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' RULE 37 MOTION TO ENFORCE THIS COURT'S ORDER GRANTING PLAINTIFFS' SECOND MOTION TO COMPEL DISCOVERY FROM DEFENDANT PENSION BENEFIT GUARANTY CORPORATION

On March 9, 2012, this Court entered an Order Granting Plaintiffs' Second Motion to Compel Discovery from Defendant Pension Benefit Guaranty Corporation ("PBGC"), such that the PBGC was required to produce "full and complete responses to Plaintiffs' Document Requests 2-17." Dkt. No. 204 at 2. The PBGC has refused to produce key responsive documents and data in its possession in contravention of the Court's Order. Pursuant to Fed. R. Civ. P. 37(a) and (b), Plaintiffs hereby move for this Court to enforce the terms of that Order forthwith, and seek their attorney fees and costs associated with this Motion.

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

Dated: February 20, 2013

Respectfully submitted,

/s/ Anthony F. Shelley _

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CONTROLLING OR OTHERWISE APPROPRIATE AUTHORITY

Order Granting Plaintiffs' Second Motion to Compel Discovery From Defendant Pension Benefit Guaranty Corporation, Docket No. 204

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' RULE 37 MOTION TO ENFORCE THIS COURT'S ORDER GRANTING PLAINTIFFS' SECOND 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	October 11, 2012 Letter from M. Khalil to J. Menke
F	January 30, 2012 Letter from M. Khalil to J. Menke
G	November 14, 2012 Letter from J. Menke to M. Khalil
H	February 13, 2013 Letter from W. Owen to M. Khalil
I	March 8, 2010 Letter from T. O'Toole to J. Menke
J	March 22, 2010 Letter from J. Menke to T. O'Toole
K	Email chain between C. Travia, K. House, and N. Campeau regarding PBGC request for AFTAP Certifications

STATEMENT OF CONCURRENCE

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

CONCISE STATEMENT OF THE ISSUES PRESENTED

Whether the Defendant's refusal to produce Plan Census Data and documents related to its benefit calculations under the Plan violates the Court's March 9, 2012 Order?

Whether the Defendant's refusal to produce documents related to its recoveries under the Delphi Plans violates the Court's March 9, 2012 Order?

Given that the Defendant has never identified a single document or privilege with the specificity required by Fed. R. Civ. P. 26, and given that, after considering the Defendant's vague privilege objections in resolving Plaintiffs' Second Motion to Compel, Judge Majzoub ordered the PBGC to provide "full and complete" discovery responses, has the Defendant violated the March 9, 2012 Order by refusing to produce thousands of responsive documents on unspecified grounds of privilege?

INTRODUCTION AND BACKGROUND

On March 2, 2012, the Court held a hearing on Plaintiffs' Second Motion to Compel Discovery from Defendant Pension Benefit Guaranty Corporation (the "Second Motion to Compel").[1] This hearing followed an eighteen-month long discovery dispute with Defendant Pension Benefit Guaranty Corporation ("PBGC") during which time, despite numerous Court Orders to the contrary, the PBGC refused to acknowledge that Plaintiffs were entitled to any discovery on Claims 1-4 of their Second Amended Complaint.[2] At the hearing on the Second Motion to Compel, the PBGC's counsel acknowledged that the only way to uphold its refusal to produce documents was to disregard Judge Tarnow's September 1, 2011 Order. *See, e.g.*, Dkt. No. 205 at 10:14-12:22. Finding that the PBGC was asking her to disregard the law of the case, *id*. at 16, Judge Majzoub overruled the PBGC's objections (of which there were a wide assortment) and granted Plaintiffs' motion. *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, and Plaintiffs

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[1] The Second Motion to Compel, Dkt. No. 197, provides a lengthy recitation of the factual and procedural background leading up to the hearing at pages 4-8. Pursuant to L.R. 37.2, a copy of the discovery requests and responses at issue in the Second Motion to Compel are attached hereto as Exs. A-D.

[2] Plaintiffs' first 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 (Dkt. 193) 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 governing statute requires. September 1, 2011 Order at 3-4.

requested 60 days for compliance. *Id*. at 18:24-25. The Court ordered the PBGC to comply with Plaintiffs' discovery requests within 90 days. Dkt. No. 204 at 2.[3] 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). The PBGC indicated that it could produce the non-archived responsive materials by the current 90-day deadline. 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. Dkt. No. 212.

