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

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

Introduction

Respondents have moved for leave to file under seal an *ex parte* submission in support of their renewed motion to compel 61 documents from Petitioner United States Department of Treasury ("Treasury"). *See* ECF No. 71 ("Motion for Leave"). Respondents argued in the Motion for Leave that the proposed submission was justified for at least four reasons: (1) the D.C. Circuit and other courts in this Circuit have recognized the appropriateness of *ex parte* submissions in similar circumstances; (2) this Court has previously allowed Treasury to make *ex parte* submissions in connection with these proceedings; (3) by allowing this *ex parte* submission, Respondents could, without unnecessarily compromising their litigation strategy, provide the Court with a focused demonstration of their litigation need for the disputed documents; and (4) because of the protective orders that Respondents have entered into with

Treasury and the Pension Benefit Guaranty Corporation (the "PBGC"), the filing must be made under seal.

Treasury has opposed the Motion for Leave. *See* ECF No. 72 ("Treasury Opp."). While Treasury does not appear to oppose Respondents' request to place the submission under seal, it does oppose Respondents' request to make the filing *ex parte*. As described below, Treasury's opposition to the Motion for Leave fails to grapple seriously with Respondents' arguments or the controlling case law. Worse, Treasury offers no explanation for its opposition other than a blatant attempt to undermine Respondents' underlying action against the PBGC by forcing a premature disclosure of Respondents' litigation theories. Accordingly, the Motion for Leave should be granted.

Argument

In its opposition, Treasury seems to concede that these proceedings are exactly the sort for which *ex parte* proceedings are appropriate. *See* Treasury's Opp. at 2 (noting the general rule that "'a court may not dispose of the merits of a case on the basis of *ex parte*, *in camera* submissions,'" but then acknowledging that disputes about whether an evidentiary privilege applies to documents provide an exception to the general rule) (quoting *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), and citing *Gilmore v. Palestinian Interim Self-Gov't Auth.*, 843 F.3d 958, 967 (D.C. Cir. 2016)). Again, this miscellaneous action, which Treasury (a third-party to the underlying action in Michigan) initiated in challenging Respondents' subpoena *duces tecum*, does not seek to resolve the merits of the underlying case, placing it outside of the general prohibition expressed in *Abourezk*.

Moreover, the particular circumstances of this case place it squarely within the type of proceeding for which *ex parte* submissions are appropriate. Indeed, Treasury itself relied upon

an *ex parte* submission in this case in making its argument that the documents in question were covered by the presidential communications privilege. *See* ECF No. 40. As a result, Treasury cannot seriously dispute that these proceedings are the sort for which *ex parte* submissions are inappropriate. So, it then tries a different tack, arguing instead that only the party asserting the privilege can take advantage of *ex parte* submissions, because the rationale allowing for *ex parte* submissions supposedly "has no applicability to a case, like this one, in which a party seeking to compel the production of documents seeks leave to file an *ex parte* submission in support of its motion to compel their production." Treasury Opp. at 3. This is, of course, plainly wrong, and, in fact, the leading case on this issue, *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997), noted with approval that the subpoena proponent in that case supported his need for documents covered by the presidential communications privilege through an *ex parte* submission. *See id*. at 736, 760.

In sum, Treasury has itself utilized an *ex parte* submission in these proceedings, and the controlling decision, which the D.C. Circuit cited repeatedly in the remand order underlying the current proceedings, *see U.S. Dep't of Treasury v. Black*, No. 17-5142, Judgment & Mem. at 4-5 (D.C. Cir. Dec. 8, 2017) (ECF #1708057), has explicitly endorsed the use of an *ex parte* submission in precisely these sorts of proceedings, for precisely this purpose, *i.e.*, to assist trial courts in assessing whether a proponent of a subpoena has a litigation need for the subpoenaed documents sufficient to overcome the public's interest in maintaining the confidentiality of documents covered by the presidential communications privilege. *See In re Sealed Case*, 121 F.3d at 736, 760. What basis, then, is left for Treasury to oppose the Motion for Leave? Treasury resorts, lastly, to arguing that, notwithstanding its obvious relevance to these proceedings, *In re Sealed Case* is supposedly inapposite, pointing to the civil nature of these

proceedings, and then arguing that a civil case can never have a need for secrecy sufficient to justify an *ex parte* submission. Treasury Opp. at 3-4. This argument too falls flat.

