arbitrariness or abuse of discretion so long as the decision is supported by the record and applies the correct legal standard, *id*. at 3 (internal quotations omitted), the Court of Appeals vacated the

[1] The Court later modified the April 13 Order to require production only of those portions of the documents that relate to General Motors, Delphi, or the PBGC, pursuant to a protective order agreed to by the parties. *See* Minute Order of July 12, 2017.

Court's production Order and remanded the case back to the Court to "balance the public interests at stake and more thoroughly analyze whether [Respondents] demonstrated a need sufficient to overcome the privilege." *Id.* at 5. With regard to the first question (concerning the public interests), the Court of Appeals agreed that "[o]nce the presidential communications privilege has been established, the standard for overcoming the privilege 'balances[s] the public interests served by protecting the President's confidentiality in a particular context with those [public interests] furthered by requiring disclosure.'" *Id*. at 3 (quoting *In re Sealed Case*, 121 F.3d at 753). The Court of Appeals specifically noted that in balancing the public interests at stake in this case, the Court should "account for how the public interest in this case differs from those presented in [the Circuit's] prior decisions." *Id*. at 4. As for the second question, the Court of Appeals' Dec. 8, 2017 decision instructs that, instead of relying on "unidentified reasons from Retirees' brief along with Treasury's purported failure to challenge Retirees' arguments," this Court should "explain how Retirees met their burden to demonstrate a need sufficient to overcome the privilege." *Id*. at 5.

The first section of this brief provides a thorough analysis of the balancing of the public interests, an analysis that strongly supports disclosure in this instance. As described below, the interest in maintaining confidentiality here is significantly diminished from that in previous cases, while the interests in disclosure are at least as significant. Accordingly, the Court's previous articulation of the needs standard was sound.

The second section of this brief addresses specifically the need showing. The Court of Appeals appeared simply to want some documentation of the record support for this Court's conclusion that Respondents had satisfied the need showing. The Court has already documented many of these findings in other orders, but Respondents have again summarized their need

showing in this brief. As Respondents detail below, *Black* challenges the PBGC's termination of Respondents' pension plan (the "Salaried Plan" or the "Plan"), which the PBGC purported to accomplish via an agreement with the Plan's administrator during a time when Delphi was in bankruptcy and the federal government was restructuring General Motors ("GM") and other players in the U.S. automobile industry.

With respect to the needs question underlying this proceeding, one of *Black's* key allegations is that the termination 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. PBGC officials have routinely testified in depositions as to an inability to recall the details of their interactions with Treasury, and as the Court has already concluded, the withheld documents, which largely consist of Treasury memoranda and emails, all likely contain evidence directly relevant to the question of what role Treasury played in the events preceding the Plan's termination, and whether the termination could have been sustained had the PBGC sought to obtain a judicial decree under the statutory criteria laid out under the Employee Retirement Income Security Act of 1974 ("ERISA"). In the need analysis in the second section of this brief, Respondents provide a detailed description of their need showing for each of the three discrete groups of documents at issue.[2]

Finally, Respondents note that they are also today filing with the Court a motion for leave to file under seal an *ex parte* submission further documenting their specific need for these

[2] The Court's previous production Order dealt with four categories of documents, one of which was drafts of a March 28, 2009 Presidential speech. *See* ECF No. 45 at 4 & n.1. Though they believe they are entitled to that category too, Respondents wish to make these proceedings as uncontroversial and uncomplicated as possible for the Court and, therefore, no longer seek the production of that category of document. Accordingly, this motion concerns only 61 of the 63 documents the Court previously considered.

documents, consistent with the showing made by the Independent Counsel in *In re Sealed Case*. *See In re Sealed Case*, 121 F.3d 729, 736, 760 (D.C. Cir. 1997) (noting that the independent counsel supported its need for documents covered by the presidential communications privilege through an *ex parte* submission).

ARGUMENT

I. THE BALANCING OF INTERESTS IN THIS CASE FAVORS DISCLOSURE, NOT CONFIDENTIALITY

The presidential communications privilege may be invoked by the President "when asked to produce documents or other materials that reflect presidential decisionmaking and deliberations and that the President believes should remain confidential." *In re Sealed Case*, 121 F.3d at 744. The privilege "should be narrowly construed," given that, like all "'exceptions to the demand for every man's evidence,'" its application is "'in derogation of the search for truth.'" *Id*. at 749 (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974) ("*Nixon*") (additional citations and internal quotation marks omitted)). Further, because "openness in government has always been thought crucial to ensuring that the people remain in control of their government," the arguments for applying a narrow construction of the privilege are "particularly strong in cases . . . where the public's ability to know how its government is being conducted is at stake." *Id*. Indeed, "[t]he very reason that presidential communications deserve special protection, namely the President's unique powers and profound responsibilities, is simultaneously the very reason why securing as much public knowledge of presidential actions as is consistent with the needs of governing is of paramount importance." *Id*.

The presidential communications privilege "is, at all times, a qualified one, so that an expansion to cover communications of presidential advisers which do not directly involve the President does not mean that these communications will become permanently shielded; they will

remain available upon a sufficient showing of need." *In re Sealed Case*, 121 F.3d at 751. Even in cases where confidential communications directly involving the President are it issue (where the President's confidentiality concerns are at their apex), "the legitimate needs of the judicial process may outweigh Presidential privilege," making it "necessary to resolve those competing interests in a manner that preserves the essential functions of each branch." *Nixon*, 418 U.S. at 707. Evaluating need in the context of the presidential communications privilege requires that courts employ a "balancing methodology," weighing on the one hand "the public interests served by protecting the President's confidentiality in a particular context," against the public interests that would be "furthered by requiring disclosure." *In re Sealed Case*, 121 F.3d at 753. Here, the balance weighs strongly in favor of disclosure.

A. The Public's Interest In Maintaining Confidentiality Here Is Not Significant

When measured against prior controlling case law from the Circuit and the Supreme Court, there are at least five factors demonstrating that there is no compelling public interest in maintaining the confidentiality of these sixty-one documents.

1. Because These Communications Did Not Involve the President of the United States Personally the Privilege Must Be Narrowly Construed, and Its Demands are Further Attenuated in Light of the Operational Distance of the Advisors Involved

Because these communications did not involve the President himself (save for one document), the privilege must be narrowly construed. The presidential communications privilege "is rooted in the need for confidentiality to ensure that presidential decisionmaking is of the highest caliber, informed by honest advice and full knowledge." *In re Sealed Case*, 121 F.3d at 750. Because "the President's Article II powers and responsibilities" provide the "constitutional basis" of the privilege, and those responsibilities are assigned "to the President alone, arguably the privilege of confidentiality that derives from them also should be the

President's alone." *Id*. at 748 (citing *Nixon*, 418 U.S. at 705 & n.16). However, in *In re Sealed Case*, the D.C. Circuit held that the privilege can extend, in some cases, "to the communications of *presidential advisers* not directly involving the President." *Id*. at 749 (emphasis added). In that case, a grand jury investigating a former Secretary of Agriculture issued a broad subpoena to the White House Counsel for deliberative documents created by White House advisers, but never viewed by the President. *Id.* at 734-35. While the Court of Appeals upheld the application of the privilege to those documents, it also warned that the extension required caution, as it "inevitably creates the risk that a broad array of materials in many areas of the executive branch will become sequestered from public view." *Id*. at 749 (internal quotation marks and citation omitted); *see also id*. at 752 (warning that extension of the privilege to presidential advisers, "unless carefully circumscribed to accomplish the purposes of the privilege, could pose a significant risk of expanding to a large swath of the executive branch a privilege that is bottomed on a recognition of the unique role of the President"). Accordingly, "[i]n order to limit this risk, the presidential communications privilege should be construed as narrowly as is consistent with ensuring that the confidentiality of the President's decisionmaking process is adequately protected." *Id.*

Treasury's assertion of the privilege here requires the same narrow construction as discussed in *In re Sealed Case*, as "[t]he vast bulk of the documents," ECF No. 45 at 5, did not involve the President, but were instead either draft memoranda from Treasury staffers to Dr. Lawrence Summers or email conversations among those staffers ostensibly concerning advice to be provided to the President. *See id*. at 5, 9 (noting that sixty of the sixty-three documents at issue fell into these two categories). Because all but one of the documents Respondents seek here did not directly involve President Obama, the public interest here is largely similar to that in

In re Sealed Case, and so the presidential communications privilege must be "carefully circumscribed" as to them. *In re Sealed Case,* 121 F.3d at 752.

