UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

U.S. DEPARTMENT OF THE TREASURY,	
Petitioner,	
v.	**No. 1:12-mc-00100-EGS**
PENSION BENEFIT GUARANTY CORPORATION,	
Interested Party,	
v.	
DENNIS BLACK, *et al.*,	
Respondents.	

REPLY IN SUPPORT OF PETITIONER'S MOTION FOR STAY

INTRODUCTION

By order dated April 13, 2017, the Court directed petitioner U.S. Department of the Treasury (Treasury) to produce "forthwith" to respondents Dennis Black, Charles Cunningham, Kenneth Hollis, and the Delphi Salaried Retiree Association the 63 documents over which Treasury had asserted the presidential communications privilege. ECF No. 44 at 1. Treasury has moved for an order staying that order until any appeal of the order had been adjudicated. ECF No. 46 at 1. Respondents agree with Treasury, ECF No. 47 at 5, that the granting of Treasury's motion for a stay is governed by the following four factors:

> whether the stay applicant has made a strong showing that he is likely to succeed on the merits . . . whether the applicant will be irreparably injured absent a stay . . . whether issuance of the stay will substantially injure the other parties interested in the proceedings . . . and . . . where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987). Respondents disagree, however, that the balance of hardships favors the granting of Treasury's motion for a stay or that Treasury has a strong likelihood of success on the merits. ECF No. 47 at 2. Respondents are mistaken, for the following reasons, on both counts.

ARGUMENT

I. THE BALANCE OF HARDSHIPS FAVORS THE GRANTING OF TREASURY'S MOTION FOR A STAY.

Respondents make five separate arguments in an effort to show that the balance of hardships does not favor the granting of Treasury's motion for a stay. None of respondents' arguments is persuasive.

Respondents argue as a threshold matter that the balance of hardships does not favor the granting of Treasury's motion for a stay because the Supreme Court held in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), that "the production of purportedly privileged documents prior to appellate review does not constitute irreparable harm because there will be sufficient remedies available post appeal." ECF No. 47 at 6. *Mohawk* is inapposite, however. The Supreme Court held in *Mohawk* that orders requiring the production of documents subject to claims of attorney-client privilege "[do not] qualify for immediate review under the collateral order doctrine" because "postjudgment appeals generally suffice to protect the rights of litigants and assure the vitality of the attorney-client privilege." 558 U.S. at 103, 109. Emphasizing, however, that its decision did not apply to orders requiring the production of records subject to claims of presidential communications privilege, the Court said: "[T]he United States contends [as *amicus curiae*] that collateral order appeals should be available for rulings involving certain governmental privileges 'in light of their structural constitutional grounding under the separation

of powers, relatively rare invocation, and unique importance to governmental functions.' *We express no view on that issue*." *Id*. at 113 n.4 (emphasis added, citation omitted).

Respondents next argue that the balance of hardships does not favor the granting of Treasury's motion for a stay because Treasury could mitigate any harm that otherwise would result from its production of the documents over which it has asserted the presidential communications by producing the documents to respondents pursuant to a protective order. ECF No. 47 at 8. The protective order that respondents have in mind is the protective order in *Black v. Pension Benefit Guaranty Corporation*, No. 2:09-cv-13616-AJT-MKM (E.D. Mich.), pursuant to which documents alleged to be privileged were produced to respondents by interested party Pension Benefit Guaranty Corporation. *Id*. *Black* is different from this case because the documents produced in *Black* were documents alleged to be "protected from disclosure by the attorney-client, attorney work product, or deliberative process privileges." Ex. A hereto at 8. They were not, as in this case, documents held by the Court to be covered by the presidential communications privilege. ECF No. 45 at 10. Documents covered by the presidential communications privilege stand on a different footing from documents covered by other privileges because of the "structural constitutional grounding [of the privilege] under the separation of powers, relatively rare invocation, and unique importance to governmental functions." *Mohawk,* 558 U.S. at 113 n.4; *see In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997) (holding that "[t]he presidential communications privilege is rooted in constitutional separation of powers principles and the President's unique constitutional role" while "the deliberative process privilege is primarily a common law privilege"); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (characterizing the attorney-client privilege as a "common law" privilege); *Feld v. Fireman's Fund Ins. Co.*, 991 F. Supp. 2d 242, 247 (D.D.C. 2013) (noting that

the work product doctrine, though codified now in the Federal Rules of Civil Procedure, was "[o]riginally a product of the common law"). Any production in this case of the documents over which Treasury has asserted the presidential communications privilege would therefore "'let the cat out of the bag, without any effective way of recapturing it if the district court's directive [is] ultimately found to erroneous,'" *Judicial Watch, Inc. v. Dep't of Justice*, 432 F.3d 366, 369 (D.C. Cir. 2005) (quoting *Irons v. FBI*, 811 F.2d 681, 683 (1st Cir. 1987)), even if the production took place pursuant to a protective order.

