

support and the proposed Supplemental Reply Brief attached thereto as Exhibit 1.

Pursuant to L.R. 7.1, Plaintiffs' counsel sought concurrence from Defendant's counsel to this motion for leave. Defendant's counsel did not concur.

Dated: March 1, 2016

Respectfully submitted,

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

/s/ Anthony F. Shelley
Anthony F. Shelley
(admitted E.D. Michigan Dec. 22, 2009)
Timothy P. O'Toole
(admitted E.D. Michigan Dec. 22, 2009)
Michael N. Khalil
(admitted E.D. Michigan Sept. 24,
2010)
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

ISSUE PRESENTED

Whether Plaintiffs should be permitted to file a supplemental reply brief in support of their Motion to Enforce Magistrate Judge Majzoub's August 21, 2013 Waiver Order to inform the Court of new evidence relevant to the resolution of that Motion?

Plaintiffs say: Yes.

CONTROLLING AUTHORITY

LR 7.1(d)

Plaintiffs Dennis Black, Charles Cunningham, Ken Hollis, and the Delphi Salaried Retiree Association (collectively, “Plaintiffs”), respectfully move the Court for leave to file a supplemental reply brief in support of their Motion to Enforce the Court’s August 21, 2013 Waiver Order (the “Rule 37 Motion”). DE 275. This request is made in order to present information received by Plaintiffs after their reply brief (DE 279) was filed and, therefore, could not have been included in the original reply.

Specifically, Plaintiffs hereby inform the Court that they now have obtained from the Defendant Pension Benefit Guaranty Corporation (“PBGC”) a copy of what appears to be the Plan Asset Audit, entitled the “Plan Asset Evaluation Report for the Delphi Retirement Program for Salaried Employees and the Delphi Hourly Rate Employees Pension Plan,” as well as several other related documents.

This development is relevant to the Court’s consideration of the Rule 37 Motion in two ways: (1) it shows that the Plan Asset Audit appears to have been completed in January of 2015, which undermines the PBGC’s representation in its Rule 37 papers that the Plan Asset Audit was incomplete as of August 2015 (*see* DE 278 at 18 n.22); and (2) the content of the Plan Asset Audit itself and the content of related materials disclosed at the time of the Plan Asset Audit provide additional support for Plaintiffs’ argument that the PBGC has additional responsive documents in its possession, which the PBGC has not produced despite this

Court's previous order requiring the PBGC to produce them.

A copy of the proposed Supplemental Reply Brief is attached as Exhibit 1.

The substance of the Supplemental Reply Brief also sets forth good grounds in support of this motion for leave. Consequently, Plaintiffs respectfully request that the Court grant them leave to file the Supplemental Reply Brief.

Dated: March 1, 2016

Respectfully submitted,

/s/ Anthony F. Shelley

Anthony F. Shelley
(admitted E.D. Michigan Dec. 22, 2009)

Timothy P. O'Toole
(admitted E.D. Michigan Dec. 22, 2009)

Michael N. Khalil
(admitted E.D. Michigan Sept. 24,
2010)

MILLER & CHEVALIER
CHARTERED

655 15th St. NW, Suite 900
Washington, DC 20005

Telephone: 202-626-5800

Facsimile: 202-626-5801

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

E-mail: ashelley@milchev.com

totoole@milchev.com

mkhalil@milchev.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2016, 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

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

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

[PROPOSED] ORDER

THIS MATTER, having come before the Court on the Plaintiff’s Motion for Leave to File a Supplemental Reply Brief, the Defendant’s Opposition thereto, any reply, and the Record herein,

IT IS HEREBY ORDERED that the Motion is GRANTED. Plaintiffs will file their supplemental brief and exhibits forthwith.

SO ORDERED this ____ day of _____, 2016.

Arthur J. Tarnow
UNITED STATES DISTRICT JUDGE

EXHIBIT 1

also recall that, in its August 31, 2015 response to the Rule 37 Motion, the PBGC represented to Plaintiffs and the Court that the Plan Asset Audit had not yet been completed. DE 278 at 18-19 n.22.

