

plan. Pursuant to Fed. R. Civ. P. 37(a) and (b), Plaintiffs hereby move for the Court to enforce the terms of the Waiver Order.

A brief in support of this Motion is attached in accordance with L.R. 7.1.

Dated: August 14, 2015

Respectfully submitted,

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CONTROLLING OR OTHERWISE APPROPRIATE AUTHORITY

Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306 (6th Cir. 2000)

Order Denying Petitioner's Request for a Writ of Mandamus and Emergency Stay Order, *In re: Pension Benefit Guaranty Corp.*, Case No. 14-2072 (6th Cir.), Docket No. 10-1

Order Denying as Moot Defendant's Motion to Certify the Privilege Waiver Order for Appeal, Docket No. 271

Order Overruling Defendant's Objections to Magistrate Judge's Order of August 21, 2013 and Mooting Plaintiffs' Motion Requesting the Magistrate Judge Dissolve the Partial Stay of the August 21, 2013 Order, Docket No. 257

Order Denying Defendant Pension Benefit Guaranty Corporation's Motion for Reconsideration and Granting in Part Defendant PBGC's Emergency Motion for Stay, Docket No. 237

Order Granting in Part Plaintiffs' Rule 37 Motion to Enforce Court Order, Docket No. 231

Order Granting Plaintiffs' Second Motion to Compel Discovery From Defendant Pension Benefit Guaranty Corporation, Docket No. 204

Order Sustaining Plaintiffs' Objections to Magistrate Judge's Scheduling Order, Granting Plaintiffs' Motion for Adoption of Scheduling Order, Administratively Terminating PBGC's Motion for Protective Order, Administratively Terminating Plaintiffs' Motion to Compel Discovery, and Entering Scheduling Order, Docket No. 193

Fed. R. Civ. P. 26

Fed. R. Civ. P. 34

Fed. R. Civ. P. 37

**EXHIBIT LIST TO PLAINTIFFS' RULE 37 MOTION TO ENFORCE THIS
COURT'S ORDER GRANTING PLAINTIFFS' SECOND MOTION TO
COMPEL DISCOVERY FROM DEFENDANT PENSION BENEFIT
GUARANTY CORPORATION**

<u>Exhibit</u>	<u>Description</u>
A	Plaintiffs' First Request for Production of Documents Pursuant to the Court's September 1, 2011 Order
B	Plaintiffs' Second Request for Production of Documents Pursuant to the Court's September 1, 2011 Order
C	PBGC's Response to Plaintiffs' First Request for Production of Documents Pursuant to The Court's September 1, 2011 Scheduling Order
D	PBGC's Response to Plaintiffs' Second Request for Production of Documents Pursuant to The Court's September 1, 2011 Scheduling Order
E	January 30, 2013 Letter from M. Khalil to J. Menke
F	February 13, 2013 Letter from W. Owen to M. Khalil
G	January 9, 2015 Letter from M. Khalil to W. Owen
H	February 4, 2015 Letter from J. Menke to M. Khalil
I	PBGC Office of Inspector General Evaluation Report, <i>PBGC's Plan Asset Audit of National Steel Pension Plans Was Seriously Flawed</i> (March 30, 2011)
J	November 28, 2014 Letter from A. Maroni (Acting PBGC Director) to the Honorable J. Boehner, <i>et al.</i>

STATEMENT OF CONCURRENCE

Pursuant to L.R. 7.1 and 37.1, Plaintiffs' counsel has conferred with counsel for the Defendant to discuss the nature of this Motion and its legal bases and relief requested, but did not obtain concurrence in the relief sought.

CONCISE STATEMENT OF THE ISSUES PRESENTED

This Court has held that the Defendant needed to provide “full and complete” responses to Plaintiffs’ discovery requests, and that the Defendant had waived its ability to assert any privileges or protections as to those document requests by failing to produce a timely privilege log. Nonetheless, the Defendant has refused to produce more than 15,000 responsive documents that it withheld on the basis of privilege. Does the Defendant’s refusal to produce these documents violate the Court’s Orders?

This Court has held that the Defendant needed to produce documents related to the Defendant’s liability for benefit payments under Plaintiffs’ pension plan that were generated subsequent to the plan’s termination. The Defendant has withheld information concerning its audit of the pension plan’s assets, which it will use to determine its liability for benefit payments made in connection with the pension plan. Does the Defendant’s refusal to produce these documents violate the Court’s Orders?