Despite these representations, the PBGC did not complete its production of non-archived materials by June 7, 2012, nor did it comply with the representation made in the Stipulation to begin immediately producing documents on a rolling basis. In fact, the PBGC's counsel informed Plaintiffs that review of the potentially responsive documents collected did not begin until May 18, 2012 (more than two months after the March 9, 2012 Order), and the PBGC's *first* production did not occur until June 7, 2012. Notwithstanding the representations to both the Court and Plaintiffs, the PBGC produced only a small fraction of its responsive documents by

[3] The PBGC has 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* Dkt. No. 209. While the PBGC's objections remain pending, no stay has ever been sought or granted, and the March 9, 2012 Order remains the law of the case.

June 7, 2012. 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 court filings from Delphi's bankruptcy proceedings.[4] Nevertheless, it has been almost exactly a full year since the entry of Judge Majzoub's Order, and the PBGC still argues that it requires more time. While the PBGC has produced a portion of the responsive documents in its possession, it has withheld almost 30,000 unidentified responsive documents on the basis of privilege, even though the time for identifying any such documents and assertions of privilege has long since passed. *See infra*, p. 9. It has also withheld key data and documents called for under the March 9, 2012 Order that are critical to challenging the PBGC's self-serving and unverified estimates of the Salaried Plan's liabilities, and are central to the merits of the case.[5] *See infra*, p. 4.

For months Plaintiffs have attempted to understand the basis of the PBGC's refusal to provide these documents and negotiate some compromise short of litigation, offering, for example, to enter into a protective order to address the PBGC's concerns about data security, and seeking a conference with the PBGC to discuss what Plan liability documents the PBGC possesses and how the most meaningful of them can be produced in the least burdensome way. *See* Exhibits E (Oct. 11, 2012 Letter from M. Khalil to J. Menke) and F (Jan. 30, 2012 Letter from M. Khalil to J. Menke). Unfortunately, these efforts have been unsuccessful. Because Plaintiffs are entitled to these documents, and because the PBGC has refused the Plaintiffs' offers to address the PBGC's concerns, Plaintiffs have no choice but to file this Motion.

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[4] Though the parties agreed that court filings from the bankruptcy case need not be located or produced, the PBGC's production has been full of such documents. Indeed, Plaintiffs estimate that more than 25,000 such documents have been produced.

In their Second Motion to Compel, Plaintiffs asked the Court to impose sanctions under Rule 37(b) in light of the PBGC's disregard of the Court's September 1, 2011 Order. *See* Dkt. No. 197 at 17-18 (PageID 9760-61). Because, in Plaintiffs' view, the PBGC has disregarded another Court Order, requiring more of Plaintiffs' resources to secure compliance with the Order, and further endangering a discovery schedule which has had to be modified multiple times to account for the PBGC's delays, Plaintiffs renew their request for fees and costs under Rule 37, and any other sanctions the Court finds appropriate, keeping in mind that, despite the fact that this case was first ordered to proceed to discovery in September 2010, discovery is still not complete.[6]

ARGUMENT

I. The PBGC Has Violated the Court's March 9, 2012 Order by Refusing to Produce Documents Related to the Plan's Benefits and Liabilities, and the PBGC's Related Recoveries

A. The Withheld Documents Are Necessary to the § 1342(c) Evaluation To Be Undertaken by this Court

This Court has stated that it will seek to resolve Plaintiffs' Complaint by hearing evidence on whether the PBGC could have persuaded this Court, on a *de novo* review, of the necessity of terminating the Salaried Plan in July 2009 pursuant to 29 U.S.C. § 1342(c). As the Court has noted, this § 1342(c) determination requires the PBGC to prove, by a preponderance of the evidence, that a plan must be terminated in order to (1) protect the interests of the participants, or (2) to avoid any unreasonable deterioration of the financial condition of the plan,

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(footnote continued from previous page)

[5] The full name of the Salaried Plan is the Delphi Retirement Program for Salaried Employees.

