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' RESPONSE TO DEFENDANT PENSION BENEFIT GUARANTY CORPORATION'S OBJECTIONS TO MAGISTRATE JUDGE'S ORDER GRANTING PLAINTIFFS' MOTION TO COMPEL

STATEMENT OF ISSUES

1. Whether the Magistrate Judge's decision to order Defendant Pension Benefit Guaranty Corporation ("PBGC") to produce discovery consistent with the Court's September 1, 2011 Order was contrary to law?
2. Whether the Magistrate Judge's decision that the PBGC should produce full and complete responses to Plaintiffs' discovery requests consistent with Fed. R. Civ. P. 26's relevancy standard was clearly erroneous or contrary to law given the fact that Plaintiffs demonstrated that each of the discovery requests at issue was facially relevant to Plaintiffs' claims?

CONTROLLING OR OTHERWISE APPROPRIATE AUTHORITY

Cases

Conti v. Am. Axle & Mfg., Inc., 326 F. App'x 900, 904 (6th Cir. 2009) (unpublished)

Black v. PBGC, Case No. 09-13616, Order Granting in Part and Denying in Part Defendant PBGC's Motion to Seal; Denying Without Prejudice PBGC's Motion to Dismiss Counts 1-3; Denying Without Prejudice PBGC's Motion for Summary Judgment on Count 4; and Denying Plaintiffs' Motion for an Order to Show Cause, ECF No. 147 (Sept. 27, 2010)

Black v. PBGC, Case No. 09-13616, 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, ECF No. 193 (Sept. 1, 2011)

Black v. PBGC, Case No. 09-13616, Order Denying Defendant's Motion for Reconsideration and Interlocutory Appeal, ECF No. 195 (Oct. 3, 2011)

Statutes and Other Authority

28 U.S.C. §§ 631-39

29 U.S.C. § 1342

Fed. R. Civ. P. 26

Fed. R. Civ. P. 72

Local Rule 72.1(d)

INTRODUCTION

On September 1, 2011, this Court entered an Order reiterating that Plaintiffs were entitled to full discovery under the Federal Rules of Civil Procedure on Counts One through Four of Plaintiffs' Second Amended Complaint. *See* ECF No. 193 ("September 1, 2011 Order") at 3.[1] Noting the "traditionally quite broad" discovery standards of the Federal Rules of Civil Procedure that apply to this case, the Court *explicitly stated* that the scope of discovery in this case would include, and indeed should focus on, "whether termination of the Salaried Plan would have been appropriate in July 2009 if, as Plaintiffs contend, Defendants were required under 29 U.S.C. § 1342(c) to file before this court for a decree adjudicating that the plan must be terminated . . . ." *Id.* at 3-4 (internal quotation marks omitted). The Court also reiterated that it had not yet ruled on the merits of any of the Second Amended Complaint's four Counts, and indeed that "addressing this question may allow the Court to avoid constitutional and statutory questions raised within the Second Amended Complaint in an exercise of judicial restraint." *Id.* at 4.

Defendant Pension Benefit Guaranty Corporation ("PBGC") nonetheless refused to respond to any of Plaintiffs' discovery requests -- *on relevance grounds*, arguing that, notwithstanding the explicit language in the September 1, 2011 Order quoted above, documents relevant to the § 1342(c) termination criteria were beyond the scope of discovery authorized by

[1] As noted in the September 1, 2011 Order, the Court first ordered that the case could proceed to discovery on September 24, 2010, when it denied the PBGC's dispositive motions. *See* ECF No. 193 at 3. Nonetheless, the PBGC still seeks to evade responding to discovery.

the Court.[2] Implausibly, the crux of the PBGC's argument was that in *denying* the PBGC's motion to reconsider its September 1, 2011 Order, the Court actually reversed its earlier discovery ruling. Because the PBGC's objections were entirely meritless, Plaintiffs filed a motion to compel.

