

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

DENNIS BLACK, *et al.*,

Plaintiffs,

v.

PENSION BENEFIT GUARANTY
CORPORATION, *et al.*,

Defendants.

Case No. 2:09-cv-13616
Hon. Arthur J. Tarnow
Magistrate Judge Mona K. Majzoub

**PBGC'S RESPONSE TO PLAINTIFFS' FIRST REQUEST
FOR PRODUCTION OF DOCUMENTS PURSUANT TO
THE COURT'S SEPTEMBER 1, 2011 SCHEDULING ORDER**

Pursuant to Federal Rule of Civil Procedure 34 and the Local Rules of this Court, the Pension Benefit Guaranty Corporation ("PBGC") responds as follows to Plaintiffs' First Request to Defendant PBGC for Production of Documents Pursuant to the Court's September 1, 2011 Scheduling Order (the "Requests").

General Objections

1. PBGC objects to the Requests to the extent that they seek documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

The causes of action pleaded in the plaintiffs' Amended Complaint are extremely narrow. In their first three counts, plaintiffs challenge the fact that the Delphi Salaried Plan was terminated by agreement between PBGC and Delphi Corp., the Salaried Plan administrator, rather than by a federal district court decree. Plaintiffs allege that such a termination by agreement was either illegal or unconstitutional, or that PBGC could not rely upon Delphi Corp.'s agreement because Delphi Corp. violated its fiduciary duties to plaintiffs. All documents related to PBGC's role in connection with the trusteeship agreement have been provided to plaintiffs as part of PBGC's administrative record (*see* the proposed form of agreement PBGC sent to Delphi Corp. (AR 000001-000009), and the memorandum explaining the change in termination date between the form of agreement and the final agreement (AR 000114-000118)) or are included with this response (*see* final signed agreement (Bates no. PBGC 000001-000003)). Documents related to Delphi Corp.'s decision to sign the trusteeship agreement rather than to oppose the termination in PBGC's district court actions were filed with the bankruptcy court as part of Delphi Corp.'s requests for approval of its settlement with PBGC and for confirmation of its Modified Plan of Reorganization. Those documents are available to plaintiffs from the bankruptcy court docket. Delphi Corp.'s decision to sign the trusteeship agreement was the subject of a motion which plaintiffs opposed, and of hearings before the bankruptcy court in which plaintiffs participated. That decision was approved by order of the bankruptcy court. That order is now final and nonappealable, and thus no longer properly subject to challenge by plaintiffs.

In their fourth count, plaintiffs originally alleged that the termination of the Salaried Plan was unlawful because PBGC could not satisfy the standards of either subsection (a) or (c) of 29

U.S.C. § 1342. In subsequent pleadings in this case, however, plaintiffs have apparently given up their assertion that PBGC has failed to establish grounds to initiate termination under subsection (a)¹ – and even if those claims have not been waived, plaintiffs have also admitted that review of PBGC’s decision to initiate termination would be review of an administrative agency decision limited to the administrative record.²

As PBGC has previously noted, however, there are two independent avenues set out for termination of a pension plan under 29 U.S.C. § 1342(c) – the plan may be terminated by court decree in compliance with the standards set forth in that subsection or the plan may be terminated by an agreement between PBGC and the plan administrator. When PBGC and a plan administrator agree to termination “without proceeding in accordance with the requirements of this subsection,” termination and appointment of a trustee are effectuated without PBGC having to obtain a court decree. In this case, as PBGC has repeatedly stated, the Delphi Salaried Plan was terminated by agreement, not by court decree. Plaintiffs have argued that termination by agreement is not allowed and that PBGC must prove that the Salaried Plan should be terminated as if PBGC were attempting to obtain a court decree in a *de novo* trial. As the Court recently emphasized, however, it “has not issued any decision on the merits with regard to whether Title IV of ERISA permits PBGC to terminate a pension plan by agreement with the plan

¹ See Brief in Support of Plaintiffs’ Objections to Magistrate Judge’s Scheduling Order and Order Denying Plaintiffs’ Motion for Adoption of Scheduling Order at 10-14 (filed Apr. 11, 2011).