Moreover, the D.C. Circuit has also noted that there is a "hierarchy of presidential advisers," such that the "demands of the privilege" become further "attenuated" as the operational distance of the advisors from the President increases. *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1115 (D.C. Cir. 2004). In *Judicial Watch*, the government sought to extend the privilege beyond the President's inner circle of advisers "to officials within the Justice Department whose sole function . . . is to advise and assist the President in the performance of his non-delegable pardoning duty." *Judicial Watch*, 365 F.3d at 1114. The court "decline[d] to sanction such an extension of the presidential communications privilege to all agency documents prepared in the course of developing the Deputy Attorney General's pardon recommendations for the President." *Id*. No less than the Justice Department advisors described in *Judicial Watch*, the Treasury staffers responsible for the majority of the communications here were, with the exception of Dr. Summers, so removed operationally from the President as to further "attenuate" the "demands of the privilege." *Id.* at 1115.

2. The Commercial Nature of These Communications Further Diminishes the Argument that the Public Has an Interest in Maintaining Their Confidentiality

The commercial nature of these documents also argues against a need for confidentiality. While the public interest in maintaining confidentiality is at its highest where there is "a claim of need to protect military, diplomatic, or sensitive national security secrets," the interest is much less acute "when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations." *Nixon*, 418 U.S. at 706. Here, none of the documents implicate national security or diplomatic concerns; rather, "all of the withheld documents 'relate to the President's decision as to how the United States should address the

financial distress of several of its large automobile corporations and protect the country from the potential consequences of their bankruptcy.'" ECF No. 45 at 6 (quoting Decl. of Jennifer M. O'Connor ¶ 7 (ECF No. 35-3).

Further, *In re Sealed Case* distinguished between documents generated in connection with a "quintessential and non-delegable Presidential power" on the one hand (such as in the appointment or removal context), versus those that can be executed "without the President's direct involvement" on the other (like the duty to take care that the laws are faithfully executed), *In re Sealed Case*, 121 F.3d at 752, 753, noting that there is some "assurance" that the former category of documents "are intimately connected" to "presidential decisionmaking." *Id*. at 753. Indeed, the D.C. Circuit in *In re Sealed Case* noted that "confidentiality [wa]s particularly critical" in that case because it occurred "in the appointment and removal context." *Id*. Here, by contrast, there is no equivalent need for confidentially, and rather than implicating the sort of non-delegable removal powers that were present in *In re Sealed Case*, the executive decision-making here, *i.e.*, how to address the financial distress and potential bankruptcy of several automobile corporations, is of precisely the sort that "can be exercised or performed without the President's direct involvement, pursuant to a presidential delegation of power or statutory framework." *Id*.

3. Because Public Testimony Has Been Offered on This Subject, the Public's Interest in Maintaining the Confidentiality of These Documents Is Substantially Diminished

The public's "interest in maintaining the confidentiality" of a subject is also "*substantially diminishe[d]*" where public testimony has already been offered on the subject. *Nixon v. Sirica*, 487 F.2d 700, 718 (D.C. Cir. 1973) ("*Sirica*") (emphasis added). Here, there have been "numerous congressional hearing at which the Delphi Salaried Plan and its termination have been discussed" ECF No. 27 at 21 (internal quotation marks and citation

omitted), and Mr. Feldman has commented specifically about the decision-making process concerning the Plan's termination, including before Congress. *See* Oral and Written Statement of Matthew Feldman, *Oversight of the SIGTARP Report on Treasury's Role in the Delphi Pension Bailout: Hearing Before the H. Subcommittee on Government Operations of the Committee on Oversight and Government Reform*, 95-101 (Sept. 11, 2013) (ECF No. 30-6); Testimony, Oral and Written Statement of Matthew Feldman, *The Administration's Auto Bailouts and the Delphi Pension Decisions: Who Picked the Winners and Losers?: Hearing Before the H. Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs of the Committee on Oversight and Government Reform*, 33-37, and generally 71-108 (July 10, 2012) (ECF No. 30-3); Deposition of Matthew Feldman, July 21, 2009, *In re Delphi Corporation*, No. 04-44481 (Bankr. S.D.N.Y) (ECF No. 30-4). Moreover as Treasury's counsel noted during one hearing before the Court, "[o]ne of the fellows who was on the group at Treasury that worked on the restructuring of GM wrote a book about it." ECF No. 61 at 12:10-11 (referring to Steven Rattner).

4. The Fact That These Communications Are Nearly a Decade Old, and That the Public's Access to the Documents Would be Limited by Protective Order, Further Diminishes Any Public Interest in Maintaining the Confidentiality of These Communications

The Supreme Court, additionally, has made clear that the passage of time can also diminish the concern of impairing candid communications with Presidential advisors, as "there has never been an expectation that the confidences of the Executive Office are absolute and unyielding" and such expectations have "always been limited and subject to erosion over time after an administration leaves office." *Nixon v. Adm'r of General Servs.*, 433 U.S. 425, 450-51 (1977) ("*GSA*"). Again, the documents here are nearly a decade old. Whatever interest there might have been in maintaining the confidentiality of these documents in the immediate wake of

the government's auto bailout has necessarily waned. Also in *GSA*, the Court noted as relevant the minimal level of the proposed intrusion, finding there that the "very limited intrusion" of screening by archivists, *id*., coupled with "the restriction [of] public access" provided in connection with the subsequent disclosure, diminished any the concerns for maintaining confidentiality of the materials in question. *Id*. at 450. As was the case in *GSA*, the level of intrusion is minimal here, as Respondents propose requiring the production of the documents pursuant to a protective order, such that the general public would not have access to the documents.

5. Because No President, Current or Former, Has Personally Invoked the Presidential Communications Privilege, the Public's Interest in Maintaining the Confidentiality of These Documents Is Necessarily Less Than in *Dellums*

Treasury has previously argued that the confidentiality interests are greater here than they were in *Dellums*, but contrary to those arguments, *Dellums* actually requires the opposite result. As a preliminary matter, *Dellums* involved a subpoena that sought tapes and transcripts of President Nixon's confidential conversations, the disclosure of which plainly implicated Presidential confidentiality. The Treasury documents at issue here, which again were never even reviewed by a President, are a far cry from the materials at issue in *Dellums*. Moreover, in *Dellums*, the court emphasized that "the significance of the assertion by a former president is diminished when the succeeding president does not assert that the document is of the kind whose nondisclosure is necessary to the protection of the presidential office and its ongoing operation." *Dellums*, 561 F.2d at 248. Here, the current President of the United States has not made such an assertion, despite having had ample opportunity to do so. Nonetheless, on appeal Treasury asserted that the public interest in preserving confidentiality is supposedly greater here than in *Dellums* because the "Office of the President" invoked the privilege in 2015, and government

attorneys "continue[] to defend its assertion in this litigation on behalf of the Office of the President." Br. of Appellant at 20, *U.S. Dep't of Treasury v. Black*, (No. 17-5142 (D.C. Cir. Aug. 28, 2017), Doc #169332.

