

**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
)	Magistrate Judge Mona K. Majzoub
)	
)	
v.)	
)	
PENSION BENEFIT GUARANTY)	
CORPORATION, <i>et al.</i> ,)	
)	
Defendants.)	

**PENSION BENEFIT GUARANTY CORPORATION'S RESPONSE
TO PLAINTIFFS' RULE 37 MOTION TO ENFORCE MAGISTRATE
JUDGE MAJZOUB'S AUGUST 21, 2013 WAIVER ORDER**

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Issues Presented

Issue 1: The Federal Rules of Civil Procedure allow parties to stipulate certain aspects of discovery exchange, including the alteration or limitation of any document request a party has issued. On January 30, 2013, plaintiffs informed PBGC in writing that plaintiffs were no longer requesting two classes of documents that had previously been included in plaintiffs' document requests: (i) those dated before August 2008, and (ii) those showing communications among only PBGC in-house and outside counsel. PBGC accepted plaintiffs' request in writing and excluded those classes of documents from its future productions and from its privilege log. Plaintiffs now assert that these documents must be produced to them pursuant to the Court's August 21, 2013 Order, which found that PBGC waived its right to claim privilege to the documents that plaintiffs had requested. Does the Court's August 21, 2013 Order allow plaintiffs to renege on their agreement and require PBGC to produce documents that plaintiffs agreed were specifically excluded from their document requests?

Issue 2: Federal Rule of Civil Procedure 34(b)(1)(A) requires that document requests issued by a party describe with reasonable particularity each item or category of items to be inspected. Plaintiffs now assert that the Court's August 21, 2013 Order requires that PBGC produce documents relating to PBGC's on-going audit of the Delphi Salaried Plan assets. Plaintiffs assert that those

documents are encompassed in their Document Request 12, which requested all documents relating to PBGC's "liability for any benefit payments" under the Salaried Plan. Does the Court's August 21, 2013 Order require PBGC to produce documents regarding PBGC's audit of pension plan assets that plaintiffs did not describe at all, much less with reasonable particularity, in any of their document requests?

Authority PBGC Chiefly Relies Upon

United States Circuit Court Cases

CDN Inc. v. Kapes, 197 F.3d 1256 (9th Cir. 1999)

United States District Court Cases

Bennett v. Rosser Int'l, Inc., No. 09-cv-00129, 2009 WL 3806773 (E.D. Ky. Nov. 9, 2009).

Gonzalez v. Ohio Casualty Insurance Co., No. 07-cw-13921, 2008 WL 3833272 (E.D. Mich. Aug. 13, 2008)

K.C. v. Schucker, 2013 WL 4505797 (W.D. Tenn. August 22, 2013)

Pan v. Kohl's Dep't Stores, No. 12-cv-1063, 2015 WL 4346218 (S.D. Ohio Jul. 15, 2015)

Other

Federal Rule of Civil Procedure 34(b)(1)(A)

6 Moore's Federal Practice 3d § 29.06 (2015)

Factual and Procedural Background

Plaintiffs have served PBGC with two requests for documents: the first on September 23, 2011, and the second on October 14, 2011. By early 2013, PBGC had collected all of the documents responsive to those requests, had made multiple document productions of hundreds of thousands of pages to the plaintiffs, and was in the process of logging over 30,000 documents in a privilege log that would comply with the Federal Rules. On January 30, 2013, plaintiffs offered in writing to narrow the scope of their formal document requests:

Plaintiffs are willing to modify the scope of their request regarding the remaining responsive documents in two ways:

1. PBGC's production going forward need not include any documents created, received or produced by the PBGC prior to August 2008.
2. PBGC need not produce any correspondence solely among lawyers in its Office of Chief Counsel, or between lawyers in its Office of Chief Counsel and its outside counsel.¹

Further, plaintiffs acknowledged that their "proposal to narrow the production in this manner necessarily means that *such documents would not need to be included in the privilege log either.*"² Plaintiffs concluded that "it is ultimately the PBGC's

¹ Plaintiffs' Rule 37 Motion to Enforce Docket No. 275 Exhibit E.

² *Id.* (emphasis added).

decision whether to accept these modifications or to continue producing *documents that Plaintiffs have not asked for.*”³

On February 13, 2013, PBGC responded to plaintiffs’ January 30 letter, explicitly accepting plaintiffs’ offer:

PBGC appreciates plaintiffs’ offer to narrow the production to exclude documents created, received or produced by PBGC prior to August 1, 2008 and to exclude correspondence solely among attorneys in its Office of Chief Counsel and its outside counsel. *We will remove those documents from the privilege log as we work to complete it.*⁴

Not only did PBGC accept in writing plaintiffs’ offer to narrow their discovery requests, PBGC also accepted plaintiffs’ offer by conduct. Just as plaintiffs asked, PBGC acted to accept the offer by ceasing production of the documents that plaintiffs “had not asked for” – PBGC culled the 13,403 documents covered by these terms from its review and did not include them in the privilege log that it was in the process of producing. Plaintiffs had stated in their letter that they hoped their offer to narrow their requests and to reduce the number of documents that PBGC would have to review in detail and log in its privilege log would speed the production of that log. The document-culling that PBGC did in response to the parties’ agreement reduced the number of documents that PBGC had to review and

³ *Id.* (emphasis added).

