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' SECOND MOTION TO COMPEL DISCOVERY FROM DEFENDANT PENSION BENEFIT GUARANTY CORPORATION

Pursuant to Fed. R. Civ. P. 37(a)(3)(B), Plaintiffs move for an order compelling Defendant Pension Benefit Guaranty Corporation ("PBGC") to produce documents in response to Plaintiffs' First Request for Production of Documents Pursuant to the Court's September 1, 2011 Order and Plaintiffs' Second Request for Production of Documents Pursuant to the Court's September 1, 2011 Order, forthwith. The PBGC has produced one document in response to Plaintiffs' requests, and refuses to comply with the scope of discovery stated in the Court's September 1, 2011 Scheduling Order.

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

Dated: December 6, 2011

Respectfully submitted,

/s/ Anthony F. Shelley _

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BRIEF IN SUPPORT OF PLAINTIFFS' SECOND MOTION TO COMPEL DISCOVERY FROM DEFENDANT PENSION BENEFIT GUARANTY CORPORATION

CONTROLLING OR OTHERWISE APPROPRIATE AUTHORITY

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

Fed. R. Civ. P. 26
Fed. R. Civ. P. 34
Fed. R. Civ. P. 37

EXHIBIT LIST TO PLAINTIFFS' MOTION TO COMPEL DISCOVERY FROM DEFENDANT PENSION BENEFIT GUARANTY CORPORATION

Exhibit	Description
A	Plaintiffs' First Request for Production of Documents Pursuant to the Court's September 1, 2011 Order
B	Plaintiffs' Second Request for Production of Documents Pursuant to the Court's September 1, 2011 Order
C	PBGC's Response to Plaintiffs' First Request for Production of Documents Pursuant to The Court's September 1, 2011 Scheduling Order
D	PBGC's Response to Plaintiffs' Second Request for Production of Documents Pursuant to The Court's September 1, 2011 Scheduling Order
E	Letter dated November 8, 2011 from T. O'Toole to J. Menke

STATEMENT OF CONURRENCE

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

CONCISE STATEMENT OF THE ISSUE PRESENTED

Whether Defendant Pension Benefit Guaranty Corporation should be compelled to provide complete responses to Plaintiffs' First and Second Sets of Requests for Production of Documents?

I. INTRODUCTION

Defendant Pension Benefit Guaranty Corporation ("PBGC") refuses to respond to any of Plaintiffs' discovery requests on relevance grounds,[1] despite the fact that this Court's September 1, 2011 Order explicitly stated that the type of documents that Plaintiffs have requested are within the scope of discovery. [2] Thus, the PBGC has not responded to the fourteen requests contained within Plaintiffs' First Request for Production of Documents Pursuant to the Court's September 1, 2011 Order (the "First Document Request") or the three requests contained within Plaintiffs' Second Request for Production of Documents Pursuant to the Court's September 1, 2011 Order (the "Second Document Request") (collectively, the "Discovery Requests").[3] This refusal has forced Plaintiffs, once again, to seek an Order from this Court to compel discovery responses.[4]

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[1] As described below, the PBGC has produced *one* document in response to the Discovery Requests and in fact argues that this is one of three documents relevant to Plaintiffs' claims.

[2] The full title of the Order is "Order Sustaining Plaintiffs' Objections to Magistrate Judge's Scheduling Order, Granting Plaintiffs' Motion for Adoption of Scheduling Order, Administratively Terminating PBGC's Motion for Protective Order, Administratively Terminating Plaintiffs' Motion to Compel Discovery, and Entering Scheduling Order", Docket No. 193 (the "September 1, 2011 Order").

[3] The Discovery Requests are attached hereto as Exs. A and B, respectively.

[4] Plaintiffs' previously-filed motion to compel (Docket. No. 179) was administratively terminated by the Court on September 1, 2011 (as was the PBGC's motion for protective order (Docket. No. 178)), based on the hope that "the issues raised in the motion[s] may now be mooted based on the Court's ruling." September 1, 2011 Order at 6. In those motions, the PBGC argued that no discovery was warranted in this case because (1) the first three counts of Plaintiffs' complaint purportedly raised no factual issues; (2) the Court should limit itself to a review of the administrative record; and (3) Plaintiffs had not yet met the evidentiary hurdles supposedly necessary to obtain discovery from the PBGC as to the completeness of that administrative record. The Court rejected these arguments and explicitly stated that there was to be full discovery on all four of Plaintiffs' counts, and that this discovery "should focus on" whether termination would have been appropriate in July 2009 if the Court had held a hearing under 29 U.S.C. § 1342(c) as Plaintiffs claim the statute requires. September 1, 2011 Order at 3-4. Unfortunately, because the PBGC refuses to acknowledge these explicit holdings, the basic issues of Plaintiffs' previously-filed motion to compel have not been mooted.

