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' REPLY IN SUPPORT OF THEIR
RENEWED MOTION TO COMPEL

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I. RESPONDENTS HAVE DEMONSTRATED THAT THE BALANCING OF INTERESTS IN THIS CASE FAVORS DISCLOSURE, NOT CONFIDENTIALITY

As the D.C. Circuit has held in this case, "[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.'" Judgment & Memorandum at 3, *U.S. Dep't of Treasury v. Black*, No. 17-5142 (D.C. Cir. Dec. 8, 2017), Doc. #1708057 ("Dec. 8 Order") (quoting *In re Sealed Case*, 121 F.3d 729, 753 (D.C. Cir. 1997)). The D.C. Circuit remanded this matter back to the Court with an invitation to undertake this balancing by "account[ing] for how the public interests in this case differ from those presented in [the Circuit's] prior decisions." *Id*. at 4. And as Respondents argued in their renewed motion to compel (ECF No. 70, "Renewed Motion to Compel"), 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. In its opposition, Treasury offers only a cursory response to Respondents' arguments.

Respondents showed in their Renewed Motion to Compel that, under the D.C. Circuit's controlling precedent, the privilege must be narrowly construed because these communications did not involve the President himself (save for one document). *See* ECF No. 70, Mem. at 6-8 (citing *In re Sealed Case*, and *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108 (D.C. Cir. 2004)). Treasury tries to sidestep this point, arguing that, under *In re Sealed Case*, the fact that these documents did not involve the President personally does not prevent the privilege from applying "fully" to the disputed documents. ECF No. 74, Mem. at 11. This is plainly a *non-sequitur*; as the D.C. Circuit "emphasiz[ed]" in *In re Sealed Case*, "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. The question thus is not whether the privilege applies to these communications, but rather, in determining what constitutes a sufficient showing of need, whether the public's interest in maintaining the confidentiality of such communications is less than it would be in cases where the President is actually involved. The D.C. Circuit has said twice that the interest is diminished in such cases.

First, in *In re Sealed Case*, the court went to great lengths to analyze the history and purposes of the privilege. In doing so, the court held that, because the communications privilege is "bottomed on a recognition of the unique role of the President," the privilege must be construed as narrowly as possible whenever the privilege is extended beyond communications that actually involve the President. *Id*. at 752. This follows from the fact that the constitutional basis of the privilege is "the President's Article II powers and responsibilities," which are vested "not in the executive branch, but in the President." *Id*. at 748 (citing *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982) and *United States v. Nixon*, 418 U.S. 683, 705 & n.16 (1974)). Indeed, contrary to Treasury's argument, the D.C. Circuit held in *In re Sealed Case* that "[t]he argument for a narrow construction is particularly strong in cases like this one where the public's ability to know how its government is being conducted is at stake." *Id*. at 749. Second, in *Judicial Watch*, the D.C. Circuit held 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*, 365 F.3d at 1115. The advisors responsible for the majority of communications here were of a sufficient operational distance from President Obama to diminish the need for the absolute confidentiality of the communications.

Respondents also demonstrated in the Renewed Motion to Compel that the commercial nature of these communications further militates against a public interest in maintaining their absolute confidentiality. *See* ECF No. 70, Mem. at 8-9 (citing *United States v. Nixon* and *In re Sealed Case*). Treasury again tries to skirt the inquiry at hand by arguing that the nature of the communications should not prevent the *application* of the privilege, *see* ECF No. 74, Mem. at 11, but as discussed above, the relevant question is whether the nature of the documents is relevant to the public's interest in maintaining confidentiality. Again, the answer is yes. As the Supreme Court noted in *United States v. Nixon*, 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." *United States v. Nixon*, 418 U.S. at 706. Similarly, the need for maintaining "confidentiality [wa]s particularly critical" in *In re Sealed Case* because those communications took place "in the appointment and removal context," because those non-delegable powers "are intimately connected" to "presidential decisionmaking." *In re Sealed Case*, 121 F.3d at 753. Given that the communications at issue here do not raise military, diplomatic, or national security concerns like those discussed in *United States v. Nixon*, and do not implicate the kind of non-delegable powers that were present in *In re Sealed Case*, this factor further weighs against maintaining the absolute confidentiality of the documents.