⁴ Plaintiffs’ Rule 37 Motion to Enforce Docket No. 275 Exhibit F (emphasis added).

log by over a third, and it allowed PBGC to deliver its privilege log months faster than it would have been able to do otherwise.

Although the agreement between plaintiffs and PBGC allowed PBGC to move more quickly to produce its privilege log, the process was still obviously not fast enough to suit plaintiffs. On February 20, 2013, only seven days after PBGC agreed to plaintiffs' offer, plaintiffs filed a motion to enforce the Court's March 2012 Order Granting Plaintiffs' Second Motion to Compel Discovery. In their motion to enforce, plaintiffs argued that the time it took PBGC to produce its privilege log constituted a waiver of privilege. In its Order entered on August 21, 2013 ("2013 Order"), this Court agreed with the plaintiffs on that point, holding as follows: "The Court finds that Defendant has waived its right to assert privilege to the documents *requested in* Plaintiffs' First and Second Requests for Production of Documents."⁵

In the 2013 Order, the Court also addressed PBGC's challenge to plaintiffs' demand that PBGC produce the Salaried Plan census data, which listed each of the participants in Delphi's Salaried Plan and provided the information necessary to calculate the pension benefits owed to each of them. Plaintiffs claimed that the census data was responsive to their Document Request 12, which asked PBGC to produce documents related to "PBGC's potential or actual liability for any benefit

⁵ Order Granting In Part Plaintiffs' Rule 37 Motion to Enforce Court Order (Docket No 218), Docket No. 231 filed 8/21/13 (emphasis added).

payments under Delphi's Pension Plans." The Court agreed with plaintiffs that "the Census Data is relevant and discoverable."

After the 2013 Order became final, PBGC fully complied with it. PBGC produced the census data and produced all of the privileged documents that were included in plaintiffs' documents requests. That production encompassed all the privileged documents that PBGC had listed on its 1000-page privilege log that it had completed and produced to plaintiffs on August 23, 2013. But because the 2013 Order applied only to documents requested in plaintiffs' document requests, PBGC has not produced to plaintiffs the vast universe of documents that were not part of those requests, including the categories of privileged documents that plaintiffs, in January 2013, expressly excluded from their document requests and which they said they "had not asked for."

To the best of PBGC's knowledge, it has now produced to plaintiffs all the documents encompassed in plaintiffs' voluminous document requests. Though PBGC has consistently argued that plaintiffs' requests exceed what should have been appropriate discovery under the terms of the actual complaint plaintiffs have filed in this case, PBGC has nonetheless produced well in excess of one million pages of documents.

Despite PBGC's massive production of documents that were actually requested by plaintiffs in their documents requests, and PBGC's full compliance

with all orders of this Court, plaintiffs wrote to PBGC on January 9, 2015, and again on August 7, 2015, claiming that PBGC still had an obligation to produce an additional two categories of documents. First, plaintiffs claimed that PBGC was required to produce the privileged documents that plaintiffs had expressly excluded from their requests in January 2013. Second, plaintiffs demanded that PBGC produce all documents related to PBGC's audit of the Delphi Pension Plan assets, even though none of plaintiff's document requests even mentioned "assets." PBGC wrote back in both instances, pointing out the simple fact that PBGC was not required to, and certainly had never been ordered by the Court to, produce documents that plaintiffs were not asking for.

In their letters leading up to the instant Motion, plaintiffs attempted to justify their demand that PBGC produce documents the plaintiffs had previously removed from their requests by citing supposed "discrepancies" in PBGC's production. Specifically, plaintiffs identified certain e-mail communications between representatives of PBGC and the U.S. Treasury Department that plaintiffs had received from the Treasury Department but that supposedly were not in PBGC's production. In their letter, plaintiffs accused PBGC of deliberately withholding responsive documents from its production and improperly hiding those documents within the categories of documents that plaintiffs had removed from their requests. In each case of alleged "discrepancy," however, PBGC was able to promptly show

that the document was in fact within PBGC's production, citing the Bates number of each specific document that plaintiffs questioned.⁶

Argument

It is not surprising that plaintiffs have dropped their argument that PBGC should be required to produce the unrequested documents due to nonexistent "discrepancies" in PBGC's massive document production. Nonetheless, plaintiffs have persisted in their demands that PBGC produce documents that are not subject to any outstanding document request, and have filed this Motion, arguing that the 2013 Order requires that PBGC produce two categories of documents that plaintiffs had not asked for. The first category – documents dated prior to August 2008 and those reflecting communications solely between PBGC attorneys – were expressly removed from the document requests by plaintiffs themselves, as described above. The second category – documents regarding PBGC's valuation of the assets of the Delphi Pension Plans – were never mentioned in any request propounded by plaintiffs to PBGC. Neither of these categories of documents was addressed in the 2013 Order, which ordered PBGC to produce only certain documents that plaintiffs had actually requested. There is no basis in law to compel PBGC to produce documents that are not included in a valid document

⁶ See Aug. 7, 2015 Letter from M. Khalil to J. Menke (Exhibit A), and Aug. 14, 2015 Letter from J. Menke to M. Khalil (Exhibit B).

request under the Federal Rules. Therefore, this Court should deny plaintiffs' Motion.

