

**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.	)	
	)	

**PLAINTIFFS’ RESPONSE TO DEFENDANT PENSION BENEFIT  
GUARANTY CORPORATION’S OBJECTIONS TO MAGISTRATE  
JUDGE’S ORDER GRANTING IN PART PLAINTIFFS’ RULE 37  
MOTION TO ENFORCE COURT ORDER**

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**STATEMENT OF ISSUE PRESENTED**

Whether the Magistrate Judge's decision, that the PBGC had waived its ability to assert privileges or other protections by waiting almost two years to assert those privileges with the specificity required by the Federal Rules of Civil Procedure, was clearly erroneous or otherwise contrary to law?

## **CONTROLLING OR OTHERWISE APPROPRIATE AUTHORITY**

### **Cases**

*United States v. Smith*, 263 F.3d 571 (6th Cir. 2001)

*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, DE 193 (Sept. 1, 2011)

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

*Black v. PBGC*, Case No. 09-13616, Order Granting Motion to Compel, DE 204 (Mar. 9, 2012)

*Black v. PBGC*, Case No. 09-13616, Order Granting in Part Plaintiffs' Motion to Enforce Court Order, DE 231 (Aug. 21, 2013)

*Black v. PBGC*, Case No. 09-13616, Order Denying Defendant's Motion for Reconsideration and Granting in Part and Denying in Part Motion to Stay, DE 237 (Sept. 5, 2013)

*Cozzens v. City of Lincoln Park*, No. 08-11778, 2009 U.S. Dist. LEXIS 4063, at \*9 (E.D. Mich. Jan. 21, 2009)

*PML North Am., L.L.C. v. World Wide Personnel Servs. of Va. Inc.*, No. 06-14447, 2008 U.S. Dist. LEXIS 32393 (E.D. Mich. Apr. 21, 2008)

*Cumberland Truck Equip. Co. v. Detroit Diesel Corp.*, No. 05-74594, 2007 U.S. Dist. LEXIS 84864 (E.D. Mich. Nov. 16, 2007)

*Carfagno v. Jackson Nat'l Life Ins. Co.*, No. 5:99 cv 118, 2001 U.S. Dist. LEXIS 1768 (W.D. Mich. Feb. 13, 2001)

### **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)

## I. INTRODUCTION

From the start of discovery in this case, the PBGC has been a recalcitrant and defiant litigant. Initially taking an “Alice in Wonderland” approach that the Court supposedly had not ordered discovery when the Court unequivocally had, the agency inflicted an initial year’s worth of delay on the discovery process while Plaintiffs were forced to obtain an order from this Court compelling the discovery the Court originally contemplated. Since then, the PBGC took over ten months to produce a fraction of what it told Magistrate Judge Majzoub it could provide in 90 days, and even still the document discovery is incomplete as the PBGC now refuses to abide by the Magistrate Judge’s latest orders that it provide Plaintiffs with materials improperly claimed to be privileged.

Magistrate Judge Majzoub’s Order Granting in Part Plaintiffs’ Rule 37 Motion to Enforce Court Order, DE 231 (the “Rule 37 Order”) rests on three well-settled legal principles. First, a party wishing to exempt a document from discovery on the basis of a privilege must make that objection with sufficient specificity (usually through a privilege log) upon pain of waiver. *See, e.g., Burlington N. & Santa Fe Ry. Co., v. U.S. Dist. Court for Dist. of Mont.*, 408 F.3d 1142 (9th Cir. 2005). Second, a failure to raise properly a privilege objection to a document request within Fed. R. Civ. P. 34’s thirty-day deadline will generally constitute a waiver of the objection. *Carfagno v. Jackson Nat’l Life Ins. Co.*, No.

5:99 cv 118, 2001 U.S. Dist. LEXIS 1768, at \*3 (W.D. Mich. Feb. 13, 2001) (internal citation omitted). Third, boilerplate objections are tantamount to no objections at all, and while courts generally refrain from finding a *per se* waiver if a party misses R. 34's deadline by a few days, the 30-day period should be considered the default, and delays of months or even just weeks can result in waiver absent substantial justification. *Burlington Northern*, 408 F.3d at 1149.

Nevertheless, for almost *two years*, the PBGC relied on boilerplate assertions of privilege to shield approximately 30,000 relevant documents from discovery.<sup>1</sup> Plaintiffs have suffered significant harm as a result of this obstructionism, having had to conduct discovery in the dark, without any knowledge as to nature of these 30,000 documents. Moreover, Plaintiffs have had to incur significant legal expenses litigating these issues, and the action's overall progress has been significantly delayed.