INTRODUCTION

On February 20, 2013, Plaintiffs filed a motion to enforce the Court’s March 2012 Order Granting Plaintiffs’ Second Motion to Compel Discovery from the Defendant. Dkt. No. 218 (hereafter, the “Rule 37 Motion”). In their Rule 37 Motion, Plaintiffs argued that the Defendant Pension Benefit Guaranty Corporation (“PBGC”) had unjustifiably withheld almost 30,000 unidentified documents as privileged, given that the time for identifying privilege assertions had long since passed. *Id.* at 14. Plaintiffs also argued that the PBGC should be required to produce documents generated after the termination of Plaintiffs’ pension plan (the “Plan”) that were related to its liability for benefit payments under the Plan, noting that “at this very moment [the PBGC] is using precisely these same documents to determine the accuracy of the Plan’s assets and liabilities as of 2009 – while at the same time taking the position here that these documents are ‘irrelevant’ to the Plan’s asset and liabilities as of 2009.” *Id.* at 9.

On August 21, 2013 Magistrate Judge Majzoub entered the Order Granting In Part Plaintiffs’ Rule 37 Motion to Enforce Court Order (Dkt. No. 231; hereafter, the “Waiver Order”). In the Order, Magistrate Judge Majzoub noted Plaintiffs’ assertion that “Defendant PBGC has produced a portion of the responsive documents in its possession but has withheld almost 30,000 documents on the basis of an unspecified privilege,” and then held that the PBGC “has waived its right to

assert privilege to the documents requested in Plaintiffs' First and Second Requests for Production of Documents." Waiver Order at 4, 7. The PBGC was also ordered to produce documents relating to the PBGC's liability for benefit payments under the pension plan that had been generated subsequent to the plan's termination. *Id.* at 8. The PBGC was ordered to produce the responsive documents by September 30, 2013.

Regrettably, Plaintiffs find themselves back before the Court yet again to attempt to ensure the PBGC's compliance with a Court Order. While the Waiver Order required the PBGC to produce approximately 30,000 responsive documents that the PBGC had withheld improperly as privileged, the PBGC continues to withhold more than 15,000 of those responsive documents, notwithstanding that the Court originally ordered them to all be produced in the fall of 2013.

The PBGC argues that it may withhold these documents in spite of the Court's Waiver Order by relying on an offer Plaintiffs' made in January 2013, in which Plaintiffs' offered to narrow the scope of their document requests if the PBGC would agree to accelerate its document production. However, the PBGC repudiated that offer in February 2013, expressly refusing to accelerate the pace of its production. Because Plaintiffs were unable to reach an agreement with the PBGC on their proposal, Plaintiffs thereafter filed the Rule 37 Motion, in which they noted both their offer of compromise, and the PBGC's rejection of it.

Nonetheless, the PBGC refuses to produce the remaining documents covered by the Waiver Order on the basis of the agreement it repudiated prior to the filing of the Rule 37 Motion.

The PBGC also refuses to produce documents responsive to Request No. 12 that were generated after the Plan's termination but prior to the resolution of the Waiver Order. The documents in question relate to the PBGC's attempts to finalize the value of the Plan's assets, a process that is necessary in order for the PBGC to finalize its benefit payments under the Plan. The PBGC previously acknowledged that asset valuation materials are relevant to the Plan's benefits and liabilities in responding to Plaintiffs' Rule 37 Motion, but argued that no such documents had yet been created. Plaintiffs subsequently learned that Plan asset documents that the PBGC had not disclosed had been provided to the PBGC in 2012. Because the PBGC refuses to produce the documents, Plaintiffs move to compel their production.

BACKGROUND

Plaintiffs are participants in the Plan (known formally as the Delphi Retirement Program for Salaried Employees), which was terminated by the PBGC in 2009. This lawsuit, initiated in September 2009, challenges the PBGC's termination of the Plan.

In the fall of 2011, Plaintiffs served the PBGC with seventeen document requests.¹ After the PBGC refused to provide any responses to those requests, Plaintiffs filed their Second Motion to Compel Discovery from the PBGC.² Dkt. No. 197. In March 2012, Magistrate Judge Majzoub granted Plaintiffs' motion, ordering the PBGC to provide "full and complete responses" to Plaintiffs' document requests. Dkt. No. 204 at 2.