I. PBGC should not be required to produce documents that the plaintiffs previously agreed were not included in their document requests.

As courts within the Sixth Circuit have recognized, parties may enter into binding stipulations regarding discovery.⁷ Stipulations may modify discovery procedures under otherwise applicable federal rules.⁸ To disregard the parties' agreements on discovery matters would be "fundamentally unfair."⁹ As the Ninth Circuit and many other courts have noted, "[b]ecause stipulations serve both judicial economy and the convenience of the parties, courts will enforce them absent indications of involuntary or uninformed consent."¹⁰

⁷ See *Varga v. Rockwell Intern. Corp.*, 242 F.3d 693, 700 (6th Cir. 2001) (finding stipulation of counsel that responses to discovery were appropriate was binding upon party).

⁸ Fed. R. Civ. P. 29(b). See *K.C. v. Schucker*, 2013 WL 4505797 (W.D. Tenn. August 22, 2013) (holding that stipulation that portion of deposition could not be used at trial was binding on parties despite the fact that deposition generally would be admissible under Fed. R. Civ. P. 32(a)); see generally 6 Moore's Federal Practice 3d § 29.06 (2015).

⁹ *KC. v. Schucker*, No. 02-2715, 2013 WL 4505797, at *3 (W.D. Tenn. August 22, 2013).

¹⁰ *CDN Inc. v. Kapes*, 197 F.3d 1256, 1258 (9th Cir. 1999); *Idaho Aids Foundation, Inc. v. Idaho Housing & Finance Ass'n*, No. CV-04-155, 2006 WL 1897226 at *2 (D. Idaho July 11, 2006); *In re Transpacific Passenger Air Transportation Antitrust Litigation*, No. C-07-05634, 2014 WL 709555 at *2 (N.D. Cal. February 24, 2014).

In this case, the plaintiffs specifically and unequivocally narrowed the scope of their broad discovery requests by excluding two classes of documents that were among the approximately 30,000 documents that PBGC had tentatively determined were privileged: (i) material dated prior to August 2008, and (ii) communications solely among PBGC inside and outside counsel. Letters exchanged between the parties' counsel, filed as exhibits to plaintiffs' Motion, evidence the parties' unconditional agreement that PBGC exclude those documents from plaintiffs' discovery requests. Plaintiffs' argument that PBGC did not accept plaintiffs' offer is baseless – PBGC did agree both in writing and in its conduct to exclude the categories of documents listed by plaintiffs from future productions and future privilege logs. The plaintiffs were well aware of the ramifications of the agreement; they specifically noted in their correspondence that this would mean the exclusion of the documents from both PBGC's document production and PBGC's privilege log.¹¹ There can be no doubt that there was a meeting of the minds between the parties.

Plaintiffs' argument that they received no consideration for the deal is equally baseless. The plaintiffs' consideration expressly stated in their letter: they did not want PBGC to produce certain categories of documents that they had not

¹¹ Plaintiffs' Rule 37 Motion to Enforce Docket No. 275 Exhibit E.

asked for. They received their consideration, and PBGC got its consideration as well – PBGC no longer had to produce documents that plaintiffs did not want to see. The fact that there may have been another reason plaintiffs agreed to narrow their discovery requests – that they hoped it would speed up PBGC’s production of the privilege log so that it could be completed within a week – has no bearing on the validity or enforceability of that agreement. Plaintiffs specifically told PBGC they did not want pre-August 2008 material nor did they want attorney-only communications, and PBGC stopped processing all documents that fell into either one of those two groups. PBGC notes, nonetheless, that this narrowing of plaintiffs’ discovery requests *did* in fact speed up PBGC’s completion of the privilege log, if not to the degree plaintiffs may have hoped, because PBGC was able to stop spending time reviewing and logging two specific, large subsets of documents the plaintiffs plainly told PBGC they no longer wanted.

Further, the 2013 Order did not invalidate the plaintiffs’ agreement to narrow the scope of their discovery requests. That Order merely found that PBGC had “waived its right to assert privilege to the documents *requested in* plaintiffs’ First and Second Requests for Production of Documents.”¹² When the Court entered the 2013 Order, plaintiffs’ document requests had been narrowed to *exclude* (i) material dated prior to August 2008, and (ii) communications solely

¹² Order Granting In Part Plaintiffs’ Rule 37 Motion to Enforce Court Order (Docket No 218), Docket No. 231 filed 8/21/13 (emphasis added).

among PBGC inside and outside counsel. Plaintiffs cannot now argue – two years after the fact – that the Order entitles them to documents they had clearly told PBGC in writing were no longer included in their document requests.