But the discretion to assert the privilege has been long recognized as belonging solely to the President, as opposed to other individuals in the Executive Branch. In 1807, during Aaron Burr's trial for treason, "President Jefferson asserted the privilege in an effort to avoid producing a letter that he had received form General Wilkinson, one of Burr's main accusers." *In re Sealed Case*, 121 F.3d at 738 (citing *United States v. Burr*, 25 F. Cas. 30, 37 (CC Va. 1807) (No. 14,692d)). "Although Burr was acquitted in his treason trial before there were proceedings on his subpoena, he was immediately put on trial again on misdemeanor charges and as a result sought production of another letter Wilkinson had sent to Jefferson." *Id*. (citation omitted). President Jefferson attempted to delegate to the prosecuting U.S. Attorney the ability to determine which portions of this second letter should be withheld, but Chief Justice Marshall (riding circuit) rejected that delegation, ordering that the "letter be provided to Burr in its entirety, because 'the propriety of withholding [the letter] must be decided by [the President] himself.'" *Id*. at 739 (quoting *United States v. Burr*, 25 F. Cas. 187, 192 (CC Va. 1807) (No. 14,694) (alterations in original)).

Here, there has been no representation that President Obama personally invoked the privilege in 2015. *See* Decl. of Jennifer M. O'Connor ¶ 4 (ECF No. 35-3) (invoking the privilege on behalf of "Office of the President"). Leaving aside the question of whether someone in the government other than the President himself is constitutionally qualified to invoke the privilege on behalf of the "Office of the President" in the first place, *see, e.g., Judicial Watch*, 365 F.3d at 1114 ("the issue of whether a President must *personally* invoke the privilege remains

an open question") (emphasis added), the invocation of the privilege by someone other than the President, when there is no accompanying representation that the President was even consulted in its invocation, cannot carry the same constitutional weight as the invocations in *Dellums*, *In re Sealed Case*, *Nixon*, *GSA*, and *Sirica*, all of which were expressly made on behalf of an actual President, not ambiguously on behalf of the institutional "Office of the President." *See In re Sealed Case*, 121 F.3d at 744 n.16 (noting that in *Nixon*, *Sirica*, and *GSA* "President Nixon personally asserted" the privilege, and that in the case before it, an affidavit indicated that "President Clinton has done so here"); *Dellums*, 561 F.2d at 243 (noting that former President Nixon was personally asserting the privilege); *see also Sun Oil Co. v. United States*, 514 F. 2d 1020, 1021 n.1 (Ct. Cl. 1975) (noting that the original claim of executive privilege in the case, made by the President's counsel, was rejected because it was not claimed personally by President Nixon).

While Treasury has pointed to language in *Dellums* noting that the privilege "inher[es] in the institution of the Presidency," rather than the President as an individual, *Dellums*, 561 F.2d at 247 n.14, that was not a holding that the privilege belonged to the government generally, or even the Office of the President more specifically. Instead, the court was explaining why a former President's invocation of the privilege is entitled to less weight than that of an incumbent President; indeed, the court went on to note the primacy of the President himself in the process, emphasizing that it is "the new President . . . who has the primary, if not the exclusive, responsibility of deciding when presidential privilege must be claimed," *id*. at 247, and that the privilege "must be claimed by the president or an official authorized to speak for the president." *Id*. at 248. "The very reason that presidential communications deserve special protection, namely *the President's* unique powers and profound responsibilities," *In re Sealed Case*, 121

F.3d at 749 (emphasis added), mitigates strongly against assigning much weight to the unattributed assertion of the privilege here by the "government," on behalf of the "Office of the President." *See* Letter from Abby C. Wright to Mark Langer at1, *U.S. Dep't of Treasury v. Black*, No. 17-5142 (D.C. Cir. Aug.1, 2017) Doc. #1686682.

B. The Public Has a Substantial Interest in Requiring Disclosure Here

1. Even in Routine Civil Litigation, the Public Interest in Disclosure Is Far from Negligible

In terms of assessing the public's interest in disclosure, while "[t]he need for information for use in civil cases . . . does not share the urgency or significance" of a criminal subpoena, this fact alone is not dispositive, and the Supreme Court has cautioned that, even in routine civil cases, a litigant's need for information is "far from negligible." *Cheney v. United States Dist. Ct.*, 542 U.S. 367, 384 (2004). Accordingly, both the D.C. Circuit and other courts have "held that the presidential communications privilege could be overcome by the evidentiary demands of a civil trial." *In re Sealed Case*, 121 F.3d at 744 (citing *Dellums*, 561 F.2d at 247, and *Sun Oil Co. v. United States*, 514 F.2d 1020, 1024 (Ct. Cl. 1975)). In fact, even in the context of civil litigation under the Freedom of Information Act, where there was no showing of litigation need, the D.C. Circuit has ordered the production of Department of Justice documents generated in the course of preparing pardon recommendations for the President, noting that "[c]ourts have long been hesitant to extend the presidential communications privilege" too far, "for ours is a democratic form of government where the public's right to know how its government is conducting its business has long been an enduring and cherished value." *Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1122 (D.C. Cir. 2004) (citing *In re Sealed Case*, 121 F.3d at 749).

2. Because This Case Presents Credible Allegations That Government Officials Have Interfered with Important Statutory and Constitutional Rights, the Public's Interest in Disclosure Here is Especially Strong

In *Dellums*, the D.C. Circuit held that in some civil actions there can be "a strong constitutional value in the need for disclosure" where "high officers of government" are alleged to have interfered with the "enforcement of constitutional rights." *Dellums*, 561 F.2d at 247. In light of these considerations, the public's interest in disclosure in this case is at least as powerful as the public interest in disclosure described in *Dellums*. Here, Respondents' suit (in the Michigan Court) asserts that their pension plan was terminated in violation of both ERISA and the United States Constitution; both of these claims implicate significant public concern. *Dellums* recognized the "strong constitutional value in the need for disclosure" where "high officers of government" are alleged to have interfered with the "enforcement of constitutional rights." *Id*. Similarly, ERISA too involves a substantial public interest, as it was passed "with the overwhelming purpose of protecting the legitimate expectations . . . of a measure of retirement security at the end of many years of dedicated service." *Page v. PBGC*, 968 F.2d 1310, 1317 (D.C. Cir. 1992) (Ruth B. Ginsburg, J.). Respondents allege that Treasury officials improperly interfered with those expectations for the sake of political expediency, in violation not only of ERISA, but also (as stated in Count Three of their complaint) in violation of the Due Process Clause of the Fifth Amendment to the Constitution.

Like *Dellums*, *Black* concerns a suit in which thousands were harmed by alleged government wrongdoing. The Plan covers roughly 20,000 participants, who lost hundreds of millions of dollars in pension benefits in the aggregate, resulting in individual pension reductions of between 30-70% on average. *Black* alleges that the Plan was terminated for impermissible reasons, and that the PBGC bypassed the essential protections guaranteed by ERISA and the

Constitution, protections that are designed to ensure that the "'personal tragedy'" that accompanies a pension termination occur only as a last resort. *Page*, 968 F.2d at 1316 (quoting *Nachman Corp. v. PBGC*, 446 U.S. 359, 374 & n.21 (1980)).