Throughout 2012 the PBGC made sporadic document productions in response to the Order Granting Motion to Compel, producing roughly 75,000 documents by the end of the year. In January 2013, the PBGC informed Plaintiffs that it had withheld approximately 29,000 documents on the basis of various privileges, and that it intended to produce a privilege log documenting its privilege assertions by mid-April 2013, and that it would thereafter finalize its document production.

¹ Pursuant to L.R. 37.2, a copy of these discovery requests, and the PBGC's responses thereto, are attached as Exs. A-D.

² The Second Motion to Compel, Dkt. No. 197, provides a lengthy recitation of the factual and procedural background leading up to the hearing on the Second Motion to Compel, at pages 4-8. Plaintiffs' First Motion to Compel (Docket. No. 179) was administratively terminated by the Court on September 1, 2011 (as was the PBGC's motion for protective order (Docket. No. 178)), based on the hope that "the issues raised in the motion[s] may now be mooted based on the Court's ruling." Dkt. 193 at 6.

By this point, nearly a year had passed since the Court had granted Plaintiffs' Second Motion to Compel, and the PBGC still had not finalized its document production under that Order, notwithstanding the fact that the PBGC had originally been ordered to finalize that completion within 90 days. Dkt. No. 204 at 2. Worse, the PBGC was now taking the position that it would not finalize its production until after it had completed its (overdue) privilege log, and that the earliest time that would occur would be the middle of April 2013.

Plaintiffs believed that the time for producing a privilege log had long since passed, and were concerned that the PBGC's slow pace in finalizing its overdue log was causing additional (and pointless) delay. Accordingly, in an effort to speed up the PBGC's pace and potentially eliminate the need for another discovery motion (or at least reduce the scope of the disagreement between the parties), Plaintiffs offered to exclude two categories of documents from its document requests: documents created, received, or produced by the PBGC prior to August 2008, and correspondence solely among lawyers in its Office of Chief Counsel, or between lawyers in its Office of Chief Counsel and its outside counsel. *See* Jan. 30, 2013 Letter from M. Khalil to J. Menke (Exhibit E) at 2-3. The PBGC responded to Plaintiffs by purporting to accept the benefit of the offer, while simultaneously refusing Plaintiffs' request that it accelerate the pace of its production, stating that "as a practical matter, this offer comes far too late in

PBGC's review process to have a meaningful impact on the time within which PBGC can complete its production." Feb. 13, 2013 Letter from W. Owen to M. Khalil (Ex. F) at 2.

Having failed to reach an agreement with the PBGC, Plaintiffs filed, on February 20, 2013, their third motion to compel, styled as Plaintiffs' Rule 37 Motion to Enforce This Court's Order Granting Plaintiffs' Second Motion to Compel Discovery. Dkt. No. 218. Plaintiffs noted in the motion that "notwithstanding their right to have the PBGC produce all of the responsive documents that have been improperly withheld," they had offered to modify the scope of their document requests in an attempt to accelerate the PBGC's production pace, but that "the PBGC has stated that this narrowing will not meaningfully impact the time that PBGC will take to produce its privilege log." *Id.* at 14. Plaintiffs' Rule 37 Motion expressly sought the production of "almost 30,000 unidentified responsive documents" that the PBGC had withheld on the basis of privilege, *id.* at 3, along with "information responsive to Requests Nos. 12 and 13 that was received, produced, or reviewed by the PBGC *subsequent* to the Plan's termination."³ *Id.* at 8 (italics in original).

³ Plaintiffs' Doc. Request No. 12 required the PBGC to produce "[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." Document Request No. 13
(footnote continued on next page)

On August 21, 2013, in the Waiver Order, the Court granted in part Plaintiffs' Rule 37 motion, holding, *inter alia*, that the PBGC's failure to produce a privilege log for more than one year after the Court ordered the PBGC to comply with Plaintiffs' 2011 discovery requests waived its ability to assert any privileges or protections as to those document requests.⁴ Waiver Order at 7. The Court also ordered the production of "documents responsive to Request nos. 12 and 13 generated subsequent to the Plan's termination." *Id.* at 6.

The PBGC mounted four separate challenges to Court's finding that the PBGC had waived the right to assert privileges by failing to produce a timely privilege log, none of which was successful.⁵ The PBGC did not, however,

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required the PBGC to provide "[a]ll documents and things received, produced or reviewed by [the PBGC] since January 1, 2009 [through the present time] related to potential PBGC recoveries in connection with the Delphi Pension Plans, including, but not limited to, the estimates of the potential recovery for each claim and the value the PBGC assigned to such claims in the valuation of the Salaried Plan's assets." *See* Ex. A at 10.

