

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

DENNIS BLACK, *et al.*,

Plaintiffs,

v.

PENSION BENEFIT GUARANTY CORP., *et al.*,

Defendants.

Case No. 2:09-cv-13616

Hon. Arthur J. Tarnow

Magistrate Judge Donald A. Scheer

**PLAINTIFFS' RESPONSE TO
THE PBGC'S MOTION TO FILE UNDER SEAL**

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Plaintiffs submit this brief in opposition to the Motion by Defendant Pension Benefit Guaranty Corporation (“PBGC”) to File Under Seal. As Plaintiffs’ counsel has informed the PBGC, the majority of the documents that the PBGC moves to file under seal are already in circulation in the public domain, as a result of the PBGC’s production of an administrative record to Plaintiffs in October 2009, *without any restrictions whatsoever*. Moreover, Plaintiffs approached the PBGC in October 2009 and sought to enter into a confidentiality agreement that would have allowed the PBGC to designate and protect confidential materials, an opportunity that the PBGC declined. Finally, there is a well established presumption against filing documents under seal, and the PBGC has made no showing *or even assertion* that the documents it seeks to place under seal satisfy that legal standard. The PBGC should be required to make a showing that there are legitimate trade secrets at stake if the well-established presumption that the public should have access to court records is to be overcome.

ARGUMENT

I. THE PBGC’S ACTIONS IN RELEASING THE ADMINISTRATIVE RECORD TO PLAINTIFFS IN OCTOBER 2009 AND DECLINING TO ENTER INTO A CONFIDENTIALITY AGREEMENT AT THAT TIME ARE INCONSISTENT WITH ITS PENDING MOTION

On September 22, 2009 Plaintiffs requested a copy of the PBGC’s administrative record concerning termination of the Delphi Retirement Program for Salaried Employees (the “Plan”), pursuant to 29 U.S.C. § 1342(c)(3)(A)(ii). The PBGC produced an administrative record to Plaintiffs on October 16, 2009. Accompanying this administrative record was a cover letter, from the PBGC’s Disclosure Officer, William FitzGerald, and an “Attestation” signed by Mr. Fitzgerald and the PBGC’s Acting Director, Vincent Snowbarger, that the administrative record enclosed was a “full and complete copy.” Neither document suggested that the PBGC was

releasing the administrative record to Plaintiffs subject to any confidentiality restrictions. In producing the administrative record to Plaintiffs, the PBGC failed to provide any indication that it believed that any of the documents contained therein were subject to any confidentiality concerns. If the PBGC had legitimate interests in keeping the information confidential, it presumably would have indicated that the information was being released pursuant to certain restrictions; it did no such thing.

Shortly after Plaintiffs requested a copy of the administrative record, they were contacted by counsel for Delphi; Delphi represented that if Plaintiffs would not enter into a confidentiality agreement regarding the designation and treatment of confidential material within the administrative record, it would initiate litigation. Plaintiffs in turn contacted the PBGC and proposed that the PBGC enter into the agreement as well. On October 14, 2009, Delphi's counsel wrote: "I was surprised to see this styled as an order to be entered into with the PBGC. And, in fact, *later in the day I received word from the PBGC that they have no intent to enter into any such order. I'll let them speak for themselves, but they don't think they need to be a party to the confidentiality order, and as for Delphi, I don't need them to be a party either.*" See Ex. A, attached hereto (emphasis added). Copied on this email exchange were two PBGC attorneys, John Menke (Assistant Chief Counsel for the PBGC) and Karen Morris (Deputy Chief Counsel for the PBGC). As neither Mr. Menke nor Ms. Morris took issue with Delphi's characterization of the PBGC's position, Plaintiffs concluded that the PBGC had no interest in making any documents in the administrative record confidential. If the PBGC had a legitimate interest in keeping the information confidential, it presumably would have (and should have) entered into the confidentiality agreement that Plaintiffs put forth in October. In waiting until

this moment to raise its confidentiality concerns, the PBGC is forcing Plaintiffs to expend their valuable and limited resources again on an issue that the PBGC had given them every reason to believe was resolved.

