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

Dennis Black, *et al.*, Plaintiffs, v. Pension Benefit Guaranty Corporation, Defendant.	Case No. 2:09-cv-13616 Hon. Arthur J. Tarnow Magistrate Judge Mona K. Majzoub

PLAINTIFFS' OPPOSITION TO THE PBGC'S EMERGENCY MOTION UNDER FED. R. CIV. P. 6(b)(1)(A) FOR EXTENSTION OF TIME TO COMPLY WITH THE COURT'S MARCH 11, 2016 ORDER

Introduction

On March 11, 2016, the Court entered an Opinion and Order Granting Plaintiffs' Rule 37 Motion to Enforce Court Order (DE 282, the "March 2016 Order"), pursuant to which Defendant Pension Benefit Guaranty Corporation (the "PBGC") was ordered to produce, within 30 days (*i.e.*, by April 10, 2016), documents that it had been withholding in violation of the Court's August 21, 2013 Waiver Order (DE 231).

The PBGC has filed an "emergency motion" (DE 286, the "Extension Motion") requesting that the Court provide the PBGC with an additional four months (at least) to produce all of the documents in its possession related to its

audits of Plaintiffs' pension plan. The Extension Motion is filed pursuant to Fed. R. Civ. P. 6(b)(1), which allows for extensions upon a showing of "good cause." Because the PBGC's Extension Motion fails to demonstrate good cause, and because the PBGC's assertion that Plaintiffs will not be prejudiced by the requested extension is inaccurate, Plaintiffs are, regretfully, obliged to oppose the Extension Motion.

Background

As the Court recounted in the March 2016 Order, the plan asset audit material in question is responsive to Plaintiff's Request for Production no. 12 ("RFP no. 12"), which Plaintiffs propounded upon the PBGC *four-and-a-half years ago*. The PBGC has utilized outside contractors to perform the bulk of the plan asset audit process, which apparently began almost five years ago, when the PBGC retained Bazillo, Cobb, and Associates ("BCA") in June 2011, to provide it with asset evaluation services related to the Delphi pension plans. Notwithstanding the fact that RFP no. 12 required the PBGC to produce documents related to the PBGC's actual or potential benefit liabilities under Plaintiffs' pension plan, and that the PBGC has admitted that "the value of a plan's assets and the asset evaluation reports are [] 'important' and 'necessary' to calculating benefits and making benefit determinations," DE 282 at 9, the PBGC has for years refused

to produce the BCA asset evaluation materials (or any asset evaluation materials), and in fact denied their existence (*see, e.g.*, DE 275-7 at 2-3).

Eventually Plaintiffs learned of the existence of the BCA asset evaluation materials, after which time the PBGC attempted to justify its refusal to produce such documents by disputing their responsiveness to RFP no. 12. *See* DE 282 at 8. Plaintiffs' most recent Rule 37 Motion followed. In the March 2016 Order, the Court rejected the PBGC's argument – that the plan asset audit materials were not responsive to RFP no. 12 – as "illogical," noting that it contradicted the PBGC's own admissions on the subject. *Id.* at 9. "Having previously found in the August 21, 2013 Order that information responsive to Request for Production no. 12 that has been received, produced, or reviewed by Defendant subsequent to the Plan's termination is relevant to the claims at issue in this case (docket no. 231 at 6), and in currently finding that documents concerning the audit of the Plan's assets are responsive to RFP no. 12," the Court granted Plaintiffs' motion to compel. *Id*. In their Rule 37 Motion, Plaintiffs had requested that the PBGC be ordered to comply with any court order within 30 days, with the PBGC requesting additional time. DE 275 at 19; DE 278 at 19-20. In the March 2016 Order, the Court ordered the PBGC to produce all the documents concerning the audit of the Plan's assets within thirty days. DE 282 at 10.

Several days later, the PBGC approached Plaintiffs with purported questions about this Court's order, but did not suggest in any way that it would have trouble meeting the 30-day deadline.[1] On March 23, 2016, however, the PBGC again contacted Plaintiffs, requesting a phone call and stating

> We have now had a few days to try to get a handle on what documents might be included in "all documents . . . related to an audit of the Plan's assets." We would like to discuss our findings with you and talk about how we can reasonably proceed in the face of the request and the Court's order.