Respondents also argue that the balance of hardships does not favor the granting of Treasury's motion for a stay because the presidential communications privilege was asserted in this case by the previous administration. ECF No. 47 at 9, 13. The Supreme Court has held that "[t]he expectation of the confidentiality of executive communications . . . [is] subject to erosion over time after an administration leaves office." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 451 (1977). No significant erosion has taken place in this case, however, because the previous administration has been out of office for less than four months.

Respondents argue further that the balance of hardships does not favor the granting of Treasury's motion for a stay because the public does not have a cognizable interest in the protection of documents covered by the privilege. ECF No. 47 at 13. The Supreme Court has held, however, that the presidential communications privilege "is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution," *United States v. Nixon*, 418 U.S. 683, 708 (1974), and the D.C. Circuit has held that "the public interest is best served by holding that communications made by presidential advisers in the course of preparing advice for the President come under the presidential communications privilege, even when these communications are not made directly to the President." *Sealed Case*, 121 F.3d at

751-52. The public thus has a significant interest in protecting documents that the Court has held to be covered by the presidential communications privilege.

Respondents argue as a final matter that the balance of hardships does not favor the granting of Treasury's motion for a stay because any appeal of the order dated April 13, 2017, will delay the adjudication of *Black*. ECF No. 47 at 12. "[D]elays of litigation" are "inevitable," however. *United States v. Ruzicka*, 329 U.S. 287, 293 (1946). Treasury considers *Black* to be a meritless lawsuit, *see* ECF No. 15 at 14-15, but has never taken any action to delay the adjudication of that action or this action. Any delay in the adjudication of *Black* that results from Treasury's appealing the order dated April 13, 2017, will be justified by the significant public interest, discussed above, in the protection of documents that the Court has held to be protected by the presidential communications privilege. Treasury has expressed its willingness, moreover, to try to minimize any delay in the adjudication of *Black* by seeking expedition of any such appeal. ECF No. 46-1 at 5.

II. TREASURY WILL HAVE A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS IF IT APPEALS THE ORDER DATED APRIL 13, 2017.

The order dated April 13, 2017, is premised on "[r]espondents[']assert[ion] that they need the withheld material because it may show pressure exerted by Treasury or the White House to terminate the Delphi Plan for impermissible or political reasons." ECF No. 45 at 10-11. That premise is unlikely to survive appellate review because, as Treasury has stated, none of the documents over which it has asserted the presidential communications privilege contains any indication that any such pressure was ever exerted. ECF No. 46-1 at 6. Respondents do not address that key point in their opposition to Treasury's motion for a stay. They merely say instead that "the Court applied the well-settled needs analysis" in determining that the order dated April 13, 2017, was warranted, ECF No. 47 at 10, and therefore do nothing to refute

Treasury's showing that it will have a strong likelihood of success on the merits if it appeals the order.

CONCLUSION

Treasury's motion for a stay should be granted for the foregoing reasons and for the reasons set forth in the memorandum in support of the motion, ECF No. 46-1.

Respectfully Submitted,

CHAD A. READLER
Acting Assistant Attorney General
CHANNING D. PHILIPS
United States Attorney
JACQUELINE COLEMAN SNEAD
Assistant Branch Director

s/ *David M. Glass*
DAVID M. GLASS, DC Bar 544549
Senior Trial Counsel
Department of Justice, Civil Division
20 Massachusetts Ave., N.W., Room 7200
Washington, D.C. 20529
Tel: (202) 514-4469/Fax: (202) 616-8470
Email: david.glass@usdoj.gov
Attorneys for Petitioner

Dated: May 11, 2017

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2017, I served the within memorandum and the exhibit to the memorandum on all counsel of record by filing them with the Court by means of its ECF system.

s/ *David M. Glass*

U.S. Dep't of the Treas. v. Pension Benefit Guar. Corp.
No. 1:12-mc-00100-EGS

Reply in Support of Petitioner's Motion for Stay

Ex. A

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

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

Issues Presented

1. On October 11, 2012, plaintiffs demanded that PBGC provide them a copy of sensitive personally identifiable information for the Salaried Plan, commonly referred to as the plan census data. The requested information contains sensitive personally identifiable information, including dates of birth, employment history, and pension benefit amounts for the Salaried Plan participants. The Privacy Act of 1974, as amended, prohibits PBGC from disclosing this information to anyone, absent obtaining each individual's written consent or a Court order expressly authorizing PBGC to disclose the information.[1] Further, the participants' sensitive personally identifiable information is not relevant to the matters raised in plaintiffs' Amended Complaint. Are plaintiffs nonetheless entitled to the participants' sensitive personally

[1] 5 U.S.C. § 552a (2012).

identifiable information in the absence of a Court order explicitly addressing the Privacy Act issues and addressing whether this material is sufficiently relevant to the matters raised in plaintiffs' Amended Complaint to justify the release of this sensitive material?

