

Case No. \_\_\_\_\_

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

**In re PENSION BENEFIT GUARANTY CORPORATION**  
*Petitioner-Defendant*

**PETITIONER'S EMERGENCY MOTION FOR STAY  
OF PROCEEDINGS IN DISTRICT COURT**

**FROM THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION**  
**Case no. 2:09-cv-13616**

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*Attorneys for the Petitioner-Defendant Pension Benefit Guaranty Corporation*

Petitioner Pension Benefit Guaranty Corporation's ("PBGC") Petition for Writ of Mandamus is concurrently being filed with this Court. By order, the United States District Court for the Eastern District of Michigan, Southern Division ("District Court") has required PBGC to imminently produce over 10,000 documents – withheld on the basis of one or more privileges – finding that PBGC has waived the right to claim those privileges. Accordingly, Petitioner seeks a stay of the proceedings in the District Court pending a decision on its Petition for Writ of Mandamus.

## **I. PROCEDURAL BACKGROUND**

Concurrent with this Emergency Motion, PBGC is filing its Petition for Writ of Mandamus. It seeks to overturn an order by the District Court ruling that PBGC waived its right to assert attorney-client, work product, and deliberative process privilege claims for certain documents and directed PBGC to produce all of its unredacted documents to the plaintiffs by September 30, 2013 ("August 2013 Order").<sup>1</sup>

The case in the District Court is not currently stayed. In response to the August 2013 Order, PBGC promptly filed a motion for reconsideration and emergency motion for stay with the Magistrate Judge and filed objections with the

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<sup>1</sup> See Order Granting in Part Motion to Compel, entered March 9, 2012, Dkt No. 204.

District Court. The Magistrate Judge denied PBGC's motion for reconsideration but granted in-part the stay pending resolution of PBGC's objections. On July 21, 2014, the District Court dismissed PBGC's objections and ordered that all documents be produced without redaction for privilege ("July 2014 Order").<sup>2</sup> On July 23, 2014, PBGC moved the District Court for a stay and to certify the July 2014 Order for interlocutory appeal.<sup>3</sup> As of this filing, the District Court has neither ruled on PBGC's request to certify its July 2014 Order for interlocutory appeal nor issued a stay.

## **II. GROUNDS FOR STAYING THE PROCEEDINGS IN THE DISTRICT COURT**

In its July 2014 Order, the District Court did not issue a deadline for PBGC to produce its privileged documents. Because the August 2013 Order required the documents to be produced by September 30, 2013, however, PBGC believes the District Court may expect it to produce the documents immediately. The District Court has effectively ruled three times that PBGC has waived privilege to the documents ordered for discovery – in the original August 2013 Order, in the denial

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<sup>2</sup> See Order Overruling Defendant's Objections to Magistrate Judge's Order of August 21, 2013 and Mooting Plaintiffs' Motion Requesting the Magistrate Judge Dissolve the Partial Stay of the August 21, 2013 Order, entered July 21, 2014, Dkt No. 257.

<sup>3</sup> See Pension Benefit Guaranty Corporation's Motion for Stay and Request to Certify the Order for Appeal, entered July 23, 2014, Dkt No. 258.

of PBGC's Motion for Reconsideration by Magistrate Judge Majzoub, and in the dismissal of PBGC's objections by Judge Tarnow in the July 2014 Order.

Importantly, Judge Tarnow's dismissal of PBGC's objections to the August 2013 Order lifted the stay issued by Magistrate Judge Majzoub in anticipation of his ruling. This motion is sought in this Court after PBGC first moved the District Court for a stay and to certify the July 2014 Order for appeal, for which the District Court has not ruled on. It is clear, however, that the District Court believes the issue is settled and is unlikely to grant another stay to the production of the privileged documents at issue.