⁴ Two days after the Waiver Order was entered, the PBGC produced its first untimely privilege log. In September 2013 the PBGC produced a second untimely log.

⁵ *See* Dkt. Nos. 237 (Order Denying Motion for Reconsideration and Granting in Part and Denying in Part PBGC's Emergency Motion to Stay), 257 (Order Overruling Defendant's Objections to Magistrate Judge's Order of August 21, 2013 and Mooting Plaintiffs' Motion Requesting the Magistrate Judge Dissolve the Partial Stay of the August 21, 2013 Order); 266 (Notice of Order from U.S. Court of Appeals - Sixth Circuit [Appeal Case Number 14-2072], denying petition of
(footnote continued on next page)

challenge the other portions of the Waiver Order, and produced certain actuarial data in the fall of 2013. In response to those productions, Plaintiffs contacted the PBGC to express concern that the PBGC appeared to be ignoring the portion of the Waiver Order that required the PBGC to produce documents related to the PBGC's potential or actual liability for any benefit payments under Delphi's pension plans under Document Request Nos. 12 and 13. Plaintiffs noted that these requests sought the PBGC's post-termination documents relating to plan asset and liability valuations. The PBGC responded to these inquiries by stating that no documents had yet been generated that would be responsive to these requests.

In responding to the PBGC's challenges to the Waiver Order, Plaintiffs noted to both this Court and the Sixth Circuit that the Waiver Order implicated almost 30,000 documents.⁶ After the last of the PBGC's challenges to the Waiver Order was rejected, the PBGC finally produced roughly 10,500 documents in

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Defendant for a Writ of Mandamus); 271 (Order Denying as Moot Defendant's Motion to Certify the Privilege Waiver Order for Appeal).

⁶ See Dkt. No. 239 at 2 n.1 (noting, in response to the PBGC's position that only about 10,000 documents were at issue, that "it appears that the PBGC is improperly withholding an additional 16,450 responsive documents for which it is not even attempting to assert a belated privilege"); *In re Pension Benefit Guaranty Corp.*, Case No. 14-2072 (6th Cir.), Dkt. No. 8-1 at 5-6 (noting that the Rule 37 Motion "asked the district court to order the PBGC to produce these 29,000 responsive documents that it had unjustifiably withheld on the basis of unspecified privileges.")

October 2014 in response to the Waiver Order (corresponding with the documents that appeared on untimely privilege logs). Shortly after the PBGC made this production, Plaintiffs contacted the PBGC to request that the PBGC produce the thousands of additional responsive documents that it had previously withheld on the basis of unspecified (and now waived) privileges covered by the Waiver Order.⁷ The PBGC advised that it needed to review the terms of the Waiver Order before responding to Plaintiffs' request to produce the additional documents.

In January 2015, Plaintiffs again contacted the PBGC to discuss its remaining obligations under the Waiver Order, including the thousands of documents covered by the Waiver Order that had not yet been produced, as well as certain Plan valuation documents responsive to Request Nos. 12 and 13 that were

⁷ Plaintiffs do not know the exact number of responsive documents at issue, as they are relying on PBGC representations. The PBGC initially stated that it had withheld close to 30,000 responsive documents on the basis of privilege. In the fall of 2013, counsel for the PBGC represented that the number was closer to 28,700. In July 2013, the PBGC produced approximately 2,250 documents that were initially withheld for privilege, but which the PBGC no longer sought to protect. Accordingly, using the PBGC's 2013 numbers, when the Waiver Order was entered, the PBGC was still withholding roughly 26,450 responsive documents on the basis of privilege. The PBGC ultimately produced approximately 10,485 documents in response to the Waiver Order. Assuming that all of the PBGC's 2013 estimations are accurate, the number of responsive documents that the PBGC withheld on the basis of privilege but refused to produce in response to the Waiver Order is probably in the range of 15,965 documents. If the PBGC's 2012 estimate of 30,000 was accurate, the number of responsive documents at issue could be closer to 17,265.