Respondents have also argued that the public's "interest in maintaining the confidentiality" of communications regarding the Obama Administration's involvement in the 2009 auto-bailout is "'substantially diminshe[d]'" because public testimony has already been offered on the subject. ECF No. 70, Mem. at 9-10 (quoting *Nixon v. Sirica*, 487 F.2d 700, 718

(D.C. Cir. 1973)). Treasury again avoids the relevant argument, ignoring *Sirica* altogether, and instead putting forth an argument about waiver. *See* ECF No. 74, Mem. at 11-12. Respondents are not arguing that Treasury has waived the right to assert the presidential communications privilege as to these communications (which would go to whether the privilege properly applies here), but rather that this public testimony has decreased the public interest in maintaining the confidentiality of these 61 documents. In *Sirica*, the D.C. Circuit explicitly held that such "public testimony" "substantially diminishes the interest in maintaining the confidentiality" of communications touching on that subject. *Sirica*, 487 F.2d at 718.

Respondents next pointed to the age of the documents (nearly a decade old at this point), and the proposed limitations on their access by the public (pursuant to a protective order), as relevant factors in assessing the public's interest in maintaining the confidentiality of the communications. *See* ECF No. 70, Mem. at 10-11 (citing *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 450-51 (1977) ("*GSA*")). Treasury again eschews the question at hand, arguing that the "mere passage of time" cannot defeat the presidential communications privilege. *See* ECF No. 74, Mem. at 12. But the relevant inquiry is not whether the privilege has been "defeated," *id*., but rather how to assess the "public interests served by protecting the President's confidentiality in [this] particular context." Dec. 8 Mem. at 3 (citations omitted). As the Supreme Court held in *GSA*, even where the presidential communications privilege applies to executive communications, the passage of time can erode the "expectation of the confidentiality" of those communications, thus diminishing the public interest in protecting absolute confidentially. *GSA*, 433 U.S. at 451.

Treasury's argument that Deputy Counsel O'Connor's invocation of the privilege in 2015 "reaffirm[ed] no significant erosion here" is entirely without merit. *See* ECF No. 74, Mem. at

12. Even assuming, *arguendo*, that the 2015 invocation by Ms. O'Connor was constitutionally sufficient, the *GSA* court did not treat the timing of President Nixon's 1974 invocation of the privilege as at all relevant to its holding that "[t]he expectation of the confidentiality of executive communications thus has always been limited and subject to erosion over time after an administration leaves office." *GSA*, 433 U.S. at 451-52. Moreover, Treasury ignores entirely *GSA's* holding that the presidential communications privilege can accommodate a "limited intrusion" that does not allow for the public's general access to documents. *Id*.

Finally, Respondents argued that the public's interest in maintaining the confidentiality of these documents is diminished by the fact that no current or former President has actually invoked this privilege. *See* ECF No. 70, Mem. at 11-14. Treasury responds by pointing to a district court decision holding that "'a member of the Homeland Security Council Staff'" was entitled to invoke the presidential communications privilege in a Freedom of Information Act case. *See* ECF No. 74, Mem. at 12-13 (quoting *Citizens for Responsibility & Ethics in Washington v. Dep't of Homeland Sec.*, 514 F. Supp. 2d 36, 48 n.10 (D.D.C. 2007)). Again, Treasury fails to understand the analysis. The point here is not whether someone other than the President can invoke the privilege, as Respondents have acknowledged that this is an open question. *See* ECF No. 70, Mem. at 12-13. Rather, the point is that, given the constitutional nature of the privilege, 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*, *United States v. 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 *United States v. 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 v. Powell*, 561 F.2d 242, 244 (D.C. Cir. 1977) (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).