In addition, as the D.C. Circuit observed in *In re Sealed Case* and as mentioned earlier, because "openness in government has always been thought crucial to ensuring that the people remain in control of their government," the arguments for applying a narrow construction of the privilege are "particularly strong in cases" like this one, "where the public's ability to know how its government is being conducted is at stake." *In re Sealed Case*, 121 F.3d at 749. In fact, the public interest in understanding the extent of Treasury's influence in these events extends beyond Respondents' litigation needs. As noted elsewhere, the other branches of government have noted the importance of these issues, with Congress having held multiple hearings on the issue, and the Special Inspector General for TARP conducting a lengthy investigation and audit.

3. The Separation of Powers Concerns Expressed in *Cheney* Are Not Present Here

Treasury has mistakenly argued that the Supreme Court's decision in *Cheney v. U.S. District Court*, 542 U.S. 367 (2004), requires courts to apply a heightened needs standard in all civil litigation, regardless of the facts of the specific case. As this Court is aware, *Cheney* was a unique case, with facts far different from those presented here. While, to be sure, it was a civil discovery dispute, it also presented the "important factor" of discovery requests "directed to the Vice President and other senior Government officials." *Id*. at 385. As a result, the case presented "separation-of-powers considerations," *id*. at 382, that might otherwise not have been present had the Vice President not been "a party in the case" and "the subject[] of the discovery orders." *Id*. at 381. Here, the subpoena in question was directed to the Department of Treasury, not to the President or Vice-President personally. Likewise, *Cheney* noted that the "specificity of

the subpoena" in question can "serve[] as an important safeguard against unnecessary intrusion into the operation of the Office of the President." *Id*. at 387. Here, by contrast, the subpoena in question was, as this Court has noted, "narrow." ECF No. 27 at 17. Finally, *Cheney* did not identify a contrary test for evaluating claims of privilege, nor did it suggest that *Dellums* or *In re Sealed Case* were improperly decided.

C. The Balance of Public Interests in This Case Supports the Court's Use of the Needs Test as Articulated in *Dellums* and *In re Sealed Case*

In sum then, the public interest in confidentiality is substantially lower here than it was in either *Dellums* or *In re Sealed Case*. Similarly, the public interests in disclosure here are similar in nature and magnitude to those presented in *Dellums* and of exactly the sort recognized as worthy of protection in *In re Sealed Case*. Because the balancing of public interests tilts more heavily in favor of disclosure here than in either *Dellums* or *In re Sealed Case*, the Court could arguably employ a less stringent test here than those courts employed. However, because the *Dellums* and *In re Sealed* standards are well established, and because the Court has already determined that Respondents' litigation need satisfies those standards, the Court need not create an ad hoc need standard that will doubtless be disputed by Treasury.

Accordingly, the Court should evaluate Respondents' litigation need by asking whether they have made a "'showing of necessity' for information that is": (1) "not merely 'demonstrably relevant' but indeed substantially material to their case," *Dellums*, 561 F.2d at 249; (2) that is "directly relevant to issues that are expected to be central to the trial," *In re Sealed Case*, 121 F.3d at 754; and (3) that "is not available with due diligence elsewhere." *Id*. As the Court previously concluded, and as Respondents again demonstrate below, that standard is satisfied here.

II. RESPONDENTS HAVE A SPECIFIC NEED FOR EACH DISCRETE GROUP OF SUBPOENAED MATERIALS, SUCH THAT EACH LIKELY CONTAINS IMPORTANT EVIDENCE THAT CANNOT BE OBTAINED ELSEWHERE

Respondents "bear the burden to demonstrate 'with specificity' 'that each discrete group of the subpoenaed materials likely contains important evidence'" to the underlying *Black* litigation. Dec. 8 Order at 4 (quoting *In re Sealed Case*, 121 F.3d at 754, 756). The 61 withheld documents consist of three distinct groups, and Respondents demonstrate below why each of the three is specifically likely to contain important evidence. Additionally, Respondents note that the Independent Counsel in *In re Sealed Case* made his needs showing via an *ex parte* submission to the court. *See In re Sealed Case*, 121 F.3d 729, 736, 760 (D.C. Cir. 1997). Because Respondents believe that their showing of need can be amplified via a similar mechanism, they have prepared for the Court an extensive *ex parte* showing of need, one that goes beyond the requirement laid out in *In re Sealed Case* to describe a litigant's need by group by specifically describing their need for each individual document. Contemporaneously, Respondents are filing a motion for leave to file under seal the *ex parte* showing, for the reasons stated in that motion for leave.

A. Treasury's Communications Regarding the PBGC, GM, and Delphi Are at the Heart of *Black's* § 1342(c) Inquiry

Black consists of four distinct claims, which all challenge the PBGC's termination of the Salaried Plan via an agreement with the Plan's administrator, Delphi, in connection with a broad settlement reached among Delphi, GM, and the PBGC. Respondents allege in Count One of *Black* that this termination-by-agreement itself was unlawful because ERISA requires the PBGC to apply for a termination decree from a United States district court, and that such a decree may issue only upon a finding by the court that a plan "must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition

of the plan or any unreasonable increase in the liability of the [PBGC insurance] fund." 29 U.S.C. § 1342(c)(1). In Count Two, Respondents allege that, even if ERISA allows a termination-by-agreement with a plan administrator, the law is well-settled that any actions undertaken by a plan administrator in connection with a plan termination are fiduciary in nature, and therefore may only be valid if done in accordance with ERISA's duties of loyalty and prudence. *See* Second Am. Compl. ¶ 43, *Black v. PBGC*, No. 09-cv-13616 (E.D. Mich. Aug. 26, 2010) ECF No. 145, citing 29 U.S.C. §§ 1002(21)(A),1104(a). In Count Three, Respondents allege that, even if ERISA allows for a termination-by-agreement with a conflicted fiduciary, the Constitution does not. *See id*. ¶ 52. Respondents further allege in Count Four of *Black* that, in its substance, the PBGC's agreement with the Plan administrator was arbitrary and capricious because the PBGC did not and could not satisfy ERISA's statutory requirements for termination. *See id.* ¶ 56.

At the time the Salaried Plan was terminated in 2009 it was, compared to other large pension plans at that time, a relatively well-funded pension plan, *see, e.g.*, ECF No. 19-5 (Watson Wyatt June 30, 2009 AFTAP Certification, noting 85.62% AFTAP funding), and there were a number of viable alternatives to termination that a court might have considered in lieu of termination, the most likely (though not only) option being a reassumption of the Salaried Plan by GM.[3] Because the PBGC had significant liens and claims over Delphi assets essential to

[3] "Delphi consisted of divisions and subsidiaries of GM until GM's divestiture of Delphi in 1999." *See* ECF No. 6-2 (Decl. of R. Pappal) ¶ 5. GM was the original sponsor of what became the Delphi Salaried Plan, and most of the Plan's participants had spent the majority of their careers as GM employees. From the time of the spin-off in 1999, through the time of the Salaried Plan's termination, Delphi was GM's largest component parts supplier. *Id*. "Consequently, if Delphi ever cease[d] shipping even a small fraction of production parts to GM, the GM plants relying on such shipments may run out of inventory of such parts and have to shut down within a matter of days." *Id*. ¶ 7. "In short, a prolonged cessation in the supply of parts from Delphi to GM would have [had] a devastating effect on GM, its ability to reorganize, and

GM's supply-chain, the PBGC had substantial leverage to negotiate a GM reassumption, and in fact the PBGC had, prior to the active engagement of Treasury and its related Auto Task Force, been actively advocating for this result.[4] Respondents allege that the PBGC relented in its efforts to ensure the Plan's continued viability, and acquiesced in the Plan's termination, not because of anything related to its statutory role under ERISA, but as a result of pressure imposed by Treasury to support its efforts to restructure the auto industry in general and GM in particular.[5] Treasury, Respondents contend, sought the then politically-expedient course of limiting disbursements from the Troubled Asset Relief Program (which would have increased if GM reassumed the Salaried Plan) and instead pressed to transfer the Salaried Plan's liabilities to the PBGC's ledger.