2. In its initial response to plaintiffs' discovery demands, PBGC asserted its right to withhold documents protected by the attorney-client, attorney-work-product, and deliberative-process privileges. Having reviewed, sorted, and produced more than one million pages of documents to plaintiffs, PBGC is now diligently working to complete a log of the privileged documents it has identified, just as the parties reported to the Court that PBGC would do. Has PBGC inadvertently waived its right to claim privileges despite PBGC's efforts to assert and preserve its privilege claims at every appropriate time?

Authority PBGC Chiefly Relies Upon

Statutes and Rules

5 U.S.C. § 552a

Fed. R. Civ. P. 26(d)(5)

United States Circuit Court Cases

Lewis v. ACB Bus. Servs., 135 F.3d 389 (6th Cir. 1998).

Perry v. State Farm & Casualty Co., 734 F.2d 1441 (11th Cir. 1984).

Laxalt v. McClatchy, 809 F.2d 885 (D.C. Cir. 1987).

U.S. v. Philip Morris, Inc., 347 F.3d 951 (D.C. Cir. 2003).

U.S. v. British Am. Tobacco (Inv.) Ltd., 387 F.3d 884 (D.C. Cir. 2004).

United States District Court Cases

Pedreira v. Sunrise Children's Servs., No. 3:00-CV-00210, 2012 U.S. Dist. LEXIS 124380 (W.D. Ky. 2012) (unpublished).

Bordeaux v. U.S., No. 97-1592, 1999 WL 499911 (E.D. La. 1999) (unpublished).

In re Katrinia Canal Breaches Consol. Litig., No. 05-4182, 2007 WL 1959193, at *6 (E.D. La. 2007) (unpublished).

Coalition for a Sustainable Delta v. Koch, No. 1:08–CV–00397 OWW GSA, 2009 WL 3378974 (E.D.Cal. 2009) (unpublished).

Carl Zeiss Vision Int'l GmbH v. Signet Armorlite, No. CIV 07CV–0894DMS POR, 2009 WL 4642388, (S.D.Cal. 2009) (unpublished).

Other

8 Charles Alan Wright, Arthur R. Miller & Richard L Marcus, FEDERAL PRACTICE AND PROCEDURE § 2016.1 (3d ed.).

6 James Wm. Moore et al., MOORE'S FEDERAL PRACTICE - CIVIL § 26.47 (3d ed.).

2 James Wm. Moore et al., MOORE'S MANUAL--FEDERAL PRACTICE AND PROCEDURE § 15.26.

1993 Advisory Committee Notes to Fed. R. Civ. P. 26(d)(5).

NIST, GUIDE TO PROTECTING THE CONFIDENTIALITY OF PERSONALLY IDENTIFIABLE INFORMATION (PII): RECOMMENDATIONS OF THE NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY, 2-1, 2-2 (Apr. 2010), *available at* http://csrc.nist.gov/publications/nistpubs/800-122/sp800-122.pdf.

OMB M-07-16, SAFEGUARDING AGAINST AND RESPONDING TO THE BREACH OF PERSONALLY IDENTIFIABLE INFORMATION, 1, n.1 (May 22, 2007), *available at* http://www.whitehouse.gov/sites/default/files/omb/ memoranda/fy2007/m07-16.pdf.

Factual and Procedural Background

PBGC has produced all documents sought by the plaintiffs except those protected by law or privilege. Immediately after the plaintiffs sued PBGC, the agency gave plaintiffs and the Court the administrative record, a multi-volume collection of documents containing detailed support for PBGC's decision to initiate termination of Delphi's pension plans, including the Salaried Plan. When plaintiffs first sought discovery in this case and PBGC objected, the Magistrate Judge assigned to the case ordered, on March 28, 2011, that the plaintiffs' challenge to the propriety of the termination of the Salaried Plan, should, like all other cases that have challenged plan terminations, be decided under terms of the Administrative Procedure Act. As the Magistrate Judge held, the Court's review would be limited to PBGC's administrative record and the plaintiffs were not entitled to discovery absent this Court's ruling that the record was inadequate.

When the Magistrate Judge's ruling was overturned by this Court's September 1, 2011 Order, plaintiffs responded by serving PBGC with unbounded document requests, demanding production of every document possessed by PBGC that referred, in any way, to Delphi. PBGC timely responded by producing the only documents outside of the administrative record that PBGC believed were relevant to the actual claims asserted in the Amended Complaint,[2] and objected to requests that PBGC believed exceeded those limitations. In that response, PBGC expressly reserved its right to assert the attorney-client, attorney work product, and any other legal privilege available to the agency.[3] PBGC did not specifically identify any documents

[2] The additional documents PBGC produced were the agreements effectuating termination and trusteeship of Delphi's six pension plans, including the Salaried Plan.

[3] *See* Exhibits C and D to plaintiffs' Rule 37 Motion.

subject to those privileges, because PBGC did not find any privileged documents that fell within the universe of documents that were relevant under PBGC's view of the case.

In her March 9, 2012 Order ("March 9 Order"), however, the Magistrate Judge granted plaintiffs' Motion to Compel, and overruled PBGC's relevance objections to plaintiffs' requests. The Magistrate Judge ordered PBGC to comply with the outstanding document requests. Although PBGC's objection to March 9 Order remains pending before Judge Tarnow, PBGC has done everything reasonably within its power to comply with the March 9 Order.