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<sup>1</sup>In recent conversations, the PBGC has clarified that in 2012 it identified approximately 28,700 responsive documents that it was withholding on the basis of privilege. The Magistrate Judge's Rule 37 Order covered this entire scope of documents. *See* DE 231 at 4 (noting that Plaintiffs' claimed approximately 30,000 documents had been improperly withheld). The PBGC now asserts that it "has reduced the number of privileged documents to about 10,000 documents for which a privilege claim is appropriate." DE 234 at 9. On July 29, 2013 the PBGC produced to Plaintiffs approximately 2,250 documents from the original batch of 28,700 documents for which it no longer believes a protection is appropriate. If it is true that the PBGC has reduced the initial 28,700 documents to only 10,000, 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.

Plaintiffs consistently contested the PBGC's reliance on these boilerplate objections, and filed two Rule 37 motions in which these faulty privilege assertions were challenged. On August 21, 2013, twenty-two months after the PBGC served its first boilerplate privilege objections, Judge Majzoub issued the Rule 37 Order here at issue, in which she found that the PBGC had waived its right to assert privileges by virtue of its failure to produce a privilege log in a reasonable time. Faced with the Rule 37 Order, the PBGC finally produced a portion of its privilege log two days later. The PBGC then moved for reconsideration, which was promptly denied. DE 237 ("Order Denying Reconsideration").

The PBGC then filed these objections pursuant to Fed. R. Civ. P. 72(a) (DE 234) (the "Rule 72 Objections"). Magistrate Judge Majzoub's Rule 37 Order should be overturned only upon a finding that her decision is clearly erroneous or contrary to law, a standard the PBGC does not come close to satisfying. Indeed, Judge Majzoub has already addressed each of the PBGC's Rule 72 Objections in her Order Denying Reconsideration, and in doing so demonstrated the baselessness of the PBGC's arguments. As the Magistrate Judge's two decisions make clear, the Rule 37 Order was entirely appropriate. Indeed, courts have regularly found waiver for much less egregious conduct.

Most galling of all, the PBGC tries to blame Plaintiffs and the Court for its current plight, asserting that they "understood" the PBGC to have preserved some

right delinquently to log privileged documents, with the very log the PBGC seeks to say all agreed it could generate still not ever having been fully produced. The reality is much different: Plaintiffs have stated from the start that the PBGC had waived privilege objections because the agency did not initially invoke them with the specificity the law requires, and Plaintiffs have reiterated that position over and over to the PBGC (and where necessary in this Court). The PBGC's staggering delay (which continues even now) in producing its privilege log, even after a ruling has been issued on Plaintiffs' Rule 37 Motion to compel the production of these improperly withheld materials, only serves to cement the propriety of the Magistrate Judge's finding that the PBGC has waived its right to assert such privileges. The Magistrate Judge, who has been entrusted to oversee the discovery in this case, found the PBGC's untimely attempts to assert privileges unreasonable. Because the Magistrate Judge's Rule 37 Order was a judicious application of well-settled law, based upon a consideration of a complete record, the Rule 72 Objections should be denied.

## **II. STATEMENT OF RELEVANT FACTS**

On October 20, 2011, the PBGC served its Responses to Plaintiffs' First Request for Production of Documents Pursuant to the Court's September 1, 2011 Scheduling Order (the "PBGC's First Responses"). Ex. C to DE 218. On November 14, 2011 Defendant PBGC served its responses to Plaintiffs' Second



Request for Production of Documents Pursuant to the Court's September 1, 2011 Scheduling Order (the "PBGC's Second Responses"). Ex. D to DE 218. Both of the PBGC's responses merely contained a "boilerplate" objection that stated: "PBGC also objects to the Requests to the extent they seek documents that: (i) are subject to the attorney-client privilege; (ii) constitute work product; or (iii) are otherwise privileged or protected from discovery under state or federal law." Ex. C to DE 218 at 5 (Page ID# 10110); Ex. D to DE 218 at 2 (Page ID# 10122). No specific documents or privileges were cited, and no privilege log accompanied the responses.

On November 17, 2011 counsel for the parties held a conference call to discuss the PBGC's refusal to produce *any* documents on relevance grounds. During the call, Plaintiffs' counsel also inquired as to when the PBGC would be producing a log documenting the particulars of its privilege assertions. Counsel for the PBGC stated that there would be no privilege log forthcoming, because the objections were merely "boilerplate." *See* DE 197 at 12.

On December 6, 2011, Plaintiffs filed their Second Motion to Compel Discovery from the PBGC (the "Second Motion to Compel"), in which they argued, *inter alia*, that:

[t]he PBGC has not voiced any of its boilerplate objections with the specificity necessary, and the Court should deem those objections waived. To the extent the PBGC had any legitimate objections to the Discovery Requests, it was obligated to state them in their responses,

on pain of waiver, so as to avoid the dangers and costs associated with piecemeal litigation.