generated after the Plan's termination in 2011. *See* Jan. 9, 2015 Letter from M. Khalil to W. Owen (Exhibit G) at 2-3 . The PBGC declined to provide either category of document. Regarding the thousands of responsive documents for which the PBGC had waived privilege, the PBGC contended that it was absolved of the responsibility to produce those documents by virtue of the offer Plaintiffs made in January 2013, notwithstanding that the PBGC had refused outright to speed up its production as Plaintiffs had requested, and without regard to the fact that the Court had granted Plaintiffs' subsequent motion for the production of all the withheld documents. *See* Feb. 4, 2015 Letter from J. Menke to M. Khalil (Ex. H) at 2-3. Regarding the second category of documents, the PBGC argued that the documents in question, which were part of the audit of the Plan's assets, were not related to the PBGC's liability for benefit payments, notwithstanding that it is impossible to calculate those liabilities without an accurate asset valuation, which is a principal reason the PBGC audits a plan's assets. *Id.* at 3.

Having already been forced to litigate ten different discovery motions in this Court (every one of which was resolved in Plaintiffs' favor), as well as an emergency stay motion before the Sixth Circuit (also resolved in Plaintiffs' favor), all in an effort to obtain responses to discovery served in 2011 or before, Plaintiffs were hopeful that they could resolve this discovery dispute without resort to further litigation. Unfortunately, the parties were unable to reach agreement on these

issues before the deadline for discovery motions.⁸ Because the PBGC refuses to produce thousands of responsive documents in violation of the Waiver Order, Plaintiffs hereby move to compel their production.

ARGUMENT

I. The PBGC 's Continued Refusal to Produce More than 15,000 Responsive Documents That It Withheld On the Basis of Privilege Violates the Waiver Order

In their Rule 37 motion, Plaintiffs argued that the PBGC has “withheld almost 30,000 unidentified responsive documents on the basis of privilege, even though the time for identifying any such documents and assertions of privilege has long since passed.” Dkt. No. 218 at 3. In granting Plaintiffs’ Rule 37 Motion, Magistrate Judge Majzoub in the Waiver Order noted Plaintiffs’ assertion that “Defendant PBGC has produced a portion of the responsive documents in its possession but has withheld *almost 30,000 documents* on the basis of an unspecified privilege,” and then held that the PBGC “has waived its right to assert privilege to the documents requested in Plaintiffs’ First and Second Requests for

⁸ Plaintiffs note that the PBGC helped to narrow the scope of the dispute during the meet and confer process in two ways. First, the PBGC agreed that it would produce a number of documents related to Document Request Nos. 12 and 13 to Plaintiffs that either were recently completed, or will be completed shortly. These documents include the Recovery Valuation and Allocation Memo, the Plan Asset Audit, the Actuarial Case Memo, and the Actuarial Case Report. Second, the PBGC alleviated Plaintiffs’ concerns that the PBGC had misunderstood the scope of documents it was withholding.

Production of Documents.” Waiver Order at 4, 7 (emphasis added). The Waiver Order went on specifically to hold that on or before September 30, 2013, the PBGC “must produce . . . documents withheld on the basis of privilege as discussed in this order.” *Id.* at 8.

Nearly two years later, more than 15,000 of those documents have yet to be produced. These documents clearly fall under the terms of the Waiver Order. The only reason Plaintiffs are even aware of their existence is that the PBGC identified them as documents responsive to Plaintiffs’ 2011 document requests that were being withheld on the basis of privileges that the PBGC has now been deemed to have waived. The Waiver Order has withstood four challenges brought by the PBGC, and not once did the PBGC ever challenge the Waiver Order’s holding that it pertained to all the documents the PBGC had withheld on the basis of privilege.

Nor is there any merit to the PBGC’s contention that there was an agreement between the parties to narrow the scope of the document requests. There is no question that Plaintiffs offered – prior to having filed the Rule 37 Motion – to narrow the scope of their document requests if the PBGC would speed up finalizing its document production; nor is there any dispute that the PBGC (again before the filing of the Rule 37 Motion) flatly declined to speed up the pace of that production. *See* Ex. F at 2 (stating that the offer came “far too late in PBGC’s review process to have a meaningful impact on the time with which PBGC can

complete its production.”). “A fundamental tenet of all contracts is the existence of mutual assent or a meeting of the minds on all essential terms of a contract.” *O’Connor v. Combined Ins. Co. of Am.*, 441 F. App’x 362, 366 (6th Cir. 2011) (internal quotation marks and citation omitted). Similarly, it is black letter law that an agreement requires consideration. “Consideration is an essential element of every contract. In other words, a promise is legally enforceable only if the promisor receives in exchange for that promise some act or forbearance, or the promise thereof.” *Floss v. Ryan’s Family Steak Houses, Inc.*, 211 F.3d 306, 315 (6th Cir. 2000) (internal citations omitted). Here, there was no meeting of the minds and no consideration. Instead, the PBGC refused the terms of Plaintiffs’ offer, attempting to impose unilateral obligations upon them without providing any consideration in return. That is not an agreement.⁹

