

**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
EMERGENCY MOTION FOR STAY PENDING RESOLUTION OF ITS
OBJECTIONS TO THE COURT’S ORDER OF AUGUST 21, 2013**

Defendant PBGC hereby submits an Emergency Motion to Stay Magistrate Judge Majzoub’s Order Granting in Part Plaintiffs’ Rule 37 Motion to Enforce Court Order, dated August 21, 2013 (the “Order”).

On September 4, 2013, PBGC filed Objections to the Order on the basis that it is clearly erroneous and contrary to law. The Magistrate Judge failed to consider PBGC’s understanding with plaintiffs regarding production of the privilege log, the parties’ report to District Judge Tarnow explaining the parties’ understanding and the Court’s Order acknowledging and approving it, the practicalities of producing the privilege log in a case involving discovery of the magnitude ordered by the Magistrate Judge here, and, in waiving PBGC’s privilege claims, the level of sanction that such a ruling embodies.

PBGC respectfully requests that the Court stay the Order until resolution of PBGC’s Objections to the Order.

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

Dated: September 4, 2013

Respectfully submitted,

/s/ C. Wayne Owen, Jr.

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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
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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 MEMORANDUM IN SUPPORT
OF ITS EMERGENCY MOTION FOR STAY PENDING RESOLUTION OF ITS
OBJECTIONS TO THE COURT’S ORDER OF AUGUST 21, 2013**

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Statement of Issues

1. PBGC has legitimate grounds for objecting to the Magistrate Judge's Order compelling production of documents for which PBGC claims privileges. The deadline imposed by the Magistrate Judge to comply with her Order may effectively eliminate PBGC's ability to have the District Judge consider PBGC's Objections to the Order. If PBGC must comply with the Order before PBGC's Objections to the Order can be resolved, PBGC will have waived privilege due to the production of the privileged documents. PBGC's opportunity to object to the Magistrate Judge's Order will be permanently lost, and PBGC will be irreparably harmed as a consequence. Where there is no prejudice to the plaintiffs, should this Court grant a stay pending resolution of PBGC's Objections to the Magistrate Judge's Order?

Controlling Authority

Baker v. Adams County/Ohio Valley Sch. Bd., 310 F.3d 927 (6th Cir. 2002)

Grutter v. Bollinger, 247 F.3d 631 (6th Cir. 2001)

Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150 (6th Cir. 1991).

Local Rule 72.2

Statement of Facts

In its August 21, 2013 Order Granting in Part Plaintiffs' Rule 37 Motion to Enforce Court Order ("Order"), the Court found that PBGC had waived its right to assert attorney-client, work product, and deliberative process privilege claims for certain documents. The Order directed PBGC to produce all of its privileged documents to the plaintiffs by September 30, 2013, along with documents pertaining to plan participant census data and PBGC recoveries.

On September 4, 2013, PBGC filed Objections to the part of the Order requiring PBGC to produce privileged documents. PBGC intends to produce documents relevant to plan participant census data and PBGC recoveries that were the subject of the remainder of the Order.

PBGC now requests that the Court stay the part of the Order requiring production of privileged documents prior to the District Judge's consideration of PBGC's Objections to the Order.

Argument

I. A Stay Pending Resolution of PBGC's Objections to the Magistrate Judge's Order is Appropriate and Justified.

A stay is appropriate and proper in this case so that the Court may decide PBGC's Objections to the Magistrate Judge's Order. In considering whether a stay is appropriate, the Sixth Circuit has stated that courts should balance the traditional factors governing injunctive relief:

(1) whether the defendant has a strong or substantial likelihood of success on the merits; (2) whether the defendant will suffer irreparable harm if the district court proceedings are not stayed; (3) whether staying the district court proceedings will substantially injure other interested parties; and (4) where the public interest lies.¹

¹ *Baker v. Adams County/Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2002). See also *Grutter v. Bollinger*, 247 F.3d 631, 632 (6th Cir. 2001); *Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991).

In order to justify a stay, “the defendant must demonstrate at least serious questions going to the merits and irreparable harm that decidedly outweighs the harm that will be inflicted on others if a stay is granted.”²

A. PBGC has demonstrated a substantial likelihood of success on the merits.

PBGC contends that the Magistrate Judge erred in the Order finding that PBGC has waived all of its privilege claims. The Order did not take into account the facts – namely that PBGC and plaintiffs have been in regular communication about the status of PBGC’s production of documents, and the parties’ understanding that a privilege log would indeed follow the conclusion of that production. The Order also failed to take into account that the understanding of the parties was embodied in a written report directed to Judge Tarnow, and that he acknowledged and approved of that understanding when he “so ordered” the report and stipulation set forth therein.

