IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Dennis Black, *et al.*, Plaintiffs, v. Pension Benefit Guaranty Corporation, Defendant.	Case No. 2:09-cv-13616 Hon. Arthur J. Tarnow Magistrate Judge Mona K. Majzoub

PLAINTIFFS' REPLY IN SUPPORT OF RULE 37 MOTION TO ENFORCE AUGUST 21, 2013 WAIVER ORDER

I. The PBGC Cannot Continue to Withhold More Than 15,000 Responsive Documents For Which It Waived the Ability to Assert Privilege On the Basis of an Offer, When It Explicitly Rejected the Terms of that Offer

In January 2013, the PBGC informed Plaintiffs that its long-overdue document production would not be finalized for another three months as the PBGC worked to complete an untimely privilege review of roughly 30,000 responsive documents. Plaintiffs, needing to get the relevant information necessary to their case, and anxious to avoid yet another extension of the discovery deadlines, offered to narrow the scope of their requests – **if** the PBGC would reciprocate by agreeing to complete its document production within the current discovery timeframe. The PBGC purported to accept the portion of the offer it liked (narrowing the scope), but expressly refused to speed up its production in any fashion – thus depriving Plaintiffs of the only consideration they had requested. Given this categorical rejection of Plaintiffs' offer, Plaintiffs only a week later moved to compel production of **all** the 30,000 withheld documents, noting in such motion both their offer, and the PBGC's rejection of it.

In August 2013, the Court issued its Waiver Order (DE 231), in which it noted that Plaintiffs challenged the PBGC's withholding of "almost 30,000 documents on the basis of an unspecified privilege," and then found that the PBGC's failure to produce a privilege log by March 2013 was unreasonable and constituted a waiver of its ability to assert privileges as to the "documents withheld

on the basis of privilege as discussed in this order." DE 231 at 4, 8. In other words, the Court granted Plaintiffs' motion on precisely the terms Plaintiffs had asked. Yet, the PBGC continues to withhold roughly 15,000 of the 30,000 responsive documents discussed in the Waiver Order, more than two years later.

Conceding the above, the PBGC argues that its qualified acceptance of the Plaintiffs' offer in February 2013 –a week before Plaintiffs filed their motion to compel – constituted a "deal" that altered the scope of the subsequent Waiver Order. Because the record plainly demonstrates that the PBGC refused to speed up its discovery efforts, the PBGC now argues that Plaintiffs' offer was made for a different reason, and that the only consideration Plaintiffs were seeking was to keep the "PBGC [from] produc[ing] certain categories of documents that they had not asked for." DE 278 at 11-12. The argument is nonsensical on its face. Plaintiffs' January 2013 letter makes clear that Plaintiffs expressly asserted their right to production of *all of the 30,000 documents*, and that "notwithstanding their right to have the PBGC produce the entirety of the documents that have been improperly withheld," Plaintiffs would be willing to "modify the scope" of their document request in an effort to accelerate the discovery process. DE 275-6 at 2.

The PBGC's quote selectively ignores those parts of Plaintiffs' correspondence that make clear that the offer was an attempt to put an end to the PBGC's persistent delays (*i.e.*, to speed-up production). For example, after the

portion of the proposed compromise that the PBGC quotes in its opposition, Plaintiffs specifically stated as follows:

> [W]e would ask that in deciding how to proceed the PBGC be mindful of the Court's current Scheduling Order, which cuts off the time for discovery motions at the end of March (and cuts off discovery at the end of April). *The PBGC's plan to finalize its production in the middle of April is plainly incompatible with these deadlines, and to the extent that these delays could be ameliorated by a modification to the discovery parameters, we hope that the PBGC will accept our good faith offer to negotiate an appropriate modification*.

DE 275-6 at 3 (emphasis added).

Indeed, in its opposition, the PBGC claims it did not understand Plaintiffs' offer to be made in an attempt to ameliorate the need for a further extension of the discovery deadlines; but in its contemporaneous correspondence, in the very same paragraph it now relies on as proof that it "accepted" Plaintiffs' proposal, the PBGC stated 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." DE 275-7 at 2. It is black letter law that there can be no agreement in such a circumstance, since the PBGC purported to accept an offer while at the same time rejecting a specific term of that offer. *See, e.g., Phoenix Iron & Steel Co. v. Wilkoff Co.*, 253 F. 165, 167 (6th Cir. 1918) ("in order for a contract to arise from the acceptance of an offer, the acceptance must be absolute and unqualified").

The PBGC's failure to try and reconcile the above provisions with its argument is telling, for in reality the context of the correspondence makes clear there was no agreement. Moreover, the fact that, one week after the PBGC informed Plaintiffs that their offer to narrow the scope of their requests would not speed up production one iota, Plaintiffs immediately went to this Court to speed up the process, demonstrates that there was no meeting of the minds. In that motion, Plaintiffs explicitly noted the offer and the PBGC's rejection of it, and specifically stated that the motion sought the production of "approximately 29,000 responsive documents." DE 218 at 14 n.10. In short, no "deal" ever existed between the parties because the PBGC rejected Plaintiffs' offer by expressly refusing to speed up its production schedule.