DE 197 at 13.

On March 2, 2012, the Court held a hearing on Plaintiffs' Second Motion to Compel. At the hearing, Plaintiffs' counsel reiterated Plaintiffs' position that the PBGC should be deemed to have waived all of its boilerplate objections. *See* DE 205 at 6:03-08 ("we feel that not only is the relevance objection not well founded, but all its other objections, all its other boilerplate objections that they put into the record should be deemed waived, because they seem to have just been made in an attempt to delay the progression of this litigation"). While the PBGC's counsel did not address the PBGC's boilerplate objections at the hearing, he did acknowledge that the only way to uphold the PBGC's refusal to produce documents was to disregard Judge Tarnow's September 1, 2011 Order. *See, e.g., id.* at 10:14-12:22. Finding that the PBGC was asking her to disregard the law of the case, *id.* at 16:20-25, Judge Majzoub overruled the PBGC's objections (of which there were a wide assortment) and ruled for Plaintiffs. *Id.* No limitations were placed on the discovery. *Id.*

At the hearing's conclusion, counsel for the PBGC represented to the Court that 120 days would be a "reasonable" time to comply with the Court's Order. *Id.* at 17:24-25. Nonetheless, the Court ordered the PBGC to provide "full and complete" responses to Plaintiffs' discovery requests within 90 days. DE 204 at 2.

The Magistrate Judge's Order was entered on March 9, 2012 (the "March 2012 Order"). DE 204. On March 23, 2012, the PBGC filed objections to the March 9, 2012 Order, arguing that Magistrate Judge Majzoub misapplied the law of the case and the applicable rules regarding discovery and relevance. *See* DE 209. The PBGC did not seek a stay of the March 2012 Order, and thus, pursuant to LR 72.2, "the ruling remains in full force and effect." Regarding its boilerplate objections, the PBGC noted that the "PBGC cannot be said to have waived objections that it actually asserted [and] . . . has not located any such relevant documents that may be privileged." DE 209 at 16 n.24.

In Plaintiffs' Response to the PBGC's Objections, Plaintiffs again reiterated their position that the PBGC's boilerplate objections were insufficient to preserve any privileges. *See, e.g.*, DE 210 at 14 ("the PBGC should be deemed to have waived each of the 'boilerplate' objections noted in its response").

Despite the Court's 90-day timetable and the PBGC's explicit representation to Judge Majzoub that (even in its view) 120 days was a reasonable time period to complete discovery, the PBGC contacted Plaintiffs in May to request a modification of the discovery schedule so that it could have additional time to locate and produce responsive electronically-stored information that had been archived (which the PBGC represented covered a period from January 2006 through August 2008). In fact, during a May 18, 2012 conference call, PBGC's

counsel stated that while it had collected approximately 95% of all responsive documents, *it had only that day begun reviewing them*, just one month before the Court's June 7th deadline. Nonetheless, the PBGC indicated that it could produce most if not all of the non-archived responsive materials by the current 90-day deadline, June 7th, 2012, so long as it had additional time to produce the archived data. Plaintiffs agreed to the modification upon the condition that the PBGC immediately begin producing, on a rolling basis, responsive non-archived material, that it substantially complete the production of non-archived material by June 7, 2012, and that it complete the production of archived material by September 30, 2012. The PBGC agreed to these conditions, and the parties entered a Stipulated Order to that effect. DE 212.

Despite the PBGC's representations in the May 2012 Stipulation, the PBGC did not immediately begin producing documents on a rolling basis, and in fact its first production did not occur until June 7, 2012 (the day when it was supposed to *complete* its production of non-archived documents). Moreover, far from substantially completing its production of non-archived documents on that day, the June 7th production was only a small fraction of the responsive non-archived documents in the PBGC's possession.

In an effort to speed up discovery and in the spirit of cooperation, Plaintiffs agreed with the PBGC further to push out the discovery deadlines, to modify their

request to exclude archived documents, and to exclude from the production the court filings from Delphi's bankruptcy proceedings. However, after the PBGC made the June 7th production, counsel for the parties conducted a conference call on June 20, 2012 to discuss the PBGC's continued delays. During that call, counsel for the PBGC stated that the PBGC was withholding documents on the basis of unspecified privileges, and that the PBGC would begin the process of logging those privileges in July 2012. Counsel for Plaintiffs reiterated Plaintiffs' position as stated in their briefs and motions, that the PBGC had waived its right to assert privileges.