The magnitude of plaintiffs' discovery demands cannot be overstated. In sum, plaintiffs demanded that PBGC produce every document in PBGC's possession mentioning Delphi and created over a 4-year period from January 1, 2006, to December 31, 2009. During that time, Delphi was in bankruptcy and was one of PBGC's largest cases. In response to the March 9 Order, PBGC's legal team assembled all documents requiring review and processing before production to plaintiffs. The total page count exceeded 1.5 million.[4]

As PBGC conducted its review, it became apparent that PBGC had underestimated the time this review would require when PBGC initially told the Magistrate Judge that the production could be completed in 120 days. And PBGC soon realized that a document review project of this size and scope could not be completed in any reasonable time frame using solely agency resources. In light of this, PBGC contacted counsel and asked them to agree to a limitation on the scope of their demands to allow PBGC to complete production more quickly and reasonably, but they declined, insisting PBGC locate and produce every non-archived document containing the word "Delphi."[5]

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[4] *See* Declaration of John A. Menke ("Menke Declaration") at ¶ 3.

[5] *See id.* at ¶ 4.

PBGC ultimately procured a litigation support firm to review the documents. At various times during the review process, as many as 50 contract attorneys were reviewing documents on PBGC's behalf. PBGC explained the situation to plaintiffs' counsel, and with their welcome cooperation, worked out an agreement for a rolling production of documents. To expedite production, PBGC told plaintiffs' counsel the agency would first identify and produce responsive, non-privileged documents, and then turn to the process of logging privileged documents. This process was described in detail in the August 20, 2012 Joint Discovery Report and Stipulated Order signed by plaintiffs.[6]

PBGC has made the following rolling productions to plaintiffs:

Date	Bates Number	Page Count
06/07/2012	PBGC-BL-0000001 to PBGC-BL-0062059	62,059
06/15/2012	PBGC-BL-0062060 to PBGC-BL-0171363	109,303
07/03/2012	PBGC-BL-0171364 to PBGC-BL-0216831	94,274
08/17/2012	PBGC-BL-0216832 to PBGC-BL-0265638	48,806
09/07/2012	PBGC-BL2-00000001 to PBGC-BL2-00310112	310,112
09/14/2012	PBGC-BL2-00310113 to PBGC-BL2-00538687	228,574
10/26/2012	PBGC-BL2-00538688 to PBGC-BL2-00714585	175,897
12/03/2012	PBGC-BL2-00714586 to PBGC-BL2-00736828	22,242
12/20/2012	PBGC-BL2-00736829 to PBGC-BL2-00769214	32,385

[6] *See id.* at ¶ 5 and Exhibit A to Menke Declaration at fn. 4 (Dkt No. 215).

As the chart above reflects, PBGC has collected, reviewed, and produced more than a million pages of responsive, non-privileged documents to plaintiffs.[7] Despite PBGC's best efforts, producing documents on the scale demanded by plaintiffs did not allow PBGC to complete its production until the end of December 2012. PBGC has spent hundreds of hours of attorney time and nearly $2 million in contractor costs to comply with plaintiffs' discovery requests.[8]

At present, apart from certain documents that plaintiffs have told PBGC not to produce, there are only two groups of responsive documents that PBGC has not given to plaintiffs: (1) documents containing sensitive, personally identifiable information about the individual participants in the Salaried Plan; and (2) documents protected from disclosure by the attorney-client, attorney work product, or deliberative process privileges. With respect to the first group, production of sensitive personally identifiable information is prohibited by the Privacy Act of 1974, as amended.[9] Regarding privileged documents, now that PBGC has completed its initial review of the documents, produced the responsive non-privileged documents, and collected the privileged ones, PBGC is constructing a detailed privilege log to identify documents being withheld.[10]

As the above history reflects, plaintiffs' broad assertion that PBGC has not been diligently working to comply with the Court's March 9 Order and plaintiffs' massive discovery requests and to deliver responsive documents to plaintiffs as soon as practicable is simply false.

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[7] *See id.* at ¶ 6.

[8] *See id.* at ¶ 7.

[9] 5 U.S.C. § 552a.

[10] As PBGC reviews documents currently tagged as privileged, any non-privileged documents that were put aside for a second review will be produced promptly to plaintiffs.

Not only has PBGC moved expeditiously to produce a mountain of documents, but it has routinely and regularly kept counsel for plaintiffs informed at every step of the process along the way.

Nonetheless, plaintiffs argue that PBGC has violated the Court's March 9 Order by failing to provide "plan census data." Plan census data includes sensitive personally identifiable information. Personally identifiable information includes any information that permits the identity of an individual to be directly or indirectly inferred.[11] The term sensitive personally identifiable information means any personally identifiable information, which if lost, compromised, or disclosed without authorization, could result in harm, embarrassment, inconvenience, or unfairness to an individual.[12] The information that plaintiffs requested contains sensitive personal information, including addresses, dates of birth, hire dates, employment history, and pension benefit amounts for each of the participants in the Delphi Salaried Plan. In addition, plaintiffs claim that PBGC has waived its right to claim privilege for any documents, even though PBGC is still in the process of completing its document review and is currently compiling an appropriate privilege log. Plaintiffs' motion should be denied.