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 I - IV of Plaintiffs' complaint. *See* Docket No. 193 at 3 (hereafter referred to as the "September 1, 2011 Order").[5] 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).

Consistent with the above, Plaintiffs served upon the PBGC requests for documents related to the question of whether the statutory criteria for termination could have been satisfied, asking for documents that the PBGC received, produced or reviewed in connection with its interactions with Delphi and the Delphi pension plans; the PBGC's potential liability and avenues for recovery; and the PBGC's interactions with parties who had a stake in determining whether the Delphi pension plans should terminate, and if so, under what circumstances. Despite the fact that these requests are unquestionably within the scope of discovery articulated by the Court, the PBGC refuses to produce documents in its possession responsive to these requests on *relevance grounds*. *See* PBGC's Response to Plaintiffs' First Request for Production of Documents Pursuant to The Court's September 1, 2011 Scheduling Order at 1-4 (attached hereto as Ex. C and hereafter referred to as the "PBGC's Response to the First Request"); *see also* PBGC's Response to Plaintiffs' Second Request for Production of Documents Pursuant to the

[5] 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* Docket No. 193 at 3. Nonetheless, the PBGC still seeks to evade responding to discovery.

Court's September 1, 2011 Scheduling Order (attached hereto as Ex. D and hereafter referred to as the "PBGC's Response to the Second Request) at 1-3.[6] Notwithstanding that the Court has already held that discovery should focus on whether the Delphi Salaried Plan could have been properly terminated upon a court's adjudication, the PBGC refuses to acknowledge the Court's Order and states that the only documents relevant to the propriety of the termination are the three documents it has now produced which evidence the signing of the agreement terminating the Salaried Plan.[7] *Id.* at 4.

The contempt displayed by the PBGC Responses is breathtaking. Certainly there can be no question that the PBGC understands that the Discovery Requests are within the scope of discovery. The language contained within the September 1, 2011 Order is explicit, and even if it were not, the PBGC certainly eliminated any doubt as to its understanding of the broad scope of discovery when it asked the Court to reconsider its decision (or in the alternative certify its Order for interlocutory appeal). PBGC Motion for Reconsideration and Interlocutory Appeal, Docket No. 194. Thus, despite the fact that this Court ordered that the case proceed to discovery in *September of 2010*, the PBGC has employed such disregard for its obligations (as a litigant bound by the Federal Rules of Civil Procedure, as a government agency charged with protecting the interests of pensioners, and as an ERISA fiduciary obligated to put the interests of the Plan's participants above its own) that it might avoid producing any responsive documents until 2012.

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[6] Collectively, Plaintiffs refer herein to the PBGC's Response to the First Request and the PBGC's Response to the Second Request as the "PBGC Responses".

[7] The PBGC responded to Plaintiffs' requests with one document, the signed termination and trusteeship agreement (Bates no. PBGC 000001-000003). The PBGC argues that this final termination and trusteeship agreement, along with the previously-disclosed "proposed form of agreement PBGC sent to Delphi Corp. (AR000001-000009)," and the previously-disclosed "memorandum explaining the change in termination date between the form of agreement and the final agreement (AR000114-000118)" constitute the entire universe of documents relevant to Plaintiffs' claims. Ex. C at 2 (Gen. Obj. 1).