Upon final completion of the document review and the production to the plaintiffs, PBGC has worked diligently over the past few months in constructing a detailed privilege log to identify documents being withheld. PBGC has produced the first part of its privilege log to plaintiffs on August 23, 2013, and plans to produce the second part of its privilege log to plaintiffs soon. Given the volume of documents at issue, over one million pages in total produced so far, it was impossible for PBGC to identify with specificity those documents for which it would claim privilege until all documents responsive to the plaintiffs’ document requests had been reviewed and cataloged. The argument made by plaintiffs in their Motion to Compel, and apparently accepted in the Magistrate Judge’s Order, that PBGC must prepare the

² *Baker*, 310 F.3d at 928.

detailed log of privileged documents described in Fed. R. Civ. P. 26(b)(5) within thirty days after receiving the initial discovery request at the pain of waiving privilege ignores the facts of this case. Therefore, given that there is no unjustified delay, inexcusable conduct, or bad faith by PBGC in this case, the draconian sanction that PBGC waived all of its privilege claims while it arduously worked to review and catalog all responsive documents is inappropriate, and PBGC's Objections to the Order are well taken.

B. PBGC will be irreparably injured unless a stay is issued.

Without the stay, the Magistrate Judge's Order will result in PBGC waiving any and all rights to privilege, before PBGC has obtained review of the Order by this Court, or an Appellate Court. Under Local Rule 72.2, the filing of Objections to the Order does not automatically stay the Magistrate Judge's Order. As a result, because of the short time frame in which to comply with the Magistrate Judge's ruling (by September 30, 2013), PBGC will be left with either releasing all of its privileged documents to the plaintiffs, thus waiving all privilege claims and rendering its Objections moot, or not complying and facing contempt of the Court. PBGC's potential loss of its right to claim privilege constitutes irreparable harm to PBGC.

C. Plaintiffs will not be substantially injured if a stay is issued.

Plaintiffs will not be substantially injured by a stay pending the resolution of PBGC's Objections to the Order, because plaintiffs would not have otherwise been entitled to receive PBGC's privileged documents absent the Magistrate Judge's ruling. And the stay would not delay resolution of this litigation to plaintiffs' detriment. As plaintiffs have repeatedly informed this Court, they believe that they must have document and deposition discovery from the U.S. Department of the Treasury before they can proceed to the merits here. That discovery has been

stayed by, and is the subject of ongoing proceedings in, the U.S. District Court for the District of Columbia,³ and there is no indication that the Treasury Department discovery issues will be resolved any time soon. The harm to PBGC that results from disclosing privileged documents is substantially outweighed by the harm, if there is any at all, to the plaintiffs in the brief delay while the Court considers PBGC's Objections.

D. Public Interest lies in favor of preserving privilege claims.

Courts have long recognized the vital role privilege plays in the administration of justice.⁴ Therefore, the public interest weighs heavily in favor of preserving PBGC's rights to claim privilege for documents during the time required for resolution of PBGC's objections to the draconian sanction imposed by the Magistrate Judge's Order.

Conclusion

For these reasons, PBGC respectfully requests that the Court stay the Order of August 21, 2013, pending the resolution of PBGC's Objections to the Order.

³ See *U.S. Department of Treasury v. Black*, No. 12-00100 (D.D.C. Feb. 17, 2010).

⁴ See *Hunt v. Blackburn*, 128 U.S. 464, 470, (1888); *Upjohn Co. v. U.S.*, 449 U.S. 383, 389, (1981); *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 90 (3d Cir. 1992); *Denius v. Dunlap*, 209 F.3d 944, 954 (7th Cir. 2000); *Am. Nat'l Bank & Trust Co. v. Equitable Life Assur. Soc'y of the U.S.* 406 F.3d 867, 878-879 (7th Cir. 2005); *NLRB v. Jackson Hosp. Corp.*, 257 F.R.D. 302, 308 (D.D.C. 2009).

Dated: September 4, 2013

Washington, D.C.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2013, I electronically filed the foregoing **Pension Benefit Guaranty Corporation's Emergency Motion for Stay Pending Resolution of Its Objections to the Court's Order of August 21, 2013** via the court's CM/ECF system which will send notification of such filing to all registered users, including the following:

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