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[11] *See* NIST, GUIDE TO PROTECTING THE CONFIDENTIALITY OF PERSONALLY IDENTIFIABLE INFORMATION (PII): RECOMMENDATIONS OF THE NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY, 2-1, 2-2 (Apr. 2010), *available at* http://csrc.nist.gov/publications/nistpubs/800-122/sp800-122.pdf.

[12] *See* OMB M-07-16, SAFEGUARDING AGAINST AND RESPONDING TO THE BREACH OF PERSONALLY IDENTIFIABLE INFORMATION, 1, n.1 (May 22, 2007), *available at* http://www.whitehouse.gov/sites/default/files/omb/ memoranda/fy2007/m07-16.pdf.

Argument

I. PBGC Should Not Be Required To Produce the Participant Census Data and Cannot Produce Documents About PBGC Recoveries That Have Not Yet Been Created.

A. The Privacy Act prohibits PBGC from producing documents containing sensitive personally identifiable information absent a court order.

PBGC is a wholly-owned government corporation, and is bound by the requirements of the Privacy Act of 1974, as amended.[13] The Privacy Act protects records that can be retrieved from a system of records by personal identifiers such as name, Social Security number, or another identifying number or symbol.[14] Pursuant to the Privacy Act, the term "record" means any item about an individual maintained by an agency that contains name, date of birth, Social Security number, or another unique identifier.[15] PBGC is legally required to safeguard all Privacy Act records and is prohibited from disclosing their contents without a written request by the individual to whom the record pertains or pursuant to a Court order.[16]

On October 11, 2012, plaintiffs requested that PBGC provide material containing sensitive personally identifiable information pertaining to participants in the Delphi Salaried Plan. In particular, the information requested includes individual dates of birth, hire dates, participation dates, employment history, and pension benefit amounts for each of the participants in the Salaried Plan. This data constitutes highly sensitive personally identifiable information and by law, PBGC is required to protect it. Because the Privacy Act prohibits PBGC from disclosing sensitive personally identifiable information absent a Court order, plaintiffs' motion should be denied.

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[13] 5 U.S.C. § 552a(a)(1) (2012).

[14] *See generally id.*

[15] *Id.* § (a)(4).

[16] *Id.* § (b)(2) and (11).

B. Because the sensitive personally identifiable information found in the plan census data is not within the scope of discovery proposed by the plaintiff and ordered by this court, the plan census data should not be produced.

In their Second Motion to Compel, plaintiffs moved the Court to order PBGC to produce "documents related to the question of whether the statutory criteria for termination could have been satisfied."[17] The Motion did not encompass the census data. Further, the plaintiffs' Second Motion to Compel did not address how the sensitive personally identifiable information of Delphi participants could be relevant to this question about the statutory criteria for pension plan termination. The plaintiffs' Second Motion to Compel did not reveal that plaintiffs sought or would seek sensitive personally identifiable information about individual pension plan participants. Instead, the plaintiffs' Second Motion to Compel requested the production of "documents that the PBGC received, produced or reviewed in connection with its interactions with Delphi and the Delphi pension plans; the PBGC's potential liability and avenues for recovery; and the PBGC's interactions with parties who had a stake *in determining whether the Delphi pension plans should terminate, and if so, under what circumstances.*"[18] Because the plaintiffs' Second Motion to Compel did not state a need for documents pertaining to individual pension plan participants, PBGC did not ask the Court to consider these individuals' privacy interests when establishing the scope of discovery.

The requested sensitive personally identifiable information is likewise not within the scope of the Court Order of September 1, 2011. That Order stated that the scope of discovery would include those documents that answer "whether termination of the Salaried Plan would have been appropriate in July 2009 if, as plaintiffs contend, Defendants were required under 29 U.S.C. § 1342(c) to file before this Court for a decree adjudicating that the plan must be

[17] Plaintiffs' Second Motion to Compel, Dkt. No. 197, at 9.

[18] *Id.* (Emphasis added).

terminated . . . ."[19] The sensitive personally identifiable information was not available to PBGC at the time of the termination decision in April 2009.[20] Therefore, the sensitive personally identifiable information was not "received, produced or reviewed in connection with its interactions with Delphi and the Delphi pension plans" during the negotiations leading up to termination because that information was not relevant to PBGC's decision to seek to terminate the plan.

