

**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, <i>et al.</i> ,)	
Respondents.)	
)	

RESPONDENTS' MOTION TO FILE AN *EX PARTE* SUBMISSION UNDER SEAL

Pursuant to the Court’s Minute Order of February 1, 2018, Respondents are today filing a renewed motion to compel 61 documents that the Petitioner United States Department of Treasury has withheld under the presidential communications privilege. In support of that motion, Respondents have prepared an *ex parte* presentation further demonstrating their litigation need for these documents. *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). This *ex parte* presentation draws heavily on materials that are covered by protective orders requiring that covered documents filed in court proceedings be submitted under seal. Accordingly, Respondents request the Court’s leave to file and maintain under seal their *ex parte* presentation in support of their renewed motion to compel. The grounds for this motion are set forth in the

accompanying memorandum. Counsel for the Petitioner has indicated that Petitioner does not consent to this motion.

Date: February 14, 2018

Respectfully submitted,

/s/ Anthony F. Shelley

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**RESPONDENTS' MEMORANDUM IN SUPPORT OF
THEIR MOTION TO FILE AN *EX PARTE* SUBMISSION UNDER SEAL**

Respondents are today filing a Renewed Motion to Compel 61 documents that the Petitioner United States Department of Treasury (“Treasury”) has withheld under the presidential communications privilege. In support of that motion, Respondents have prepared an *ex parte* presentation further demonstrating their litigation need for these documents. As Respondents noted in earlier briefing, *see* ECF No. 51 at 29, an *ex parte* filing addressing these points is appropriate here because Respondents should not have to prejudice their underlying case against the Pension Benefit Guaranty Corporation (“PBGC”) by providing the PBGC and Treasury with a roadmap to Respondents’ litigation strategy prior to the close of discovery and the filing of summary judgment motions in the underlying Michigan lawsuit in order to obtain the discovery they need, and the D.C. Circuit and other courts in this Circuit have recognized the appropriateness of *ex parte* submissions in similar circumstances. *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); *United States v. Poindexter*, 727 F. Supp. 1470, 1479 n.16 (D.D.C. 1989) (authorizing use of an *ex parte* submission in support of a motion to compel discovery in order to avoid forcing the defendant to “reveal to the prosecution the theories of his defense as a prerequisite to attempting to secure the discovery to which he may be entitled”).

Respondents believe this *ex parte* submission is further justified in light of the fact that the Court has previously allowed Treasury to make *ex parte* submissions to the Court in connection with these 61 documents, as well as the concerns the Court has previously expressed regarding its ability to assess the relevance of these disputed documents in light of “other information” in Respondents’ possession that might “shine a different light on [the] relevance” of the documents in question. *See* ECF No. 61 at 6:18-20 (Hr’g Tr. May 16, 2017).

Respondents particularly are filing this motion for leave in order to file *under seal* the *ex parte* submission that the case law permits. The *ex parte* submission that Respondents have prepared is designed to support the Renewed Motion to Compel with reference to documents that Respondents have obtained from both Treasury and the PBGC, from time periods contemporaneous with the 61 documents in question, that demonstrate further why each of these documents is specifically likely to contain information highly relevant to Respondents’ case. In contrast to the documents relied upon in the Renewed Motion to Compel, most of the 50 documents supporting this *ex parte* submission are subject to protective orders, *see* ECF No. 29 (stipulation and protective order governing documents produced by the Treasury) and ECF No. 48-1 (stipulated protective order regarding documents the PBGC produced to Respondents under the Michigan Court’s privilege waiver order), such that Respondents are obligated to file these documents under seal. If the Court grants the motion, Respondents will arrange to have the *ex*

parte submission hand delivered to Chambers, or in any other many the Court deems appropriate. Insofar as Respondents may have been able to file their *ex parte* submission without leave of Court, given the allowance in the case law for the submission, they cannot file it under seal (as the protective orders require) without leave of Court.

In filing this motion for leave, Respondents request that, if the motion is granted, the *ex parte* submission would remain *ex parte* and undisclosed to opposing counsel in the case, even after the motion for leave would be granted. Otherwise, in the ordinary case, granting of a motion to file under seal would result in all parties to the case having access to the documents, though the documents otherwise would remain non-public.

WHEREFORE, Respondents respectfully request that the Court grant leave for them to file an *ex parte* submission under seal.

Date: February 14, 2018

Respectfully submitted,

/s/ Anthony F. Shelley

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[PROPOSED] ORDER

THIS MATTER, having come before the Court on the Respondents' Motion to File an *Ex Parte* Submission Under Seal, and any Opposition or Reply thereto, and the entire Record herein,

IT IS HEREBY ORDERED that the Motion is GRANTED. Respondents may file their submission under seal and *ex parte*.

IT IS FURTHER ORDERED that the submission shall remain under seal and *ex parte*, such that neither the Petitioner nor Interested Party Pension Benefit Guaranty Corporation shall have access to these *ex parte* materials.

SO ORDERED this ____ day of _____, 2018.

Emmet G. Sullivan
UNITED STATES DISTRICT JUDGE