In August 2012, the parties submitted to the Court a Joint Discovery Report and Stipulated Order (the "Discovery Report"). DE 215. The Discovery Report noted a number of areas where mutual agreement had been reached between the parties. *See, e.g., id.* at 3 n.3 ("The Parties have agreed that the PBGC should not begin collecting Archived Documents until the Non-Archived Documents have been produced."). The Discovery Report also noted that "[t]he PBGC has withheld an unspecified number of otherwise responsive documents on privilege grounds. PBGC has not produced a privilege log identifying the document[s] withheld or the privileges asserted, though it intends to produce such a log at the conclusion of its production of Non-Archived Documents. Plaintiffs and PBGC reserve the right to

litigate issues of privilege if necessary when a privilege log is in fact produced.”

*Id.* at 3-4 n.4.

On October 5, 2012 the Parties entered into a Stipulated Order to set new discovery deadlines. In the text of that Order, the PBGC stated “that it should be able to complete its production of documents and privilege logs by the end of November 2012.” DE 217 at 2.

On December 20, 2012 PBGC made what it described as its final production of documents. No privilege log was provided.

On January 17, 2013, counsel for the parties held a conference call, during which the PBGC indicated it had identified approximately 29,000 responsive documents that it was withholding on grounds of privilege or work-product, that it planned to “re-review” these documents, and that it planned to produce a privilege log describing these documents by the middle of April 2013. In response, on January 30, 2013, Plaintiffs sent a letter to the PBGC outlining their continued objections to the PBGC’s assertion of privilege. In relevant part, the letter noted that “we remind you that because the PBGC failed to state these alleged privileges and protections with the specificity and timeliness required by the Federal Rules of Civil Procedure, it is the Plaintiffs’ position that the PBGC has waived any right to withhold these documents.” *See* Ex. F to DE 218 at 1 (Page ID# 10137).

Plaintiffs filed their Rule 37 Motion on February 20, 2013, in which they asked the Court to order the PBGC to produce the responsive documents that it had unjustifiably withheld on the basis of unspecified privileges. DE 218.

As 2013 progressed, Plaintiffs continued to inquire whether the PBGC intended to produce a privilege log, and if so, when, as Plaintiffs were concerned that, should their Rule 37 motion be denied, the deadline for discovery motions might expire without Plaintiffs ever having a chance to review or to challenge the PBGC's unspecified privileges. The PBGC consistently responded that it was close to producing a log, but missed self-imposed deadlines in April, May, June, and July. In July, the PBGC stated that the log was completed, but that approximately one-half of the log contained documents withheld on the deliberative process privilege, and that the PBGC's General Counsel had yet to actually review those documents and decide whether she actually wanted to assert those privileges. The PBGC announced that it would provide a portion of the log to Plaintiffs by the beginning of August. The PBGC missed that deadline as well.

On August 21, 2013, Magistrate Judge Majzoub issued her Rule 37 Order, holding that the PBGC waived its right to assert privileges with respect to the documents requested in Plaintiffs' First and Second Requests for Documents by failing to produce a privilege log as of the briefing of the Rule 37 Motion. Her ruling made clear that the waiver was appropriate even assuming, *arguendo*, that

the PBGC's position was correct, that it need not have begun logging its privileges until after her March 9, 2012 Order. DE 231 at 7. Two days later, on August 23, 2013, the PBGC produced the "first half" of its privilege log, ostensibly identifying the documents for which it wishes to assert the attorney-client or work-product privilege.

The next week, on August 30, 2013, the PBGC filed a motion for reconsideration with Judge Majzoub. DE 232. On September 4, 2013 the PBGC filed these Rule 72 Objections, raising precisely the same arguments presented in its motion for reconsideration. DE 234. Five days later, on September 5, 2013, Judge Majzoub denied the PBGC's motion, addressing each of the PBGC's arguments in turn in a thorough five-page order and memorandum (DE 237). The PBGC still has yet to produce its self-described "second half" of its privilege log, twenty-three months after first making its boilerplate assertions of privilege.

### **III. STANDARD OF REVIEW**

A district court is to review 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)). 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).

#### **IV. ARGUMENT**

##### **A. THE RULE 37 ORDER IS BASED ON WELL-SETTLED LAW**

The Federal Rules of Civil Procedure contain specific requirements for making a valid objection to a discovery request. *See, e.g.*, Fed. R. Civ. P. 34(b)(2)(C) (noting that where an objection to production is put forward, the objection must be made with specificity). “As a general rule, failure to object to

discovery requests within the thirty days provided by Rules 33 and 34 constitutes a waiver of any objection.” *Carfagno v. Jackson Nat’l Life Ins. Co.*, No. 5:99 cv 118, 2001 U.S. Dist. LEXIS 1768, at \*3 (W.D. Mich. Feb. 13, 2001) (citation and quotation omitted and citing 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice & Procedure* § 2173 (2d ed. 1994)).<sup>2</sup>

Because the Federal Rules require that a party wishing to assert a privilege or other protection must do so with specificity, “vague statements concerning the possible privileged nature of documents called for” are insufficient to secure Rule 26(b)(5)’s protection. *Carfagno*, 2001 U.S. Dist. LEXIS 1768, at \*7-8. This Court has routinely found that “the filing of boilerplate objections is tantamount to filing no objections at all.” Rule 37 Order (DE 231) at 7 (citations omitted).

