

Plaintiffs have requested that Magistrate Judge Majzoub dissolve the partial stay (the “Partial Stay”) of her August 21, 2013 Order (Dkt. No. 231) (the “Waiver Order”) requiring the Defendant Pension Benefit Guaranty Corporation (the “PBGC”) to produce to Plaintiffs by September 30, 2013 documents improperly withheld on the basis of waived privileges. *See* Dkt. No. 245 (the “Motion to Dissolve Stay”). The PBGC has opposed the Motion to Dissolve Stay by filing a motion to strike under Rule 12(f) of the Federal Rules of Civil Procedure. *See* Dkt. No. 246 (the “Motion to Strike”). The PBGC’s Motion to Strike seeks relief unavailable under the Federal Rules, contains numerous misstatements, and fails to explain how the continued imposition of the Partial Stay is appropriate.

As a threshold matter, Fed. R. Civ. P. 12(f) may only be used to strike objectionable “pleading[s].” Fed. R. Civ. P. 12(f). Because Plaintiffs’ Motion to Dissolve Stay is plainly not a pleading, it may not be struck under Rule 12(f). *See, e.g., Design Basics, LLC v. Chelsea Lumber Co.*, No. 11-CV-10854, 2013 U.S. Dist. LEXIS 96071, at *2-3 (E.D. Mich. July 10, 2013) (noting that Fed. R. Civ. P. 12(f) “only provides for the striking of matters in ‘pleadings’” which are limited to “a complaint; an answer to a complaint; an answer to a counterclaim designated as a counterclaim; an answer to a crossclaim; a third-party complaint; an answer to a third-party complaint; and a reply to an answer.”); *Huff v. FirstEnergy Corp.*, No.

5:12CV2583, 2013 U.S. Dist. LEXIS 133574, at *17-18 (N.D. Ohio Sept. 17, 2013) (same).

Moreover, the PBGC's argument that the Motion to Dissolve Stay is somehow out-of-time is untenable. While the PBGC argues that the Partial Stay was intended to be a permanent injunction that could only be removed upon a resolution of the PBGC's Rule 72 objections, the Court's Order stated no such thing. The plain language of the Partial Stay states that it will remain "in effect until Judge Tarnow rules on Defendant PBGC's objection to the August 21, 2013 order *or until the Court orders otherwise.*" Dkt. No. 237 at 4 (emphasis added). The PBGC's interpretation cannot be reconciled with the second part of the sentence plainly contemplating that the Court could dissolve the stay in circumstances *other than a resolution of the PBGC's Rule 72 objections.*

That Magistrate Judge Majzoub would leave the door open to revisiting the propriety of the Partial Stay makes complete sense. As Plaintiffs have previously noted, a court normally considers a four-part test in deciding whether to grant the sort of injunctive relief that the PBGC argues is in place here, looking to see: (1) whether the moving party has a substantial likelihood of success on the merits; (2) whether the moving party will suffer irreparable harm if the lower court order is not stayed; (3) whether staying the lower court order will substantially injure other interested parties; and (4) where the public interest lies. *See e.g.*, Motion to

Dissolve Stay at 3 n.1 (citing *See, e.g., Family Trust Found. of Ky., Inc. v. Ky. Judicial Conduct Comm'n*, 388 F.3d 224, 227 (6th Cir. 2004)).

However, in some limited instances, and in furtherance of efficiently administering their dockets, courts will *initially* enter a temporary or “administrative” stay in order to allow the Court more time to consider a matter styled as an “emergency” -- which is how the PBGC characterized its stay request (Dkt. No. 233) -- or pending additional developments; in such instances, after a sufficient time has passed, the administrative stay can then be dissolved. *See e.g., Vill. of Bensenville v. Fed. Aviation Admin.*, No. 05-1383, 2005 U.S. App. LEXIS 23277, at *1 (D.C. Cir. Oct. 25, 2005) (per curiam) (dissolving administrative stay entered twenty days earlier after finding that petitioners had failed to demonstrate “the irreparable injury or likelihood of success on the merits requisite for the issuance of a stay pending review.”). While true that Magistrate Judge Majzoub did not expressly refer to the Partial Stay as an administrative stay, the circumstances surrounding its entry suggest such was the underlying intent.