During the call, the PBGC's counsel suggested that it had recently begun to search for responsive documents in response to RFP no. 12, and had determined it could not meet the 30-day deadline set by the Court for compliance. The PBGC's counsel asked if Plaintiffs would agree to modify the Court's March 2016 Order by granting the PBGC a 120 day extension of the time to produce the plan asset audit materials. Plaintiffs took the matter under advisement but suggested they were

[1] During this call, the parties also discussed the PBGC's obligation under the March 2016 Order to produce "all of the approximately 30,000 documents that it had previously withheld on the basis of privilege." DE 282 at 10. In 2013 and 2014, the PBGC produced roughly 13,000 of these documents, (roughly 10,000 in response to the Waiver Order and roughly 3,000 because it determined it no longer wished to assert any privileges), such that there remain approximately 17,000 documents to be produced under the March 2016 Order. These numbers are consistent with the PBGC's contemporaneous filings from 2013, including an affidavit by the PBGC's counsel. *See, e.g.*, DE 242-1 at 11 n.14. However, the PBGC now claims that the 17,000 number was inaccurate, and that there are only 13,400 documents remaining for production from this original 30,000 (3,600 less than the 17,000). Plaintiffs have requested an explanation from the PBGC for this disparity, but so far have not received one. We note this discrepancy here to alert the Court that, absent a full production of the 17,000 documents, or a reasonable accounting from the PBGC for the discrepancy with the PBGC's earlier representations, the parties may, regrettably, need to return to the Court for still another ruling.

very disappointed to learn that the PBGC had not begun searching for responsive documents until after the Court's most recent Order.

On March 28, 2016, Plaintiffs declined to agree to a modification of this Court's order, explaining as follows:

> [W]e cannot understand how the PBGC is only now addressing with us the fact that you have more than half a million pages of material related to the Salaried Plan's asset evaluation/audit in your possession. As we noted in Thursday's conference call, the PBGC has been on notice for years regarding our interest in this material and our belief that it is encompassed in the scope of Document Request No. 12 (which we served more than four years ago). We have conferred about the Plan Asset Audit numerous times over the years, and not once have you mentioned that there could be a large amount of responsive material at your disposal. In fact, your representations have suggested the opposite. Moreover, the Parties squarely addressed the issue of timing with the Court last August in briefing Plaintiffs' Rule 37 Motion. At the risk of stating the obvious, the time to raise these issues was then, not now. In fact, we don't understand how you were able to take a position on timing in the August 2015 Rule 37 briefing without having undertaken this review. The PBGC had a duty to have done this preliminary work ahead of the Rule 37 briefing, and to either present the Court and Plaintiffs with informed arguments about why a 30-day production timetable was not feasible, or to prepare itself for the practicalities of complying with Plaintiffs' requested 30-day timeframe.
>
> Additionally, we are not convinced that it is impossible for the PBGC to comply with the Court's Order. It appears that the majority of the materials related to the PBGC's audit of the Plan's assets have already been identified and collected. All then that remains for these is to have them "processed" and "produced," which in reality should consist of simply assigning the documents bates numbers and then electronically transferring them to Plaintiffs. Even with the large amount of materials described in your email, we believe this can be accomplished comfortably in the time frame established by the March 11 Order. As for the remaining documents that have not already been

> identified (which would be limited to Category 4), we do not share your belief that it was unreasonable for the Court to require the PBGC to identify and produce these documents in a 30-day period, especially in light of the considerable protections afforded the PBGC under our October 20, 2014 Stipulated Protective Order (DE 267).

On the evening of March 30, 2016, the PBGC filed the Extension Motion, requesting the Court to rule on the motion *ex parte*. DE 286. This opposition follows.

Argument

In order to receive an extension of time for compliance with this Court's order, the PBGC must demonstrate "good cause." Good cause does not exist here in light of the facts and history of this case.