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<sup>2</sup> *See also, e.g., Allen v. Sears, Roebuck & Co.*, No. 07-CV-11706, 2008 U.S. Dist. LEXIS 45048, \*4-5 (E.D. Mich. June 10, 2008) (Majzoub, Mag. J.) (citing *Carfagno* in enforcing waiver where Plaintiffs failed to file a timely privilege log as required by Fed. R. Civ. P. 26(b)(5)(A) and failed to demonstrate prejudice from the waiver’s enforcement); *Cozzens v. City of Lincoln Park*, No. 08-11778, 2009 U.S. Dist. LEXIS 4063, at \*9 (E.D. Mich. Jan. 21, 2009) (plaintiffs waived privilege where they did not file a privilege log in response to defendant’s motion to compel, did not provide information about the allegedly privileged documents at a hearing a month later, and did not file a motion for a protective order pursuant to Rule 26(c)); *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 356 (D. Md. 2008); *DL v. District of Columbia*, 251 F.R.D. 38, 43 (D.D.C. 2008) (“When faced with general objections, the applicability of which to specific document requests is not explained further, ‘[t]his Court will not raise objections for [the responding party],’ but instead will ‘overrule[] [the responding party’s] objection[s] on those grounds.’”) (quoting *Tequila Centinela, S.A. de C.V. v. Bacardi & Co., Ltd.*, 242 F.R.D. 1, 12 (D.D.C. 2007)).

Judge Majzoub's Rule 37 Order is grounded in these bedrock principles. First, Judge Majzoub found that the PBGC's general and vague assertions of privilege stated in its responses to Plaintiffs' document requests were "boilerplate objections . . . tantamount to filing no objections at all." *Id.* (citing *PML N. Am., L.L.C. v. World Wide Personnel Servs. of Va. Inc.*, No. 06-14447, 2008 U.S. Dist. LEXIS 32393, at \*5 (E.D. Mich. Apr. 21, 2008); *Cumberland Truck Equip. Co. v. Detroit Diesel Corp.*, No. 05-74594, 2007 U.S. Dist. LEXIS 84854, at \*9 (E.D. Mich. Nov. 16, 2007)). While the PBGC argues that these cases are distinguishable on the ground that "[i]n both cases, the party at issue failed to show any indication that a privilege log would follow[,]" DE 234 at 11 (emphasis in original), the distinction completely misses the mark. The cases cited by Magistrate Judge Majzoub support the uncontroverted principle that the filing of a boilerplate objection is tantamount to filing no objection at all. There is nothing in those cases to suggest that a boilerplate objection becomes less problematic if accompanied by a vague promise to cure its lack of specificity at some point in the future. As discussed below, whether a party might later remedy that deficiency by supplementing its boilerplate objections with specific ones is a separate question, to be judged by the reasonableness of the delay.

Second, Judge Majzoub addressed whether the PBGC's delay was egregious enough that it should result in waiver, in light of the prevailing circumstances.

Plaintiffs had argued that, in accordance with the requirements of the Federal Rules of Civil Procedure, the PBGC was required to state its specific privilege assertions in making its responses to Plaintiffs' document requests, which were made on October 20, 2011 and November 14, 2011, respectively. The PBGC argued that it did not have to begin logging its privileged documents until after the Magistrate Judge issued her March 9 Order. DE 223 at 17. Citing the 1993 Advisory Committee Notes to Fed. R. Civ. P. 26(d)(5) and *Untied States v. Phillip Morris, Inc.*, 347 F.3d 951 (D.C. Cir. 2003), the PBGC argued that it need not undertake the process of logging its privilege assertions so long as it has an objection pending to the breadth of the request. *See* DE 223 at 16. However, the authorities the PBGC relies on make clear that a party is only exempted from its responsibility to log its privilege assertions where "the party reasonably believed that its objections applied to the document." *Phillip Morris*, 347 F.3d at 954. Here, given the clarity of the September 1, 2011 Order (DE 193) and the Order Denying Reconsideration (DE 195), the PBGC lacked a "reasonable" basis for its relevance or breadth objections. Again, the PBGC's own counsel basically admitted as much at oral argument. *See supra* p. 6, (citing hearing transcript). Accordingly, the Magistrate Judge would have been perfectly justified in judging the reasonableness of the PBGC's delay as measured from the date of its October and November responses.