After full briefing, submission of a joint statement of resolved and unresolved issues, and hearing on Plaintiffs' motion to compel, Magistrate Judge Majzoub straightforwardly granted the motion in its entirety and ordered the PBGC to provide "full and complete" discovery responses to Plaintiffs' requests within 90 days. The PBGC now asks this Court to find that Magistrate Judge Majzoub abused her discretion: (1) in ordering discovery consistent with the Court's September 1, 2011 Order, and (2) in ordering discovery consistent with the relevancy standard articulated in Fed. R. Civ. P. 26. Because the PBGC's objections are patently frivolous, Magistrate Judge Majzoub's Order Granting Plaintiffs' Second Motion to Compel Discovery from the PBGC (ECF No. 204) should be affirmed.

STATEMENT OF FACTS

The facts of this case have been recited many times to the Court. Despite the fact that the Court first authorized this case to proceed to discovery in September 2010, the PBGC has yet to respond to a discovery request. Plaintiffs filed their first motion to compel discovery from the PBGC in June 2011; however the motion was administratively terminated upon the Court's issuance of its September 1, 2011 Order, which clarified that discovery was authorized on all four Counts of Plaintiffs' Second Amended Complaint, and that this would be full discovery under the Federal Rules of Civil Procedure (not merely discovery truncated on the completeness

[2] The PBGC produced *one* document in response to the Discovery Requests and in fact argues that this is one of three documents relevant to Plaintiffs' claims. *See* ECF No. 197-3 at 1-4 (Ex. C to Plaintiffs' Second Motion to Compel Discovery from Defendant Pension Benefit Guaranty Corp.).

of the PBGC's proffered administrative record). In the September 1, 2011 Order, the Court reiterated its prior holding that it was not yet prepared to rule on the merits of any of the four Counts, and gave the parties explicit instructions as to what the scope of this discovery would entail:

> In terms of addressing the scope of discovery for purposes of entering a scheduling order -- The Court's initial focus, keeping the above case law in mind, is on Count 4 and whether termination of the Salaried Plan would have been appropriate in July 2009 if, as Plaintiffs contend, Defendants were required under 29 U.S.C. § 1342(c) to file before this court "for a decree adjudicating that the plan must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund." Plaintiffs maintain in their objections that addressing this question may allow the Court to avoid constitutional and statutory questions raised within the Second Amended Complaint in an exercise of judicial restraint. The Court agrees.

Sept. 1, 2011 Order at 3-4 (quoting 29 U.S.C. § 1342(c)).

On September 23, 2011, and October 14, 2011, Plaintiffs served the PBGC with the First and Second Document Requests pursuant to the September 1, 2011 Order, which focused on the question articulated in the September 1, 2011 Order -- *i.e.*, whether the termination of the Plan would have been appropriate assuming a § 1342(c) hearing had been held.

Despite the Court's explicit instruction that discovery was to be conducted on whether the termination criteria of § 1342(c) could be satisfied, the PBGC refused to provide any documents in response to Plaintiffs' requests beyond a copy of the signed "termination and trusteeship" agreement. *See* ECF No. 197-3 at 2 (Ex. C to Plaintiffs' Second Motion to Compel). Accordingly, Plaintiffs filed their second motion to compel discovery on December 6, 2011. ECF No. 197 (the "Second Motion to Compel"). PBGC filed its response brief on December 22, 2011 (ECF No. 200), and Plaintiffs filed a reply brief in support of their Second Motion to Compel on January 3, 2012 (ECF No. 201). Pursuant to ECF No. 199, the parties also filed a

joint statement of resolved and unresolved issues on January 13, 2012 (ECF No. 202) (the "Joint Statement"), detailing the parties' positions on each disputed discovery request.

On March 6, 2012, Magistrate Judge Majzoub held a hearing on the Second Motion to Compel, during which she was put in the unusual position of having to explain to the PBGC that both she and the PBGC were obligated to follow this Court's previous Orders. *See* Hr'g. Tr. (Mar. 6, 2012) (ECF No. 205) at 10:22-23 (noting that "You and I have to live with Judge Tarnow's Order"); *id*. at 11:16-19 ("Believe me, I have heard you. And you have heard me. And we have both heard Judge Tarnow. What would you have me do with this motion?"). After an exasperating hearing in which the PBGC repeatedly argued that Magistrate Judge Majzoub should disregard the September 1, 2011 Order in making her ruling, the Court orally granted Plaintiffs' motion. Magistrate Judge Majzoub then entered the Order Granting Plaintiffs' Second Motion to Compel ((ECF No. 204) the "Magistrate Judge's Order") on March 9, 2012. PBGC filed its objection to the Magistrate Judge's Order on March 23, 2012 (ECF No. 209) (the "PBGC's Objections").