If this Court were to order PBGC to produce documents specifically excluded by the parties' agreement, it would be not only be fundamentally unfair, it would set a dangerous precedent. If parties had to fear that their written agreements narrowing discovery were reversible at the whim of the other party, then cooperative discovery efforts among parties would be discouraged, discovery could be extended indefinitely, and courts would be inundated with discovery battles. This Court should find that the 2013 Order does not require PBGC to produce documents that the plaintiffs' specifically told PBGC they could exclude from their First and Second Requests for Production of Documents.

Moreover, nearly all of the documents that plaintiffs are now demanding in their Motion are privileged. If this Court finds that plaintiffs can renege on their agreement, and PBGC must disclose to plaintiffs documents dated prior to August 2008 and communications solely between PBGC inside and outside counsel, the holding of the 2013 Order, that PBGC had waived its right to claim privilege because of contumacious delay in producing a privilege log, obviously does not apply to those documents. PBGC did not omit those documents from its privilege log or delay logging them out of obstinacy. Rather, it omitted them because

plaintiffs plainly said they did not want them logged. If the documents are now deemed to be back within plaintiffs' requests, PBGC is entitled to a reasonable time to carefully review them and to prepare the detailed privilege log that the Federal Rules require. Based on its experience with the privileged documents that plaintiffs actually requested, PBGC would expect that such an effort would require several months.

II. PBGC should not be required to produce documents regarding PBGC's audit of Delphi pension plan assets because they were not requested in plaintiffs' document requests.

A. Plaintiffs' Document Request 12 did not state with reasonable particularity a request for documents related to PBGC's audit of the Delphi Pension Plan assets.

Federal Rule of Civil Procedure 34(b)(1)(A) requires that a request for documents "describe with reasonable particularity each item or category of items to be inspected." Courts in the Sixth Circuit have employed an objective standard in construing whether certain documents are responsive to a party's document request. For example, in *Pan v. Kohl's Department Stores*, the court recognized that "[t]he test for reasonable particularity is whether the request places the party upon 'reasonable notice of what is called for and what is not.'"¹³ The court held

¹³ *Pan v. Kohl's Dep't Stores*, No. 12-cv-1063, 2015 WL 4346218 at *2 (S.D. Ohio Jul. 15, 2015) quoting *Hager v. Graham*, 267 F.R.D. 486, 493 (N.D. W.Va. 2010).

that copyright infringement training materials were not reasonably identified in any of the plaintiff's document requests:

Had he wanted to see this type of material – which cannot be uncommon or unanticipated in the retail world – he could have asked for it in terms clear enough to put Kohl's on notice that training materials were being requested. He did not.¹⁴

Similarly, in *Gonzalez v. Ohio Casualty Insurance Co.*, this Court, recognizing that document requests must be clear, denied a request to compel production of documents it found were not described with reasonable particularity in a discovery request.¹⁵ This Court held that a request for “settlement agreements” could not be read to include a request for “releases.”¹⁶

Plaintiffs argue that their Document Request 12 requires the production of documents related to PBGC's audit of the Delphi Pension Plan assets, but no reasonable reading suggests that it encompassed such documents. Plaintiffs' Document Request 12 asks for documents “related to the PBGC's potential or

¹⁴ *Id.*

¹⁵ *Gonzalez v. Ohio Casualty Insurance Co.*, No. 07-cw-13921, 2008 WL 3833272 at *2 (E.D. Mich. Aug. 13, 2008) (“Defendant has not shown that it specifically requested the releases in compliance with the Federal Rules of Civil Procedure in a manner to which the Court can properly compel a response pursuant to Fed.R.Civ.P. 37.”)

¹⁶ *Id.*

actual liability for any benefit payments under Delphi's Pension Plans."¹⁷ By its terms, the request is directed at documents related to "liability." Nowhere do the words "assets," "plan asset audit," or any similar words appear. Plaintiffs have failed to make a discovery request describing with particularity the documents they now seek – documents related to PBGC's audit of the Delphi Pension Plan assets. This Court should refuse to compel the production of such documents.

Plaintiffs argue that information about the Delphi Pension Plan assets – including an asset audit conducted by a contractor that was ultimately rejected by PBGC – relates to "PBGC's potential or actual liability for benefit payments" because Plan asset values are used to determine benefit payments. But that argument is inconsistent with the specific focus of plaintiffs' request: liability for benefit payments. To adopt plaintiffs' view would defeat the purpose of the "reasonable particularity" rule as stated by the Sixth Circuit. Parties like PBGC would not only have to produce the specific documents that the request put them on notice that the other party wanted, but they would also have to guess, at their peril, everything that the other party might think was "related" to those documents.