Faced with all of the above, Plaintiffs are, understandably, at their wits' end. As Plaintiffs noted in their first motion to compel, "a party resisting discovery is swimming against a strong upstream policy current where the policy underlying the discovery rules encourages more rather than less discovery, and discourages obstructionist tactics." *Powerhouse Marks, L.L.C. v. Chi Hsin Impex, Inc.*, No. 04-CV-73923-DT, 2006 U.S. Dist. LEXIS 2767, at *6 (E.D. Mich. Jan. 12, 2006) (Majzoub, J.) (internal quotation marks and citation omitted). Nonetheless, the PBGC has, so far, been able to resist discovery precisely by employing obstructionist tactics. Fed. R. Civ. P. 37 does, however, imbue a court with the power to impose a wide variety of sanctions to deal with such delaying tactics. In addition to the payment of reasonable expenses (which Plaintiffs seek here and submit are entirely appropriate to award here), where a party "fails to obey an order to provide or permit discovery," a court may "issue further just orders." Fed. R. Civ. P. 37(b)(2)(A). Among the sanctions the court may employ is an order "directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims"; and "rendering a default judgment against the disobedient party." Fed. R. Civ. P. 37(b)(2)(A)(i) and (vi). Because the PBGC has continuously refused to cooperate with discovery since this Court allowed the case to proceed to discovery in September 2010, and is overtly refusing to comply with the scope of discovery established in the September 1, 2011 Order, Plaintiffs request that, if the PBGC does not fully comply with Plaintiffs' Discovery Requests within 30 days of the Court's resolution of this motion to compel, the Court impose the sanctions described within Fed. R. Civ. P. 37(b)(2)(A)(i) and (vi).

II. FACTUAL AND PROCEDURAL BACKGROUND

As the Court is well aware, this lawsuit concerns the propriety of the PBGC's termination

of Plaintiffs' defined benefit pension plan in August 2009.[8] Despite ERISA's express requirement that a pension plan may only be terminated pursuant to a court adjudication and decree,[9] the PBGC terminated the Plan without a hearing, pursuant to nothing more than an "agreement" between Defendant and the Plan's administrator, Delphi Corporation ("Delphi"). Because no hearing occurred, the Plan terminated without any judicial adjudication regarding the satisfaction of the statutory criteria. This is problematic not just because ERISA's procedural protections have been ignored, as challenged in Counts One through Three, but also because serious questions remain as to the ability of the PBGC to meet "the standards for termination of the Salaried Plan under 29 U.S.C § 1342(a) and (c) with the current termination terms it has negotiated and put in place." Pls.' Second Am. Compl. ¶ 56. Count Four alleges not only that the PBGC cannot satisfy § 1342's requirements, but also that the PBGC took statutorily impermissible factors into account, and explicitly alleges that a number of the actions undertaken by the PBGC in connection with the Plan's termination were unjustified, including the release of its liens against Delphi's foreign assets, its failure to place additional liens against Delphi's foreign assets, its waiver of actions against Delphi and General Motors entities, and its failure to obtain additional funding from Old and New GM.

Most of the background relevant to the pending discovery dispute has already been documented by the Court in its Order Sustaining Plaintiffs' Objections to Magistrate Judge's

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[8] The full name of the plan is the Delphi Retirement Program for Salaried Employees (the "Plan"). The PBGC executed documents terminating the Plan in August 2009, the PBGC made the termination effective as of July 31, 2009.

[9] Pursuant to ERISA § 4042(c) (29 U.S.C. § 1432(c), a court should only grant such a decree if it finds that the plan needs to 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."

Scheduling Order, Granting Plaintiffs' Motion for Adoption of Scheduling Order, Administratively Terminating PBGC's Motion for Protective Order, Administratively Terminating Plaintiffs' Motion to Compel Discovery, and Entering Scheduling Order, Docket No. 193 at 2-3 (the "September 1, 2011 Order"). In short, after holding a hearing on the PBGC's motion to dismiss Counts One through Three and for summary judgment on Count Four, "[t]he Court denied PBGC's dispositive motions without prejudice and specifically permitted discovery to proceed as to Plaintiffs' complaint." September 1, 2011 Order at 2. Thereafter, Plaintiffs sought to have a scheduling order entered allowing discovery on Counts 1 through 4, the PBGC opposed these efforts, and a scheduling order was issued by the Magistrate Judge that allowed Plaintiffs to begin conducting discovery, but on an erroneously narrowed scope of discovery. *Id.* at 2.

Plaintiffs filed objections to the Magistrate Judge's order, and simultaneously proceeded with the more limited discovery ordered by the Magistrate Judge by serving the PBGC with interrogatories and document requests (attached as Exs. A and B to Docket No. 179) consistent with the Magistrate Judge's Discovery Orders. The PBGC refused to comply even with these discovery requests. (Exs. C and D to Docket No. 179).