A stay is appropriate and proper in this case so that the Court may rule on the Petition for Writ of Mandamus. In considering whether a stay is appropriate, the Sixth Circuit has stated that the Court 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.<sup>4</sup>

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<sup>4</sup> *Baker v. Adams Cnty./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.”<sup>5</sup>

**A. PBGC has Demonstrated a Substantial Likelihood of Success on The Merits.**

As explained in detail in the Petition for Writ of Mandamus, mandamus is appropriate in this case because compliance with the District Court’s July 2014 Order will cause irreparable harm that cannot be cured on appeal from final judgment. The District Court’s July 2014 Order was clearly erroneous under the applicable law and thus PBGC’s Petition for Writ of Mandamus has a substantial likelihood of success.

**B. PBGC will be Irreparably Injured Unless a Stay is Issued.**

The District Court has effectively ordered PBGC to immediately produce over 10,000 documents, without asserting privilege. Because of the time frame at issue here to comply with the District Court’s ruling, PBGC is left with two options barring a stay by this Court: (1) release all of its privileged documents to the plaintiffs, thus permanently waiving all privilege claims and rendering its Petition for Writ of Mandamus moot, or (2) refusing to comply and face contempt of the District Court. Because the first option will result in the release of

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<sup>5</sup> *Baker*, 310 F.3d at 928.

documents containing legal strategies and internal deliberations and the second option is not appealable by PBGC, this constitutes irreparable harm to PBGC.

**C. Plaintiffs will Not be Substantially Injured if a Stay is Issued.**

Plaintiffs, former salaried employees of the Delphi Corporation challenging PBGC termination and trusteeship of the Delphi Retirement Program for Salaried Employees, will not be substantially injured by a stay pending the resolution of PBGC's Petition for Writ of Mandamus because plaintiffs would not have otherwise been entitled to receive PBGC's privileged documents absent the District Court's ruling and the stay would not delay resolution of this litigation to plaintiffs' detriment. Plaintiffs in this case have repeatedly informed the District Court that they believe they must have document and deposition discovery from the U.S. Department of the Treasury before they can proceed to the merits here.<sup>6</sup> Plaintiffs have not received all of the documents they are seeking from the U.S. Department of Treasury, nor have they yet conducted any of the related depositions they have sought. The harm to PBGC that results from disclosing privileged documents is substantially outweighed by the harm, if there is any at all, to the

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<sup>6</sup> See Joint Request for Resolution of the PBGC's Objections to Magistrate Judge's Order of March 9, 2012, filed April 23, 2013, Dkt. No. 228; Statement of Supplemental Discovery Statement by All Plaintiffs, filed October 3, 2012, Dkt. No. 216; and Stipulated Order Regarding Discovery Deadlines, October 1, 2013, Dkt. No. 241.

plaintiffs in the brief delay while the Court considers PBGC's Petition for Writ of Mandamus.

**D. Public Interest Lies in Favor of Preserving Privilege Claims.**

Courts have long recognized the vital role privilege plays in the administration of justice.<sup>7</sup> 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 Petition for Writ of Mandamus to prevent the draconian sanction imposed by the District Court's July 2014 Order.

**III. RELIEF SOUGHT**

PBGC requests that the Court stay the proceedings in the District Court, including PBGC's deadline to produce documents without privilege redactions, pending determination of the Petition for Writ of Mandamus.

August 21, 2014

Respectfully submitted,

/s/ C. Wayne Owen, Jr.

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<sup>7</sup> See, e.g., *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888); *Upjohn Co. v. United States*, 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 Assurance Soc'y of the U.S.*, 406 F.3d 867, 878-79 (7th Cir. 2005); *NLRB v. Jackson Hosp. Corp.*, 257 F.R.D. 302, 308 (D.D.C. 2009).

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*Attorneys for the Petitioner/Defendant Pension Benefit Guaranty Corporation*



**CERTIFICATE OF SERVICE**

I hereby certify that on August 21, 2014, I served the preceding **PETITIONER'S EMERGENCY MOTION FOR STAY OF PROCEEDINGS IN DISTRICT COURT** on the Office of the Clerk for the United States Court of Appeals for the Sixth Circuit via electronic mail and on the following via electronic mail or Federal Express:

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/s/ C. Wayne Owen, Jr.  
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