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

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

The PBGC has produced one three-page document in response to Plaintiffs' discovery requests, arguing that this is the only document in its possession relevant to Plaintiffs' claims. The basis for the PBGC's argument is that amendments to Federal Rule of Civil Procedure enacted in 2000 somehow require that the scope of discovery in this case be limited to Plaintiffs' first claim (which goes to whether ERISA permits a plan to be terminated by agreement, or requires a hearing first). This argument is meritless.

First, the PBGC's relevancy argument directly conflicts with this Court's September 1, 2011 Order and the Sixth Circuit authority cited by the Court in support of its Order. *See* Docket No. 193 at 3 ("'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., Inc.* 326 Fed. App'x 900, 904 (6th Cir. 2009) (unpublished)).[1]

Second, even though the more restrictive standard advocated by the PBGC has no basis in the law, Plaintiffs' requests are clearly appropriate under that standard as well. On September 1, 2011, the Court held, clearly and unequivocally, that the scope of discovery in this case would include, and indeed *should "focus" 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."

Docket No. 193 at 3-4. In other words, Judge Tarnow ordered full and "broad" discovery directed toward 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.

Plaintiffs served the PBGC with discovery requests directed to precisely this question. As more fully discussed in the brief in support of the Motion to Compel, Docket No. 197 at 14-17, each of these requests is, on its face, reasonably calculated to lead to the discovery of admissible evidence on this question, and the PBGC has not attempted to refute the relevance of these requests to the § 1342(c) termination criteria. To take just one example, the PBGC asserts outrage about the scope of Document Request No. 2, which seeks information the PBGC received, produced, or reviewed between 2006 and 2009 related to Delphi or its pension plans. *See* Docket No. 200 at 12. But, by its own admission, this was precisely the time period when the PBGC began "continually" monitoring the status of Delphi's pension plans. *See* Affidavit of

[1] The PBGC chastises Plaintiffs for relying on *Conti*, *see* Docket No. 200 at 5 n.7, without acknowledging that Judge Tarnow relied on *Conti* as well, for the same proposition, in his September 1, 2011 Order.

Neela Ranade, Delphi's Chief Negotiating Actuary, ¶ 6 (Docket No. 37). Where the ultimate question that the Court will resolve is whether termination of the Plan under § 1342(c) was necessary, all the documents that the PBGC possessed during the time when it was monitoring the company's ability to maintain and sponsor its pension plan are potentially relevant to that claim, or at least likely to lead to the discovery of admissible evidence. Moreover, even if the universe could be narrowed some, which Plaintiffs do not believe it could, the PBGC simply takes the position that *no* documents are discoverable on precisely the question on which Judge Tarnow ordered discovery. That cannot be correct.

To be sure, the PBGC acknowledges that "it appeared to PBGC that the Court had effectively held that PBGC was required to prove its case for termination as if the termination agreement had not been executed or was impermissible." Docket No. 200 at 11. But, the PBGC argues that because the Court "clarified" that it had not yet ruled on the merits of Counts 1-3, that it somehow follows that "plaintiff's [sic] claim that ERISA did not permit PBGC to terminate the Salaried Plan by agreement remains outstanding and the only document discovery relevant to that issue is the signed termination agreement between PBGC and Delphi." *Id.* This argument is, at best, unintelligible, and at worst, a bad faith attempt to justify the PBGC's continued obstructionist tactics.

That the Court has not yet ruled on the merits of Counts 1-3 is not news. It is, in fact, the very basis of the rationale expressed in the September 1, 2011 Order, in which the Court noted that it would, consistent with the "fundamental rule of judicial restraint," attempt to avoid the difficult constitutional and statutory questions raised by Counts 1-3 by first addressing Count 4. Docket No. 193 at 4. Nonetheless, the PBGC inexplicably argues that the Court's reiteration that it has not yet ruled on the merits of Plaintiffs' claims somehow justifies such a narrow

reinterpretation of relevance in this case that "the only document discovery relevant" to Count 4 is "the signed termination agreement between PBGC and Delphi." Docket No. 200 at 11. There is no attempt by the PBGC to explain this extraordinary leap of logic, and regardless, the PBGC's proffered interpretations of the Court's Orders of September 1, 2011 and October 3, 2011 are utterly without merit, as are its relevance objections.

As for the PBGC's other boilerplate objections, Plaintiffs reiterate their request that the Court deem them waived. While the PBGC asks the Court to allow it to preserve the right to assert the objections later with the specificity required by the Federal Rules once its meritless relevance objection is overruled, this would add significant and "unnecessary expense to the parties and unjustified burden on the court." *Hall v. Sullivan*, 231 F.R.D. 468, 473 (D. Md. 2005). This kind of piecemeal litigation is inappropriate in any discovery dispute, but especially in a dispute where the respondent has been evading providing any discovery responses for *over a year*. Similarly, the imposition of fees and other sanctions under Fed. R. Civ. P. 37 is entirely appropriate. Again, the Court authorized this case to proceed to discovery in September of 2010, yet the PBGC has repeatedly refused to cooperate with those orders (such that a whole year has come and gone with the PBGC having produced one document); moreover, the PBGC makes no secret of the fact that it intends to continue to engage in the same sort of dilatory tactics (*e.g.*, requesting the right to assert additional specific objections piecemeal if the Court overrules its current relevance objections). While such delay tactics may serve the PBGC well, for a group of retirees who are living on slashed pensions, this strategy is particularly painful. The time has come to put an end to these tactics and require the PBGC to actually comply with the discovery ordered by this Court.

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 January 3, 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)
david.glass@usdoj.gov (David M. Glass)

/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