[6] 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.

or (3) to avoid any unreasonable increase in the liability of the PBGC's insurance fund. September 1, 2011 Order, Dkt. No. 193, at 3-4 (quotation and citation omitted). Fundamentally, in order to determine whether any of those criteria have been satisfied, a conclusive determination must be made as to the Salaried Plan's actual financial state (*i.e.*, its liabilities vs. its assets, and the necessary funding contributions). Document Request No. 12 requires the PBGC to produce "[a]ll documents and things received, produced or reviewed by the PBGC since January 1, 2006 [through the present time] related to the PBGC's potential or actual liability for any benefit payments under Delphi's Pension Plans." *See* Ex. A at 10. Thus, this document request goes to the heart of one of the primary factual disputes in this case – *i.e.*, what was the financial state of the Plan?

Providing an answer to this question is simply a matter of analyzing the appropriate data. That said, the answer is subject to considerable dispute. The PBGC's preliminary (and Plaintiffs believe, self-serving) estimate of the Plan's benefit liabilities used to justify the Salaried Plan's termination was $5.2 billion. *See* Dkt. No. 37, ¶ 9. Conversely, the Plan's independent actuary, Watson Wyatt, certified in June 30, 2009 a much lower liability figure of $3.497 billion. *See* Dkt. 134, Ex. B. Resolving this discrepancy so as to come to an accurate understanding of the Plan's actual benefit liabilities is a critical part of the § 1342(c) termination determination.

A plan's liabilities will depend on a variety of factors, first and foremost the plan participant census data (which looks, among other things, to how many participants are in the plan, their ages and service histories, whether and when they began receiving benefits under the plan, and the benefit each is entitled to under the plan's formula) (the "Census Data"). After the Census Data is collected and confirmed, the plan's benefit liabilities can be determined by

utilizing the appropriate actuarial assumptions regarding expected retirement dates and mortality, and the discount rate appropriate for measuring the aforementioned values.

Because the PBGC requested and assumed the role of the Salaried Plan's trustee in August 2009, it currently possesses the Census Data for the Salaried Plan. Put another way, the only party with access to the data underlying the PBGC's liability estimates is the PBGC.

B. The Court's March 9, 2012 Order Clearly Requires the Production of the Withheld Materials

The PBGC has been ordered to provide "full and complete" responses to Plaintiffs' Doc. Request No. 12, which, to reiterate, requires the PBGC to produce "[a]ll documents and things received, produced or reviewed by the PBGC since January 1, 2006 [through the present time] related to the PBGC's potential or actual liability for any benefit payments under Delphi's Pension Plans." *See* Dkt. No. 204. The Census Data on the participants in the Salaried Plan is unquestionably responsive to this request; indeed, it is *precisely* this Census Data that is used to derive the PBGC's liability for benefit payments under the Plan, both as trustee and as guarantor.

The PBGC has refused to provide the Census Data; it does not dispute that the information is responsive to Document Request No. 12, but does argue that it is prohibited from providing the information by the Privacy Act, 5 U.S.C. § 552a. As a threshold matter, the PBGC had an opportunity to present arguments related to the Privacy Act in the briefing and arguments related to Plaintiffs' Second Motion to Compel. It did not do so with any specificity, meaning that the argument should be deemed waived. Even if the PBGC has not waived these arguments, Plaintiffs have noted multiple times to the PBGC that § 552a(b)(11) of the Privacy Act allows for disclosure of material covered by the Privacy Act where such disclosure is "pursuant to the order of a court of competent jurisdiction." The March 9, 2012 Order is clearly such an order. However, the PBGC refuses to acknowledge the authority of the March 9, 2012

Order. The basis for the PBGC's refusal seems to be its insistence that the Court should have specifically mentioned the Privacy Act in its Order. S*ee* Ex. G at 2 ("the Court has not ordered PBGC to produce Privacy Act-protected participant information"); Ex. H at 2 ("The Court overseeing this case has entered no such order requiring specific disclosure of this data."). However, § 552a(b)(11) contains no such requirement that the relevant court order expressly mention the Privacy Act, and the PBGC has not provided any authority to suggest that such specificity is required. Moreover, given that the PBGC did not raise these Privacy Act objections in its discovery responses, or during briefing or argument on the Second Motion to Compel, the Court was denied the opportunity to craft its Order with the purported specificity that the PBGC now insists is required. Additionally, the PBGC has refused Plaintiffs' invitations to enter into a protective order or to discuss other ways to "further ensure the protection of this information." *See* Ex. E at 1-2; Ex. F at 5. The PBGC's refusal to explore these alternatives suggests that the PBGC is not nearly as concerned with protecting "sensitive information" of Plan participants, as it is with protecting its own highly questionable liability estimates from judicial scrutiny.[7]