In reality, the fact that President Trump has not invoked the privilege makes this case largely indistinguishable from *Dellums*. Again, 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. This is important because a former President's invocation of the privilege is entitled to less weight than that of an incumbent President; and it is the invocation by the new President himself, personally, that matters in assessing the interest in confidentiality, because 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 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), militates strongly against assigning much weight to the assertion of the privilege here by the "Office of the President." *See* ECF No. 74, Mem. at 10.

As for the other side of the equation, Respondents also demonstrated why the public has a substantial interest here in requiring disclosure. *See* ECF No. 70, Mem. at 14-17. Respondents began by noting the Supreme Court's admonition that, even in routine civil litigation, the public interest in disclosure is "'far from negligible.'" *See id.* at 14 (quoting *Cheney v. United States Dist. Ct.*, 542 U.S. 367, 384 (2004)). Respondents next pointed out that, "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." *See* ECF No. 70, Mem. at 15-16 (citing *Dellums*, 561 F.2d at 247, *Page v. PBGC*, 968 F.2d 1310, 1317 (D.C. Cir. 1992), and *In re Sealed Case*, 121 F.3d at 749). Finally, Respondents pointed out that the separation of powers concerns that were present in *Cheney* are not present in this case. *See* ECF No. 70, Mem. at 16-17.

Treasury makes a cursory argument that the need for information is weightier in the criminal context than in the civil, ECF No. 74, Mem. at 10 (internal citations omitted), but otherwise does not address the public interests in disclosure, and provides no response to the significant public interests summarized above. While Respondents agree that the law is clear that the public interest in disclosure is weightier in the criminal context, and indeed acknowledged such in their Renewed Motion to Compel, *see* ECF No. 70, Mem. at 14, that factor alone is not determinative of the public's interest in disclosure, as the D.C. Circuit has emphasized in both *Dellums* and *In re Sealed Case*. Indeed, even in civil litigation involving a sitting President (which this case does not), the Supreme Court has recognized that "every . . . citizen who properly invokes [a court's] jurisdiction, . . . has a right to an orderly disposition of her claims." *Clinton v. Jones*, 520 U.S. 681, 710 (1997).

Because the public interest in confidentiality is substantially lower here than it was in either *Dellums* or *In re Sealed Case*, and the public interests in disclosure 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*, if Respondents' litigation need satisfies the tests laid out in those cases, it will be sufficient to overcome the government's assertion of the presidential communications privilege here.

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

Under the standard laid out in *Dellums* and *In re Sealed Case*, Respondents must demonstrate two elements. First, Respondents must show that "each discrete group of the subpoenaed materials likely contains important evidence" that is "directly relevant to issues that are expected to be central to the trial." *In re Sealed Case*, 121 F.3d at 754. The *Dellums* court found this prong satisfied upon a showing of "substantial[] material[ity]." *Dellums*, 561 F.2d at 249. The second element that Respondents must demonstrate is that the evidence "is not available with due diligence elsewhere." *In re Sealed Case*, 121 F.3d. at 754. If the Court concludes that Respondents have met this burden, then the presumption against disclosure is overcome, and the Court should review the documents *in camera* under a more lenient relevance standard, and "release any evidence that *might reasonably be relevant*" to the underlying litigation need. *Id.* at 759 (emphasis added).

A. Respondents Have Demonstrated that the Three Groups of Documents Are Likely to Contain Evidence Directly Relevant to *Black*'s § 1342(c) Inquiry

Respondents seek the production of three groups of documents covered by the presidential communications privilege: (1) iterations of 13 memoranda from staffers to Dr. Summers; (2) 4 email chains, largely among Treasury staffers; and (3) documents related to a

July 16, 2009 letter to President Obama concerning the future of the Delphi Salaried Pension Plan. In order to meet the first prong of their need burden, Respondents must show that "each discrete group of the subpoenaed materials likely contains important evidence" that is "directly relevant to issues that are expected to be central to the trial" in *Black*. *In re Sealed Case*, 121 F.3d at 754. This standard, while stringent, is not meant to be insurmountable, and in fact the D.C. Circuit noted that "[i]n practice, this component can be expected to have limited impact," as it largely overlaps with the normal relevance standard utilized in evaluating criminal subpoenas, *id.*, though it does require more than "tangential[] relevan[ce]" and is not satisfied by relevance to "side issues," such as witness impeachment or simple evidentiary matters. *Id*. at 755 (internal citations omitted).