No doubt there is an enormous number of unspecified categories of documents that might "relat[e] to liability payments." But trying to put the burden on PBGC to determine which of those documents plaintiffs are seeking completely

¹⁷ Plaintiffs' Rule 37 Motion to Enforce Docket No. 275 Exhibit A.

ignores Rule 34's requirement for reasonable particularity. If plaintiffs wanted documents regarding PBGC's valuation of Delphi Pension Plan assets (not to mention contractor work product on asset valuation, whether or not accepted by PBGC), they could and should have asked for those documents with particularity. "Assets" and "liabilities" are hardly the same thing; indeed, in most cases they are opposites.¹⁸ Just as this Court found in the *Gonzalez* case that a request for "settlement agreements" did not include "releases," it should find here that a request for documents about "liabilities" does not include documents about "assets." Plaintiffs should not be allowed to expand the scope of their discovery requests, after formal discovery has closed, by shoehorning an unrelated category of documents into a request that by its clear terms was directed elsewhere.

B. The Court cannot compel production of documents that were informally requested by letter, rather than in a document request under the Federal Rules.

Plaintiffs claim the Court should compel production of the asset information because they requested information about PBGC's audit of the Delphi pension plan assets in an informal letter or through oral discussions. But that informal request does not rise to the level of an actual Rule 34 document request that can be compelled under Rule 37. The court in *Bennett v. Rosser International, Inc.*, while

¹⁸ Black's Law Dictionary defines "asset" as "An item that is owned and has value." It defines "liability" as "A financial or pecuniary obligation in a specified amount; debt." *Black's Law Dictionary* at 140 and 1053 (10th ed. 2014).

noting that much of the discovery in that case was conducted informally, still ruled that “once a dispute arose ... [the requesting party] should have filed a formal request before filing the instant motion to compel.”¹⁹

In communications with plaintiffs’ counsel, PBGC always disputed that plaintiffs’ Document Request 12 included a request for information about PBGC’s valuation of the Delphi Pension Plan assets.²⁰ Plaintiffs concede as much in their Motion.²¹ If plaintiffs want those documents, the Federal Rules require that they formally request them – not ask this Court to compel their production by claiming that the documents were covered by an unrelated document request. That PBGC agreed, as a courtesy to plaintiffs, to provide a copy of the final Plan Asset Audit Memo when it is completed is not a concession that this document or similar documents were responsive to any formal document request served by plaintiffs.²²

¹⁹ *Bennett v. Rosser Int’l, Inc.*, No. 09-cv-00129, 2009 WL 3806773 at *2 (E.D. Ky. Nov. 9, 2009).

²⁰ Plaintiffs’ Rule 37 Motion to Enforce Docket No. 275 Exhibit F, at 2-3.

²¹ Plaintiffs’ Rule 37 Motion to Enforce Docket No. 275, at 17-18.

²² PBGC expressly stated in its August 14, 2015 letter to plaintiffs that it did not believe that the final Plan Asset Audit for the Delphi Salaried Plan was a “proper subject[] for discovery in this action.” However, because the final Plan Asset Audit is considered part of PBGC’s decision when informing pension participants of the amount of their benefits that PBGC will pay, PBGC routinely provides that document in response to Freedom of Information Act requests. As an accommodation, PBGC agreed that it would treat plaintiffs’ letter request as if it

Nor does PBGC's agreement to produce that document entitle plaintiffs to additional documents they failed to include in their original document requests. This Court should find that the 2013 Order does not require PBGC to produce documents that plaintiffs did not formally request.

If this Court finds that PBGC must disclose to plaintiffs documents regarding PBGC's audit of the Delphi Pension Plan assets, even though plaintiffs did not ask for them in a formal document request, then PBGC respectfully requests a reasonable amount of time to collect and review those documents, and to create an appropriate privilege log.

Conclusion

For the reasons stated above, this Court should deny the plaintiffs' Motion. In the alternative, if this Court is inclined to grant plaintiffs' Motion and order the production of some or all of the subject documents, PBGC respectfully requests a

were a FOIA request, and would provide a copy of the Plan Asset Audit to them when it had been completed. *See* Exhibit B.

reasonable amount of time to collect and review those documents, and to create an appropriate privilege log.

Dated: August 31, 2015

Washington, D.C.

Respectfully Submitted:

/s/ C. Wayne Owen, Jr. _____

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Certificate of Service

I hereby certify that on August 31, 2015, I electronically filed the foregoing 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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/s/ C. Wayne Owen, Jr.
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EXHIBIT A



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August 7, 2015

Via Electronic Mail

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Re: *Black v. PBGC*, Case No. 2:09-cv-13616

Dear John and Wayne:

As you know, the deadline for certain discovery motions related to the discovery that the parties have already served upon one another is next Friday, August 14, 2015. In connection with that deadline, I write to inquire further about what we view as the PBGC's unfulfilled obligations under the Court's August 21, 2013 Order Granting in Part Plaintiffs' Rule 37 Motion (the "Waiver Order") (Dkt. No. 231).

We have previously informed you that we believe the PBGC's refusal to produce two key categories of documents violates the Waiver Order: (1) approximately 20,000 responsive documents that the PBGC withheld on the basis of unspecified privileges; and (2) documents related to Requests 12 and 13 that the PBGC received, produced, or reviewed subsequent to the Plan's termination. As discussed below, we have reviewed the PBGC's rationale for withholding this information and find that it cannot withstand scrutiny. More importantly, we are concerned that the PBGC has mischaracterized the scope of the documents it is withholding.