Nonetheless, the Magistrate Judge did not do that. Instead, she was able to avoid that question by noting that, even if the PBGC was right that it need not have begun logging documents until after her March 9, 2012 Order, this still meant that the PBGC had failed to log any asserted privileges for over a year prior to the completion of the briefing of the Rule 37 Motion. Indeed, the PBGC's production of the privilege log on August 23, 2013 was over *seventeen months* after the March 9, 2013 Order. Judge Majzoub found this delay unreasonable, and there is no shortage of authority to support such a finding.<sup>3</sup>

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<sup>3</sup> See, e.g., *supra* n. 2; see also *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. Of Mont.*, 408 F.3d 1142, 1149 (9th Cir. 2005) (finding of waiver was not an abuse of discretion where privilege log was filed five months after the Rule 34(b) response); *GMC LLC v. Lewis Bros., L.L.C.*, 10-CV-00725S(F), 2012 U.S. Dist. LEXIS 107039, at \*21 (W.D.N.Y. July 31, 2012) (privilege waived after failure to produce privilege log for 13 months); *Horace Mann Ins. Co. v. Nationwide Mut. Ins. Co.*, 238 F.R.D. 536, 538 (D. Conn. 2006) (holding that discovery responses that were twenty-two days late and did not contain a privilege log, waived the privilege claim); *Pham v. Hartford Fire Ins. Co.*, 193 F.R.D. 659, 662 (D. Colo. 2000) ("boilerplate objection" filed seventy-one days late that did not comply with Rule 26(b)(5) waived attorney-client privilege); *Smith v. Conway Org.*, 154 F.R.D. 73, 76 (S.D.N.Y. 1994) ("[F]our-month delay in responding to the Document Requests . . . waived the protection of the attorney work-product rule."); *Land Ocean Logistics, Inc. v. Aqua Gulf Corp.*, 181 F.R.D. 229, 237-38 (W.D.N.Y. 1998) (Discovery responses filed 3.5 months late that did not comply with Rule 26(b)(5) waived asserted privileges); *Witmer v. Acument Global Techs., Inc.*, No. 2:08-cv-12795, 2010 U.S. Dist. LEXIS 100663, at \*13-17 (E.D. Mich. Sept. 23, 2010) (granting motion to compel where defendants failed to file timely written objections and a privilege log and later filed privilege logs that were untimely, defective and conclusory); *Bowling v. Scott County*, No. 3:04-CV-554, 2006 U.S. Dist. LEXIS 56079, at \*7-9 (E.D. Tenn. Aug. 10, 2006) (finding waiver of privilege where defendants failed to provide the court with a privilege log or sufficient information in any form to evaluate the applicability of privilege);

**B. THE RULE 37 ORDER FULLY ACCOUNTED FOR THE PBGC'S COMMUNICATIONS TO THE PLAINTIFFS AND THE COURT**

The PBGC's first stated objection to the Rule 37 Order is that Magistrate Judge Majzoub "fail[ed] to account for the parties' understanding that PBGC would produce a privilege log at the conclusion of its production," DE 234 at 10, the implication being that, had Judge Majzoub properly accounted for this "understanding," she would have had to excuse the PBGC's failure to produce any portion of its privilege log until twenty-two months after being due. Putting it charitably, the argument is meritless.

As described in the Rule 37 Motion, and as summarized above (*supra* pp. - 4-12), for the last two twenty-two months Plaintiffs have consistently argued that the PBGC waived its right to withhold documents on the basis of privilege by failing to assert those privileges in its Document Responses with the specificity and timeliness required by the Federal Rules of Civil Procedure. Indeed, Plaintiffs filed two motions to compel the production of the improperly withheld documents on exactly this basis. Not once during this twenty-two month period did the PBGC ever request that Plaintiffs rescind their waiver arguments, nor did it ever seek to enter into an agreement or stipulation to toll its time to produce a privilege log.

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*Sonnino v. Univ. of Kan. Hosp. Auth.*, 221 F.R.D. 661, 669 (D. Kan. 2004) ("The applicability of the privilege turns on the adequacy and timeliness of the showing as well as on the nature of the document.") (quoting *Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540, 542 (10th Cir. 1984)).