The fact that there was no agreement is also plainly reflected in Plaintiffs’ Rule 37 Motion (Dkt. No. 218), filed, again, *after* the correspondence the PBGC

⁹ Plaintiffs also note that the PBGC cannot claim to have relied on this offer to its detriment. The basis of the Waiver Order was that the PBGC’s failure to log its privileges by March 2013 (the time the PBGC filed its opposition to Plaintiffs’ Rule 37 Motion) amounted to a waiver of any privileges it might have otherwise possessed for documents responsive to Plaintiffs’ first and second sets of document requests. Plaintiffs’ offer, made in January 2013, had no effect on the PBGC’s inability to complete its privilege log by March 2013; if anything, it should have made it easier for the PBGC to complete a log by that time, as there would have been less privilege assertions to log.

relies upon, which specifically noted that the PBGC rejected Plaintiffs' offer, and makes clear that Plaintiffs sought the production of all the documents that the PBGC had withheld on the basis of privilege. *See id.* at 13-14. Rather than carve out an exception for the documents covered by the offer rejected by the PBGC, Magistrate Judge Majzoub ordered the production of all the documents that the PBGC had withheld as privileged, Dkt. No. 231 at 4, 7-8, and that Order was upheld by Magistrate Judge Majzoub over the PBGC's motion for reconsideration, and also by Judge Tarnow over the PBGC's objections under Fed. R. Civ. P. 72. The PBGC then petitioned for mandamus relief (which was denied). Plaintiffs noted in their opposition papers before both Judge Tarnow and the Sixth Circuit that the Waiver Order implicated roughly 29,000 documents. *See* Dkt. No. 239 at 2 n.1 (noting, in response to the PBGC's position that only about 10,000 documents were at issue, that "it appears that the PBGC is improperly withholding an additional 16,450 responsive documents for which it is not even attempting to assert a belated privilege"); *In re Pension Benefit Guaranty Corp.*, Case No. 14-2072 (6th Cir.), Dkt. No. 8-1 at 5-6 (noting that the Rule 37 Motion "asked the district court to order the PBGC to produce these 29,000 responsive documents that it had unjustifiably withheld on the basis of unspecified privileges.").

As described above, the PBGC continues to withhold more than 15,000 responsive documents that it should have produced under the terms of the Waiver

Order. The PBGC should be ordered to comply with its remaining obligations under the Waiver Order forthwith.

II. The PBGC's Refusal to Produce Documents It Received After the Plan's Termination Regarding the Valuation Of the Plan's Assets Violates The Waiver Order

The Court's August 21, 2013 Waiver Order required the PBGC to produce "documents responsive to Request for Production nos. 12 and 13 generated subsequent to the Plan's termination." Waiver Order at 8. Document Request No. 12 required the PBGC to produce "[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." Ex. A at 10. The PBGC has withheld documents generated between 2011-12 responsive to Request No. 12 that relate to the PBGC's audit of the Plan's assets, arguing that they are not responsive to Request No. 12. The argument is nonsensical, and the PBGC's refusal to produce the documents violates the Waiver Order.

There can be no doubt that an audit of Plan assets is responsive to a document request seeking information as to the PBGC's liability for benefit payments. In order to determine its potential or actual liability for benefit payments under the Plan, the PBGC needs to know the value of the Plan's assets as of the date of the Plan's termination, as those assets will determine how much of

the PBGC's guaranteed funds will be required to be made to Plan participants, and will also determine the amount of asset allocation benefit payments that will be made to Plan participants. The PBGC's inspector general has noted the direct correlation between a plan's assets and benefit payments under that plan, stating that "[t]he value of a plan's assets is important because it is used in calculating retirement benefits. For some plans, increases in the calculated value of plan assets at the date of plan termination result in increased benefits for plan participants." PBGC Office of Inspector General Evaluation Report, *PBGC's Plan Asset Audit of National Steel Pension Plans Was Seriously Flawed* (Exhibit I) at 1 (Mar. 30, 2011). Indeed, the PBGC cannot possibly finalize its liability (as either guarantor or trustee) under a pension plan without first knowing the value of the assets available, which is why a delayed asset evaluation can stall the benefit determination process, and why the PBGC's Acting Director has referred to the completion of an asset evaluation report as a "necessary prerequisite to issuing final benefit determinations." Nov. 28, 2014 Letter from A. Maroni to the Honorable J. Boehner, *etal.* (Ex. J) at 4.