STANDARD OF REVIEW

A district court reviews a magistrate judge's order in accordance with the standards set forth in the Federal Magistrate's Act, 28 U.S.C. §§ 631-39, Rule 72 of the Federal Rules of Civil Procedure, and Local Rule 72.1. Under those legal provisions, non-dispositive pretrial motions are to be reviewed under the clearly erroneous or contrary to law standard of review. 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a). A factual finding is clearly erroneous or contrary to law when the reviewing court is left with the definite and firm conviction that a mistake has been committed. *United States v. Smith*, 263 F.3d 571, 581 (6th Cir. 2001) (citing *United States v. Ayen*, 997 F.2d 1150, 1152 (6th Cir. 1993)). "The 'clearly erroneous' standard applies only to

factual findings made by the Magistrate Judge, while her legal conclusions will be reviewed under the more lenient 'contrary to law' standard." *Gandee v. Glaser*, 785 F. Supp. 684, 686 (S.D. Ohio 1992), *aff'd without op.*, 19 F.3d 1432 (6th Cir. 1994) (citing *Fogel v. Chestnutt*, 668 F.2d 100, 116 (2d Cir. 1981), *cert. denied sub nom., Currier v. Fogel*, 459 U.S. 828 (1982)).

"If two permissible views of the evidence exist, a magistrate judge's decision cannot be 'clearly erroneous.'" *Hennigan v. GE Co.*, No. 09-11912, 2010 U.S. Dist. LEXIS 111757, at *5 (E.D. Mich. Oct. 20, 2010) (citing *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985). Rather, "[t]o be clearly erroneous, a decision must strike [the court] as more than just maybe or probably wrong; it must, . . . strike [the court] . . . as wrong with the force of a five-week-old, unrefrigerated dead fish." *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988). Under the contrary to law standard, the Court "'may overturn any conclusions of law which contradict or ignore applicable precepts of law, as found in the Constitution, statutes, or case precedent.'" *Glaser*, 785 F. Supp. at 686 (internal quotation and citation omitted).

ARGUMENT

I. THE MAGISTRATE JUDGE'S ORDER IS ENTIRELY CONSISTENT WITH, AND INDEED REQUIRED BY, THE COURT'S PREVIOUS ORDERS

The PBGC argues that Magistrate Judge Majzoub failed to follow the "law of this case," because she (1) "based her decision on the erroneous belief that the September 2011 Order had granted plaintiffs wide open discovery," and (2) because she failed to recognize that "the Court's subsequent October Order reversed that interpretation and confirmed that the only issue in the case is the validity of the termination agreement between Delphi and the PBGC." ECF No. 209 at 9. Both arguments are plainly frivolous.

In the first place, the Court's September 1, 2011 Order speaks for itself in terms of the scope of discovery. *See* Sept. 1, 2011 Order at 3 (noting that "the limits set forth in Rule 26 must

be 'construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case.'") (quoting *Conti v. Am. Axle & Mfg.*, 326 F. App'x 900, 904 (6th Cir. 2009)). And the PBGC's disingenuous objections notwithstanding, counsel for the PBGC actually acknowledged that he at least understood that the Court has already so ruled (*see* Hr'g Tr. at 13:3-5 "I know Judge Tarnow has said that you have wide open discovery."). Thus, even the PBGC's own counsel acknowledges that the Magistrate Judge's Order is not "contrary to the law of this case," (ECF No. 209 at 9) and that this line of attack is nothing more than an impermissible attack on the Court's September 1, 2011 Order.