The PBGC points to a footnote in the August 20, 2012 Discovery Report (DE 215 at 3-4 n.4) as evidence of an implicit understanding between it, Plaintiffs, and the Court that the Plaintiffs were rescinding their waiver arguments and that instead the PBGC was to be afforded a perpetual extension on its privilege log. This is nonsensical. In the first place, the footnote makes clear that the PBGC's statement that it will produce a privilege log at the conclusion of discovery is entirely unilateral. Nothing in the footnote or the Discovery Report suggests that Plaintiffs are acquiescing to this timeframe or rescinding their waiver arguments (which, again, were reiterated at the oral argument on the Motion to Compel, and were still pending before this Court in connection with the PBGC's Rule 72 Objections to the March 9, 2012 Order, *see* DE 210 at 14). In fact, the Plaintiffs expressly reserved the right to contest the propriety of the PBGC's privilege assertions if a privilege log were ever to be produced in that same footnote. *Id.*

Moreover, even if this footnote could somehow be said to represent some kind of mutual agreement about when the PBGC would be allowed to produce a privilege log (which it assuredly did not), the representations the PBGC was making to the Plaintiffs and the Court were that the entire privilege log would be produced in November 2012. *See* DE 217 at 2 ("PBGC believes that it should be able to complete its production of documents and privilege logs by the end of November 2012."). The situation that the Magistrate Judge faced was entirely

different. Notwithstanding the PBGC's representations to the Court, it did not produce even a portion of the privilege log until August 23, 2013 (nine months after the time the PBGC contemplated in the October 2012 Stipulated Order, and two days after the Rule 37 Order was issued), and even then, the PBGC still failed to account for any of the thousands of "deliberative process" assertions that the PBGC believes it should still be able to assert. As Magistrate Judge Majzoub noted, assuming *arguendo* that the Court was sanctioning the PBGC's unilateral discovery plan by entering this Stipulated Order, that Order "was entered one year before this Court entered its order granting in part Plaintiffs' Rule 37 motion to enforce is earlier order compelling discovery. Yet within that year Defendant PBGC has still not identified the privileges it claims or produced a privilege log." In short, the August 20, 2012 Discovery Report in no way excuses the PBGC's dilatory attempts to assert privileges.

Faced with these facts, the Magistrate Judge properly concluded that there was nothing in the PBGC's communications to Plaintiffs or to the Court which would justify its attempts to assert privileges at such a late date. As Judge Majzoub found, "[c]ontrary to Defendant PBGC's argument [that there was a mutual understanding], it was Plaintiffs who moved to enforce a court order and compel production of documents withheld on the basis of unspecified privileges precisely because Defendant failed to assert proper privilege objections or produce



a privilege log.” DE 237 at 2. Judge Majzoub went on to note that, in rendering the Rule 37 Order, she took into account the Parties’ briefs, arguments, and “efforts to extend discovery dates, assert objections, produce the requested documents, and comply with court orders.” *Id.* at 3. With regard to the PBGC’s argument that there was some sort of mutual understanding as a result of Plaintiffs’ agreement to extend discovery deadlines, she noted:

Plaintiffs argued to the Court that they agreed to extend discovery deadlines and modify their request to exclude archived documents in an effort to work with Defendant PBGC, but they *did not agree to allow Defendant PBGC an unlimited amount of time to produce documents, assert privileges, and produce a privilege log. In fact, Plaintiffs argued that Defendant PBGC waived any right to assert privileges with respect to the withheld documents.*

*Id.* at 2 (emphasis added).

Thus, having reviewed the history of these interactions, Judge Majzoub made the entirely proper factual determination that the PBGC and Plaintiffs never had any mutual understanding that would excuse the PBGC’s extraordinary delays. Again, because this is a factual determination, it is entitled to be evaluated under the clearly erroneous standard. *See supra* pp. 12-13. The Rule 37 Order must stand.<sup>4</sup>

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<sup>4</sup> The one authority that the PBGC relies on, *Best Buy Stores, L.P. v. Manteca Lifestyle Center, LLC*, No. 2:10-cv-0389, 2011 U.S. Dist. LEXIS 62817 (E.D. Cal. June 14, 2011), only provides further support for the Magistrate Judge’s Rule 37 Order. The court there excused the defendant’s untimely privilege log production only because there was an *uncontested, mutual agreement* between the parties as to

**C. THE RULE 37 ORDER FULLY ACCOUNTED FOR THE PRACTICALITIES INVOLVED IN CREATING A PRIVILEGE LOG IN THIS CASE**

The PBGC next argues that the Rule 37 Order should be overturned because it failed to account for the “practicalities” involved in creating its privilege log. *See* DE 234 at 12. On its face, this objection must fail, as the Magistrate Judge has explicitly confirmed that “the Court is fully apprised of the scope of discovery in this case and did not fail to consider the practicalities involved in creating a privilege log.” DE 237 at 4. As with its first objection, this is a question of fact-finding that must be reviewed under the “clearly erroneous” standard. Moreover, the Magistrate Judge’s determinations on this count are entitled to significant deference, first because of her significant familiarity with the scope of discovery in this action, and also because she regularly deals with discovery conflicts of exactly this sort, and is in a sound position to determine whether the PBGC’s assertions of burden are credible. Thus, even assuming, as the Magistrate Judge did for the