The Court resolved the discovery disputes with the September 1, 2011 Order by sustaining Plaintiffs' objections. The Court held that the parties could conduct discovery 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 a deferential review of the PBGC's administrative record). 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 question raised within the Second Amended Complaint in an exercise of judicial restraint. The Court agrees.

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

Because the September 1, 2011 Order expanded the scope of discovery, Plaintiffs withdrew their previous discovery requests, and on September 23, 2011, served the PBGC with the First Document Request. The First Document Requests vary only slightly from Plaintiffs' earlier document requests, and focus 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. Thereafter, on October 14, 2011, Plaintiffs served the PBGC with the Second Document Request. The Second Document Request was even more narrowly tailored than the first, and asked for relevant documents that the PBGC had already assembled and reviewed in response to various Freedom of Information Act ("FOIA") requests, but had refused to disclose on the basis of FOIA exemptions not applicable to the broad standards of federal civil discovery. The PBGC served its Response to the First Request on October 20, 2011, stating that the only documents relevant to Plaintiffs' claims were the three documents evidencing the signing of the termination and trusteeship agreement, and thus effectively refusing to respond to Plaintiffs' First Document Request.[10]

[10] As discussed below, numerous other boilerplate objections were included in the response, but the principal objection the PBGC relies on seems to be its relevance objection.

On November 8, 2011 Plaintiffs sent a letter to the PBGC noting the numerous problems with its Response to the First Request and asking for the opportunity to hold a meet and confer conference. *See* Ex. E. On November 14, 2011 the PBGC served its Response to the Second Request, again refusing to produce any documents. On November 17, 2011 the parties conducted a meet and confer conference by telephone in an unsuccessful effort to resolve or narrow the discovery dispute. Because the PBGC refuses to honor its obligations under the Federal Rules of Civil Procedure and the terms of this Court's orders, Plaintiffs now file this motion to compel. As Plaintiffs' discovery requests seek information relevant to scope of discovery stated in the September 1, 2011 Order, and because the PBGC's objections are meritless, the Court should grant Plaintiffs' motion to compel.

ARGUMENT

I. The PBGC's Relevance Objection is Meritless

The principal objection relied upon by the PBGC is a relevance objection, as articulated in a four-page discussion of relevance in its Response to the First Request. *See* PBGC Response to First Request at 1-4. (Ex. C). The objection is baseless.

"Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense. . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1); *see also Lewis v. ACB Bus. Servs.*, 135 F.3d 389, 402 (6th Cir. 1998) ("The scope of discovery under the Federal Rules of Civil Procedure is traditionally quite broad . . . 'broader than that permitted at trial. The test is whether the line of interrogation is *reasonably calculated to lead to the discovery of admissible evidence*.'") (quoting *Mellon v. Cooper-Jarrett, Inc.*, 424 F.2d 499, 501 (6th Cir. 1970) (emphasis added)). "As the Supreme Court has

instructed, because 'discovery itself is designed to help define and clarify the issue,' 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.*'" *Conti v. Am. Axle & Mfg.*, 326 F. App'x 900, 904 (6th Cir. 2009) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (emphasis added)). In making discovery determinations, courts should be "guided by the strong, overarching policy of allowing liberal discovery." *State Farm Mut. Auto. Ins. Co. v. Pain & Injury Rehab. Clinic, Inc.*, No. 07-CV-15129, 2008 U.S. Dist. LEXIS 50507 (E.D. Mich. June 30, 2008).

The Court has already informed the parties as to how these broad discovery standards should be applied to the particular circumstances of this case. "The Court's initial focus . . . 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 th[e] 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.'" September 1, 2011 Order at 3-4. Thus, any discovery that "appears reasonably calculated to lead to the discovery of admissible evidence" on the question of the propriety of the Plan's termination, is clearly within the scope of discovery, and this is in fact the focus of Plaintiffs' discovery.