The PBGC also argues, in the alternative, that the Partial Stay “remains appropriate.” Motion to Strike at 4. The gist of the PBGC’s argument here is that (1) dissolving the Partial Stay will deprive the PBGC of its “right” to have its objections resolved by the District Court prior to producing the documents in question; and (2) that the Partial Stay is not really delaying the resolution of the

case. Both arguments are noteworthy for their underlying legal and factual misstatements.

As an initial matter, the PBGC does not have a “right” to have its objections resolved prior to having to comply with the Court’s August 21, 2013 Waiver Order. The PBGC *had* a right to preserve potentially privileged documents, but the PBGC *waived* that right by flagrantly flouting the Federal Rules of Civil Procedure for over a year. Dkt. No. 237. Having waived those privileges, the PBGC should be required now to comply with the Waiver Order unless it can meet the heavy burden justifying a preliminary injunction pending review of its objections. *See, e.g., Overstreet v. Lexington-Fayette Urban County Gov’t*, 305 F.3d 566, 573 (6th Cir. 2002) (“A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it.”). It cannot meet its heavy burden, in particular because the ability of the Court later to exclude any materials from the record should the PBGC succeed on its objections categorically prevents the PBGC from showing any irreparable harm. *See Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 109 (2009).

Moreover, not only does the PBGC misstate the relevant law, it also misstates the facts. First, the PBGC’s statement, that Magistrate Judge Majzoub considered and “properly rejected” Plaintiffs’ arguments prior to entering the

Partial Stay, is both false and misleading. *See* Motion to Strike at 5. The Partial Stay was entered without Plaintiffs' response (*see* Dkt. No. 237 at 1) in connection with the PBGC's first "emergency" motion for a stay, and Magistrate Judge Majzoub entered the Partial Stay solely "in consideration of the fact that [the PBGC] has recently filed an objection to the August 21, 2013 order." Plaintiffs' first legal arguments on this point were submitted more than two weeks later, *see* Dkt. No. 240, in response to the PBGC's *second* emergency motion for stay (Dkt. No. 235), which still remains pending.

Second, the PBGC's assertion that "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," Motion to Strike at 5, is similarly misleading. While Plaintiffs have informed the DC court that the Treasury's tactics are "unreasonably delaying and complicating the progression of *Black v. PBGC* in the Michigan Court," that is not the same as saying that the Treasury is the *sole* cause of delay in these proceedings.¹

¹ *See* Respondents' Memorandum in Opposition to the Treasury's Motion to Quash at 2, *Dep't of Treasury v. Black*, No. 1:12-mc-00100 (D.D.C. Oct. 25, 2013), ECF No. 19. Indeed, Plaintiffs have made a point of noting the "history of obstructionism employed by the various agencies of the government in this case." Respondents' Motion to Lift Stay at 6, *Dep't of Treasury v. Black*, No. 1:12-mc-00100 (D.D.C. Aug. 13, 2013), ECF No. 11.

Third, the PBGC states that “plaintiffs asked PBGC to extend the discovery deadlines in this lawsuit to give them [more] time to obtain discovery from Treasury.” *Id.* In point of fact, Plaintiffs specifically noted that “we don’t think [the current] date can hold given the still-pending discovery disputes before Judge Tarnow and Judge Sullivan,” (Ex. A, attached hereto), making clear that *both* disputes necessitated an extension of the discovery deadlines.

