

INTRODUCTION

Pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, Plaintiffs' Motion Requesting Judge Majzoub's Dissolve the Partial Stay of her August 21, 2013 Order – requiring PBGC to disclose its privileged documents by September 30, 2013 – should be struck because plaintiffs are seeking reconsideration of the Court's stay order months after the deadline for pursuing such relief.

Alternatively, the Court should not dissolve the stay because it was correctly ordered and remains appropriate for this case's current posture.

On August 30, 2013 the Pension Benefit Guaranty Corporation ("PBGC") filed an Emergency Motion for Stay Pending Reconsideration of Magistrate Judge Majzoub's August 21 Order (DE #233). After filing its objections to Magistrate Judge Majzoub's Order ("Objections"), PBGC similarly filed an Emergency Motion to Stay the disclosure of these documents until the Court resolved its Objections (DE #235). On September 5, 2013, Magistrate Judge Majzoub issued an order denying PBGC's Motion for Reconsideration, but granting PBGC's Emergency Motion to Stay (DE #237) ("September 5 Stay Order"). The stay was put in place "until such time as Judge Tarnow rules on Defendant PBGC's

objection on the August 21, 2013 order, or until the Court orders otherwise.”¹ The stay was granted “in consideration of the fact that Defendant PBGC has recently filed an objection to the August 21, 2013 order.”² Under the applicable Federal and Local Rules, the plaintiffs had 14 days after September 5, 2013 to object or to seek reconsideration of the September 5 Stay Order. In failing to act timely in seeking dissolution of the stay, the Plaintiffs have waived their right to the relief they seek.

ARGUMENT

I. Plaintiffs’ Motion Should Be Struck Because It Is An Out-Of-Time Motion For Reconsideration.

Rule 12(f) provides, in pertinent part, that “on motion by a party . . . the court may strike from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter.” Although a motion to strike is considered a drastic remedy, courts have “liberal discretion to strike such filings as it deems appropriate under Rule 12(f),” and a motion to strike should be granted “where the relief requested is unavailable.”³

¹ September 5 Order, Dkt. No. 237, filed September 5, 2013.

² *Id.*

³ *Johnson v. Co. of Macomb*, No. 08-10108, 2008 WL 2064968, at *1 (E.D. Mich., May 13, 2008).

Under Local Rule 7.1(h), a “motion for rehearing or reconsideration must be filed within 14 days after entry of the judgment or order,” and under Fed. R. Civ. P. 72(a), a party must serve and file any objections to a magistrate judge’s pretrial order regarding a non-dispositive matter within 14 days.⁴ In failing to timely exercise their rights, plaintiffs have waived their opportunity to overturn the stay.⁵

Now – *five months after Magistrate Judge Mazjoub’s September 5 Stay* – plaintiffs have filed a brief styled as a motion to request the dissolution of the stay. Plaintiffs cite no case law in which a magistrate judge “dissolved” a stay in this procedural posture, months after all deadlines for objection to the stay or its reconsideration have passed.

In reality, plaintiffs’ brief is an untimely motion for reconsideration.

Magistrate Judge Mazjoub’s stay as written remains in force until such time as

⁴ Instead of objecting to the fully-valid stay ordered by Magistrate Judge Mazjoub, Plaintiffs improperly filed a Brief In Opposition to Defendant’s Emergency Motion to Stay Pending Resolution of its Objections to the Magistrate Judge’s Order of August 21, 2013 (DE#240), in which they argued the order created merely an “administrative stay.” The matter is currently pending before the District Judge.

⁵ See *Burket v. Hyman Lippitt, P.C.*, Nos. 05-CV-72110-DT, 05-CV-72171-DT, 05-CV-72221-DT, 2006 WL 2309843, at *1 (E.D. Mich., Aug. 9, 2006) (Mazjoub, J.) (motion for reconsideration was timely because it was filed within 10 days of the decision); *Altman v. Grant Country School Dist.*, No. 2009-185(WOB-JGW), 2012 WL 845294, at *1 (E.D. Ky., Mar. 12, 2012) (failure to appeal nondispositive issue to district court judge within 14 days as required under Rule 72(a) waives right to object).

Judge Tarnow rules on PBGC's objection to the underlying discovery ruling. Because plaintiffs have waived their right to object or move for reconsideration, the relief requested in this motion is unavailable and should be struck pursuant to Rule 12(f).

II. In The Alternative, Plaintiffs' Motion Should Be Denied Because The Stay Was Correctly Granted And Remains Appropriate.

Even if plaintiffs had timely filed a reconsideration motion, their motion should be denied because Magistrate Judge Majzoub's stay is fully enforceable and remains in full effect under the terms of the stay granted.

Plaintiffs mischaracterize Magistrate Judge Majzoub's ruling by calling the relief a "partial stay" (previously they argued it was merely an "administrative stay"), and thus inferring it somehow lacks the force, length and validity of a hypothetical "full stay." Plaintiffs contend that the stay is "no longer appropriate" because it was only meant as a "temporary stopgap" to give Judge Tarnow a short time to review PBGC's objection without the threat of the disclosure of privileged documents. There is nothing in the language of the September 5 Stay Order to suggest that the Magistrate was placing any time limit upon the District Court. Moreover, PBGC has the right under Fed. R. Civ. 72(a) to have its objections considered by the District Court. If the September 5 Stay Order is lifted, PBGC

will be effectively denied that right if it must reveal its privileged documents to the plaintiffs.

In support of their motion, plaintiffs reproduce the same arguments advanced in their Brief In Opposition to Defendant's Emergency Motion to Stay (DE#240) – arguments that the Magistrate properly rejected in the first instance. PBGC's arguments in favor of the stay that the Magistrate granted are set forth in PBGC's briefs in support its original stay motion.⁶

Plaintiffs argue the lack of a resolution of PBGC's objection to the relief they seek has delayed resolution of this case to their detriment. However, in their proceedings before the U.S. District Court for the District of Columbia, plaintiffs informed that Court that their inability to obtain discovery from the Department of Treasury is the cause for the delay of their lawsuit before this Court. In fact, plaintiffs asked PBGC to extend the discovery deadlines in this lawsuit to give them time to obtain discovery from Treasury. And plaintiffs recently asked for and

⁶ See PBGC's Emergency Motion to Stay (DE #233) at 6-7; PBGC's Reply In Support of Emergency Motion for Stay Pending Resolution of its Objections to the Court's Order of August 21, 2013 (DE # 243) at 2-4 (including reference to plaintiffs' use of the *Holt-Orstead* and *Mohawk Indust., Inc.* cases reargued by plaintiffs in the motion at issue here). Copies of these briefs are attached as Exhibits A and B.

received a one-month extension of time for a hearing in the District of Columbia proceeding.

CONCLUSION

Under the same rules that apply to all parties in cases before this Court, Plaintiffs had 14 days to request reconsideration of, or object to, the September 5 Stay Order, just as PBGC did with respect to the August 21 Order. After the 14 days had passed, plaintiffs waived their right to seek modification of the September 5 Stay Order. PBGC respectfully requests that the Court strike or, in the alternative, deny plaintiffs' motion and leave in place the Magistrate's September 5 Stay Order .

Dated: February 19, 2014

Washington, D.C.

Respectfully Submitted:

/s/ C. Wayne Owen, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2014, I electronically filed the foregoing **Pension Benefit Guaranty Corporation's Motion to Strike or, in the Alternative, Deny Plaintiffs' Motion Requesting that Judge Majzoub Dissolve the Partial Stay of Her August 21, 2013 Order** 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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