First, nothing in *In re Sealed Case* (or any other case for that matter) supports the categorical limitation that Treasury seeks to impose here on the ability of a civil litigant to utilize an *ex parte* submission to justify a need determination. Additionally, while *In re Sealed Case* did note that there was a need in that case "to preserve the secrecy of the grand jury's investigation," that statement was *not* provided as a justification for the *ex parte* submission, but rather as an explanation as to why the Independent Counsel had "been understandably reluctant to detail the witnesses it has interviewed so far or the areas on which the investigation is focusing." *In re Sealed Case*, 121 F.3d at 760.

Second, Respondents have pointed to a compelling need for secrecy here, *i.e.*, to not prematurely reveal their litigation strategy prior to the close of discovery and the filing of summary judgment motions in the underlying Michigan lawsuit. *See* Mem. in Supp. of Mot. for Leave at 1. As Respondents noted in the Motion for Leave, the court in *United States v. Poindexter*, 727 F. Supp. 1470 (D.D.C. 1989), authorized the use of an *ex parte* submission in support of a motion to compel discovery in a very similar circumstance, 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." *Id*. at 1479 n.16. Treasury tries to distinguish *Poindexter* by going back to the same old well, arguing that the case is supposedly inapposite because it was criminal rather than civil. Treasury. Opp. at 4. But, again, nothing in *Poindexter* (or any other case) suggests that civil litigants do not have an interest in maintaining the confidentiality of their litigation theories, and this is plainly not the law. *See, e.g., Dir., Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997)

(noting that while a "party can discover fact work product upon showing a substantial need for the materials and an undue hardship in acquiring the information any other way," an attorney's "opinion work product, on the other hand, is virtually undiscoverable"). The rationale of *Poindexter* has equal weight in the civil context as the criminal, as it should not be necessary in either context to force one to reveal litigation "theories" to adversaries "as a prerequisite to attempting to secure the discovery to which he may be entitled." *Poindexter*, 727 F. Supp. at 1479 n.16.

Finally, allowing Respondents the opportunity to file an *ex parte* submission in support of their need showing will not substantially prejudice Treasury's rights. The Court is not overseeing the merits litigation of Respondents' underlying suit, so there is no concern that the consideration of the *ex parte* submission will somehow influence the ultimate merits fact-finding, and Treasury indeed is not itself a party to that merits litigation. Further, even with regard to the current proceedings, Treasury is not prejudiced. The materials that underlie the *ex parte* submission are largely available to Treasury, in that they were either produced by Treasury, or produced by the PBGC to Treasury. Accordingly, Treasury believes that Respondents have some obligation to provide the PBGC and Treasury with a roadmap to Respondents' litigation strategy and theories, previewing for the PBGC and Treasury, prior to the filing of summary judgment and the depositions of Treasury staffers Wilson and Feldman, which documents Respondents think are critically important to their case, how the PBGC and Treasury documents produced so far fit in with one another, whether any PBGC documents contradict the Treasury's narrative, and what information from Treasury Respondents believe is necessary in order to make their case. Neither Treasury nor the PBGC has any right to that information, and its revelation would serve no legitimate purpose.

Conclusion

Respondents' motion for leave to file under seal an *ex parte* submission in support of their renewed motion to compel 61 documents from Treasury should be granted.

Date: March 7, 2018

Respectfully submitted,

/s/ Anthony F. Shelley

Anthony F. Shelley (D.C. Bar No. 420043)
Timothy P. O'Toole (D.C. Bar No. 469800)
Michael N. Khalil (D.C. Bar No. 497566)
Miller & Chevalier Chartered
900 Sixteenth St. NW
Washington, DC 20006
Telephone: 202-626-5800
Facsimile: 202-626-5801
E-mail: ashelley@milchev.com
totoole@milchev.com
mkhalil@milchev.com

Attorneys for Respondents