Yet, notwithstanding the broad scope of discovery required by the Federal Rules of Civil Procedure and the Court's application of that standard to this case as articulated in September 1, 2011 Order, the PBGC now resists discovery under the theory that it need produce only those documents "relating to the signing of the agreement terminating the Salaried Plan." PBGC Response to the First Request at 4. (Ex. C). Ignoring the plain language of the September 1,

2011 Order, the PBGC seeks to rely on its argument that ERISA allows it to terminate a plan by agreement, and thus the fact that it could not satisfy § 1342(c)'s termination standards is, it argues, irrelevant.[11] The argument is plainly meritless, and it is in fact this very argument that the Court rejected in the September 1, 2011 Order, which *explicitly stated* that Plaintiffs could conduct discovery on the question of the PBGC's ability (or lack thereof) to satisfy the termination criteria laid out in 29 U.S.C. § 1342(c) because the question "'bears on' the case issues." September 1, 2011 Order at 4 (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)). The Court was again forced to confront and reject the argument in the context of the PBGC's motion for reconsideration and interlocutory appeal. Because the scope of the Discovery Requests is clearly within the scope of discovery articulated in the September 1, 2011 Order, the PBGC's relevance objection should be overruled and the PBGC should be ordered to comply immediately with Plaintiffs' Discovery Requests or face sanctions under Fed. R. Civ. P. 37.

II. The PBGC's Boilerplate Objections Are Meritless, and Each Boilerplate Objection Should be Deemed Waived

The Federal Rules of Civil Procedure contain specific requirements for making a valid objection to a discovery request. Pertinent to the PBGC's objections, 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. 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); *DL v. District of Columbia*, 251 F.R.D. 38, 43 (D.D.C. 2008) ("When faced with general objections,

[11] If this argument sounds familiar, that is because it is the same argument the PBGC has made in its dispositive motions, its discovery briefs, and its motion for reconsideration and interlocutory appeal, and one that the Court has stated time and again that it is not prepared to reach without first allowing the parties to conduct discovery on all four claims.

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)).

The Federal Rules also seek to discourage the abusive practice of reflexive boilerplate objections, and to this end Fed. R. Civ. P. 26(g)(1) requires that, where a party is represented by counsel, every discovery request, response or objection be signed by at least one attorney of record, imposing upon the attorney who signs an obligation to conduct a "reasonable inquiry" before objecting to an interrogatory or document request. *See* Fed. R. Civ. P. 26(g)(1); *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 356 (D. Md. 2008). As the *Mancia* court noted, this "obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection . . . ." *Mancia*, 253 F.R.D. at 357 (quoting advisory committee notes to Fed. R. Civ. P 26(g). The standard for judging whether the attorney has made a reasonable inquiry is "an objective standard similar to the one imposed by Rule 11." *Id.*

Here, despite the Federal Rules' requirements, the PBGC has stated every conceivable boilerplate objection in the book to Plaintiffs' requests. *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"); PBGC's Responses to Requests 3-17, as contained in the PBGC's Responses to the First and Second Document Requests (asserting that the request "exceeds the scope of this litigation because it does not relate to any claim filed by the plaintiffs"); General Objection No. 2, as contained in the PBGC's Responses to the First and Second Document Requests (asserting that the requests seek "documents that: (i) are subject to the attorney-client privilege; (ii)

constitute attorney work product; or (iii) are otherwise privileged or protected from discovery under state or federal law").

These objections are boilerplate objections in the purest sense of the word, in that they have been made without regard to whether the objections actually apply. For example, in response to the PBGC's General Objection No. 2 (which asserts various privileges), Plaintiffs asked the PBGC when it intended to provide a privilege log. Counsel for the PBGC responded by stating that there would be no such log forthcoming, as the PBGC had not actually identified any documents that it would wish to claim the privilege for. When asked why the PBGC stated the objection in its response, counsel for the PBGC stated that these were merely "boilerplate" objections. Similarly, the assertion that these requests are overbroad, unduly burdensome, and not likely to lead to the discovery of admissible evidence are likewise boilerplate assertions. On their face, each of Plaintiffs' requests is directed to the scope of discovery articulated in the September 1, 2011 Order. Because the requests are not facially overbroad, burdensome, or irrelevant, the PBGC bears the burden of demonstrating their inappropriateness. *See, e.g., Powerhouse Marks, LLC v. Chi Hsin Impex, Inc.*, No. 04-CV-73923-DT, 2006 U.S. Dist. LEXIS 2767, at *6 (E.D. Mich. Jan. 12, 2006) ("'An objecting party must specifically establish the nature of any alleged burden, usually by affidavit or other reliable evidence.'") (quoting *Burton Mech. Contractors, Inc., v. Foreman*, 148 F.R.D. 230, 233 (N.D. Ind. 1992)); *see also Ford Motor Co. v. United States*, No. 08-12960, 2009 U.S. Dist. LEXIS 81720, at *5-6 (E.D. Mich. Sept. 9, 2009) ("[T]he mere statement by a party that the interrogatory was 'overly broad, burdensome, oppressive and irrelevant' is not adequate to voice a successful objection to an interrogatory. On the contrary, the party resisting discovery 'must show specifically how . . . each interrogatory is not relevant or how each question is overly broad, burdensome or