The PBGC's alternative argument, that the Court's October denial of the PBGC's motion for reconsideration "reversed [the September 1, 2011 Order] and confirmed that the only issue in the case is the validity of the termination agreement between Delphi and the PBGC," is similarly baseless. *Id.* Again, the September 1, 2011 Order stated, explicitly, that the Court was proceeding in this fashion in part because, it "may allow the Court to avoid constitutional and statutory question raised within the Second Amended Complaint in an exercise of judicial restraint." ECF No. 193 at 4. Clearly the Court's reiteration in its October Order that it has not yet ruled on the merits of Plaintiffs' claims is in no way contrary to anything in the September 1, 2011 Order, and the PBGC has not offered any logically coherent reason to believe that it could be read to diminish or alter the scope of discovery previously authorized. Indeed, the PBGC's comments at the oral argument make clear that its objections are not really based on anything in the October Order, but are founded rather in its argument that the Court has exceeded its authority in ordering the PBGC to comply with any discovery. *See, e.g.*, Hr'g Tr. at 12:01-04 ("We're being asked – we're seemingly being asked by the Court to engage in a hearing about

issues that we thought had – we had placed behind us and which the law explicitly says we don't need to address."). As Magistrate Judge Majzoub noted with some frustration at the hearing, we should be beyond these arguments by now. *See id.* at 12:12 (ECF No. 205). That the PBGC continues to invent new arguments to avoid responding to discovery strongly suggests that it is engaged in naked obstructionism. The PBGC's Objections should be denied.

II. BECAUSE THE PBGC FAILED TO SHOW THAT PLAINTIFFS' REQUESTS WENT BEYOND THE BROAD DISCOVERY STANDARD OF RULE 26, THE MAGISTRATE JUDGE'S ORDER MUST BE AFFIRMED

A. Once the Low Burden of Facial Relevance Has Been Established, the Party Resisting Discovery Bears the Burden of Demonstrating Irrelevancy

Where discovery appears relevant on its face, "the party resisting the discovery has the burden to establish the lack of relevance by demonstrating that the requested discovery is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure." *Chavez v. Daimler Chrysler Corp.*, 206 F.R.D. 615, 619 (S.D. Ind. 2002). Thus, once Plaintiffs established the "low burden of relevance . . ., the legal burden regarding the defense of a motion to compel reside[d] with the party opposing the discovery request." *Martin K. Eby Constr. Co. v. OneBeacon Ins. Co.*, No. 08-1250, 2012 U.S. Dist. LEXIS 43141, at *15 (D. Kan. Mar. 29, 2012) (citing *Swackhammer v. Sprint Corp. PCS*, 225 F.R.D. 658, 661, 662, 666 (D. Kan. 2004)).

B. The Record Before Magistrate Judge Majzoub Clearly Demonstrated that the Discovery Requests Are Facially Relevant to Plaintiffs' Claims, and the PBGC Made No Showing of Irrelevancy

As discussed above, this Court authorized discovery on all four Counts of the Second Amended Complaint, and expressly held that:

> The Court's initial focus, keeping the above case law in mind, is on Count 4 and whether termination of the Salaried Plan would have been appropriate in July 2009 if, as Plaintiffs contend, Defendants were required under 29 U.S.C. § 1342(c) to file before this court "for a decree adjudicating that the plan must be

> terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund."

Sept. 1, 2011 Order at 3-4. Hence, any discovery that "appears reasonably calculated to lead to the discovery of admissible evidence" (*id.* at 3 (quoting Fed. R. Civ. P. 26(b)(1))) on any of Plaintiffs' claims, including the question of the propriety of the Plan's termination under the § 1342(c) criteria is, *per se*, facially within the scope of discovery authorized in this case. This relevance standard is to be "'construed broadly.'" *Id.* at 3 (quoting *Conti v. Am. Axle & Mfg., Inc.*, 326 F. App'x 900, 904 (6th Cir. 2009) (unpublished).

Magistrate Judge Majzoub had ample evidence before her establishing the facial relevance of Plaintiffs' discovery requests, including: (1) Plaintiffs' second motion to compel (ECF No. 197); (2) Plaintiffs' reply in support of their second motion to compel (ECF No. 201); and (3) the Parties' Joint Statement (ECF No. 202), each of which addressed the question of relevancy, and each of which Plaintiffs incorporate within this response. In those papers, Plaintiffs detailed how each of the discovery requests was calculated to lead to the discovery of admissible evidence on Count Four, that is on the question of whether the Plan needed to be terminated in July 2009 to protect the interests of the participants, or to avoid any unreasonable increase to the liability of the Plan or the PBGC. Additionally, where appropriate, Plaintiffs also pointed out where the discovery requests were also relevant to the other Counts of the Second Amended Complaint. This showing is summarized below.