This is not the first time that Plaintiffs have had difficulty obtaining information from the PBGC that would contradict the PBGC's funding estimates. In March 2010, Plaintiffs were first alerted to the fact that Watson Wyatt may have prepared the actuarial valuation of the Salaried

[7] The PBGC has also noted that it does not maintain the Census Data in the format Plaintiffs have requested, and therefore stated that it need not be produced at all. *See* Nov. 14, 2012 Letter from J. Menke to M. Khalil, Ex. G. Plaintiffs have responded by noting that a party seeking discovery of electronically stored information may select the form of the data to be produced, *see* Fed. R. Civ. P. 34(b)(1)(C), but have also stated that they remain "open to discussion as to the form that its production should take, and . . . working with [the PBGC] in a cooperative fashion to determine the most efficient way to proceed." Jan. 30, 2013 Letter from M. Khalil to J. Menke, Ex. F at 4. PBGC has not addressed this request. *See* Feb. 13, 2013 Letter from W. Owen to M. Khalil, Ex. H.

Plan referred to above, and inquired whether the PBGC had any knowledge of such a report. *See* Ex. I (Mar. 8, 2010 Letter from T. O'Toole to J. Menke). Counsel for the PBGC stated that he asked "personnel who had worked on the Delphi case about the supposed report," and that "[t]o the best of our knowledge, no one at PBGC knows of such a Watson Wyatt report, if it exists, and no one here has a copy of such a report." Ex. J (Mar. 22, 2010 Letter from J. Menke to T. O'Toole). Plaintiffs subsequently obtained the report directly from Watson Wyatt, *see* Exhibit B to Dkt. No. 134, which showed approximately $1.7 billion less in benefit liabilities than the PBGC's own estimates. Discovery later showed that not only had Watson Wyatt sent a copy of this actuarial valuation directly to the PBGC, but also had done so at the explicit request of the PBGC. *See* Ex. K.

Beyond the Census Data, Plaintiffs have noted that the PBGC has not produced *any* information responsive to Requests Nos. 12 and 13 that was received, produced, or reviewed by the PBGC *subsequent* to the Plan's termination.[8] Counsel for the PBGC confirmed this to be the case in a telephone conference on January 17, 2013, stating that the PBGC had only searched for responsive documents from the *pre*-termination time period. However, the PBGC has been generating extensive documents related to liabilities and recoveries for the last three years as it audits and recalculates its preliminary benefit determinations. These audits, conducted as of the date of Plan termination, are designed to confirm the accuracy of the PBGC's initial 2009 estimates, making them clearly relevant to the § 1342(c) determination. Moreover, Document

[8] Pursuant to Document Request No. 13, the PBGC is obligated to provide "[a]ll documents and things received, produced or reviewed by [the PBGC] since January 1, 2009 [through the present time] related to potential PBGC recoveries in connection with the Delphi Pension Plans, including, but not limited to, the estimates of the potential recovery for each claim and the value the PBGC assigned to such claims in the valuation of the Salaried Plan's assets." *See* Ex. A. This information is directly relevant to the § 1342(c) determination in that it will go to show what funds were potentially available to fund the Delphi Plans.

Requests 12 and 13 as written require the production of material received, produced, or reviewed *after* the Plan's termination. *See* Ex. A at 3 (noting that "[u]nless otherwise indicated, the document requests refer and relate to the time period beginning on January 1, 2006 until the date when this Request for Documents is answered or required to be supplemented, whichever is later."). Under ERISA and its implementing regulations, these documents will be used by the Plan trustee (here, the PBGC) to determine the Plan's value as of the termination date – *i.e.*, July 31, 2009. *See, e.g.*, 29 U.S.C. § 1344; 29 C.F.R. § 4044.41(b). Thus, the PBGC at this very moment is using precisely these same documents to determine the accuracy of the Plan's assets and liabilities as of 2009 – while at the same time taking the position here that these same documents are "irrelevant" to the Plan's assets and liabilities as of 2009. Even if the PBGC's relevance objections had not already been considered and overruled in the Court's March 9, 2012 Order, the fact that the information is facially relevant to the § 1342(c) determination shows that these objections are without merit.