In their Renewed Motion to Compel, Respondents have shown that it is highly likely that each of these groups will have information of substantial importance to *Black*. *See* ECF No. 70, Mem. at 18-36. The record cites supporting this showing are provided in those pages in the Renewed Motion to Compel.[1] Respondents here simply summarize that showing already made. In that respect, *Black* consists of four distinct claims, which all challenge the PBGC's termination of the Delphi Salaried Plan via an agreement with the Plan's administrator, Delphi, in connection with a broad settlement reached among Delphi, General Motors ("GM"), and the

[1] Respondents have also moved to provide the Court with an *ex parte* showing further substantiating their litigation need for these documents, to be filed *ex parte* and under seal. *See* ECF No. 71. As noted there, Respondents' *ex parte* submission draws heavily on materials that are covered by protective orders, and using those materials, explains further their need for the 61 documents at issue. *Id*. In order to avoid having to reveal prematurely their litigation strategy to the PBGC and Treasury prior to the close of discovery and the filing of summary judgment motions in the underlying Michigan lawsuit, and in order to accommodate their obligations under the protective orders, Respondents have asked the Court's leave to make this submission both *ex parte* and under seal, noting that a similar submission was used in *In re Sealed Case*. *Id.* at 1 (citing *In re Sealed Case*, 121 F.3d at 736 and 760). Despite its own use of *ex parte* filings in this case, Treasury has opposed Respondents' motion for leave to make this *ex parte* submission under seal. *See* ECF No. 72.

PBGC in the summer of 2009. 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 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.

Respondents 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* Second Am. Compl. ¶ 56, *Black v. PBGC*, No. 09-cv-13616 (E.D. Mich. Aug. 26, 2010), ECF No. 145. At the time the Salaried Plan was terminated in 2009, Respondents allege that there were a number of viable alternatives to termination that a court might have considered in lieu of termination, the most likely (though not only) option being a reassumption of the Salaried Plan by GM.

Because the PBGC had significant liens and claims over Delphi assets essential to GM's supply-chain, the PBGC had 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. Respondents allege that the PBGC relented in its efforts to advocate for a GM reassumption of the Salaried Plan, or otherwise advocate for the Plan's continued viability, not because of anything related to its statutory role under ERISA, but as a result of pressure imposed by Treasury to support Treasury's efforts to restructure the auto industry in general and GM in particular, leading to the Plan's improper termination. Treasury, Respondents contend, preferred the 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.

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, and whether the PBGC stopped advocating for that result because of Treasury's improper interference with the PBGC. The record demonstrates that the three groups of Treasury documents at issue here all go to the heart of the substantive inquiry concerning the termination.

Regarding the 13 memoranda, Respondents demonstrated that these documents, written between Feb. 17, 2009 and August 4, 2009, were all from specific time periods of importance to Treasury's Delphi determinations, and were likely to contain information of particular relevance to *Black*. *See* ECF No. 70, Mem. at 22-29. For example, the February 17, 2009 Auto Team memorandum (Item No. 770) specifically addressed the risk that 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 PBGC could have demonstrated in the summer of 2009 that Salaried Plan needed to be terminated.