While the PBGC normally completes the asset audit/evaluation process within 2-3 years of a plan's termination, the PBGC has not yet finished that process for the Delphi plans, which were terminated more than 6 years ago. In 2013 the PBGC hired KPMG to complete the plan asset audit work for the Delphi

Plans, and the PBGC has assured Plaintiffs that it will provide the final Plan Asset Audit when it is completed. However, Plaintiffs have learned that the PBGC had previously used a different contractor (Bazillo, Cobb, and Associates), to provide plan asset evaluation services for the PBGC relating to the Delphi plans. *See* Ex. J at 3. The contractor performed more than \$500,000 worth of work for the PBGC between June 2011 and August 2012, but was ultimately terminated after the PBGC determined that the contractor's work was deficient after a review of deliverables in July 2012. *Id.*

Plaintiffs requested that the PBGC provide Plaintiffs with the deliverables it received from Bazillo, Cobb and Associates, along with any other documents in its possession that are responsive to Request Nos. 12 and 13, but the PBGC has refused, stating that these documents "relate to PBGC's audit of the Delphi plans assets, not PBGC's liability for benefit payments or PBGC's recoveries on its claims arising out of the Delphi plan terminations." Ex. H at 3. As noted above, this argument contradicts not only common sense, but the words of the PBGC's Acting Director and Inspector General.

Moreover, the PBGC has been on notice since at least January 2013 that Plaintiffs believed that Document Request No. 12 encompassed information relating to a plan's asset audit, as the parties discussed it during a meet and confer call held that month. Indeed, Plaintiffs' January 30, 2013 letter notes Plaintiffs'

contention that the Plan Asset Audit Memo is responsive to Document Request No. 12. *See* Ex. E at 4-5. The letter goes on to note a concern that the PBGC's "decision to withhold documents relevant (and in fact necessary) to a determination of the Plan's assets and liabilities . . . raises serious questions about the procedures the PBGC has put in place for responding to Plaintiffs' Document Requests." *Id.* at 5. In response, the PBGC did not contend that the Plan Asset Audit Memo for the Salaried Plan was not responsive, but rather that it could not be produced yet because it had not yet been created. Ex. F at 2-3. Given that the PBGC acknowledged that the Plan Asset Audit Memo is responsive to the document requests at issue, it must also acknowledge that work performed in furtherance of that report is similarly responsive.

Similarly, the briefing on Plaintiffs' Rule 37 Motion also made it clear that Plaintiffs believed asset audit documentation was responsive to Request No. 12. *See, e.g.*, Dkt. No. 218 at 9 ("Under ERISA and its implementing regulations, these documents will be used by the Plan trustee (here, the PBGC) to determine the Plan's value as of the termination date – *i.e.*, July 31, 2009. Thus, the PBGC at this very moment is using precisely these same documents to determine the accuracy of the Plan's assets and liabilities as of 2009 – while at the same time taking the position here that these documents are irrelevant to the Plan's asset and liabilities as of 2009.") (internal citation omitted). The PBGC did not oppose

Plaintiffs' request for this information by arguing that documents related to a valuation of the Plan's assets were not responsive to Request No. 12, and, as Plaintiffs' noted in reply, "[t]he 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." Dkt. No. 226 at 3. In short, the PBGC knew that Plaintiffs' Rule 37 Motion sought information related to the PBGC's audit of the Plan's assets. However, instead of presenting the responsiveness arguments it now relies on, it pretended that the documents Plaintiffs sought did not exist. Indeed, Plaintiffs only learned of the existence of these documents by reviewing the PBGC's responses to congressional inquiries. *See Exs. I and J.*

Because these documents are covered by the terms of the Waiver Order, the PBGC should be ordered to produce them.

CONCLUSION

The Court should order the PBGC to comply with the terms of its Waiver Order by providing within 30 days: (1) the remaining responsive documents it withheld on the basis of privileges deemed waived in the Waiver Order; and (2) the asset audit documents in its possession that were generated after the Plan's termination.

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2015, 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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