In a September 2011 order, the Michigan Court defined the scope of discovery in *Black v. PBGC*, stating that:

> In terms of addressing the scope of discovery for purposes of entering a scheduling order – [t]he Court's initial focus, keeping the above case law in mind, is on Count 4 and whether termination of the Salaried Plan would have been appropriate in July 2009 if, as Plaintiffs contend, Defendants were required under 29 U.S.C. § 1342(c) to file before this court "for a decree adjudicating that the plan must be terminated in order to protect the interests of the participants or to

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the communities that depend on employment by GM and its community of parts suppliers." *Id.* ¶ 11.

[4] *See, e.g.*, ECF No. 11-6 (D. Cann Dep. Tr.) at 67:6-14 (the PBGC was in favor of a GM reassumption and was in fact "cheerleading for the transfer, . . . utilizing [the PBGC's] liens overseas as potential leverage to get it done").

[5] For example, President Obama appointed the Auto Task Force to oversee the administration's efforts to support and stabilize the domestic automotive industry on February 15, 2009, and in a memo dated a few days prior to the Auto Task Force's creation, Compass Advisors, one of the PBGC's bankruptcy advisors, noted that the PBGC was still engaged in a "full court press to convince GM and Government officials that the 414(L) transfer [of Delphi pensions back to GM] is in everyone's best interest [as] GM doesn't need two classes of employees and should provide pensions to all retirees." ECF No. 11-5 at 8 (PBGC-BL-0184878) (Feb. 13, 2009 Memo from Compass Advisers to PBGC).

> avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund."

Order at 3-4, *Black v. PBGC*, No. 09-cv-13616 (E.D. Mich. Sept. 1, 2011) ECF No. 193.

In entering this Order, the Michigan Court determined that the most efficient way to proceed was to permit Respondents to take discovery on their substantive claim (Count Four) alleging that the PBGC had not and could not meet the statutory criteria for termination (the "§ 1342(c) inquiry"), and then to address the remaining statutory and constitutional questions posed by Counts One through Three, if necessary, after discovery. Essentially, as a matter of judicial economy, the Michigan Court determined it was worthwhile to address first whether the termination, on its merits, satisfied the statutory criteria because, if it did, the procedural and Constitutional questions as to the form of the termination (at issue in the first three Claims) might be avoided. In that event, if the termination was substantively lawful, the PBGC's use of an incorrect procedural vehicle might be harmless error.

The 61 documents at issue here all go to the heart of ERISA's § 1342(c) inquiry (*i.e.*, the substantive inquiry concerning the termination). Had the PBGC gone to a court in July 2009 seeking a decree that the Salaried Plan must be terminated in order to avoid an unreasonable increase to the liability of the PBGC's insurance fund, a central issue at the trial would have been whether a GM reassumption of the Salaried Plan was a viable possibility. Thus, as Respondents have previously noted, the § 1342(c) inquiry includes not only evidence of "misconduct" by the Treasury to place pressure on the PBGC to terminate the Plan, but also evidence related to whether a GM reassumption of the Salaried Plan was a viable possibility, and evidence of Treasury influencing the PBGC to relent on advocacy of GM reassumption of the Salaried Plan. *See, e.g.*, ECF No. 30 at 12-16; ECF No. 51 at 16-24. Also as Respondents have repeatedly described, the PBGC and Delphi both believed GM reassumption was a viable possibility, and

the PBGC possessed significant leverage, in the form of its liens and claims, to make such reassumption commercially reasonable. The 61 documents at issue are all likely to contain information directly on these issues.

B. The Three Discrete Groups of Documents Are Likely to Contain Evidence Directly Relevant to *Black*'s § 1342(c) Inquiry

The 61 documents at issue consist of three groups of documents: (1) draft memoranda from staffers to Dr. Lawrence Summers providing updates regarding GM and Delphi; (2) electronic mail conversations among Auto Team members concerning advice to be provided to the President regarding GM, Delphi, and the PBGC; and (3) a personal request for information by President Obama on the Delphi Salaried Plan, along with Treasury emails and a memorandum in response.

1. It Is Likely That the Memoranda from Staffers to Dr. Summers Contain Information Directly Relevant to *Black*'s § 1342(c) Inquiry

The majority of the withheld documents (53 of 61) are iterations of 13 memoranda, written between Feb. 17, 2009 and August 4, 2009, from Auto Team staffers to Dr. Summers. *See* Treas. Revised Privilege Log (ECF No. 51-2) (Nos. 67, 72, 84, 94, 275, 560, 593, 596, 599, 601, 603, 605, 611, 623, 627, 629, 631, 633, 638, 668, 670, 672, 674, 676, 692, 758, 759, 760, 761, 762, 766, 770, 777, 849, 856, 859, 860, 863, 944, 948, 950, 956, 1006, 1089, 1091, 1094, 1152, 1166, 1168, 1217, 1219, 1221, and 1223). A review of the information provided in the Treasury's privilege logs supports the belief that each of these memoranda will contain highly relevant evidence to the § 1342(c) Inquiry.

For example, Item No. 770 is a 3 page memorandum from Treasury's Auto Team to Secretary Geithner and Dr. Summers regarding GM and Chrysler, providing Treasury's "impressions and updating on GM and Chrysler restructuring plans and viability

determinations." *See id.* at ECF Page 72 of 110; Treas. Original Privilege Log (ECF No. 35-5) at 139. More details are provided about the memo by the Special Inspector General for Troubled Asset Relief Program ("SIGTARP"), who reported that "[o]n February 17, 2009, the day they received GM's restructuring plan, the Auto Team sent a memo to Auto Task Force chairs Dr. Summers and Secretary Geithner with 'first-blush impressions' of the auto companies' restructuring plans. As for GM, the memo listed four risks," including Delphi and its pension liabilities. SIGTARP Report (ECF No. 13-2) at 7. Accordingly, it is a certainty that the memo deals with the risk Delphi and its pension liabilities posed to GM. Because those issues are central to whether the PBGC had leverage to persuade GM to assume the Salaried Plan, they are highly relevant to whether the Salaried Plan needed to be terminated. And, given that this memo was shared with SIGTARP, and information regarding its contents was subsequently provided to the general public in the SIGTARP report, it is hard to conceive of how the Office of the President could have an interest sufficient to defeat Respondents' need.

To take another example, Item No. 692 is a revised 2 page "information memorandum" from Alan Krueger (Office of Economic Policy) to the National Economic Council ("NEC"), dated March 6, 2009, covering auto parts suppliers. *See* Treas. Revised Privilege Log at ECF Page 56 of 110. Item Nos. 593, 596, 599, 601, 603, and 605 are iterations of a 2 page memo regarding Chrysler, GM, Delphi, and Congress, dated March 8, 2009, from members of the Auto Team to Secretary Geithner and Dr. Summers. *Id*. at pages 26-32. Treasury's original privilege log describes No. 601 as a "[r]evised internal memorandum regarding impressions and updating on GM and Chrysler restructuring plans." *See* Treas. Original Privilege Log at 108.

In his book *Overhaul*, Steve Rattner describes a meeting that the auto team had in Larry Summers's office on the afternoon of March 2, 2009. "We quickly agreed that the

administration's goal should be not to save suppliers per se but to save only those that were of critical importance to the automakers." Steven Rattner, *Overhaul: An Insider's Account of the Obama Administration's Emergency Rescue of the Auto Industry*, at 90-91 (2010). Given that the two memos described above were created just days after that meeting, their timing alone makes it extremely likely that they will contain evidence directly relevant to the question of whether Delphi was of "critical importance to the automakers," or at least to the analysis the NEC and Treasury's Auto Team believed should govern such an inquiry as the Auto Team was beginning its work on Delphi pension issues. This goes directly to the question of the PBGC's leverage in light of its liens and claims on Delphi assets.