PBGC has given plaintiffs the material PBGC actually used to determine the plans' financial status at the time of plan termination — the information is contained in PBGC's multi-volume administrative record. Plaintiffs also obtained reams of additional pension funding data in the documents that PBGC has already provided to them, and in discovery that plaintiffs have already taken from Delphi's former actuaries. Because the census data plaintiffs now demand was not in PBGC's possession at the time of the termination decision and would never have been part of any court hearing on the subject, it cannot possibly be relevant to plaintiffs' claims now. And even if arguably relevant in light of the broad discovery standards the Court has applied to this case, it is merely cumulative of the vast amounts of data on the same subject already available to plaintiffs. The minimal probative value of this data as it relates to plaintiffs' claims is far outweighed by the potentially destructive consequences to the individuals' privacy if the data is released.

PBGC recognizes that "[t]he scope of discovery is, of course, within the broad discretion of the trial court."[21] PBGC intends to fully comply with the March 9 Court Order. Nonetheless,

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[19] Docket No. 193 at 3 [hereinafter, "September 1, 2011 Order"].

[20] *See* Menke Declaration at ¶ 10.

[21] *Lewis v. ACB Bus. Servs.*, 135 F.3d 389, 402 (6th Cir. 1998).

courts have recognized the need to balance conflicting interests when considering requests for protected data. The 11th Circuit held that requests for court orders to disclose Privacy Act data "should be evaluated by balancing the need for the disclosure against the potential harm to the subject of the disclosure."[22] The D.C. Circuit has noted that "[w]here the records sought are subject to the Privacy Act, the District Court's supervisory responsibilities may in many cases be weightier than in the usual discovery context."[23] The plaintiffs did not ask the Court to conduct this "balancing test" in the Motion to Compel, and the application of that test shows that the sensitive personal information at issue is outside the scope of discovery as contemplated by the Court.

Production of the requested plan census data would compromise the privacy interests of Delphi participants and would have no bearing on whether the Delphi Salaried Plan was appropriately terminated. Plaintiffs' motion to compel PBGC to produce the individual participant records that make up the plan census data should be denied.

C. *In camera* review and a protective order is needed if the Court compels PBGC to produce sensitive personally identifiable information.

Before the Court rules on plaintiffs' request for the Privacy Act data, the Court should first hold an *in camera* review to examine the documents in light of the Privacy Act's

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[22] *Perry v. State Farm & Casualty Co.*, 734 F.2d 1441, 1447 (11th Cir. 1984).

[23] *Laxalt v. McClatchy*, 809 F.2d 885, 889 (D.C. Cir. 1987)(finding that in so exercising its discretion, it is appropriate for the court "to undertake some substantive balancing of interests"). *See also Pedreira v. Sunrise Children's Servs.*, No. 05-4182, 2012 U.S. Dist. LEXIS 124380, 13-14 (W.D. Ky. Aug. 30, 2012) ("Even though the confidentiality statutes identified by Defendants do not create absolute evidentiary privileges in this action, federal courts have realized that considerations of comity dictate that confidentiality statutes be allotted 'some weight along with other factors in deciding which materials should be discoverable.'") (citing *Seales v. Macomb County*, 226 F.R.D. 572, 577 (E.D. Mich. 2005)).

requirements prohibiting disclosure of sensitive personally identifiable information.[24] An *in camera* review will allow the Court to weigh disclosure of the highly sensitive personally identifiable information against the prohibitions in the Privacy Act.

And the *in camera* review will give the Court the opportunity to craft an appropriate protective order for any Privacy Act-protected information contained in these documents.[25] A protective order limiting discovery under 26(c) of the Federal Rules of Civil Procedure is a necessary procedural device for protecting sensitive Privacy Act-protected records. As noted by the D.C. Circuit in evaluating disclosure of Privacy Act protected information, "such traditional devices as protective orders and in camera inspection offer reliable means with which to give effect to liberal discovery principles without threatening the interests protected by statutory publication bans."[26]

The protective order that the Court crafts should place tight restrictions upon the use of the sensitive personally identifiable information.[27] In this case, for instance, the Privacy Act data should be used solely for the purpose of calculating plan liabilities and for no other purpose, the data should be provided by PBGC directly to plaintiffs' actuarial firms under strict confidentiality agreements, the data should not be available to or reviewed by anyone other than

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[24] *See Bordeaux v. United States*, No. 97-1592, 1999 WL 499911, at *1-2 (E.D. La. July 14, 1999) (recognizing relevancy of 5 U.S.C. § 552a(b)(11) to the court's resolution of dispute over motion to compel responses to production of documents subject to Privacy Act, but ordering in camera review of documents so that the legitimacy of agency objections may be determined "in the considered and cautious manner contemplated by the Privacy Act").

[25] 5 U.S.C. § 552a(b)(11).

[26] *Laxalt v. McClatchy*, 809 F.2d 885, 889 (D.C. Cir. 1987).

[27] *See In re Katrinia Canal Breaches Consol. Litig.*, No. 05-4182, 2007 WL 1959193, at *6 (E.D. La. June 27, 2007) (ordering that materials containing "sensitive personal information" protected by the Privacy Act be treated as " 'CONFIDENTIAL INFORMATION' pursuant to the Master Protective Order").

the designated actuaries, and the data, and all copies of it, should be returned to PBGC at the conclusion of this case.