I. The 20,000 Waiver Documents that the PBGC is Still Withholding

We believe this issue is straightforward. In March 2012, the Court ordered the PBGC to produce "full and complete responses" to document requests Plaintiffs served upon the PBGC in 2011. Dkt. No. 204 at 2. In January 2013, the PBGC informed Plaintiffs that it had withheld approximately 29,000 documents on the basis of various privileges, and that it intended to produce a privilege log documenting its privilege assertions by mid-April 2013. Believing that the time for producing a privilege log had long since passed, in February 2013 Plaintiffs moved the Court for relief, including, *inter alia*, an order requiring the production those 29,000 documents. The Court granted Plaintiffs' motion in August 2013, finding that the PBGC's failure to produce a privilege log for more than one year after the court ordered the PBGC to comply with Plaintiffs' 2011 discovery requests waived its ability to assert any privileges or protections as to those document requests. Dkt. No. 231 at 7.

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C. Wayne Owen, Jr., Esq.
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The PBGC eventually produced approximately 10,500 documents in response to the Waiver Order. You claim that the PBGC was relieved of its obligation to produce the remaining responsive documents covered by the Waiver Order based on a letter we sent in January 2013 (a month before the third motion to compel was filed). In that letter, Plaintiffs offered to modify the scope of their requests. Plaintiffs offer, however, was made in the hopes that the PBGC would speed up the production of its final document production and privilege log, and potentially avoid the need for yet a third motion to compel. Your claim that the PBGC accepted Plaintiffs' offer is false; in point of fact, you rejected the part of the offer that would have benefited Plaintiffs by stating that it came "far too late in PBGC's review process to have a meaningful impact on the time with which PBGC can complete its production." Feb. 13, 2013 Letter from W. Owen to M. Khalil. "Consideration is an essential element of every contract. In other words, a promise is legally enforceable only if the promisor receives in exchange for that promise some act or forbearance, or the promise thereof." *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 315 (6th Cir. 2000) (internal citations omitted). Because the PBGC refused to provide the requested consideration, there was no agreement.

The fact that there was no agreement is plainly reflected in Plaintiffs' Third Motion to Compel (Dkt. No. 218), filed *after* the correspondence described above, which specifically notes that the PBGC rejected Plaintiffs' offer, and makes clear that Plaintiffs sought the production of all the documents that the PBGC had withheld on the basis of privilege. *Id.* at 14. As noted above, Magistrate Judge Majzoub ordered the production of *all the document that the PBGC had withheld as privileged*, Dkt. No. 231 at 4, 7-8, and that Order was upheld by Magistrate Judge Majzoub over the PBGC's motion for reconsideration, and also by Judge Tarnow over the PBGC's objections under Fed. R. Civ. P. 72. The PBGC then petitioned for mandamus relief (which was denied), and in their opposition papers, Plaintiffs noted to the Sixth Circuit that the Waiver Order implicated "29,000 relevant documents."

The bottom line is this: (a) the PBGC was ordered to produce full and complete responses to those Plaintiffs' document requests; (b) these 20,000 documents are responsive to Plaintiffs' document requests, but the PBGC withheld them, at least ostensibly, on the basis of unspecified privileges; and (c), the Court ruled, unequivocally, that the PBGC had "waived its right to assert privilege to the documents requested in Plaintiffs' [document requests]." Waiver Order at 7. Accordingly, the PBGC has no right to withhold the roughly 20,000 responsive documents in question.

Still, Plaintiffs would prefer to avoid having to file yet another discovery motion unless the information in question is critical to a fair litigation of the case. Thus, notwithstanding their unquestionable right to the 20,000 documents in question, Plaintiffs are reluctant to undertake the time and expense of litigating yet another motion to compel, especially if, as the PBGC has represented, the 20,000 documents consist only of documents predating the August 2008

John A. Menke, Esq.
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timeframe, or correspondence solely among lawyers in its office of chief counsel and its outside counsel. However, in reviewing all the documents that the PBGC and the U.S. Department of Treasury (“Treasury”) have produced, Plaintiffs are concerned that the 20,000 documents the PBGC has withheld go beyond the criteria outlined in the January 2013 letter, and moreover could be of highly probative value.

This concern has been prompted by inconsistencies in the document productions. For example, Plaintiffs note that the Treasury produced an email exchange between Joe House and Matthew Feldman from May 18, 2009. *See* UST-BL-007024. The text of Mr. House’s 6:00 pm email to Mr. Feldman is redacted, as the Treasury has asserted that it may be withheld under the deliberative process privilege. Because of the Waiver Order, the PBGC should of course also have produced this email, yet we cannot find any copy of this 6:00 pm email exchange in the documents that the PBGC has produced to us. Similarly, the PBGC produced a number of emails that indicate that the PBGC expected to receive on March 17 “a set of funding projections to include assumption of the salaried plan.” PBGC-BL2-00793407. These funding projections were discussed frequently by PBGC staff prior to March 17. Yet, we have not been able to identify these funding projections in the documents that the PBGC produced to us, nor have we seen any subsequent email correspondence between PBGC staff discussing the failure of GM to produce the anticipated funding projections.