Respondents have a similar need for the 7 documents in this category that are iterations of an "April Memo" regarding "the Delphi Corporation." *See* Treas. Revised Privilege Log at ECF pages 12, 83-87, 80-82 (Item Nos. 84, 275, 860, 863, 849, 856, 859). The Treasury's original privilege log describes some of these documents as being draft memoranda "on Delphi's liquidity issues and potential consequences of Delphi shutdown." Treas. Original Privilege Log at 151-53. A memo from April 2009 that addresses Treasury's views on the "potential consequences of Delphi shutdown" is highly relevant to the § 1342(c) inquiry, as it necessarily relates to the value and leverage the PBGC had vis-à-vis GM reassumption given its liens and claims on Delphi assets, which could result in a Delphi shutdown. Similarly, the memorandum might also provide insight into whether Treasury (or some other component of the Executive Branch) was able to persuade the PBGC to abandon its advocacy of a GM reassumption.

Indeed, all of Treasury's 13 withheld memoranda are likely to contain highly relevant information for exactly the same reasons, as they are all from the narrow period of time when Treasury was considering GM and Delphi related issues, and they all explicitly state that they are

designed to address topics specifically covering GM or the auto industry more generally. In addition, in light of the stipulation and protective order that the parties entered into, some portion of each of these memoranda must either contain the agreed-upon search terms for relevance, or were determined to be relevant to "Delphi, the Delphi Pension Plans, or the release and discharge by PBGC of liens and claims relating to the Delphi Pension Plans," based upon a manual review by Treasury. *See* ECF No. 28 ¶ 2. Hence, Respondents' need for these memoranda (and other documents) must be considered in light of the other information they have provided the Court.

Again, in her report, the SIGTARP concluded that "Treasury's Auto Team used their financial leverage as GM's only lender to significantly influence the decisions GM made during the time period leading up to and through GM's bankruptcy." SIGTARP Report at 8 (ECF No. 13-2). In fact, "the Auto Team used their leverage as GM's largest lender to influence and set the parameters for GM to make decisions." *Id*. at 11. According to SIGTARP, "[t]he Auto Team specifically pressed GM to be *less generous* in relation to Delphi and pensions." *Id*. at 13 (emphasis added). The Treasury memoranda likely expand on these issues, which are directly relevant to the § 1342(c) inquiry because they go Treasury's potential willingness to consider a GM reassumption of the Salaried Plan.

Similarly, Respondents have noted that Treasury informed both Delphi and GM that there would be no additional financial support to Delphi, in any form, absent a "global solution." *See* ECF No. 6-6 (Matthew Feldman Dep. Tr.) at 135:4-8 ("I think our position has always been the same, which is if Delphi wanted funding from General Motors, there needed to be a signed deal that could lead to emergence from Chapter 11."). In order to achieve its global solution, Treasury took the lead in vetting offers from Delphi, Delphi's DIP Lenders, Platinum Equity, and Federal Mogul (*i.e.*, the latter being potential acquirers of Delphi) in deciding what form a

new or reorganized Delphi would ultimately take. *See generally* ECF No. 6-7 (Decl. of John D. Sheehan). Some of these Treasury memoranda are likely to address Treasury's interactions with these potential suitors, which could be relevant to the viability of an assumption by one of those entities of the Delphi Salaried Plan.

The memoranda are equally likely to contain information relating to Treasury's interactions with the PBGC. Both GM and the Treasury concluded that there could be no global solution that would secure GM's supply while Delphi assets were subject to the threat of PBGC liens and claims. S*ee* ECF No. 6-3 (Decl. of Rick Westenberg) ¶ 15 ("neither GM nor Parnassus (nor presumably any other potential purchaser) is willing to purchase the assets (or shares in the non-debtor affiliates that own the assets) while they are subject to the threat of the PBGC liens."); *see also* ECF No. 6-6 (Matthew Feldman Dep. Tr.) at 204:24-205:7 ("If I understand, if there could not have been a consensual resolution with the PBGC, and it would have taken 3 months to terminate the pension plan, would have had – you would have had to weigh that delay in Delphi emergence against whatever economic benefits you had against – in not taking the liability."). Accordingly, Treasury's desire to arrive at a global solution necessarily required that it deal with Delphi's pension plans and the PBGC's associated liens and claims as it planned GM's reorganization.

The Auto Team then took over (from GM) negotiations with the PBGC on GM's behalf. One of Treasury's perceived objectives in these negotiations was "induc[ing] PBGC to waive alleged 'rest of world' liens against Delphi's non-debtor affiliates . . . ." ECF No. 19-2 at 1. The shift in negotiating partner was problematic for the PBGC, as Treasury was wearing "at least" three conflicting hats: (1) through its Auto Team, it was the agency charged with restructuring the auto industry; (2) as a PBGC board member, it was one of three agencies charged with

providing oversight and direction to the PBGC; and (3) as a major competing creditor in the Delphi bankruptcies, it would, as the chief lender to GM, ultimately decide whether GM would be permitted to fund a reassumption of the Delphi pension plans. *See, e.g.*, ECF No. 11-7 (V. Snowbarger Dep. Tr.) at 39:6-12, 62:13-63:2. GM perceived a benefit to Treasury taking the lead on dealing with the PBGC "because it was 'Government agency to Government agency' and *Treasury would get a better deal for GM*." ECF No. 13-2 (SIGTARP Report) at 14 (emphasis added).

The communication between the Auto Task Force and the PBGC on Delphi issues took place almost exclusively through two individuals, Joe House at the PBGC, and the Auto Team's Matt Feldman. *See, e.g.*, ECF No. 11-7 (V. Snowbarger Dep. Tr). at 47:16-19; ECF No. 11-8 (J. House Dep. Tr.) at 118:4-19. Mr. Feldman has stated that he began these discussions with a clear agenda – "to reach an agreement where the salaried Delphi plans would be terminated and General Motors would assume the hourly pension plans." ECF No. 6-6 (M. Feldman Dep. Tr.) at 158:24-159:4.

While the PBGC had previously been engaged in a "full court press" to have GM assume the Salaried Plan, once Treasury took over negotiating for GM, the PBGC took on a much more submissive role in those negotiations, eventually abandoning its advocacy of a GM reassumption of the Salaried Plan altogether. And notwithstanding the PBGC's earlier enthusiasm for GM reassumption, its statutory mandate to try to preserve pension plans, the significant leverage it wielded over GM via its liens and claims, and its realization that Treasury held the key to securing financing for the Salaried Plan, the PBGC, apparently, stopped treating its interactions with Treasury as a negotiation. As the PBGC's negotiator admitted, "the word 'negotiation' doesn't really describe the nature of the liasing. It was much more of a – a coordination

exercise." ECF No. 11-8 (J. House Dep. Tr). at 12:4-7. When asked specifically about the PBGC's efforts to persuade the Treasury to fund the Delphi plans, Mr. House was clear that such advocacy was not a part of his mandate. *See id.* at 45:6-8 ("I don't have a recollection of trying to persuade Treasury of anything."). As would be described in more detail in Respondents' proposed *ex parte* showing (if the Court grants leave for its submission under seal), the timing and context of many of these memoranda make it extremely likely that they will provide more detail on Treasury's interactions with the PBGC, which again is a key aspect of *Black*.