Having established the facial relevancy of the requests, the burden fell to the PBGC to show that "the requested discovery (1) does not come within the broad scope of relevance as defined under Fed. R. Civ. P. 26(b)(1), or (2) is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure." *Beach v. City of Olathe*, 203 F.R.D. 489, 496 (D. Kan. 2001). However, because

the requests at issue were actually tailored to the September 1, 2011 Order, the PBGC was unable to make such a showing.

Having failed to make a showing of irrelevance on the record, the PBGC asks this Court to attribute error to the Magistrate Judge's Order based upon the PBGC's blatant misrepresentation of the record and the claims contained within Plaintiffs' Second Amended Complaint. The lynchpin of the PBGC's argument appears to be that Magistrate Judge Majzoub committed reversible error based upon a single statement at the hearing (taken out of context) that she would not agree to the PBGC's request to limit discovery because she "'wouldn't know where to start.'" PBGC's Objections at 6 (quoting Hr'g Tr.). From this statement, the PBGC attempts to make it seem that Magistrate Judge Majzoub threw up her hands and did not bother to "analyze how these broad discovery requests relate to the actual narrow claims plaintiffs pled." PBGC's Objections at 16. Nothing could be further from the truth.

First, the PBGC's suggestion that Magistrate Judge Majzoub failed to analyze Plaintiffs' discovery requests is patently false. Magistrate Judge Majzoub made clear at the hearing that she had looked at the parties' submissions on the question of relevancy "in great detail[.]" Hr'g Tr. at 4:12; *see also id.* at 14:12-13 ("I know what they asked for. I have read it."). Indeed, in addition to the court submissions, Magistrate Judge Majzoub also heard argument from both sides on the scope of Plaintiffs' requests. *See id*. at 13-16. Moreover, what Magistrate Judge Majzoub actually said during the hearing was that she was not limiting the discovery "because frankly, I wouldn't know where to start **based on the law of this case**." Hr'g Tr. at 16:20-25 (emphasis added). Because Plaintiffs had demonstrated the facial relevancy of their requests, the burden was on the PBGC to demonstrate irrelevance based on "the law of this case." Given the PBGC's refusal to acknowledge the law of the case, it is not surprising that the PBGC was

unable to meet this burden. Magistrate Judge Majzoub dealt with the only actual relevancy objection put forward by the PBGC failure, and it is ridiculous to suggest that the Magistrate Judge should have expended additional resources in detailing why each one of Plaintiffs' requests met the low burden of relevancy in light of the fact that she dealt with the lone objection actually put forward by the PBGC.

The September 1, 2011 Order made clear what the scope of discovery is to include in this case, and the PBGC must abide by that Order. Because the PBGC has not made any showing as to why the Magistrate Judge's Order on the relevancy of Plaintiffs' discovery requests is clearly erroneous or contrary to law, the Magistrate Judge's Order should be affirmed in its entirety.

1. Discovery Seeking Information Related to Delphi and the Delphi Pension Plans

Document Request No. 2 asks for information related to Delphi or its pension plans that the PBGC received, produced or reviewed between 2006 and 2009 (the time period in which the PBGC acknowledges it was actively monitoring Delphi). As detailed in the brief in support of Plaintiffs' Second Motion to Compel, the PBGC is a federal agency with a narrow statutory charge -- to guaranty pension plans. ECF No. 197 at 14. Information that the PBGC collected related to Delphi and its pension plans during this time period should necessarily be related to this statutory charge. Whether the information collected during this time related to Delphi's ability to maintain its plans, the propriety of asserting liens on Delphi assets to protect the Plan's participants, proposals by third parties like GM to assume liability for some or all of Delphi's pension plans, or something else, such information "bears on, or [] reasonably could lead to other

matters that could bear on," the propriety of the Plan's termination. *Conti*, 326 F. App'x at 904. Thus, Document Request No. 2 is facially relevant to Count Four.[3]

Because Plaintiffs demonstrated the facial relevance of this request, the burden fell to the PBGC to show that it "does not come within the broad scope of relevance as defined under Fed. R. Civ. P. 26(b)(1)." *City of Olathe*, 203 F.R.D. at 496. The PBGC made no such showing. While the PBGC did object to the temporal scope of the request (*see* Hr'g Tr. at 13-14, arguing that "it was not until January 2009 that the issue of terminating these plans was even before the PBGC"), Plaintiffs noted in their reply brief that the PBGC, by its own admission, began monitoring the Delphi pension plans in 2006. *See* ECF No. 201 at 2 (citing Declaration of Neela Ranade, ECF No. 37, ¶ 6, in which Ms. Ranade notes that the PBGC began monitoring the funding status of Delphi's pension plans in 2006). The PBGC never made any showing as to how, given this admission, documents from 2006 are beyond Rule 26's relevance standard. The Magistrate Judge's Order should be affirmed as to Request No. 2.

