

On March 9, 2012 this Court ordered the PBGC to provide full and complete responses to sixteen of Plaintiffs' Document Requests, including Document Request No. 12, which seeks production of "[a]ll documents and things received, produced or reviewed by the PBGC since January 1, 2006 [through the present time] related to the PBGC's potential or actual liability for any benefit payments under Delphi's Pension Plans." *See* Dkt. No. 204; Ex. A to Dkt. No. 218. Compliance with this Court's order would indisputably involve production of census data, which PBGC is currently reviewing to determine the actual liability for benefit payments under the Delphi Salaried Plan. Because this Court's order includes production of the census data, the PBGC's production would fall squarely within the Privacy Act provision that allows production of government agency documents "pursuant to" a Court order.

The PBGC avoids this straightforward analysis, instead seeking to avoid production by wrenching random quotations from Plaintiffs' Second Motion to Compel out of context. *See* Dkt. No. 223 at 11. But this attempted diversion must fail. The only pertinent questions here are (1) whether the Court ordered compliance with Document Request No. 12, and (2) whether the census data falls within the scope of that request. The answer to both questions is "yes," and as a result the Privacy Act expressly allows PBGC to comply with this Court's order.

As a fallback, the PBGC asks that its production occur pursuant to a protective order. *See id.* at 13-14. Plaintiffs agree, and in fact have, on numerous occasions, requested that the parties enter into a stipulated protective order to achieve this result.¹ *See* Exs. E and F to Dkt. No. 218. The terms proposed by PBGC are also substantially similar to those Plaintiffs have

¹ On March 14, 2013, counsel for Plaintiffs reiterated to the PBGC the Plaintiffs' willingness to enter into a protective order. Indeed Plaintiffs have always to been receptive to ways to protect legitimate privacy interests, and thus do not request names, social security numbers, addresses, or any other personal identifiers. Instead, Plaintiffs' request has been limited to information Plaintiffs' actuaries have indicated is necessary for a proper liability calculation under the Plan. .

been proposing all along, and entry of a protective order under such terms would be appropriate.

See PBGC Response at 13.²

II. THE PBGC IS REQUIRED TO PRODUCE DOCUMENTS RESPONSIVE TO REQUEST NOS. 12 AND 13 RECEIVED, PRODUCED, OR REVIEWED BY THE PBGC SUBSEQUENT TO THE PLAN'S TERMINATION

The time period governing Document Requests Nos. 12 and 13 goes beyond the time of the Plan's termination, up to and including the present time. *See* Ex. A to Dkt. 218 at 3 (“[u]nless otherwise indicated, the document requests refer and relate to the time period beginning on January 1, 2006 until the date when this Request for Documents is answered or required to be supplemented, whichever is later.”). As noted in the Rule 37 Motion, the PBGC has been generating extensive documents related to the Plan's liabilities and recoveries (and thus the § 1342(c) determination) for the last three years as it audits and recalculates its preliminary benefit determinations. *See* Dkt. No. 218 at 8-9. The PBGC Response provides no explanation for withholding post-termination documents responsive to Request No. 12, and thus that portion of the Rule 37 Motion should be treated as conceded. As to Request No. 13, PBGC claims “documents related to the PBGC recoveries, including ‘estimates of the potential recovery for each claim and the value the PBGC assigned to such claims in the valuation of Salaried Plan's assets . . . have not been created.’” Respectfully, Plaintiffs believe that PBGC counsel must be mistaken. Indeed, a December 2011 GAO Report has a significant discussion about the PBGC's recoveries related to the Delphi Plans, and estimates that over \$600 million of those recoveries resulted from transactions occurring in 2011. *See* Gov't Accountability Office, *GM Agreements with Unions Give Rise to Unique Differences in Participant Benefits*, GAO-12-168, at 23-24

² PBGC proposes limiting access to the census data exclusively to the actuaries themselves. This limitation is too narrow to the extent it prevents counsel from having meaningful discussions with the actuaries about the data. Plaintiffs would have no objection to an "actuaries and counsel's eyes only" provision.

(Dec. 15, 2011), <http://www.gao.gov/assets/590/587045.pdf>. If PBGC continues to deny the existence of these documents, Plaintiffs request discovery on the issue.

III. THE PBGC SHOULD BE DEEMED TO HAVE WAIVED ITS ABILITY TO ASSERT PRIVILEGES

Despite the extraordinary amount of time that has passed since being served with the relevant Document Requests (over 18 months), the PBGC has not yet described any assertions of privilege with the specificity required by the Federal Rules. The PBGC argues it should be excused because of the breadth of Plaintiffs' discovery requests and because it noted relevance objections to the Document Requests in its responses. However, unless a party seeks a protective order, which the PBGC has never done, a party can be excused only where its failure to timely and specifically assert a privilege was based on a "good faith" belief that the documents are not "otherwise discoverable." *See* 1993 Advisory Committee Notes to Fed. R. Civ. P. 26(b)(5); *United States v. Philip Morris, Inc.*, 347 F.3d 951, 954 (D.C. Cir. 2003) ("if the court determines that the objection does not cover the allegedly privileged document, or that the objection was not made in good faith as Rule 26(g) requires [] the court may then decide whether the party should be deemed to have waived the privilege."). This narrow exception cannot apply here because, at the time it refused to produce **any** documents and instead forced Plaintiffs to file a motion to compel, PBGC could not claim to have had any "good faith" belief that the documents in question were not otherwise discoverable. PBGC's decision to withhold **all** documents on grounds of relevance was, on its face, frivolous. As Magistrate Judge Majzoub noted at oral argument, seriously entertaining the PBGC's relevance objections would have required her to disregard the plain, unambiguous language of Judge Tarnow's Sept. 1, 2011 Discovery Order. Relevance objections that ignore the unambiguous language of a court order are *per se* unreasonable. *See D.L. v. District of Columbia*, 274 F.R.D. 320, 328 (D.D.C. 2011).

Moreover, the PBGC has never provided any coherent explanation justifying the extraordinary time it has taken to comply with Plaintiffs' discovery. Only a single attorney for Plaintiffs has been assigned to review the documents PBGC produced, and this single attorney has completed the task while simultaneously attending to multiple other clients, matters and tasks at the same time. Plaintiffs are frankly befuddled as to why the impressive resources the PBGC has ostensibly brought to bear in responding to these discovery requests (10 in-house attorneys and 50 contract attorneys) have taken so long to produce so little. Indeed, in the experience of Plaintiffs' counsel, such resources should have been sufficient to complete the production in the 90 days originally ordered by Judge Majzoub. This unjustified delay is inexcusable and, given that it was preceded by a lengthy period of withholding **all** documents based on a frivolous relevance objection, potentially in bad faith. Thus, waiver is appropriate. *Philip Morris, Inc.*, 347 F.3d at 954 (“waiver of a privilege is a serious sanction most suitable for cases of unjustified delay, inexcusable conduct, and bad faith.”) (quoting *First Sav. Bank, F.S.B. v. First Bank Sys., Inc.*, 902 F. Supp. 1356, 1361 (D. Kan. 1995)).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2013, I caused the foregoing electronically to be filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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