² See Plaintiffs’ Supplemental Brief in Support of Their Motion for Preliminary Injunction at 26 (filed Jan. 8, 2010).

administrator.”³ Therefore, the only documents relevant to the fourth count and PBGC’s compliance with 29 U.S.C. § 1342(c) are the same documents relating to the signing of the agreement terminating the Salaried Plan that are relevant to the first three counts of the Amended Complaint.

Notwithstanding the extremely narrow causes of action actually pleaded in their Amended Complaint, the document requests served by plaintiffs are exceedingly broad. Plaintiffs do not limit their requests to documents relating to the agreement terminating the Salaried Plan; rather, they request every single document relating or referring to Delphi in PBGC’s possession, and more. Though Fed. R. Civ. P. 26 allows for broad discovery, all discovery requests must be “relevant to any party’s claim” PBGC therefore objects to plaintiffs’ document requests as overbroad and failing to seek only relevant material to the extent that they request documents that relate to matters other than the agreement terminating the Delphi Salaried Plan.

And, to the extent that PBGC has provided any of the documents requested, PBGC does not concede the relevance thereof to the subject matter of the proceeding. PBGC expressly reserves the right to raise all questions of relevance and admissibility and to object on any grounds to the use of any documents provided in response to the Requests. The fact that PBGC has responded to any Request or any part thereof subject to objections does not waive all or any part of any objection to any Request.

³ See Order Denying Defendant’s Motion for Reconsideration and Interlocutory Appeal at 4 (filed October 3, 2011).

2. PBGC also objects to the Requests to the extent they seek documents that: (i) are subject to the attorney-client privilege; (ii) constitute attorney work product; or (iii) are otherwise privileged or protected from discovery under state or federal law. In addition, the inadvertent or mistaken production of documents and/or information subject to the protections of the attorney-client privilege, work product doctrine or other applicable privilege, immunity or exemption, shall not be deemed a general, inadvertent, implicit, subject matter, separate, independent or other waiver of such privilege or protection, and does not put in issue or constitute the affirmative use of advice of counsel or of any privileged or protected communications. PBGC reserves the right to seek the return of all copies of any such document inadvertently produced in response to the Requests.

3. PBGC also objects to the Requests to the extent that they seek the production of documents that contain confidential, proprietary and/or non-public information subject to confidentiality agreements executed between PBGC and third parties, or documents that PBGC must keep confidential pursuant to the Employee Retirement Income Security Act of 1974, as amended, or other applicable federal law.

4. PBGC also objects to the Requests to the extent that they: (i) are unreasonably cumulative or duplicative; (ii) seek material that is already in the Plaintiffs' possession, custody, or control; (iii) seek material reasonably obtainable from some other source that is more convenient, less burdensome or less expensive; or (iv) otherwise constitute an abuse of discovery under Rule 26(b)(2) of the Federal Rules of Civil Procedure.

5. PBGC also objects to the Requests to the extent they lack particularity and seek the production of "all" documents responsive to a particular description where the production of

"all" such documents is not relevant to the subject matter involved in this matter and/or where the search for, collection of or production of all such documents would be unduly burdensome or oppressive.

6. PBGC also objects to the Requests to the extent they purport to impose any obligation on PBGC beyond the scope of, or inconsistent with, those imposed by the Federal Rules of Civil Procedure, the Local Rules of the United States District Court for the Eastern District of Michigan, other applicable law or any orders of the Court.

Responses and Specific Objections

Subject to, and without waiving, the foregoing General Objections, which are incorporated by reference into each of the following Responses and Specific Objections, PBGC responds to the Requests as follows:

Plaintiffs' Request No. 1:

All documents and things identified in your responses to plaintiffs' First Set of Interrogatories to you.

PBGC's Response No. 1:

PBGC's Administrative Record collectively represents the only documents and things identified by PBGC in response to plaintiffs' First Set of Interrogatories, and that Record has already been produced to plaintiffs.

Plaintiffs' Request No. 2:

All documents and things received, produced or reviewed by the PBGC between January 1, 2006 and December 31, 2009 (including, but not limited to, documents received from Delphi) related to Delphi or the Delphi Pension Plans.