2. Discovery Seeking Information Related to Delphi's Ability to Maintain the Plan and Information Related to the Possibility of GM, or Another Potential Purchaser of Delphi Assets, Assuming Financial Responsibility for the Delphi Pension Plans

As noted in the brief in support of Plaintiffs' Second Motion to Compel, the PBGC has repeatedly argued that the Plan's termination was necessary because of the PBGC's fear that Delphi would not be able to maintain its pension plans, and the plans were at risk of "abandonment." ECF No. 197 at 14-15.[4] Hence, two key questions underlying the propriety of

[3] Also, as noted in the Joint Statement, this Request is reasonably calculated to lead to the discovery of admissible evidence on Counts Two and Three. *See* ECF No. 202 at 4.

[4] Plaintiffs offered additional relevance arguments on these Requests in the Joint Statement. *See* ECF No. 202 at 6-10.

the Plan's termination are whether Delphi was actually unable to sponsor its plan, or whether any other entity (whether GM or some other potential purchaser of Delphi and its assets) would have been willing to sponsor the Delphi plans, or provide financial assistance to an entity willing to sponsor the plans. Request No. 3 (which seeks documents the PBGC received, produced or reviewed in the relevant time period related to GM's financial involvement with Delphi's pension plans); Request No. 4 (which seeks documents the PBGC received, produced or reviewed in the relevant time period related to the potential assumption of liability for any of Delphi's pension plans by an entity other than Delphi); and Request No. 5 (which seeks documents related to the ability of Delphi to maintain its pension plans), are directly relevant to the question of whether the PBGC could demonstrate that the termination of the Plan was necessary under § 1342 (Count Four), and whether the Plan's fiduciary could have agreed to the Plan's termination consistent with its fiduciary duties (Count Two). Plaintiffs also argued that Request No. 5 was calculated to lead to the discovery of admissible evidence on Count Three. *See* ECF No. 202 at 9.

It is difficult to imagine how this Court could begin to consider the propriety of a § 1342(c) termination without addressing these questions, and the PBGC never even attempts to argue that the information is irrelevant to the § 1342(c) criteria (*see* PBGC's Objections at 14 (ECF No. 209), in which the PBGC argues relevance to § 1342(a) criteria, and that the "additional documents sought by plaintiffs have no relevance to plaintiffs' actual allegation that termination of the Salaried Plan by agreement was illegal or unconstitutional"). The PBGC's attempt to misconstrue Plaintiffs' claims is obviously not sufficient to constitute a showing that "the requested discovery is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure." *Daimler*

Chrysler Corp., 206 F.R.D. at 619. The Magistrate Judge's Order should be affirmed as to Requests 3-5.

3. Discovery Seeking Information Related to the PBGC's Insurance Fund Liability for the Delphi Pension Plans, including the PBGC's Settlement Agreements with Delphi and GM, Is Appropriate

As noted in the brief in support of Plaintiffs' second motion to compel production, the PBGC has frequently asserted that the Plan's termination could be justified under § 1342 in order to avoid any unreasonable increase in the liability of the PBGC's insurance fund. ECF No. 197 at 15. The PBGC's insurance liability for the Plan was determined based on three basic variables: the Plan's guaranteed liabilities, the Plan's assets (including PBGC liens and potential third-party contributions by entities like GM or Treasury), and the PBGC's recoveries (from Delphi and GM). Document Requests 6-14 seek information on these subjects in the PBGC's possession – as limited to the time period relevant to Plaintiffs' claims. Such materials are clearly relevant to the propriety of the Plan's termination under the § 1342(c) criteria.[5] Also, as noted in the Joint Statement, these Requests are reasonably calculated to lead to the discovery of admissible evidence on Counts Two and Three. *See* ECF No. 202 at 10-24.

