

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

**PENSION BENEFIT GUARANTY CORPORATION’S REPLY IN  
SUPPORT OF EMERGENCY MOTION FOR STAY PENDING  
RESOLUTION OF ITS OBJECTIONS TO THE  
COURT’S ORDER OF AUGUST 21, 2013**

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*Attorneys for the Defendant Pension Benefit Guaranty Corporation*

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, PBGC similarly filed an Emergency Motion to Stay the disclosure of the privileged documents until the Court resolved PBGC’s Objections (DE #235). On September 5, 2013, Magistrate Judge Majzoub issued an order denying PBGC’s Motion for Reconsideration, but granting in-part PBGC’s Emergency Motion to Stay (DE #237) (“September 5 Order”). Magistrate Judge Majzoub ruled that PBGC’s initial request for a stay until resolution of the Motion for Reconsideration was moot due to her ruling, but nevertheless granted PBGC the relief requested in its Motion to Stay.<sup>1</sup> Magistrate Judge Majzoub granted the stay explicitly “in consideration of the fact that Defendant PBGC has recently filed an objection to the August 21, 2013 order.” *Id.*

Plaintiffs’ Brief in Opposition to Defendant’s Emergency Motion to Stay (DE #240) (“Opposition”) mischaracterizes the status of this case, arguing as if there were not a stay already in place. Plaintiffs’ in-passing description of Magistrate Judge Majzoub’s ruling as an “administrative stay,” implies that it

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<sup>1</sup> DE #237 at 4 (“[T]he provision of the August 21, 2013 order requiring disclosure of documents withheld on the basis of privilege will be stayed until such time as Judge Tarnow rules on Defendant PBGC’s objection on the August 21, 2013 order, or until the Court orders otherwise.”).

somehow lacks the full force of a “regular” stay. To the contrary, Magistrate Judge Majzoub’s stay granted in the September 5 Order is as fully enforceable as any order granted by a Magistrate Judge of this Court. The Magistrate Judge’s stay may be overturned by this Court only pursuant to a ruling on objections filed by plaintiffs pursuant to Fed. R. Civ. P. 72(a). Plaintiffs have filed no such objections and have, therefore, waived their opportunity to seek to overturn the stay.

Even had the plaintiffs not waived their right to challenge the Magistrate Judge’s stay order, its validity is apparent. The stay should remain in effect until resolution of PBGC’s objections for the reasons explained in detail in PBGC’s opening brief: if PBGC were required to produce the documents at issue before PBGC’s Objections are resolved, PBGC would be forced to waive its right to assert any privilege. The protections afforded to PBGC by the attorney-client, work product, and deliberative process privileges would be permanently lost, and PBGC would be irreparably harmed as a consequence, whereas plaintiffs would not be harmed by merely awaiting this Court’s ruling.<sup>2</sup>

Plaintiffs cite to *Holt-Orsted v. City of Dickson*, 641 F.3d 230 (6th Cir. 2011), for the proposition that immediate disclosure of privileged documents will

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<sup>2</sup> See PBGC’s Emergency Motion to Stay (DE #233) at 6-7.

not irreparably harm PBGC.<sup>3</sup> In *Holt-Orsted*, the Sixth Circuit ruled that it did not have jurisdiction to hear an interlocutory appeal of a magistrate judge's order requiring a party's former attorney to testify over a claim of attorney-client privilege.<sup>4</sup> Importantly, the magistrate judge had ruled the attorney could testify because the court had previously reviewed the privilege claims asserted by the party and ruled that privilege did not protect the information sought.<sup>5</sup> In this case, there has been no Court review of the documents for which PBGC asserts privilege. Moreover, the *Holt-Orsted* court cited *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009) – as did plaintiffs here – for the proposition that circuit courts of appeal will not rule on discovery orders from parties in an interlocutory appeal.<sup>6</sup> But unlike *Holt-Orsted*, this Court does have jurisdiction under Rule 72 to consider PBGC's objections to a magistrate judge's decision.

In fact, rather than holding that forcing a party to reveal its privileged material causes no harm to that party, the Supreme Court and the Sixth Circuit have consistently held that the privileges at issue here are among our legal

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<sup>3</sup> Opposition at 10-11.

<sup>4</sup> *Holt-Orsted*, 641 F.3d. at 232.

<sup>5</sup> *Id.* at 233.

<sup>6</sup> *Id.* at 236-37.

system's most fundamental rights,<sup>7</sup> and that "an erroneous forced disclosure of confidential information [cannot] be adequately remedied on direct appeal because a court cannot restore confidentiality to documents after they are disclosed."<sup>8</sup> A privilege claim "operates to prevent the disclosure itself" and "[m]andatory disclosure [...] is the exact harm the privilege is meant to guard against."<sup>9</sup>

Finally, plaintiffs claim that the stay granted by the Magistrate Judge will cause them harm by delaying the progress of this litigation. But nothing could be farther from the truth. As plaintiffs have repeatedly told both this Court – as recently as this past Monday – and the District Court for the District of Columbia, plaintiffs believe that they must have extensive discovery from the U.S. Department of the Treasury. That discovery has been stayed, and is the subject of ongoing proceedings in the D.C. court. There is no certainty about when and if that discovery will occur.

Plaintiffs' attempts in their Opposition to mischaracterize the Magistrate's ruling and muddle the issue presented by this briefing should not distract the Court from the reality of the current posture: a valid and appropriate stay ordered by

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<sup>7</sup> See, e.g., *Hickman v. Taylor*, 329 U.S. 495 (1947); *In re Lott*, 424 F.3d 446, 449 (6th Cir. 2005).

<sup>8</sup> *In re Professionals Direct*, 578 F.3d 432, 438 (6th Cir. 2009).

<sup>9</sup> *In re Lott*, 424 F.3d 446, 451 (6th Cir. 2005).

Magistrate Judge Majzoub is currently in place until resolution of PBGC's Objections. In light of the severity of the sanction imposed by the Magistrate Judge's Order waiving PBGC's privileges, the Magistrate Judge's stay pending review by the District Court is appropriate and essential.

**Conclusion**

For these reasons, PBGC respectfully requests that the Court leave in place the stay granted by Magistrate Judge Majzoub pending the resolution of PBGC's Objections to the August 21 Order.

Dated: October 3, 2013

Washington, D.C.

Respectfully Submitted:

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 3, 2013, I electronically filed the foregoing **Pension Benefit Guaranty Corporation's Reply in Support of 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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