D. PBGC cannot produce documents about PBGC recoveries that have not yet been created.

Finally, plaintiffs demand that PBGC produce certain documents related to PBGC recoveries, including "estimates of the potential recovery for each claim and the value the PBGC assigned to such claims in the valuation of Salaried Plan's assets." As PBGC has repeatedly informed plaintiffs, those documents have not been created. Moreover, plaintiffs have offered no explanation of why these documents, which will have been created years after the terminations in question in the lawsuit and which relate not to the termination itself but to PBGC's recoveries on its claims that arose after the termination was completed, can possibly be relevant to the matters raised in the Amended Complaint.

II. PBGC Has Not Waived Any Privilege

In addition to demanding the production of sensitive information protected by the federal Privacy Act, plaintiffs also argue that PBGC has completely waived its right to assert privilege, either because it did assert that right in its initial response to plaintiffs' document demands (the novel "waiver by assertion" argument) or because PBGC did not produce its detailed privilege log within thirty days after the Magistrate Judge's March 9, 2012 Order. Both arguments simply ignore the facts of this case and should be rejected.

A. PBGC did not fail to assert its right to claim privilege in a timely manner.

Plaintiffs assert that PBGC waived its privilege claims by failing to meet the 30-day period provided by Fed. R. Civ. P. 34(b)(2)(A). The cases cited by plaintiffs for such assertion, *Carfagno v. Jackson Nat'l Life Ins. Co.* and *Allen v. Sears, Roebuck & Co.*, are readily

distinguishable. In both cases, the party at issue failed to submit *any* response to the request for documents within the required timeframe.[28] That is not the case here. PBGC filed timely responses to the plaintiffs' document requests, stating its objections that, among other grounds, plaintiffs sought material irrelevant to the counts in their complaint and that PBGC would only produce non-privileged materials. PBGC's response expressly reserved its rights to claim privilege in the future.

Further, plaintiffs claim that PBGC was required to submit, within 30 days of receiving plaintiffs' Document Requests, a privilege log meeting the specificity required under Fed. R. Civ. P. 26(d)(5)(A), even though PBGC at the time was objecting to the requests on relevancy grounds. Fed. R. Civ. P. 26(d)(5)(A), however, specifically states that when a party "withholds information *otherwise discoverable* (emphasis added)" by claiming privilege, it must "expressly make the claims" and "describe the nature of the documents, communications, or tangible things not produced or disclosed – and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." As stated in the 1993 Advisory Committee Notes to Fed. R. Civ. P. 26(d)(5), this requirement only applies to items that are "otherwise discoverable." If a broad discovery request is made and the responding party objects to the breadth of the request, the party need not log the allegedly privileged documents that fall within the scope of its objection until the court rules on the objection.[29] Here, PBGC clearly objected to the breadth of plaintiff's First and Second Requests for Production of

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[28] *Carfagno v. Jackson Nat'l Life Ins. Co.*, No. 5:99 cv 118, 2001 U.S. Dist. LEXIS 1768 (W.D. Mich. 2001); *Allen v. Sears, Roebuck & Co.*, No. 07-CV-11706, 2008 U.S. Dist. LEXIS 45048, *4-5 (E.D. Mich 2008) (Majzoub., Mag. J.)

[29] *See*1993 Advisory Committee Notes to Fed. R. Civ. P. 26(d)(5); *U.S. v. Philip Morris, Inc.*, 347 F.3d 951, 954 (D.C. Cir. 2003) (party is required to note its privilege objection and to describe document only when document is "otherwise discoverable"); 6-26 MOORE'S FEDERAL PRACTICE - CIVIL § 26.47[1][b].

Documents and thus was not required to begin logging its privileged documents until after the Magistrate Judge issued her March 9 Order. Once Magistrate Judge Majzoub ordered PBGC to respond to the plaintiffs' discovery requests, PBGC conferred with plaintiffs on the document production timeline and continued to keep plaintiffs apprised of expected production dates and PBGC's intention to compile a privilege log following completion of the document production.[30]

B. PBGC did not waive its privileges after the Court issued its order.

Plaintiffs concede that PBGC must review a document before it can determine whether a privilege applies and that objection on privilege grounds must comply with Fed. R. Civ. P. 26(d)(5)(A).[31] Nevertheless, plaintiffs insist that PBGC was required to do so within 30 days of the Document Requests or, alternatively, within 30 days after the Magistrate Judge's March 9 Order, to avoid waiver of privilege claims. That argument is simply nonsensical in light of the circumstances of this case. When privilege review is a "'herculean task' ... providing the specifics [as required under Fed. R. Civ. P. 26] by the due date for a Rule 34(b) response would be unrealistic."[32]

Plaintiffs suggest that PBGC has been flouting the discovery deadlines and delaying production without explanation. To the contrary, since the very beginning of its production process, PBGC has been in regular communication with plaintiffs' counsel, apprising them of the document production schedule.[33] Immediately upon recognizing the magnitude of documents covered by plaintiffs' demands, PBGC contacted plaintiffs' counsel to work out a reasonable

[30] *See* Menke Declaration at ¶ 5 & 8.