The PBGC's only argument as to relevance on these requests is, again, to mischaracterize Count Four. *See* PBGC's Objection at 15 (ECF No. 209) ("These topics have no bearing whatsoever on the only § 1342(c) question raised by plaintiffs in this case – whether PBGC and Delphi were permitted to terminate the Salaried Plan by agreement.") The Magistrate Judge's Order should be affirmed as to Requests 6-14.

[5] *See also* ECF No. 202 at 10-24.

4. Discovery Seeking Information Relevant to Plaintiffs' Claims that the PBGC Has Already Collected in Responding To FOIA Requests but Has Deemed Non-Disclosable Under FOIA

In 2009 and 2010, Plaintiffs' Counsel requested that the PBGC produce to them, pursuant to the Freedom of Information Act ("FOIA"), documents related to the PBGC's termination of the Salaried Plan. In responding to the FOIA requests, the PBGC withheld and/or redacted numerous documents on the basis of certain exemptions supposedly allowed under FOIA. Plaintiffs requested these withheld documents in Document Requests Nos. 15 -17. Plaintiffs detailed in their second motion to compel (ECF No. 197 at 16-17) and the joint statement of resolved and unresolved issues (ECF No. 202 at 24-31) the facial relevancy of these documents. For example, the September 25, 2009 FOIA request (which forms the basis for Discovery Request No. 15) asked for the PBGC to produce all information that Delphi had provided to the PBGC "in connection with the Plan's termination, to the extent that it is not included in the Administrative Record." *Id.* at 24. As Plaintiffs previously noted in the record, it is hard to imagine a more narrowly tailored request to the propriety of the Plan's termination than a request limited to information that Delphi provided to the PBGC "in connection with the Plan's termination." The Magistrate Judge's Order should be affirmed as to Requests 15-17.

III. BY FAILING TO MAKE ANY ADDITIONAL OBJECTIONS WITH THE REQUIRED SPECIFICITY, AND BY SEEKING TO RELY UPON A RELEVANCE OBJECTION MADE IN BAD FAITH, THE PBGC HAS WAIVED ITS RIGHT TO ASSERT ADDITIONAL OBJECTIONS

As noted in the brief in support of Plaintiffs' Second Motion to Compel at 10-13, the PBGC should be deemed to have waived each of the "boilerplate" objections noted in its response. Fed. R. Civ. P. 34(b)(2)(C) requires that where an objection to production is put forward, the objection must be made with specificity. Despite the Federal Rules' requirements, the PBGC stated every conceivable boilerplate objection in the book to Plaintiffs' requests, none

of them made with the specificity required by the Federal Rules. *See, e.g.*, PBGC's Responses to Requests 2-17, as contained in the PBGC's Responses to the First and Second Document Requests (alleging that the requests are "overbroad, vague, ambiguous, and unduly burdensome"). While the PBGC argues that it did not mean to waive these objections, see PBGC's Objections at n.24, a failure to object with sufficient specificity may result in a waiver of that objection. *See, e.g., Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 356 (D. Md. 2008). Because the PBGC's Objections are so obviously frivolous, waiver is the appropriate result here.

IV. PLAINTIFFS ARE ENTITLED TO THEIR REASONABLE FEES AND EXPENSES INCURRED IN BRINGING THE SECOND MOTION TO COMPEL

In having to brief their Second Motion to Compel, Plaintiffs have incurred significant expenses and legal fees. Because these fees and expenses are purely the result of the PBGC's *frivolous* objections, Plaintiffs will, pursuant to Federal Rule of Civil Procedure 37(a)(5)(A), seek their fees and expenses associated with the Second Motion to Compel, including their fees and expenses in responding to the PBGC's current objections, upon the Court's resolution of the current discovery matter (in the event the Court here rules in Plaintiffs' favor).

CONCLUSION

This Court should affirm the Magistrate Judge's Order in its entirety.

Respectfully submitted,

/s/ Anthony F. Shelley

Alan J. Schwartz (P38144)
JACOB & WEINGARTEN, P.C.
777 Somerset Place
2301 Big Beaver Road
Troy, Michigan 48084
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

CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2012, 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)

/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