

**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 Donald A. Scheer
)	
Pension Benefit Guaranty Corporation, <i>et al.</i> ,)	
)	
Defendants.)	
)	

**PLAINTIFFS’ REPLY TO PENSION BENEFIT GUARANTY CORPORATION’S
RESPONSE TO PLAINTIFFS’ MOTION FOR AN ORDER TO SHOW CAUSE**

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The Court's Order of January 26, 2010 is clear. The PBGC was authorized to begin reducing benefits only if it met one of the Order's two stated contingencies.

The PBGC argues, however, that it has not violated the "actual terms" of the Order, and "[a]t most, Plaintiffs' preliminary injunction motion remains pending before the Court." PBGC's Resp. to Pls.' Mot. for an Order to Show Cause (hereafter "PBGC Response") at 1, 3. In support of its position, the PBGC continues to argue that it is legally unable to implement either contingency, and therefore cannot be blamed for its refusal to comply with the contingencies while reducing Plaintiffs' benefits. *Id.* at 2-3. But the argument that the PBGC was free to begin benefit reductions without complying with either contingency conflicts with the PBGC's earlier representations (on which Plaintiffs have reasonably relied) that it would not act to alter the status quo without the Court's authorization. Similarly, the PBGC's argument that it is unable to comply with the Court's contingencies was precisely the one the Court rejected in its February 17, 2010 Order (which the PBGC has chosen not to appeal), when it denied the PBGC's January 28, 2010 Motion to Alter or Amend the Court's January 26, 2010 Order on Plaintiffs' Motion for Preliminary Injunction ("Motion to Alter or Amend"). *See* Dkt. No. 122, Order Denying Mot. to Alter or Amend the Court's January 26, 2010 Order.

This Court held a hearing on Plaintiffs' motion for a preliminary injunction on December 22, 2009. At the hearing, the PBGC informed the Court that it planned to begin reducing Plaintiffs' benefits on February 1, 2010. However, the PBGC represented to the Court that, notwithstanding the February deadline, it would await the Court's ruling on the pending preliminary injunction motion prior to altering the status quo.

THE COURT: . . . I'm thinking that Mr. Menke's organization could wait for a decision from this Court without the necessity of an injunction if I can assure him that a decision will be forthcoming before the February 1st date. . . . [I]f it's delayed a couple of weeks, I think everyone can live with that.

MR. MENKE: Your Honor, we will obviously await Your Honor's decision, whenever it comes.

Tr. of Dec. 22, 2009 Hearing on Mot. for Prelim. Inj. at 43:21-44:05 (attached as Ex. A).

The January 26th Order authorized the PBGC to reduce benefits only if it met one of the Order's two stated contingencies. By reducing Plaintiffs' benefits without meeting one of those two contingencies, the PBGC violated the January 26th Order. Moreover, given the PBGC's representation at the December hearing that it would not begin benefit reductions until this Court decided the preliminary injunction motion, if the PBGC truly believes that "[a]t most, Plaintiffs' preliminary injunction motion remains pending before the Court," then its reduction in benefits also violates its own representations to the Court. PBGC Response at 3.

That the PBGC reached the same conclusion is obvious; the PBGC "immediately" filed the Motion to Alter or Amend, in which the "PBGC informed the Court and the parties that the limitations in Title IV of ERISA precluded PBGC from carrying out either of the two alternative contingencies." *Id.* at 2. If the PBGC did not think itself constrained by its earlier representation, or that a benefit reduction without meeting the contingencies would have been a violation of the "actual terms" of the January 26th Order, there would have been no reason to seek to alter or amend that Order, and certainly no reason to do with such alacrity (it was filed just two days after the January 26th Order, and just four days before the February benefit payments were set to go out).

Nevertheless, the PBGC began reducing benefits, without waiting for a further ruling from the Court. In so doing, it violated the PBGC's earlier promise to the Court, as well as the Court's order of January 26, 2010. But if there was any doubt, the Court resolved it by denying the PBGC's Motion to Alter or Amend, even suggesting at the Status/Settlement Conference held on February 18, 2010, that if the PBGC was unhappy with the order it should take an

appeal, and indicating that if there were any question about appealability, the Court would certify the relevant question if requested.

In light of this guidance, the PBGC could not fairly proceed as though the January 26th Order and this Court's denial of the Motion to Alter or Amend had been of no consequence whatsoever. But that is exactly what the PBGC did by reducing benefits without meeting one of the two contingencies set forth in the January 26th Order.

On March 4, 2010, the PBGC "again informed the Court and the plaintiffs that PBGC could not, consistent with ERISA, implement either of the two contingencies in the January 26th Order." PBGC Response at 2. The PBGC Statement also reveals that "the PBGC does not intend to seek an appeal at this time," PBGC Statement at 2 (Dkt. No. 126), and that it simply had decided not to act in accordance with the contingencies stated in the Court's Orders. Plaintiffs accordingly responded to the PBGC Statement by asking that the Court enter an order to show cause as to why the PBGC should not be found in violation of this Court's Orders.

For all of these reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for an Order to Show Cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 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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