Similarly, Respondents have noted that another two of the memoranda are from March 6, 2009 (Item No. 692) and March 8, 2009 (Item Nos. 593, 596, 599, 601, 603, and 605), coming just after a March 2, 2009 White House meeting where Dr. Summers provided guidance to the Auto Team about federal assistance to be provided to auto suppliers like Delphi. *See* ECF No. 70, Memo. at 23-24 (citing Steven Rattner, *Overhaul: An Insider's Account of the Obama Administration's Emergency Rescue of the Auto Industry*, at 90-91 (2010)). The timing and

subject matter of these two memoranda makes it extremely likely that they will contain evidence directly relevant to the question of whether Delphi was of "critical importance to the automakers," *id*., or at least to the analysis Treasury's Auto Team believed should govern such an inquiry as it 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, which again, is central to whether the PBGC could have demonstrated the necessity of the Plan's termination in 2009.

And the same can be said for the Auto Team's April memorandum on the Delphi Corporation (Item Nos. 84, 275, 860, 863, 849, 856, 859). As Respondents noted in their Renewed Motion to Compel, 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." *See* ECF No. 70, Mem. at 24 (citing 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 of the Salaried Plan given its liens and claims on Delphi assets, which could have resulted in a Delphi shutdown. As described above, given that the PBGC at this time saw a GM reassumption of the Salaried Plan as its best opportunity to avoid termination, evidence of the PBGC's leverage with GM to negotiate a reassumption of the Plan is of substantial materiality to whether the PBGC could have demonstrated that the Plan needed to be terminated in 2009. 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. Again, during the time period in question, Treasury, which is a PBGC board member, was one of three

agencies charged with providing oversight and direction to the PBGC, took over (from GM) negotiations with the PBGC on GM's behalf. At the time the Plan was terminated, Treasury was also directly negotiating the future of Delphi with a number of players besides the PBGC, including GM, Delphi, Delphi's lenders, potential Delphi acquirers, and Delphi's 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. These conflicts of interest, along with the PBGC's inexplicable change in attitude toward GM reassumption, make documents that are likely to contain evidence of Treasury's interactions and influence on the PBGC substantially relevant to *Black*.

Respondents offered similar arguments regarding the 4 email chains and the group of 5 documents related to the July 16, 2009 letter to President Obama concerning the future of the Delphi Salaried Plan. *See* ECF No. 70, Mem. at 29-32. Treasury addresses none of these points, but instead makes two general relevance arguments, neither of which is persuasive.

Treasury's initial argument is based on the declaration of its counsel, who states that he has undertaken a "careful re-examination of the documents at issue," and has now concluded that none of the material is relevant to *Black*. ECF No. 74, Mem. at 5. It is of course the Court's opinion, not that of Treasury's counsel, that matters on relevance determinations, and the Court has previously found, after multiple *in camera* reviews, 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.'" ECF No. 45 at 11 (citation omitted).[2]

[2] While the D.C. Circuit vacated the Court's production Order, it emphasized that "'a district court's ruling on a subpoena for the production of documentary evidence'" should be reviewed "'only for arbitrariness or abuse of discretion.'" Dec. 8 Order at 3 (quoting *In re Sealed Case*, 121 F.3d at 740). Because this record review requires "'some articulation of the district court's reasons for its ruling,'" and because the Circuit was unable to distinguish which parts of Respondents' arguments the Court relied upon in its determination, it vacated the ruling because

Additionally, the Court's review, at this point, is addressed to whether Respondents have shown that "each discrete group of the subpoenaed material *likely* contains important evidence" that is "directly relevant to issues that are expected to be central to the trial." *In re Sealed Case*, 121 F.3d at 754 (emphasis added). Here, Respondents have more than adequately carried their burden of demonstrating that these three categories of documents likely 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. It is only once the Court agrees that Respondents have satisfied their burden on this score that a comparison of the documents to Respondents' need comes into play, such that the Court should, following *in camera* review, "release any evidence that *might reasonably be relevant*" to the underlying litigation need.[3] *In re Sealed Case*, 121 F.3d at 761 (emphasis added).