After they filed their reply brief in support of their Rule 37 Motion, Plaintiffs obtained from the PBGC the following relevant documents: (a) a report entitled the Plan Asset Evaluation Report for the Delphi Retirement Program for Salaried Employees and the Delphi Hourly Rate Employees Pension Plan, dated January 30, 2015 (the “Plan Asset Evaluation Report”) , a copy of which is attached here as Exhibit A; (b) a supplement to the Plan Asset Evaluation Report, dated May 19, 2015 (attached here as Exhibit B); (c) a second supplement to the Plan Asset Evaluation Report, dated December 4, 2015 (attached here as Exhibit C); and (d) the Actuarial Case Memo for the Delphi Retirement Program for Salaried Employees, dated September 30, 2015 (attached here as Exhibit D). Additionally, Plaintiffs here also attach correspondence between Congressman Michael Turner and the PBGC’s Inspector General discussing the Plan Asset Audit, dated Dec. 9, 2015 and Feb. 12, 2016, respectively. Attached here as Exs. E and F. Based on a review of these documents, it is appears that the Plan Asset Evaluation Report is what the parties have been referring to as the Plan Asset Audit.

As discussed more fully below, these documents are relevant to the Rule 37

Motion's disposition in two ways: (1) they show that the Plan Asset Audit was completed in January of 2015, which undermines the PBGC's representation in its Rule 37 opposition brief that the Plan Asset Audit was incomplete as of August 2015 (when discovery closed); and (2) they provide further support for Plaintiffs' argument that the PBGC continues to withhold documents it was required to produce under the Court's Waiver Order.

A. The January 30, 2015 Plan Asset Evaluation Report Appears to Be the Plan Asset Audit the PBGC Claimed in Its Rule 37 Briefing Had Not Yet Been Completed

The PBGC's "process for identifying and determining the value of a pension plan's assets is called a plan asset audit." DE 275-10 at 8. Plaintiffs have, for many years, sought through discovery information in the PBGC's possession concerning the PBGC's Plan Asset Audit for their pension plan (the "Plan"). See DE 275 at 15-19 (summarizing requests for Plan Asset Audit and PBGC responses). In opposing Plaintiffs' Rule 37 Motion, the PBGC made a number of representations in August 2015 about the Plan Asset Audit, stating, *inter alia*, that its audit efforts were not yet complete, and promising that it "would provide a copy of the Plan Asset Audit to [Plaintiffs] when it had been completed." DE 278 at 18-19 n.22.

On December 9, 2015, Congressman Michael Turner contacted the PBGC's Inspector General requesting, among other things, that the Inspector General

determine the accuracy of the PBGC's representation that it had not yet completed the Plan Asset Audit. Ex. E. Shortly thereafter, counsel for the PBGC notified Plaintiffs that the Plan Asset Evaluation Report for Plaintiffs' pension plan would soon be accessible on the PBGC's website.² A review of the Plan Asset Evaluation Report shows that: (a) it was completed on January 30, 2015; and (b) it appears to be the Plan Asset Audit that the PBGC was referring to in its representations before the Court. Ex. A.

The PBGC has since clarified for its Inspector General that "although the term 'audit' is frequently used, PBGC actually conducts and oversees plan asset 'evaluations.'" Ex. F at 2. Consistent with this clarification, the Plan Asset Evaluation Report appears to be the Plan Asset Audit. The Plan Asset Evaluation Report states on its face that its objective was to "conduct an evaluation of the assets and liabilities held by the [Delphi] Plans as of [the date of their termination] that were trusted by the PBGC." Ex. A at 2. It's scope of work was to "[p]rovide evidence of the existence of the [Delphi] Plans' assets and liabilities; [e]stimate the fair market value ... of the investments in the Plans as of [their date of termination]; and [e]stimate the value of the Plans' other assets and liabilities as of [their date of termination]." *Id.* at 3.

² The Plan Asset Evaluation Report was posted on the PBGC's website "[o]n or about December 23, 2015." Ex. F at 4.

To be sure, the PBGC's consultant, KPMG, prepared two supplemental documents after the Plan Asset Evaluation Report was completed in January 2015. Exs. B and C. The PBGC appears to take the position that the Plan Asset Evaluation Report was not "complete" without these supplemental reports. The documents do not support this contention.