[31] Plaintiff's Rule 37 Motion at 12 (Docket No. 218).

[32] *See* 8 Charles Alan Wright, Arthur R. Miller & Richard L Marcus, FEDERAL PRACTICE AND PROCEDURE § 2016.1 (3d ed.).

[33] *See* Menke Declaration at ¶ 4, 5 & 8.

plan for production, with realistic deadlines.[34] Plaintiffs, being fully informed of PBGC's production plan, agreed to a rolling production where PBGC would first provide plaintiffs with the most quickly reviewable documents before moving on to documents requiring additional processing such as redaction and privilege determinations.[35] Plaintiffs' counsel understood that PBGC would begin compiling the privilege log only after completing production to plaintiffs of all non-privileged documents.[36] Having reached this understanding with plaintiffs' counsel, PBGC first focused on producing a vast volume of non-privileged documents to the plaintiffs and then turned to the privilege logging process.

Nor has PBGC ignored the discovery deadlines. As it became clear that certain deadlines had been overly optimistic, PBGC worked with plaintiffs' counsel to agree to more sensible ones. Indeed, PBGC agreed to plaintiffs' recent request to extend the current discovery deadlines for an additional three months.

It is well established that finding a waiver of privilege is a severe sanction, not an automatic consequence of every technical failure to comply with the rule 34(b)'s time limit for responding to a discovery request with sufficient detail.[37] For instance, if objections to discovery have been stated, but the objections do not fully comply with the rule, the court may allow the responding party to make a more complete response.[38] Because waiver of privilege is considered

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[34] *See id.* at ¶ 4.

[35] *See id.* at ¶ 5.

[36] *See id.* at ¶ 5.

[37] *See* 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, FEDERAL PRACTICE AND PROCEDURE § 2016.1 (3d ed.); *see also US. v. British Am. Tobacco (Inv.) Ltd.*, 387 F.3d 884, 885 (D.C. Cir. 2004) ("'[W]aiver of privilege is a serious sanction' that a court should impose only if a party behaves unreasonably or worse.")

[38] *See* 2-15 Moore's Manual--FEDERAL PRACTICE AND PROCEDURE § 15.26[6][e].

a serious sanction, it is generally only found in cases of unjustified delay, inexcusable conduct, and bad faith.[39]

Responding to the plaintiffs' discovery, particularly as their demands lacked any reasonable limitations,[40] has required more time than PBGC anticipated. PBGC is now constructing a detailed privilege log to identify with specificity those remaining responsive documents for which PBGC claims privilege. Therefore, given PBGC's compliance with the plaintiffs' discovery requests and PBGC's good faith efforts in completing the production of the privilege log, no waiver of privilege sanction is warranted in this case.

[39] *See* 6-26 MOORE'S FEDERAL PRACTICE – Civil 26.47[5]. *See e.g., Coalition for a Sustainable Delta v. Koch,* No. 1:08–CV–00397 OWW GSA, 2009 WL 3378974, at *11–14 (E.D.Cal. Oct.15, 2009) (unpublished) (in a case dealing with a universe of 80,000 documents and thousands of emails, defendants' assertion of privilege two months after the production of documents was reasonable); *Carl Zeiss Vision Int'l GmbH v. Signet Armorlite*, No. CIV 07CV–0894DMS POR, 2009 WL 4642388, at *3–4 (S.D.Cal. Dec.1, 2009) (unpublished) (despite a nine-month delay in production of privilege log, privilege objection held not to be waived).

[40] Plaintiffs only offered to exclude certain items on January 30, 2013 after PBGC already completed its initial sort of privileged items. These items included correspondence only between PBGC counsel and documents prior to August 2008.

Conclusion

For the reasons stated above, PBGC respectfully requests that the Court deny the plaintiffs' Motion.

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Washington, D.C.

Respectfully Submitted:

/s/ C. Wayne Owen, Jr.
ISRAEL GOLDOWITZ
Chief Counsel
KAREN L. MORRIS
Deputy Chief Counsel
JOHN A. MENKE
Assistant Chief Counsel
C. WAYNE OWEN, JR
CRAIG T. FESSENDEN
ERIN C. KIM
Attorneys

Attorneys for the Defendant
PENSION BENEFIT GUARANTY COPORATION
Office of Chief Counsel
1200 K Street, N.W.
Washington, D.C. 20005
Phone: (202) 326-4020 ext. 3204
Fax: (202) 326-4112
Emails: owen.wayne@pbgc.gov and efile@pbgc.gov

Local Counsel:

BARBARA L. McQUADE
United States Attorney
PETER A. CAPLAN
Assistant United States Attorney
Eastern District of Michigan
211 West Fort Street, Suite 2001
Detroit, MI 48226
Phone: (313) 226-9784

Certificate of Service

I hereby certify that on March 13, 2013, 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:

alan@jacobweingarten.com (Alan J. Schwartz)

/s/ C. Wayne Owen, Jr.
C. Wayne Owen, Jr.