Treasury's counsel also states that a majority of the memoranda and emails contain the words Delphi and GM but do not specifically mention the Delphi pension plans, or the PBGC,

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it believed a greater articulation of Court's reasoning was necessary for review, not because it disagreed with the Court's conclusion. *Id*. (quoting *In re Sealed Case*, 121 F.3d at 740).

[3] Under this "might reasonably be relevant" standard, *In re Sealed Case*, 121 F.3d at 761, and given Treasury's descriptions of the withheld 61 documents as all being related to Treasury's 2009 auto-bailout, it seems likely that *all* portions of the documents will be subject to release if Respondents are found to have a sufficient litigation need for these documents. Certainly, all portions of the documents that deal with Delphi, GM, the PBGC, or pensions, are of reasonable relevance to the issues in *Black*. To the extent some portion of the documents deal with issues unrelated the 2009 auto-bailout, for example if they deal with Treasury's involvement with other industries or other unrelated issues, they would be properly be withheld.

and Treasury implies that the absence of specific references to those terms makes the documents irrelevant to *Black*. *See* ECF No. 74, Mem. at 6 n.2. But, this fails to account for the fact that any evidence showing Treasury's internal assessment of the value of Delphi to GM is of substantial materiality to *Black*, because that, in turn, will show the corresponding value of the PBGC's liens and claims on Delphi assets, as well as the leverage that the PBGC could (and should) have potentially exercised with GM in advocating for a GM reassumption of the Salaried Plan, which will inform whether or not, ultimately, the PBGC could demonstrate that the Delphi Salaried Plan needed to be terminated under § 1342(c)'s criteria as opposed to there being other alternatives that would have been determined at a termination hearing before the Michigan Court.

Treasury's second general relevance objection is that Respondents cannot satisfy the relevance determination because Respondents supposedly "would not be entitled to remedial relief in *Black*," regardless of what the evidence shows regarding the PBGC's ability to prove its termination case under § 1342(c). *See* ECF No. 74, Mem. at 7. Treasury's argument here is obscure, but it appears to be a repackaging of the "standing" argument that the Court considered and rejected in its 2014 Order. *See* ECF No. 27 at 12-14. As the Court noted then, this "is nothing more than an assertion that the PBGC should win on the merits of the case." *Id*. at 12. Respondents "have alleged that their Plan was terminated by PBGC for political reasons and in violation of ERISA, not because the Plan was no longer financially viable or because PBGC had statutory authority to terminate. This is precisely the issue in discovery in the Michigan court." *Id*. at 12-13. As for Treasury's assertion that "Respondents are not entitled to equitable relief from the PBGC," *id*. at 13, the Court noted that, "at the pleading stage of the litigation, this Court agrees with Judge Tarnow, who 'declin[ed] to accept [the PBGC's] position that Plaintiffs cannot

obtain any relief in this lawsuit if the [Michigan] [c]ourt concludes that the PBGC acted improperly.'" *Id*. at 14 (quoting Order at 3, *Black v. PBGC*, (E.D. Mich. Feb. 17, 2010), ECF No.122.

Leaving aside that this argument has already been considered and rejected by this Court (in an Order undisturbed on appeal), it fails also because it misapprehends the role of the judiciary in the § 1342(c) termination process and Respondents' allegations against the PBGC. As an initial matter, Treasury is wrong that the PBGC's actions under 29 U.S.C. § 1342(c)(1) would not be subject to judicial review. *See* ECF No. 74, Mem. at 7. As the Michigan Court has observed, "'[t]he only authority that the PBGC has under § 1342 is to ask a court for relief. That implies an independent judicial role. . . . All the PBGC [does] is commence litigation, and its position is no more entitled to control than is the view of the Antitrust Division when the Department files suit under the Sherman Act. As the plaintiff, a federal agency bears the same burden of persuasion.'" Order at 5, *Black v. PBGC*, (E.D. Mich. Sept. 1, 2011), ECF No. 193 (quoting *In re UAL Corp.*, 468 F.3d 444, 449-50 (7th Cir. 2006)).