The first supplement, dated May 19, 2015, is an 11-page document "meant to supplement the Contractor's initial [Plan Asset Evaluation] Report dated January 30, 2015 for the Delphi Plans" by "increas[ing] coverage over the amount of investments selected for testing" in the Plan Asset Evaluation Report. Ex. B at 1. The second, dated December 4, 2015, is an 18-page document, "prepared at the request of PBGC to summarize information in previously issued reports" and "[p]rovide clarification and additional background regarding certain test procedures and findings" previously documented in KPMG's earlier reports. Ex. C at 1, 2. The notion that the Plan Asset Evaluation Report (or what the parties had been referring to as the Plan Asset Audit) was not actually complete without those supplements seems untenable, however, both because the scope of those supplements is narrow, and because the Plan Asset Evaluation Report purports to be a completed product that explicitly "disclaim[s] any intention or obligation to update or revise the observations whether as a result of new information, future events, or otherwise." Ex. A at 32. Additionally, the PBGC's Inspector General

has noted that the “PBGC indicated on its public website that the plan asset evaluation report was completed in February,” before either of the supplemental reports were completed, and that “[n]o subsequent monthly website postings mention the decision to conduct additional asset valuation work.” Ex. F at 4-5.

Moreover, the PBGC has told its Inspector General that “the KPMG work to assess the asset values was completed as of May 19, 2015,” *id.* at 3, and that all of the “substantive work to value the plan assets was completed in May 2015 (when asset values were finalized and transmitted to PBGC financial operations staff for reconciliation), and assets were reconciled and finalized on June 29, 2015.” *Id.* at 2. “These values were then used to prepare the actuarial case memo and to calculate individual participant benefits.” *Id.* At this point, the Plan Asset Audit had to have been complete. *See* Letter to Michael R. Turner from Acting Inspector General Deborah Stover-Springer at 3 n.3 (attached here as Exhibit G) (noting that the PBGC had previously informed its Inspector General that the Actuarial Case Memo can only be started after the “Plan Asset Audit” is completed and reconciled).

It is, accordingly, difficult to reconcile the PBGC’s statement that it “would provide a copy of the Plan Asset Audit to [Plaintiffs] when it had been completed,” DE 278 at 18-19 n.22, with the fact that the “substantive work to value the plan assets was completed in May 2015.” Ex. F at 2. Indeed, the PBGC’s

Inspector General has noted that these representations would lead “a reasonable person” to conclude the opposite, that “the asset valuations were not completed.”

Id. at 4 n.1.

The PBGC’s non-disclosure of the Plan Asset Evaluation Report prevented Plaintiffs from conducting discovery about it, or including it in the materials considered by their expert witness.³ Had the PBGC produced the Plan Asset Evaluation Report when it was completed in January 2015, Plaintiffs would have been able to pursue follow-up discovery related to the document, and to include it in the documents considered by their expert witness in the preparation of his report. Consequently, the PBGC has prejudiced Plaintiffs’ discovery rights, and forced Plaintiffs to expend their precious resources inefficiently. *See, e.g., Carpenter v. City of Flint*, 723 F.3d 700, 707 (6th Cir. 2013) (noting that, in the context of Rule 37, a litigant is prejudiced by an opposing party’s “dilatory conduct if the [litigant] is ‘required to waste time, money, and effort in pursuit of cooperation which [the opposing party] was legally obligated to provide.’”) (quoting *Harmon v. CSX Transp., Inc.*, 110 F.3d 364, 368 (6th Cir. 1997)).

In considering any remedies for the PBGC’s conduct, this Court should

³ Pursuant to a stipulated order entered into by the Parties, August 14, 2015 was the cut-off for the parties to serve most discovery on each other, or to file most discovery motions. DE 274. Plaintiffs’ deadline for serving its expert report was June 30, 2015. DE 273.

consider an award of plaintiffs' reasonable expenses caused by the PBGC's discovery failure, Fed. R. Civ. P. 37(b)(2)(C), a reopening of the discovery deadlines for Plaintiffs, *see Gamby v. Equifax Info. Servs., LLC*, No. 06-11020, 2008 U.S. Dist. LEXIS 67945, at *8-9 (E.D. Mich. Sept. 5, 2008), and/or some "further just order[]." Fed. R. Civ. P. 37(b)(2)(A).⁴