Taken in isolation, discrepancies such as these might not cause us too much concern. However, taken together, they make us question whether these are really isolated aberrations, or are instead indicative of a larger problem in which the PBGC has withheld documents it has represented were produced. This concern is only amplified by the fact that there is a universe of roughly 20,000 responsive documents that Plaintiffs have never seen, and which were all withheld on the basis of unspecified privileges that have never been logged. Accordingly, these and other discrepancies have caused us to question whether the PBGC has somehow misunderstood the extent of documents that it has withheld. While Plaintiffs might be willing to forego their right to obtain 20,000 documents that they know fit the criteria laid out in the January 2013 letter, they are not willing to do so under the present circumstances, where there is significant doubt about what documents the PBGC has actually withheld.

Rather than insist outright on the production of all those documents however, Plaintiffs are willing to propose the following compromise: the PBGC hires an independent third-party to produce a “log” of the withheld documents that lists four information fields: (1) Date; (2) To; (3) From; and (4) CC. We will then review these fields to determine if they fall within the criteria laid out in the January 2013 letter. If the PBGC agrees to this review, Plaintiffs will agree to forego their right to any documents that meet the criteria laid out in the January 2013 letter, but the PBGC will agree that any documents not meeting the criteria will be produced to

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Plaintiffs immediately. If the PBGC does not agree to this proposal, Plaintiffs anticipate moving for the production of all the withheld documents consistent with the Court's Orders.

II. The Documents Related to the PBGC's Determination of Plan Benefits

The Waiver Order required that the PBGC produce, "documents responsive to Request for Production nos. 12 and 13 generated subsequent to the Plan's termination." Waiver Order at 8. After the Waiver Order was issued, we wrote to you to express our concern that the PBGC appeared to be ignoring the portion of the Order that required the PBGC to produce documents "related to the PBGC's potential or actual liability for any benefit payments under Delphi's Pension Plans." These requests sought the PBGC's post-termination documents relating to plan asset and liability valuations, and during our subsequent conversations on the subject, we understood the PBGC's position to be that no documents had yet been generated that would be responsive to these requests.

We were subsequently provided with correspondence from the PBGC's Acting Director Alice Maroni, stating that in 2011 (prior even to the filing of Plaintiffs' Rule 37 Motion) a PBGC contractor performed significant work on valuing the assets of the Delphi plans (which would plainly be responsive to Request No. 12). The letter noted that the contractor was eventually terminated in 2012, but only after completing over \$500,000 worth of work, and only after the production of unsatisfactory "deliverables."

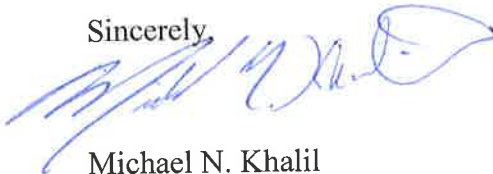
We have asked that you provide us with the contractor's deliverables, as it plainly falls under both our document requests and the terms of the Court's Waiver Order, but you have taken the position that you need not produce these documents because documents related to PBGC's audit of the Delphi plans assets are not relevant to the PBGC's liability for benefit payments or the PBGC's recoveries. The argument is insulting. As you well know, it is *impossible* for the PBGC to determine the amount of its liability for benefit payments under a given plan without first ascertaining the value of that plan's assets. "The value of a plan's assets is important because it is used in calculating retirement benefits. For some plans, increases in the calculated value of plan assets at the date of plan termination result in increased benefits for plan participants. However, for other plans – especially plans such as National Steel in which plan funding falls far short of the calculated guaranteed benefit amount – even relatively large increases in the value of plan assets may not translate into additional benefits for retirees." PBGC Office of Inspector General Evaluation Report, PBGC's Plan Asset Audit of National Steel Pension Plans Was Seriously Flawed (March 30, 2011) at 1. Indeed, the PBGC's Acting Director has gone so far as to describe the completion of the asset evaluation report as a "necessary prerequisite to issuing final benefit determinations." Nov. 28, 2014 Letter from A. Maroni to the Honorable J. Boehner, *et. al*, at 4. In a related vein, we understand that the PBGC has now completed the key documents necessary for finalizing benefit determinations under the

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Delphi Salaried Plan that we previously requested, including the Recovery Valuation and Allocation Memo, the Plan Asset Audit, and the Actuarial Case Memo. If the PBGC does not immediately produce the aforementioned documents, all of which are directly relevant to the merits of the case and plainly covered by the Waiver Order, we will have no choice but to move to compel.

Please let us know your position on these issues as soon as possible. If we cannot resolve these issues in the next few days, we intend to seek relief from the Court by the discovery motion deadline.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael N. Khalil", is written over the word "Sincerely,". The signature is fluid and cursive, with a large loop at the end.