Further, Respondent's' allegations against the PBGC in Count Four are broader than Treasury describes, and capture all the documents they seek here from Treasury. Respondents have alleged in Claim Four that "[t]he PBGC cannot satisfy the standards for termination of the Salaried Plan under 29 U.S.C. § 1342(a) and (c) with the current termination terms it has negotiated and put in place." *See* Second Am. Compl. ¶ 56, *Black v. PBGC*, No. 09-cv-13616 (E.D. Mich. Aug. 26, 2010), ECF No. 145. Respondents additionally allege that:

> The termination of the Plan pursuant to the current termination terms is (i) unsupported by fact; (ii) not in accordance with 29 U.S.C. § 1342(a) and (c); (iii) unsupported by the law; (iv) the result of the PBGC's clear error in judgment and consideration of irrelevant factors; and (iv) otherwise arbitrary and capricious. Contrary to the statutory requirements, the PBGC's termination of the Plan was politically motivated; the fact that the PBGC's decision was the result of political

> expediency rather than relevant statutory criteria is evidenced by the allegations described in this Second Amended Complaint, including among other things: the PBGC's release of its liens against Delphi's foreign assets, its failure to place additional liens against Delphi's foreign assets despite the under-funding of the Salaried Plan; its waiver of actions against Delphi and GM entities, and its failure to obtain additional funding from Old and New GM for the Salaried Plan in exchange for the release of the liens.

Id.

Moreover, as Respondents argued in their Renewed Motion to Compel, the plaintiffs in *Sun Oil Co. v. United States,* on a very similar set of allegations, were able to make a sufficient need showing to overcome the presidential communications privilege. *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*. Much like the Sun Oil plaintiffs alleged that, "as a matter of law only the Secretary of the Interior could, for environmental reasons only, have refused permission" for the building permit there in question, *id*. at 1024, Respondents in Count Four allege that someone in Treasury or the Administration influenced the termination process "for

impermissible, extraneous, political, or other reasons which they think, if shown, would make their case." *Id*. at 1025.

B. Respondents Have Met Their Burden to Show that the Information Sought Here Is Not Available With Due Diligence Elsewhere

As Respondents documented at length in their Renewed Motion to Compel, the information contained in these documents is not available with due diligence elsewhere, and indeed, far from representing "just another source of information," *In re Sealed Case*, 121 F.3d at 755, these documents mark the culmination of years of discovery efforts by Respondents. *See* ECF No. 70, Mem. at 33-36. Treasury's only response to this demonstration is to suggest that some of the same information would be available to Respondents through their planned deposition of Mr. Feldman, who was largely responsible for Treasury's interactions with the PBGC. *See* ECF No. 74, Mem. at 8.

If this were a sufficient condition to defeat the needs analysis, the needs analysis could probably never be overcome to require the production of documentary evidence where a deponent might be available in the future. But the D.C. Circuit has rejected these sorts of arguments on numerous occasions, noting the inferiority of such witness testimony to actual documentary evidence, and expressing no concern about the potential for overlap. *See, e.g., Dellums*, 561 F.2d at 248 (approving of the district court's determination that the plaintiffs ability to depose Mr. Mitchell in the future did not mean that the plaintiffs should not have access to President Nixon's tape recordings and transcripts, because, even if the plaintiffs should be able to depose Mr. Mitchell in the future, "the results are bound to be far inferior to the actual contemporaneous record of the planning for the demonstrations"); *Sirica*, 487 F.2d at 718 ("There is no 'constitutional right to rely on possible flaws in the [witness's] memory. * * * No other argument can justify excluding an accurate version of a conversation that the [witness]

could testify to from memory.'") (quoting *Lopez v. United States*, 373 U.S. 427, 439 (1966)). Those concerns are even greater here, given that the events at issue took place roughly nine years ago. Additionally, and as described above repeatedly, the 61 documents are likely to contain relevant important evidence to *Black* beyond simply documenting Treasury's interactions with PBGC.

CONCLUSION

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

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Respectfully submitted,

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