oppressive.'") (quoting *Josephs v. Harris Corp.*, 677 F.2d 985, 992 (3d Cir. 1982)).

As Chief United States Magistrate Judge Grimm noted in *Mancia*, "[i]t would be difficult to dispute the notion that the very act of making such boilerplate objections is *prima facie* evidence of a Rule 26(g) violation, because if the lawyer had paused, made a reasonable inquiry, and discovered facts that demonstrated the burdensomeness or excessive cost of the discovery request, he or she should have disclosed them in the objections[.]" *Mancia*, 253 F.R.D. at 359.

The PBGC has not voiced any of its boilerplate objections with the specificity necessary to preserve the objection, 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. *See Hall v. Sullivan*, 231 F.R.D. 468, 473 (D. Md. 2005) ("No benefit is achieved by allowing piecemeal objections to producing requested discovery, as this adds unnecessary expense to the parties and unjustified burden on the court."). Otherwise, the parties and the Court will invariably find themselves with yet another round of discovery litigation, a plainly unjust result considering the fact that the PBGC has been on notice for over a year that it must respond to discovery requests in this case.

III. Plaintiffs' Discovery Requests Are Appropriate as They Seek Information Related to the Claims Before this Court

As the Court stated in the September 1, 2011 Order, "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.'" September 1, 2011 Order at 3 (quoting *Conti v. Am. Axle & Mfg., Inc.*, 326 Fed. Appx. 900, 904 (6th Cir. 2009) (unpublished) (quoting

Oppenheimer Fund, Inc., v. Sanders, 437 U.S. 340, 351 (19078). On their face, each of Plaintiffs' requests meets this standard.

A. Discovery Seeking Information Related to Delphi and the Delphi Pension Plans Is Appropriate

Document Request No. 2 asks for information related to Delphi or its pension plans[12] that the PBGC received, produced or reviewed between 2006 and 2009 (the time period in which the PBGC acknowledges it was actively monitoring Delphi). The PBGC is a federal agency with a narrow statutory charge -- to guaranty pension plans. 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.

B. 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 Is Appropriate

According to the PBGC's administrative record, the termination of the Salaried Plan pursuant to § 1342 was necessary in part because "Delphi has stated that it will not be able to maintain the [Salaried Plan] and [the Hourly Plan] under any circumstances. Moreover, if the DIP lenders foreclose, and Delphi is effectively liquidated, the Plans risk abandonment.

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[12] The PBGC's administrative record indicates that the PBGC treated questions in connection with the Salaried Plan in conjunction with questions related to the Hourly Plan. *See, e.g.*, AR00000019, 23,24, 29-38. (Docket Nos. 52, 57, and 58). Because the PBGC, in practice, considered the two plans in conjunction, the information that the PBGC possessed in regards to the Hourly Plan "reasonably could lead to other matters that could bear on" the propriety of the Salaried Plan's termination under § 1342.

Therefore, DISC recommends PBGC seek to terminate the [Salaried Plan] under ERISA § 4042(a)(2) [29 U.S.C. § 1342(a)(2)]." AR00000037 (Docket No. 49-9). Hence, a key question underlying the propriety of the Plan's termination is whether Delphi, or 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, and whether the Plan's fiduciary could have agreed to the Plan's termination consistent with its fiduciary duties.

C. 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

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. 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 -- during the relevant time period. Such materials are clearly relevant to the propriety of the Plan's termination under the § 1342(c) criteria.