PBGC's Response No. 2:

PBGC objects to Request Number 2 on the grounds identified in the General Objections above. PBGC also objects to this request because it is overbroad, vague, ambiguous, and unduly burdensome. As set forth in its General Objection 1 above, and without waiving the foregoing objections and the General Objections, PBGC is producing the only relevant, non-privileged documents related to the agreement between PBGC and Delphi Corp. terminating the Delphi Salaried Plan that have not already been produced to plaintiffs or are not available to plaintiffs from publicly available sources.

Plaintiffs' Request No. 3:

All documents and things (including, but not limited to, communications, spreadsheets, funding assumptions, snapshots, memoranda, as well as all other documents and things) received, produced or reviewed by the PBGC since January 1, 2006 related to financial involvement by GM with the Delphi Pension Plans, including, but not limited to, GM's assumption of some or all of the liability for any of the Delphi Pension Plans (and the cost of such an assumption), potential funding of any of the Delphi Pension Plans by GM, or the payment of supplemental pension benefits to Delphi Pension Plan participants by GM.

PBGC's Response No. 3:

PBGC objects to Request Number 3 on the grounds identified in the General Objections above. PBGC also objects to Request Number 3 because it is overbroad, vague, ambiguous, and unduly burdensome. Furthermore, Request Number 3 exceeds the scope of this litigation because it does not relate to any claim filed by the plaintiffs.

Plaintiffs' Request No. 4:

All documents and things received, produced or reviewed by the PBGC since January 1, 2006 and December 31, 2009 related to the potential assumption of liability for any of the Delphi Pension Plans by an entity other than Delphi.

PBGC's Response No. 4:

PBGC objects to Request Number 4 on the grounds identified in the General Objections above. PBGC also objects to Request Number 4 because it is overbroad, vague, ambiguous, and unduly burdensome. Furthermore, Request Number 4 exceeds the scope of this litigation because it does not relate to any claim filed by the plaintiffs.

Plaintiffs' Request No. 5:

All documents and things received, produced or reviewed by the PBGC between January 1, 2006 and December 31, 2009 related to the ability of Delphi to maintain the Delphi Pension Plans.

PBGC's Response No. 5:

PBGC objects to Request Number 5 on the grounds identified in the General Objections above. PBGC also objects to Request Number 5 because it is overbroad, vague, ambiguous, and unduly burdensome. Furthermore, Request Number 5 exceeds the scope of this litigation because it does not relate to any claim filed by the plaintiffs.

Plaintiffs' Request No. 6:

All documents and things received, produced or reviewed by the PBGC since January 1, 2006 related to liens involving the Delphi Pension Plans, both asserted and assertable by PBGC, including, but not limited to, valuation of those liens, communications related to the release or waiver of those liens, and the identity of assets subject to those liens.

PBGC's Response No. 6:

PBGC objects to Request Number 6 on the grounds identified in the General Objections above. PBGC also objects to Request Number 6 because it is overbroad, vague, ambiguous, and unduly burdensome. Furthermore, Request Number 6 exceeds the scope of this litigation because it does not relate to any claim filed by the plaintiffs.

Plaintiffs' Request No. 7:

All documents and things received, produced or reviewed by the PBGC since January 1, 2006 related to the value of Delphi or the value of Delphi's assets.

PBGC's Response No. 7:

PBGC objects to Request Number 7 on the grounds identified in the General Objections above. PBGC also objects to Request Number 7 because it is overbroad, vague, ambiguous, and unduly burdensome. Furthermore, Request Number 7 exceeds the scope of this litigation because it does not relate to any claim filed by the plaintiffs.

Plaintiffs' Request No. 8:

All documents and things you received from the Federal Executive Branch or produced to the Federal Executive Branch, since January 1, 2009, related to Delphi or the Delphi Pension Plans, including, but not limited to, documents related to the termination of the Delphi Pension Plans, the assumption of any liability associated with the Delphi Pension Plans by GM, PBGC liens on Delphi assets, recoveries related to the Delphi Pension Plans, the Waiver and Release Agreement, and the Delphi-PBGC Settlement Agreement.