On May 26-27, 2009, the Delphi bankruptcy court ordered certain key stakeholders in the Delphi bankruptcy to participate in mediation; Delphi, the PBGC, GM, the Auto Task Force, and Delphi's DIP lenders were among the attendees. A few days after the mediation concluded, Delphi announced its belief that the PBGC would terminate the Salaried Plan. Respondents allege that Treasury played the determinative role in shaping this outcome. Indeed, shortly before the mediation took place, Delphi officials stated their understanding that the PBGC and Treasury had reached an agreement in principle about how Delphi's pensions should be handled. *See* ECF No. 11-9 (May 13, 2009 PBGC email chain). When asked about this email, Mr. House admitted his memory of these events was poor, and also acknowledged that he and Mr. Feldman were engaged in conversations at the same time frame (May 12-13), the substance of which he could not recall. ECF No. 11-8 (J. House Dep. Tr.) at 139:18-140:20. Moreover, on May 22, 2009 (the Friday just prior to the start of the mediation), Mr. Feldman emailed Mr. House to request another one of their off-the-record phone conversations, this time to discuss the upcoming mediation in light of a conversation that Mr. Feldman had just had with the Delphi mediator. *See* ECF No. 11-10 (May 22, 2009 email). Mr. House could not recall the substance of this conversation either. *See* ECF No. 11-8 (J. House Dep. Tr.) at 141:17-19.

Item Nos. 638, 760, 761, 762, 1006, 1166, and 1168 are iterations of an Auto Team memorandum prepared during this precise timeframe (between May 24, 2009 and May 26, 2009), and are described as addressing "plans for GM reorganization and update on GM negotiations." *See*, *e.g.*, Treas. Original Privilege Log (ECF No.35-5) at 177, No. 1006. Such negotiations are plainly relevant to *Black* § 1342(c) Inquiry, as they go to whether and how Treasury influenced the PBGC, PBGC leverage via GM, and GM's willingness to assume Delphi pension liabilities, and they are also an excellent example of information that Respondents have been unable to obtain from the PBGC. Indeed, emails produced in the days after the mediation suggest that Treasury's Auto Team put forward a detailed proposal at the mediation that would involve the PBGC initiating termination of the Delphi Salaried Plan, the reassumption by GM of the Delphi Hourly Plan, and a settlement by the PBGC of all its liens and claims. *See, e.g.*, ECF No. 19-3 at ECF Page 2 (May 28, 2009 email chain from Delphi to the Treasury's Matt Feldman stating that the PBGC "needs to hear from you on what GM/UST plan to do with the HRP [*i.e.*, the Hourly Plan] and SRP [*i.e.*, the Salaried Plan]. . . in the event that GM takes the HRP and leaves behind the SRP, the PBGC will terminate the SRP and will waive ROW liens on the SRP if they can receive some reasonable settlement on the termination liabilities."); *see also* ECF No. 11-8 (J. House Dep. Tr.) at 147:6-165:6; ECF No. 11-11 (May 29, 2009 email chain).

2. It Is Likely That the Withheld Email Contain Information Directly Relevant to *Black*'s § 1342(c) Inquiry

The next group consists of a series of email chains. *See* Treas. Revised Privilege Log (ECF No. 51-2) at pages 18,33, 39-40, 74-75 (Item Nos. 358, 610, 621, and776). For largely the same reasons as discussed above in connection with the withheld memoranda, these email chains likely contain information of substantial relevance to the § 1342(c) inquiry. First, as with the memoranda, the email chains occur in the relative time period (March 28, 2009, April 22, 2009,

and May 26-28, 2009). Second, as with the memoranda, by virtue of the search criteria Treasury utilized to determine responsiveness, these documents must deal with topics that are plainly relevant to the § 1342(c) Inquiry. *See* ECF No. 28 ¶ 2. Third, the limited information provided by Treasury's revised privilege log further substantiates the relevance of these email chains. For example, the April 22, 2009 email chain is identified as one covering "General Motors [and] Delphi Corporation." *See* Treas. Revised Privilege Log (ECF No. 51-2) at ECF Page 39 of 110 (No. 621). Similarly, the March 28, 2009, email chain purports to cover the upcoming presidential announcement, scheduled for March 30, 2009, regarding GM's restructuring. *Id*. at ECF Pages 33 & 39 of 110 (Nos. 610 and 621). The May 26-28, 2009 email chain is described in Treasury's revised privilege log as dealing with "automotive labor rates," *id*. (No. 358), and in Treasury's original privilege log as "communications regarding internal questions about the cost gap between GM and Toyota labor rates and discussion of presidential memo re: same." Treas. Original Privilege Log (ECF No. 35-5) at 56. As discussed above with reference to the Treasury memoranda from the same time period, this time period coincided with an important mediation in the Delphi bankruptcy proceedings, pursuant to which Treasury and the PBGC appeared to have reached an agreement over the terms of the Salaried Plan's termination.

Given all of the above considerations, and as would be described in greater detail in Respondents' *ex parte* submission, all of the withheld email chains are likely to contain evidence relating to Treasury's internal assessment of the value of Delphi to GM, the corresponding value of the PBGC's liens and claims on Delphi assets, the leverage that the PBGC could (and should) have potentially exercised with GM in advocating for a GM reassumption of the Salaried Plan, any influence by Treasury relating to the Delphi Salaried Plan, or whether or not, ultimately, the Delphi Salaried Plan needed to be terminated under § 1342(c)'s criteria as opposed to there being

other alternatives that would have been unearthed at a termination hearing before the Michigan Court.

3. It is Likely That the July 16, 2009 Letter and Related Memorandum and Email Chains from August 4, 2009 Contain Information Directly Relevant to *Black*'s § 1342(c) Inquiry

Item No. 764 is a 2 page letter from a member of the public to President Obama, dated July 16, 2009. Treasury has redacted additional substantive information about the document in the revised privilege log provided to Respondents. However the Court's April 13, 2017 Order indicates that the letter "contain[s] a handwritten request from President Obama to consult Dr. Summers regarding the Delphi salaried pension plan." ECF No. 45 at 5. According to the Treasury's revised privilege log, Item Nos. 763, 765, and 767 are described as email strings from August 4, 2009 between "members of the Auto Team," regarding a "letter." Treasury's original privilege log describes the emails as "[c]ommunications regarding constituent communication with the President on auto industry matters," and identifies only Auto Team members as being among the authors and recipients. Treas. Original Privilege Log (ECF No. 35-5) at 138-39. Item No. 766 is described as a 2 page memorandum regarding a "letter." The revised privilege log does not reveal any recipient of the memo, and additional information about the memorandum's scope and contents are redacted. However, Treasury's original privilege log indicates that this document is a "Draft memorandum regarding [PBGC's] decision to take over the salaried and hourly pension plans of Delphi." *Id.* at 139.

The relevance of these documents to Respondents' case is self-evident, as they all likely contain direct evidence of President Obama's thinking regarding the Salaried Plan as of July 16, 2009, and Treasury's attempts to respond to the concerns raised in President Obama's July 16, 2009 letter. On their face, they show that Obama administration officials were taking a

concerted interest in the termination question, and that fact alone is relevant to the termination case. But the documents could have greater relevance depending on what they show. For example, the documents might show that the Auto Team sought to allay President Obama's concerns by conveying inaccurate or incomplete information regarding the plight of Delphi's salaried workers, or the commercial importance to GM of releasing the PBGC's liens and claims on Delphi assets, or other related issues. These facts would in turn be relevant to the question of whether the Salaried Plan needed to be terminated, or whether other options, such as a reassumption by GM, were viable alternatives that should have been explored. Similarly, the documents might reveal further details concerning the relationship between Treasury and the PBGC, and the extent to which political forces shaped Treasury's actions vis-à-vis Delphi's salaried retirees.