B. The Content of the Newly-Produced Materials Provides Further Support For Plaintiffs' Argument That the PBGC Was Required By the Waiver Order to Produce Documents Related to the Plan Asset Audit, And That It Continues to Withhold Improperly Those Documents

The pending Rule 37 Motion argues that the PBGC has violated the terms of the Waiver Order by withholding a variety of documents related to the Plan Asset Audit that came into the PBGC's possession or control after the termination of Plaintiffs' pension plan. *See* DE 275 at 15-19. Such documents include those related to the PBGC's June 2011 contract with Bazillo, Cobb, and Associates to perform asset evaluation services for the Delphi Salaried and Hourly Plans. *Id.* In opposition, the PBGC has asserted that these documents need not be produced because they are not responsive to Plaintiffs' pertinent document request (Request No. 12), which required the PBGC to produce "[a]ll documents and things

⁴ In the Waiver Order, relying on a PBGC declaration stating that the Defendant had made "a good faith effort" to cooperate with discovery, and noting that there was then still pending the PBGC's objections to Magistrate Majzoub's March 9, 2013 discovery Order, the Court denied Plaintiffs' request to award them fees and other remedies under Rule 37 "at this time." DE 231 at 7-8.

received, produced or reviewed by the PBGC since January 1, 2006 related to the PBGC's potential or actual liability for any benefit payments under Delphi's Pension Plans." See DE 275-2 at 10. The content of the newly-produced materials provide additional support for Plaintiffs' position, as they show that, whether described as a Plan Asset Audit or a Plan Asset Evaluation Report, documents related to the evaluation of the Plan's assets are directly relevant to determining the PBGC's potential or actual liabilities under the Plan.

The PBGC pays three types of benefits in connection with terminated plans: (1) guaranteed benefits under 29 U.S.C. § 1322(a) and (b); (2) asset-funded benefits under 29 U.S.C. § 1344(a); and (3) recovery-funded benefits under 29 U.S.C. § 1322(c). The PBGC's September 30, 2015 Actuarial Case Memo for the Salaried Plan (Ex. D), which describes the "present values of benefits as of the Date of Plan Termination ("DOPT")," illustrates the direct connection between the Plan Asset Evaluation Report (which calculates the value of the Plan's assets) and the PBGC's calculation of the benefits it owes under the Plan. Ex. D at 1. For example, the Actuarial Case Memo notes that the unfunded guaranteed benefits (*i.e.*, the PBGC's liability for guaranteed benefits) are determined by subtracting the "*final assets available for allocation*" from the present value for Title IV benefits. *Id.* (emphasis added). Similarly, the *asset-funded benefits* the PBGC must distribute under § 1344 are, not surprisingly, determined by reference to the

assets available for allocation. *Id.* at 56. Finally, the calculation of recovery funded benefits (referred to as the “4022(c) allocation”) also requires the value of the Plan’s assets in that it is determined by reference to the unfunded non-guaranteed benefits (*i.e.*, unfunded by Plan assets). *See id.* at 1, 57. In fact, the plan asset information is so critical that the PBGC has consistently stated that the Actuarial Case Memo could not be started until the Plan Asset Audit had been completed.⁵

In short, the PBGC’s own documents demonstrate that the value of the Plan’s assets is the foundation for determining, in the words of the discovery request, the “PBGC’s potential or actual liability for any benefit payments under Delphi’s Pension Plans.” Because the PBGC continues to withhold documents related to the Plan Asset Audit that it received in 2011-12 (such as documents related to the PBGC’s June 2011 contract with Bazillo, Cobb, and Associates to perform asset evaluation services), and because the Waiver Order required the PBGC to produce all such documents, Plaintiffs’ Rule 37 Motion should be granted.

⁵ Ex. G at 3 n.3 (noting that the Actuarial Case Memo could only be “started after the Plan Asset Audit date is reconciled by the Financial Operations Department”); *see id.* at 1 (“PBGC’s current schedule for completing the required work is aggressive with cascading dependencies – that is, one activity must be completed before the next can begin.”).

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

Respectfully submitted,

/s/ Anthony F. Shelley
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