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a delayed production of the privilege log. *See, e.g., id.* at \*24-26 (noting that plaintiff did not dispute that the parties had a mutual agreement they would exchange privilege log in the future, that the plaintiff had also delayed its production of a privilege log past the due date, and that “because the parties have agreed to exchange privilege logs sometime in the future the court declines to find that defendant’s delayed production of a privilege log necessarily amounts to a waiver of defendant’s privileges in this particular case”). Here, in contrast, there was no agreement, nor does the PBGC actually allege one. At best, the PBGC can be said to allege that it had unilaterally stated its intention to produce a log at the end of the production process, a position that Plaintiffs explicitly rejected.

purposes of her Rule 37 Order, that the PBGC need not have begun logging privileged documents until after her March 9, 2012 Order, the PBGC has a monumentally uphill task to reverse the Magistrate Judge's finding that the PBGC's failure to produce a privilege log by the time Plaintiffs' Rule 37 Motion was briefed was unreasonable. The PBGC has not begun to meet this burden.

Additionally, notwithstanding the PBGC's characterizations of the production's scope and volume, as Plaintiffs noted in their Rule 37 Motion, the truth of the matter is that the amount of documents that the PBGC has reviewed and produced, while significant, is nothing extraordinary in today's world of e-discovery, and certainly manageable given the PBGC's resources.<sup>5</sup> Further, and contrary to the PBGC's assertions here, Plaintiffs agreed to significantly modify their discovery requests -- in order to hurry along the lethargic PBGC -- by excluding archived data, which tends to be the most burdensome to accumulate, a fact that the Magistrate Judge specifically noted in her Order Denying Reconsideration. *See* DE 237 at 2. For all these reasons, this objection is baseless, and should be denied.

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<sup>5</sup> *See, e.g.*, DE 226 at 5 (noting that "the PBGC has never provided any coherent explanation justifying the extraordinary time it has taken to comply with Plaintiffs' discovery," and also noting that a single attorney for Plaintiffs has been able to review, in a fraction of the time, what it has taken the PBGC almost two years and sixty attorneys to accomplish). As Plaintiffs there noted, such resources should have been sufficient to complete the production in the 90 days originally ordered by Judge Majzoub. *Id.*

**D. THE PBGC'S WAIVER IS SOLELY A FUNCTION OF THE PBGC'S OWN FAILURES**

The PBGC's final argument is that the Rule 37 Order's finding of waiver is "inequitable and unwarranted," DE 234 at 16, describing its twenty-two month failure to assert any privileges as a "technical failure to comply with the rule 34(b)'s time limit." *Id.* at 14. For all the reasons discussed above, this argument is plainly without merit. The PBGC's assertion that its twenty-two month delay to assert privileges should be deemed merely a "technical" violation of the Federal Rules only serves to reinforce how little regard the PBGC has for those Rules. *See e.g., supra* n.3 (listing cases finding violations for far less egregious behavior). Moreover, as Judge Majzoub noted in her Order Denying Reconsideration, the responsibility for waiver lies solely with the PBGC. "The Court did not deny Defendant PBGC its right to protect its privileged material. Rather . . . [the] PBGC failed to assert proper privilege objections to Plaintiffs' discovery requests, which were served almost two years ago in September and October 2011, and has failed to produce a privilege log to protect its own allegedly privileged material." DE 237 at 3.

"If the time limits set forth in the discovery rules are to have any meaning, waiver is a necessary consequence of dilatory action in most cases. 'Any other result would . . . completely frustrate the time limits contained in the Federal Rules and give a license to litigants to ignore the time limits for discovery without any

adverse consequences.’’ *Carfagno v. Jackson Nat’l Life Ins. Co.*, No. 5:99 cv 118, 2001 U.S. Dist. LEXIS 1768, at \*4 (W.D. Mich. Feb. 13, 2001) (quoting *Krewson v. City of Quincy*, 120 F.R.D. 6, 7 (D. Mass. 1988)). Here, the Rule 37 Order is entirely just, and in keeping with the goals and purposes of the Federal Rules of Civil Procedure. And, as noted above, the Order is wholly consistent with jurisprudence both within this Circuit, and nationally. *See supra* n.2 and n.3.

### **CONCLUSION**

This Court should overrule the PBGC’s objections to the Magistrate Judge’s Order.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 23, 2013, I caused the foregoing electronically to be filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all registered users, including the following:

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