PBGC's Response No. 8:

PBGC objects to Request Number 8 on the grounds identified in the General Objections above. PBGC also objects to Request Number 8 because it is overbroad, vague, ambiguous, and unduly burdensome. Furthermore, Request Number 8 exceeds the scope of this litigation because it does not relate to any claim filed by the plaintiffs.

Plaintiffs' Request No. 9:

All documents and things you received from GM or produced to GM, since January 1, 2006, related to Delphi or the Delphi Pension Plans, including, but not limited to, documents related to the termination of the Delphi Pension Plans, PBGC liens on Delphi assets, recoveries related to the Delphi Pension Plans, the Waiver and Release Agreement, and the Delphi-PBGC Settlement Agreement.

PBGC's Response No. 9:

PBGC objects to Request Number 9 on the grounds identified in the General Objections above. PBGC also objects to Request Number 9 because it is overbroad, vague, ambiguous, and

unduly burdensome. Furthermore, Request Number 9 exceeds the scope of this litigation because it does not relate to any claim filed by the plaintiffs.

Plaintiffs' Request No. 10:

All documents and things related to the Waiver and Release Agreement.

PBGC's Response No. 10:

PBGC objects to Request Number 10 on the grounds identified in the General Objections above. PBGC also objects to Request Number 10 because it is overbroad, vague, ambiguous, and unduly burdensome. Furthermore, Request Number 10 exceeds the scope of this litigation because it does not relate to any claim filed by the plaintiffs.

Plaintiffs' Request No. 11:

All documents and things related to the Delphi-PBGC Settlement Agreement.

PBGC's Response No. 11:

PBGC objects to Request Number 11 on the grounds identified in the General Objections above. PBGC also objects to Request Number 11 because it is overbroad, vague, ambiguous, and unduly burdensome. Furthermore, Request Number 11 exceeds the scope of this litigation because it does not relate to any claim filed by the plaintiffs.

Plaintiffs' Request No. 12:

All documents and things received, produced or reviewed by the PBGC since January 1, 2006 related to the PBGC's potential or actual liability for any benefit payments under Delphi's Pension Plans.

PBGC's Response No. 12:

PBGC objects to Request Number 12 on the grounds identified in the General Objections above. PBGC also objects to Request Number 12 because it is overbroad, vague, ambiguous, and unduly burdensome. Furthermore, Request Number 12 exceeds the scope of this litigation because it does not relate to any claim filed by the plaintiffs.

Plaintiffs' Request No. 13:

All documents and things received, produced or reviewed by you since January 1, 2009 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.

PBGC's Response No. 13:

PBGC objects to Request Number 13 on the grounds identified in the General Objections above. PBGC also objects to Request Number 13 because it is overbroad, vague, ambiguous, and unduly burdensome. Furthermore, Request Number 13 exceeds the scope of this litigation because it does not relate to any claim filed by the plaintiffs.

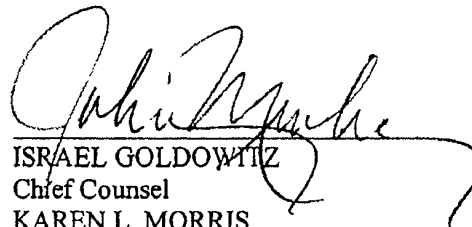
Plaintiffs' Request No. 14:

All documents and things received, produced or reviewed by the PBGC related to the Waterfall Right or the Waterfall Participation as those terms are defined in the Waiver and Release Agreement.

PBGC's Response No. 14:

PBGC objects to Request Number 14 on the grounds identified in the General Objections above. PBGC also objects to Request Number 14 because it is overbroad, vague, ambiguous, and unduly burdensome. Furthermore, Request Number 14 exceeds the scope of this litigation because it does not relate to any claim filed by the plaintiffs.

Dated: October 20, 2011
Washington, D.C.



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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 20th day of October, 2011, a copy of the foregoing was served via electronic mail in PDF format, and by US Mails, upon the attorneys listed below:

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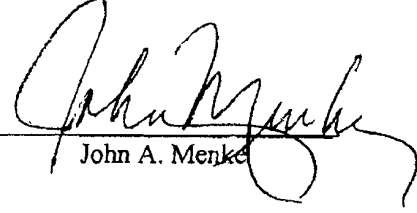
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