II. The PBGC Has Violated the Court's March 9, 2012 Order by Refusing to Produce Thousands of Unspecified Responsive Documents on the Basis of Boilerplate Privileges

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)); *see also 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)).[9]

Here, the PBGC has apparently withheld over 29,000 responsive documents on the basis of an unspecified privilege, stating that it intends to produce a privilege log justifying such withholding sometime in April 2013, the same month that discovery in this case is set to conclude, and *after* the deadline for serving discovery motions. As a practical matter, such timing is clearly unworkable. More important, as a legal matter (both under the case law generally, and the law of this case specifically) it is untenable, as the PBGC has waived its ability to assert these privileges.

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[9] *See also* Practice Guidelines for Judge Arthur J. Tarnow, *available at* http://www.mied.uscourts.gov/Judges/guidelines/topic.cfm?topic_id=245 (last visited Feb. 19, 2013) ("Documents withheld on the basis of privilege should be listed on a privilege log with sufficient information to enable the requesting party to understand the nature of the documents and the basis of the privilege claim.").

As noted above, the Federal Rules generally require that a party wishing to assert a privilege or other protection must do "within the thirty days provided by Rules 33 and 34," and with the specificity required by Fed. R. Civ. P. 26(b)(5). *See Carfagno,* 2001 U.S. Dist. LEXIS 1768, at *3, *7-8. The PBGC served its responses to Plaintiffs' Document Requests in October and November 2011, but failed to identify a *single* document for which it wished to assert a privilege or protection. While the responses made a general objection that the requests sought "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", *see* Exs. C at 5 (PageID 9826) and D at 5 (PageID 9838), such "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.

Thereafter, the parties conferred in an attempt to resolve their discovery dispute, at which time the PBGC again failed to identify any documents for which it wished to assert a privilege, and even going so far as to refer to its privilege objection as being "boilerplate." Even after the filing of Plaintiffs' Second Motion to Compel (and the PBGC's response thereto) in December 2011, the filing of the parties' Joint Statement of Resolved and Unresolved Issues in January 2012, and the hearing on Plaintiffs' Second Motion to Compel in March, the PBGC failed to identify *a single document* (or even a category of documents) for which it wanted to assert a privilege. To the extent the PBGC did not waive its ability to assert these objections in the fall of 2011, it certainly waived them once the hearing on Plaintiffs' Second Motion to Compel concluded and it had still failed to identify a single document for which it wished to assert a privilege. *See, e.g.*, *Cozzens*, 2009 U.S. Dist. LEXIS 4063, at *9; *see also Witmer v. Acument Global Technologies, 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); *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.'") (emphasis added, and quoting *Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540, 542 (10th Cir. 1984)).

The PBGC seeks to justify this delay by asserting that "it would have been impossible for PBGC to create the privilege log before completing" its document review. *See* Ex. H at 2 (Feb. 13, 2013 Letter from W. Owen to M. Khalil). This argument misses the point entirely. Of course a party must review a document before it can determine whether a privilege applies; the question is when must it undertake that review, and with what alacrity? As noted above, the Federal Rules provide the answer, requiring generally that a respondent undertake this process when responding to a document request. Had the PBGC taken the Court's discovery Orders seriously from the beginning, its production would be complete, its ability to assert privileges could have been preserved, and neither the Court nor Plaintiffs would have to waste time or energy considering why it took the PBGC more than a year to complete a production it said was reasonable to complete in four months. But, the PBGC did not do so, making the strategic decision to avoid responding to Plaintiffs discovery requests, while Plaintiffs were forced to litigate the PBGC's objections in their Second Motion to Compel. As Magistrate Judge Scoville noted in *Carfagno*, "[i]f 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*, 2001 U.S. Dist. LEXIS 1768, at *4 (quoting *Krewson v. City of Quincy*, 120 F.R.D. 6, 7 (D. Mass. 1988)).