The cases the PBGC relies on are inapposite, and the PBGC provides no authority to suggest that an offering party can be forced to honor an agreement where the counter-party expressly refused a key term of the offer.[1] Nor is there any merit to the PBGC's "fairness" argument. On the contrary, it would be manifestly unfair to Plaintiffs to hold them to an offer that the PBGC explicitly rejected, and in which the PBGC gave up nothing in return. Finally, the PBGC's

[1] *See, e.g., Varga v. Rockwell Int'l Corp.*, 242 F.3d 693 (6th Cir. 2001). *Varga's* holding, irrelevant here, is that an evidentiary stipulation can be binding upon courts to the extent that it was clear from the context of the proceedings that the stipulation had been entered into voluntarily by the parties. *Id*. at 699.

assertion that proceedings should be delayed further to allow the PBGC an opportunity to produce a privilege log for the remaining 15,000 documents covered by the Waiver Order is likewise farcical. This Court has already ruled that the PBGC waived its right to assert privileges for these documents, and both Judge Tarnow and the Sixth Circuit have considered and rejected the PBGC's challenges to that ruling.

II. The Asset Audit Documents in Question Are Plainly Covered by the Court's Waiver Order

Approximately four years ago, Plaintiffs served a discovery request on the PBGC that required it to produce information related to the PBGC's liability for benefit payments under Delphi's pension plans. Plaintiffs have cited materials from the PBGC's own Inspector General and Acting Director making clear that asset audit materials are integral to the calculation of the benefits the PBGC owes under a plan. DE 275 at 16 (citing Exs. I and J attached thereto). Indeed, those materials illustrate that the PBGC has been long delayed in issuing its benefit determinations under the Salaried Plan precisely because of delays in completing the asset audit process. DE 275-11 at 3-5.

The PBGC has no response, choosing to ignore the statements of its own officials because there is no way to reconcile its arguments with the understanding of the PBGC's Acting Director and Inspector General, that the PBGC's asset evaluation documentation is a "necessary prerequisite to issuing final benefit

determinations." DE 275-11 at 4. Instead, the PBGC relies on inapposite definitions from Black's law dictionary to support its contention that it would have had to "guess, at [its] peril" as to whether the asset materials were to be included within the request. DE 278 at 16. Of course, that assertion is untenable in light of the uncontested fact that the PBGC considers the asset evaluation process a "necessary prerequisite to issuing final benefit determinations," DE 275-11, and given that Plaintiffs, prior to filing the motion to compel, expressly stated their belief that these materials were encompassed in Document Request No. 12.

Furthermore, the PBGC's assertions, that the PBGC "always disputed that plaintiffs' Document Request 12 included a request for information about PBGC's valuation of the Delphi Pension Plan assets," and that "Plaintiffs conceded as much in their Motion," are demonstrably false. To the contrary, and as noted in Plaintiffs' motion, in January 2013 (prior to filing the Rule 37 Motion that led to the Waiver Order), Plaintiffs stated their belief that the Plan Asset Audit Memo is responsive to Document Request No. 12, s*ee* DE 275 at 17-18 (citing Ex. E at 4-5 attached thereto), and in fact the record further shows that the PBGC did not dispute that assertion. Instead, the PBGC stated that the Plan Asset Audit Memo was among a number of documents that "*have not yet been created by the PBGC and therefore we cannot produce them*." DE 275-7 at 2-3 (emphasis added). If the PBGC truly believed that the information that the PBGC received in 2012 related

to the Plan Asset Audit Memo was not responsive to Request No. 12, it had an obligation to raise that issue in connection with Plaintiffs' 2013 Rule 37 Motion, rather than attempting to obscure the existence of these documents by pretending they did not exist. The PBGC's current efforts to cloud the record are simply more of the same.[2]

Dated: September 10, 2015

Respectfully submitted,

/s/ Anthony F. Shelley

Alan J. Schwartz (P38144)
JACOB & WEINGARTEN, P.C.
25800 Northwestern Highway
Suite 500
Southfield, Michigan 48075
Telephone: 248-649-1900
Facsimile: 248-649-2920
E-mail: alan@jacobweingarten.com

Anthony F. Shelley
Timothy P. O'Toole
Michael N. Khalil
MILLER & CHEVALIER CHARTERED
655 15th St. NW, Suite 900
Washington, DC 20005
Telephone: 202-626-5800
Facsimile: 202-626-5801
E-mail: ashelley@milchev.com
totoole@milchev.com
mkhalil@milchev.com

Attorneys for Plaintiffs

[2] The PBGC's request for "additional time" to "create an appropriate privilege log," for these asset valuation documents also should be denied. DE 278 at 18-19. The Waiver Order explicitly held that the PBGC has waived the ability to assert privileges responsive to Plaintiffs' document Requests 2-17. Because the asset audit documents are responsive to Request No. 12, the PBGC has waived the ability to assert privileges as to those documents.

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 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:

owen.wayne@pbgc.gov (C. Wayne Owen)
david.glass@usdoj.gov (David M. Glass)
edward.w.risko@gm.com (Edward W. Risko)
rswalker@jonesday.com (Robert S. Walker)

/s/ Anthony F. Shelley
Anthony F. Shelley
MILLER & CHEVALIER CHARTERED
655 15th St. NW, Suite 900
Washington, DC 20005
Telephone: 202-626-5800
Facsimile: 202-626-5801
E-mail: ashelley@milchev.com