Michael N. Khalil

EXHIBIT B



Pension Benefit Guaranty Corporation
1200 K Street, N.W., Washington, D.C. 20005-4026

VIA E-MAIL

August 14, 2015

Michael N. Khalil, Esq.
Miller & Chevalier Chartered
655 Fifteenth St., N.W., Suite 900
Washington, D.C. 20005-5701

Re: *Black v. PBGC* – Discovery Issues

Dear Mike:

I am writing to respond to the issues you raised in your August 7, 2015 letter:

I. Documents that DSRA agreed PBGC need not produce or include on its privilege log.

PBGC has not “withheld” 20,000 documents from its production. As PBGC explained in its February 4, 2015 letter on this same topic, PBGC has simply lived by the agreement that it reached with you. Rather than repeat the February 14 letter here, I have attached a copy of it to this response.

Your new claim that PBGC rejected DSRA’s offer to modify its document requests to no longer include documents dated before August 2008 or documents solely among PBGC’s in-house counsel or between PBGC’s in-house and outside counsel is false. PBGC’s acceptance of DSRA’s offer could not have been plainer – PBGC stated that it appreciated the plaintiffs’ offer and “We will remove those documents from the privilege log . . .,” exactly as plaintiffs had asked. Because this agreement removed these documents from plaintiffs’ discovery requests, the Court orders, which required PBGC to comply with plaintiffs’ requests or to produce all privileged documents that plaintiffs requested, do not apply to those documents. There was ample consideration for the parties’ agreement, assuming that consideration was required, contrary to your assertion otherwise. As the plaintiffs indicated in their offer, they saved the time and expense spent reviewing documents that they had not asked for, and PBGC was spared the time and expense of producing them. The fact that you subsequently misstated the number of documents at issue in your pleadings related to plaintiffs’ motion to compel does not modify the parties’ agreement.

Your argument that PBGC should be required to produce the documents covered by the parties’ 2013 agreement because of your “concern” that PBGC has withheld documents that “go beyond the criteria outlined in the January 2013 letter” is baseless. PBGC has not failed to produce responsive documents under the guise of complying with the parties’ agreement. Your claim that PBGC has done so arises from only two so-called “discrepancies” in PBGC’s

production – to wit, you have been unable to find two specific documents in the more than one million pages of documents that PBGC has produced to plaintiffs. Those discrepancies do not exist. Joe House's e-mail dated May 18, 2009, at 6:00 p.m., in full and unredacted form, was included in PBGC's production at Bates No. PBGC-BL2-00125294. The March 17, 2009 funding projections were included in PBGC's production at Bates Nos. PBGC-BL2-00569016-020. Neither document was missing or withheld from PBGC's production.

In sum, PBGC has not "misunderstood the extent of documents it has withheld" or withheld documents that "go beyond the criteria" of the parties' agreement. PBGC simply has not produced those documents that you yourself said plaintiffs were no longer requesting. You have not provided any basis for plaintiffs to renege on their agreement and to require PBGC to engage in a time-consuming and expensive process of re-reviewing and logging those documents that plaintiffs said they did not wish to see.

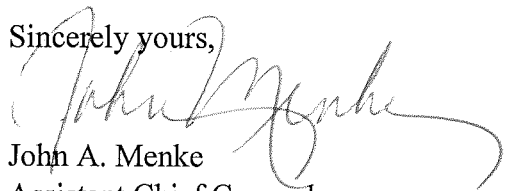
II. Documents relating to the processing of the terminated Delphi pension plans.

PBGC responded to your demand that it produce documents relating to PBGC's audit of the Delphi Salaried Plan assets in its February 4 letter as well and need not restate that response again. Simply put, a request for documents relating to the Salaried Plan "liabilities" does not include documents relating to the Salaried Plan's assets. Apart from the fact that the asset audit has absolutely nothing to do with PBGC's decision to terminate the Salaried Plan, which is what we understand plaintiffs are challenging in their amended complaint, PBGC has no obligation to produce documents that plaintiffs have not requested.

Nonetheless, we note that in the penultimate paragraph of your letter, you specifically request certain documents – the Recovery Valuation and Allocation Memo, the Plan Asset Audit, and the Actuarial Case Memo. Though we do not believe that these documents are proper subjects for discovery in this action, PBGC has generally provided them to persons who ask for them under the Freedom of Information Act (FOIA). Therefore, in order to save you and PBGC unnecessary paperwork, PBGC will treat that portion of your letter as if it were a FOIA request. We have completed the valuation and allocation of amounts PBGC recovered through Delphi's bankruptcy proceedings, and we are including with this letter a copy of the Recovery Valuation and Allocation Memo (with attachments). Documentation of the plan asset valuation and our review of the Actuarial Case Memo and Report are in process. We will provide you copies of these reports as soon as they have been completed.

Please call me if you have any questions.

Sincerely yours,


John A. Menke
Assistant Chief Counsel