The PBGC has also had additional opportunities to specify its assertions of privilege. For example, in their Second Motion to Compel, Plaintiffs noted this deficiency and specifically argued that the PBGC should be found to have waived the right to assert any privileges. *See* Dkt. No. 197 at 10-13 (PageID 9753-56); Dkt. No. 205 at 6:1-8. The PBGC had an opportunity to respond to this waiver argument both in its briefs and at argument, but chose simply to rest on its vague assertions. After considering all of the parties' arguments, *see* Dkt. No. 205 at 4:12-15, Judge Majzoub ordered the PBGC to provide "full and complete" responses to Plaintiffs' Document Requests within 90 days, overruling the PBGC's various objections (including the boilerplate objections as to privilege and work-product).

Because"[d]iscovery deadlines are intended to ensure the efficient progress of a lawsuit," *Carfagno*, 2001 U.S. Dist. LEXIS 1768, at *4 (internal quotation marks and citation omitted), a party's flouting of deadlines necessarily impedes a lawsuit's progress. That is especially true in this case. The PBGC has already taken a year to accomplish what it told Judge Majzoub it could do in four months. Discovery deadlines have twice had to be adjusted, and the PBGC's current strategy will require them to be adjusted yet again. While Plaintiffs are obviously not in a position to predict exactly what delays would ensue, if the PBGC has taken the expansive view of privilege suggested by a 29,000 line item privilege log, it is reasonable to assume that the parties and the Court could find themselves litigating privilege issues for months.

This is exactly the kind of piecemeal litigation that the Federal Rules seek to avoid. *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."). Moreover, because of the current deadlines, Plaintiffs have had to notice the PBGC's Rule 30(b)(6) deposition, but Plaintiffs find themselves in the unenviable position of having to conduct that deposition with no inkling as to the nature of almost 30,000 responsive documents that the PBGC has withheld on privilege grounds.[10]

Finally, Plaintiffs note that, notwithstanding their right to have the PBGC produce all of the responsive documents that have been improperly withheld, Plaintiffs have offered to modify the scope of their request regarding the remaining responsive documents by excluding documents created, received, or produced by the PBGC prior to August 1, 2008, and to exclude correspondence solely among lawyers in its Office of Chief Counsel and its outside counsel. *See* Ex. F at 2-3. PBGC has stated that this narrowing will not meaningfully impact the time that PBGC will take to produce its privilege log. *See* Ex. H at 2.

III. 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)

The PBGC has refused to abide by commitments it has made to the Court, refused to produce documents unhelpful to its theories (even where required by Court Order), and flouted

[10] Although the PBGC has indicated that it is withholding approximately 29,000 responsive documents on grounds of privilege, it is not clear that all of these (or even the bulk of them) will actually be responsive. Plaintiffs' experience has been that the PBGC's interpretation of what constitutes a "responsive" document has been inconsistent and frequently overbroad, including numerous documents that have no obvious relevance to the litigation. Plaintiffs are puzzled by these "document dumps," since they have repeatedly attempted to narrow the scope of production, and since the PBGC has fought so vigorously to avoid production of facially relevant and "responsive" documents like the Census Data.

the discovery timelines mandated by the Federal Rules of Civil Procedure. These actions have wasted the Court's time and the Plaintiffs' resources, and have prolonged this case far beyond the time otherwise necessary. 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 in a variety of ways to sanction a party that fails to obey Court Orders on discovery, including "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," prohibiting a party from introducing designated matters into evidence, striking pleadings, or by rendering a default judgment. *See* Fed. R. Civ. P. 37(b)(2)(A). Because the PBGC has continuously refused to satisfy its discovery obligations since this Court ordered the case to proceed to discovery in September 2010, and is explicitly refusing to comply with the scope of discovery established in the March 9, 2012 Order, Plaintiffs request that, if the PBGC does not fully comply with Plaintiffs' Discovery Requests within 14 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).

CONCLUSION

The Court should order the PBGC to immediately comply with the terms of its March 9, 2012 Order by providing (1) the Salaried Plan's Census Data; (2) documents responsive to Request Nos. 12 and 13 generated subsequent to the Plan's termination; and (3) the responsive documents it has unjustifiably withheld on the basis of unspecified privileges. Moreover, the Court should award to Plaintiffs from the PBGC their reasonable attorney fees and costs in making this Motion. Finally, the Court should impose the sanctions specified in Rule

37(b)(2)(A) should the PBGC fail to comply with the Discovery Requests within fourteen (14) days from the Court's resolution of this Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 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 the following e-mail addresses:

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