Finally, Respondents note that, as with a number of the other withheld documents, Treasury has not treated these particular documents with an expectation of confidentiality. The July 16, 2009 letter was drafted outside the government, and the substance of President Obama's response has already been published by the Court in its April 13, 2017 Order. As for the email strings, Treasury's revised privilege log notes that the "last email in the string [in Item Nos. 763 and 765] is an email by which a member of the Auto Team copies the other emails in the string to his *personal* email account," *see* ECF No. 51-2, pages 65 and 69 of 110 (emphasis added), and also notes that Item No. 763 is an email string between "members of the Auto Team and *others*." *Id*. (emphasis added). As for the August 4, 2009 memorandum, that appears to have been an attachment to the email that the Auto Team member sent to his personal email account.

C. The Information Sought Here Is Not Available With Due Diligence Elsewhere

Respondents "bear the further burden of demonstrating that the subpoenaed 'evidence is not available with due diligence elsewhere,' which means that '[e]fforts should first be made to determine whether sufficient evidence can be obtained elsewhere, and the subpoena's proponent should be prepared to detail these efforts and explain why evidence covered by the presidential privilege is still needed.'" Dec. 8 Order at 4-5 (quoting *In re Sealed Case*, 121 F.3d 729, 754-55 (D.C. Cir. 1997)). This requirement "reflects *Nixon*'s insistence that privileged presidential communications should not be treated as just another source of information." *In re Sealed Case*, 121 F.3d at 755.

First, as an initial matter, far from representing "just another source of information," *id.*, these documents mark the culmination of Respondents' discovery efforts. Respondents have conducted discovery from all other key parties (including the PBGC, GM and Delphi), and indeed not only is this the final phase of discovery in *Black*, but proceedings in *Black* have been stayed for years to allow for the conclusion of this discovery.

Second, *In re Sealed Case* noted that "there will be instances where such privileged evidence will be particularly useful," and that, "[i]n such situations, the subpoena proponent will be able easily to explain why there is no equivalent to evidence likely contained in the subpoenaed materials." *Id.* This is exactly such a case. Again, Treasury's influence on the PBGC is a central point of contention in *Black*, and there is no comparable source of information available to Respondents on this score. As Respondents have previously noted to the Court, the PBGC conducted its interactions with Treasury almost exclusively through Mr. House, who stated his inability to recall the substance of almost all those interactions. *See* ECF No. 11 at 19-

20 and n.10 (noting that there are approximately 60 instances in Mr. House's deposition transcript where he states an inability to recall events related to the Delphi plans).

Moreover, to the extent that Respondents have obtained evidence from the PBGC related to its interactions with the PBGC, that does not make the Treasury's own documents any less relevant or unique. The *Sun Oil* court found the needs test satisfied under nearly identical facts. *See Sun Oil Co. v. United States*, 514 F.2d 1020 (Ct. Cl. 1975). In *Sun Oil*, a group of oil companies that leased off-coast areas from the United States brought a takings claim alleging that their lease granted them a right to erect platforms, and by delaying and refusing permitting for an oil drilling platform, the United Stated breached its contract and effected a taking. *Id*. at 1021. The oil companies sought to ascertain through discovery who made the decision to deny their application to proceed with the platform, and why it was denied. *Id*. President Nixon sought to shield two memoranda between presidential aides and two from his aides to the President, allegedly refining "the options believed open for ultimate presidential consideration and decision." *Id*. at 1025. Much like this case, the oil companies believed the memos relevant because they might help prove that "the President or someone on his White House staff turned their application down and did so for impermissible, extraneous, political, or other reasons which they think, if shown, would make their case." *Id*. The court noted that it did not know whether the documents would reveal the information that plaintiffs hoped for, but determined that given the documents were "suggestively relevant to the subject matter of this action," the oil companies were entitled to try, and that "a generalized claim of privilege" by the former President was insufficient to "prevail against the plaintiffs' need to develop the facts by resort to discovery." *Id*.

Again, the facts demonstrate that Treasury played a determinative role in the GM and Delphi restructurings generally, and the fate of the Delphi pension plans more specifically. Moreover, at the time the Plan was terminated, Treasury was directly negotiating the future of Delphi with a number of players besides the PBGC, including GM, Delphi, Delphi's DIP Lenders, Federal Mogul, Platinum Equity, and various unions, and the Auto Team was deliberating amongst itself and various White House officials as to what to do in relation to the Delphi plans. *See* ECF No. 11-14 at 1 (PBGC-BL-0170325) ("Feldman says that up to now, UST auto has consulted/deliberated exclusively amongst itself and [the White House/National Economic Council]."). Documents relating to these negotiations and deliberations will be directly relevant to the § 1342(c) inquiry, either going to the question of whether GM reassumption of the Salaried Plan was a viable option, or whether some other potential acquirer of Delphi could be persuaded to assume the Salaried Plan.

To take the GM reassumption example, as noted above, SIGTARP has concluded that it was Treasury's Auto Team that made the determination as to what financial commitments GM could make in connection with Delphi, and that ultimately Mr. Rattner overruled GM's CEO, who wanted to "do something" for the Salaried Retirees, on the basis of Mr. Rattner's *ad-hoc* definition of what was "commercially defensible." ECF No. 15-12 at ECF Page 43 of 61. Respondents have also noted that the record is devoid of any explanation as to why the Auto Team determined that GM's reassumption of the Salaried Plan would not have been "commercially defensible" in exchange for the release of the PBGC's liens and claims, which the PBGC had by virtue of the Salaried Plan's underfunding. Documents related to Treasury's *ad-hoc* "commercial necessity" standard, the determinations of GM and Treasury about whether to commit financial resources to the Salaried Plan, and the justifications for those determinations,

are all critically relevant to the § 1342(c) determination. Yet, Treasury does not suggest that the PBGC had access to these documents, and it certainly does not (and cannot) suggest that the PBGC (or any party other than Treasury) has or would be willing to make that information available to Respondents.

Finally, Respondents must again note that Treasury has been engaged in singular efforts to obscure its role in these issues for years. It has actively opposed Respondents' every attempt to obtain discovery, not only from itself, but even from the PBGC. *See, e.g., Black v. PBGC*, ECF No. 188 (Treasury's Opposition to Respondents' Motion to Compel Discovery from the PBGC). Furthermore, Treasury stonewalled Congressional requests for documents for years, only agreeing to produce the documents once the House Oversight Committee issued a subpoena. *See* ECF No. 11-15 at 1 (noting that Treasury had ignored previous document requests dating back to January 2010 prior to the House Oversight Committee issuing its document subpoena). Moreover, the SIGTARP Report, referred to above, "was very much delayed by the refusal of four auto team members [including Messrs. Rattner, Feldman and Wilson] to be interviewed by [SIGTARP]" ECF No. 15-12 at ECF Page 25 of 61. In short, Treasury has done everything in its power to obscure its role in the resolution of Delphi's pension plans. And while SIGTARP eventually obtained the documents it sought, those are precisely the documents sought here, and Respondents have no access to them but for this subpoena.

CONCLUSION

For the foregoing reasons, Respondents' Renewed Motion to Compel should be granted.

Date: February 14, 2018

Respectfully submitted,

/s/ Anthony F. Shelley

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

[PROPOSED] ORDER

THIS MATTER, having come before the Court on Respondents' Renewed Motion to Compel, the Opposition by the Petitioner, any Reply, and the entire record,

IT IS HEREBY ORDERED that the Renewed Motion is GRANTED.

The United States Department of Treasury is hereby ordered to produce the relevant portions of the 61 documents at issue pursuant to a protective order agreed to by the parties.

SO ORDERED this ____ day of _____, 2018.

_____
Emmet G. Sullivan
UNITED STATES DISTRICT JUDGE