D. The PBGC's Objection to Document Requests 15-17 is Meritless

In 2009 and 2010, Plaintiffs' Counsel requested that the PBGC produce to them, pursuant to the Freedom of Information Act, 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. Because these documents were facially relevant to the claims at hand, and because the PBGC has *already* assembled the information in question in making its determination to withhold the documents (meaning that there can be no burden to the PBGC to produce the documents), Plaintiffs requested these withheld documents in Document Requests Nos. 15 -17. The PBGC has refused to produce these documents, principally on the meritless assertion that, because these documents were the subject of a FOIA request and determination, they have somehow become immune from civil discovery. *See* PBGC Response to the Second Request at 2 ("It is entirely inappropriate, and outside the scope of this litigation, for plaintiffs' counsel to attempt to use this lawsuit to circumvent and frustrate the well-established FOIA appeals process.").

The PBGC's feigned outrage notwithstanding, it is well established that the exemptions recognized by FOIA do no create privileges outside the normal rules of civil discovery. *See, e.g., Pierson v. United States*, 428 F. Supp. 384, 394 & n.24 (D. Del. 1977) (rejecting idea that FOIA privilege confers evidentiary privilege under the Federal Rules of civil procedure, and quoting Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Fed. Crim. Laws of the H. Comm. on the Judiciary, 93d Cong., Serial No. 2, 254 (1973) (testimony of Friendly, J.) "[The] problems of what a citizen should be able to get from a Government agency when he has simply the general interest of the citizen in finding what is going on and the problems of a litigant who has a particularized need are obviously very different and almost by

hypothesis what is the right solution for the first cannot be the right solution for the second."). As with any discovery request, the threshold question is one of relevance, a threshold clearly satisfied here. For example, the September 25, 2009 FOIA request (Attachment A to Ex. B) 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 1. 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." Yet, notwithstanding the narrow nature of this request, the PBGC objects to the request with all the boilerplate objections discussed above, including relevancy, overbreadth, vagueness, ambiguity, burden, and privilege. The assertion is baseless, and regardless these boilerplate objections fail to comport with Fed. R. Civ. P. 34's specificity requirements (as discussed earlier) and should be accordingly disregarded.

IV. The Court Should Award Plaintiffs Their Reasonable Expenses Incurred in Making this Motion Pursuant to Fed. R. Civ. P. 37(a), and, If the PBGC Continues to Disregard This Court's Discovery Orders, the Court Should Make Appropriate Findings of Fact Against the PBGC Pursuant to Fed. R. Civ. P. 37(b)

As described above, the PBGC's asserted objections are completely meritless. It is beyond disgraceful that a government agency charged with protecting the interests of pensioners -- indeed, the PBGC is the pensioners' fiduciary -- should continue to seek to avoid its discovery obligations and force pensioners with limited resources repeatedly to have to respond to meritless objections and obstructionist strategies. Plaintiffs respectfully request that, should the Court grant this Motion, it award them their reasonable fees incurred in making the Motion, pursuant to Fed. R. Civ. P. 37(a).

Additionally, Fed. R. Civ. P. 37(b)(2)(A) allows a court to sanction a party that fails to permit court-ordered discovery by "directing that the matters embraced in the order or other

designated facts be taken as established for purposes of the action, as the prevailing party claims." Fed. R. Civ. P. 37(b)(2)(A)(i). Because the PBGC has continuously refused to cooperate with discovery since this Court allowed the case to proceed to discovery in September 2010, and is explicitly refusing to comply with the scope of discovery established in the September 1, 2011 Order, Plaintiffs request that, if the PBGC does not fully comply with Plaintiffs' Discovery Requests within 30 days of the Court's resolution of this motion to compel, the Court impose the sanctions described within Fed. R. Civ. P. 37(b)(2)(A)(i).

CONCLUSION

The Court should compel the PBGC to respond fully to the First and Second Document Requests. Moreover, the Court should award to Plaintiffs from the PBGC their reasonable fees in making this Motion. Finally, in light of the fact that the PBGC has delayed complying with discovery in this case for over a year and the Court specifically ordered the current discovery already in its September 1, 2011 Order, the Court should impose the sanctions specified in Rule 37(b)(2)(A) should the PBGC fail to comply with the Discovery Requests within thirty (30) days from the Court's resolution of this Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2011, I caused the foregoing electronically to be filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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