As discussed in Plaintiffs' Supplemental Brief in Support of their Motion for Preliminary Injunction at n.1, Plaintiffs ultimately reached an informal agreement with Delphi to refrain from circulating a limited number of documents. While Plaintiffs do not believe that Delphi would have met the statutory burden for confidentiality for most or all of those documents, Plaintiffs chose to reach agreement rather than incur the costs associated with litigating the issue.

II. THE PBGC HAS NOT MADE THE NECESSARY SHOWING TO JUSTIFY SEALING THE ADMINISTRATIVE RECORD

“The English common law, the American constitutional system, and the concept of the ‘consent of the governed’ stress the ‘public’ nature of legal principles and decisions.” *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177 (6th Cir. 1983). In keeping with these principles, the judiciary must exercise discretion before restricting the public’s access to court documents, “because court records often provide important, sometimes the only, bases or explanations for a court’s decision.” *Id.* Where a court record is the basis for an adjudication, “only the most compelling reasons can justify the total foreclosure of public and professional scrutiny.” *Id.* at 1180 (quoting *Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982)).

The only justification that the PBGC has supplied in support of its motion is the fact that the documents “contain commercial information subject to two confidentiality agreements among PBGC, Delphi Corporation and others.” PBGC Mem. in Supp. of Mot. to Seal at 3. This is not a sufficient showing, and was exactly the type of justification that the Sixth Circuit rejected in *Brown*, which also dealt with an effort to seal information in an administrative record

obtained by the agency pursuant to a confidentiality agreement. “We decline to carve out an exception to the right of access in order to protect the secrecy of an administrative record. The public has a strong interest in obtaining the information contained in the court record . . . [and] in ascertaining what evidence and records the District Court and this Court have relied upon in reaching our decisions.” *Brown*, 710 F.2d at 1180-81.

While courts have allowed an exception to the presumption of openness in cases where “trade secrets” are involved, *see id.* at 1179, such a standard is clearly not met here. In the first place, the PBGC has not alleged that the information in question contains trade secrets. Moreover, one need look no further than the PBGC’s description of the documents in question to see that trade secrets are not involved.¹ Most of the information (as one would expect) deals with the financial state of Delphi and the funding of the Plan. This is not sufficient to outweigh the public’s interest in having full access to the documents upon which the PBGC relies in justifying its actions in terminating Plaintiffs’ pension plan.

Moreover, as Plaintiffs informed the PBGC on January 8, 2010, many of the pages that the PBGC has moved to file under seal are already in the public domain. Of the approximately 257 pages that the PBGC proposes to file under seal, 55 are implicated by Plaintiffs’ agreement with Delphi, which was finalized on December 15, 2009. Since that time Plaintiffs have been free to circulate all documents in the administrative record not implicated by the Delphi

¹ *See* PBGC Mem. in Supp. of Mot. to Seal at nn.1-3 (describing that it seeks to place under seal (1) a 2007 actuarial valuation of the Salaried Plan; (2) two Delphi presentations to its joint statutory committees; (3) a memorandum from PBGC’s Department of Insurance Supervision and Compliance to the Chair of PBGC’s Trusteeship Working Group recommending termination of the Salaried Plan and the Hourly Plan; and (4) a valuation report prepared by Greenhill & Co.)

agreement, and presumably have done so.² As such, it is especially difficult to understand the basis of the PBGC's motion regarding those remaining 202 pages.

Because the PBGC has failed to show good cause why any documents within the administrative record should be filed under seal, the PBGC's Motion should be denied.

Respectfully submitted,

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² At the very least, those 202 pages are part of the Administrative Record Excerpts filed with this Court in support of Plaintiffs' Supplemental Brief, Exs. Z, DD, FF, and II..

CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2010, 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:

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