Fourth, the PBGC states that “plaintiffs recently asked for and received a one-month extension of time for a hearing in the District of Columbia proceeding.” Mot. to Strike at 5-6. This too is false. The Plaintiffs notified the DC Court that both their counsel and the counsel for the Treasury had a conflict on the initial date chosen by the court (March 5, 2014), and provided numerous alternative dates in March for the hearing. *See* Respondents’ Unopposed Motion to Reschedule Hearing Date, *Dep’t of Treasury v. Black*, No. 1:12-mc-00100 (D.D.C. Feb. 6, 2014), ECF No. 23. While the Court happened to schedule an alternative day in the next month, Plaintiffs plainly did not request a month-long extension. Frankly, the PBGC goes out of its way to mischaracterize repeatedly the facts, the record, and the course of proceedings, and the Court should not countenance these tactics.

In short, Plaintiffs have done everything in their power to move this case forward, and have consistently objected to the PBGC’s delaying tactics. Because

the continued imposition of the Partial Stay will necessarily delay the progress of the litigation, it should be dissolved.

Dated: February 28, 2014

Respectfully submitted,

Alan J. Schwartz (P38144)
JACOB & WEINGARTEN, P.C.
777 Somerset Place
2301 Big Beaver Road
Troy, Michigan 48084
Telephone: 248-649-1900
Facsimile: 248-649-2920
E-mail: alan@jacobweingarten.com

/s/ Anthony F. Shelley
Anthony F. Shelley
Timothy P. O'Toole
Michael N. Khalil
MILLER & CHEVALIER
CHARTERED
655 15th Street, N.W., Suite 900
Washington, D.C. 20005
(202) 626-5800 (phone)
(202) 626-5801 (facsimile)
E-mail: ashelley@milchev.com
totoole@milchev.com
mkhalil@milchev.com

Counsel for the Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2014, 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:

owen.wayne@pbgc.gov (C. Wayne Owen)
david.glass@usdoj.gov (David M. Glass)
edward.w.risko@gm.com (Edward W. Risko)
rswalker@jonesday.com (Robert S. Walker)

/s/ Anthony F. Shelley
Anthony F. Shelley
MILLER & CHEVALIER CHARTERED
655 15th Street, N.W., Suite 900
Washington, D.C. 20005
(202) 626-5800 (phone)
(202) 626-5801 (facsimile)
E-mail: ashelley@milchev.com

Exhibit A

Khalil, Michael

From: Khalil, Michael
Sent: Tuesday, December 10, 2013 4:22 PM
To: 'Owen Wayne'; O'Toole, Timothy; Shelley, Anthony
Cc: Morris Karen; Menke John; Fessenden Craig; Wiesner Jared; Kim Erin
Subject: RE: Black v. PBGC; Case No. 09-13616

John /Karen/Craig/Wayne,

I left John a voicemail about this on Friday, but wanted to follow up by email. As I understand it, Plaintiffs' objections and responses to your document requests are due on January 7, 2014. In light of the upcoming holidays, would the PBGC agree to extend the time for those objections and responses until February 1, 2014? We realize that February 1st is the current discovery cutoff date, but we don't think that date can hold given the still-pending discovery disputes before Judge Tarnow and Judge Sullivan. We are hopeful that a two month extension of the discovery dates would be sufficient to resolve the remaining discovery issues. Would the PBGC agree to a further extension of the discovery deadlines by two months?

Best,

Mike

From: Owen Wayne [<mailto:Owen.Wayne@PBGC.GOV>]
Sent: Thursday, December 05, 2013 3:45 PM
To: Khalil, Michael; O'Toole, Timothy; Shelley, Anthony
Cc: Morris Karen; Menke John; Fessenden Craig; Wiesner Jared; Kim Erin
Subject: Black v. PBGC; Case No. 09-13616

Attached please find PBGC's First Set of Requests for Production of Documents to Plaintiffs. A hard copy is also being sent via US Mail.

Thank you.

C. Wayne Owen, Jr.
Assistant Chief Counsel
Office of the Chief Counsel
Pension Benefit Guaranty Corporation
1200 K Street, NW
Washington, DC 20005-4026
(202) 326-4000, ext. 3204
owen.wayne@pbgc.gov