I. The PBGC Had No Reasonable Grounds to Delay Searching for Documents Responsive to RFP No. 12 Until March 2016

The "primary measure" of "good cause" is a party's diligence. *Inge v. Rock Fin. Corp.*, 281 F.3d 613, 625 (6th Cir. 2002) (internal quotation marks omitted). But, as described above, the PBGC has been anything but diligent here. Indeed, the principal infirmity with the PBGC's extension request is that any problems it has in meeting the current deadline are entirely self-inflicted. Again, the PBGC has been on notice for years that Plaintiffs were seeking, through discovery, documents related to its audit of their pension plan. Plaintiffs served RFP no. 12 upon the PBGC more than four years ago. Over the years since that request was served, the parties conferred numerous times regarding the fact that Plaintiffs

believed that materials related to the audit of their plan's assets needed to be produced pursuant to that request. Moreover, in briefing Plaintiffs' most recent Rule 37 Motion, the parties squarely addressed how much time the PBGC should be given in the event Plaintiffs' motion was granted. Yet, the PBGC's motion makes clear that it did not begin to investigate the amount of responsive documents in its possession or control, or the steps it would need to take to produce such documents, until this past month.

In other words, the dilemma the PBGC finds itself in now is entirely self-inflicted, and courts routinely refuse to find good cause for an extension where the ground for a request is "self-inflicted" delay. *See, e.g.*, *Pub. Loan Co. v. FDIC*, 803 F.2d 82, 87 (3d Cir. 1986) (affirming decision not to grant an extension to a non-diligent party because any prejudice party would suffer from a lapsed deadline resulted from a self-inflicted wound); *see also United States v. Tovar-Sanchez*, No. 88-1403, 1989 U.S. App. LEXIS 23891, at *2-5 (9th Cir. July 7, 1989) (affirming district court ordered finding no "good cause" where ground for requested continuance was the result of "self-inflicted" delay); *CC.Mexicano.US, LLC v. Aero H Aviation, Inc.*, No. 2:14-cv-108, 2015 U.S. Dist. LEXIS 176152, at *11 (D. Nev. Dec. 15, 2015) (no good cause to reopen deadlines where ground for requested continuance was "largely self-inflicted"); *Laws v. Stevens Transp., Inc.*, No. 2:12-cv-544, 2013 U.S. Dist. LEXIS 120088, at *10-11 (S.D. Ohio Aug. 23,

2013) (same); *Chuck Bivens Servs. v. McWane, Inc.*, No. 2:12-cv-200, 2013 U.S. Dist. LEXIS 80316, at *3-4 (S.D. Ohio June 7, 2013) (same); *Mobley v. City of Atlantic City Police Dep't*, No. 97-2086, 1999 U.S. Dist. LEXIS 21121 (D.N.J. June 24, 1999) (same).

The PBGC offers no showing that it exercised the requisite diligence to justify an extension. To the contrary, the PBGC asserts, in a footnote, that it was reasonable to wait to even look for responsive documents until after the March 2016 Order because its obligation to produce such documents in response to RFP no. 12 was supposedly unclear until that Order was issued. *See* DE 286 at 4 n.2. But this post-hoc rationalization cannot constitute good cause, especially given that, as the Court has noted, the Defendant had previously admitted that "the value of a plan's assets and the asset evolution reports are [] 'important' and 'necessary' to calculating benefits and making benefit determinations." DE 282 at 9. In the face of these admissions, the Court has already found that the PBGC's refusal to produce the plan asset audit materials in response to RFP no. 12 was "illogical," and that "ascertaining that documents concerning the audit of the Plan's assets are indeed responsive to Plaintiffs' request for documents related to Defendant's liability for benefit payments under the plan would not require any guesswork; such a determination should be automatic." *Id*.

On the face of this record, the PBGC cannot show that it behaved with the sort of diligence necessary to warrant a finding of good cause. To the contrary, this is a case where the ground for the requested extension is precisely the sort of "self-inflicted" delay that courts have found insufficient. The Extension Motion should be denied on this ground alone.

II. The PBGC Has Failed to Demonstrate that it Cannot Comply With the Current Deadline

The Extension Motion also fails to demonstrate that the PBGC cannot comply with the March 2016 Order. Given the nature of the PBGC's motion, particularly its request for "emergency" relief, the PBGC should be required to clearly and specifically articulate the efforts the PBGC has undertaken to comply with the Court's Order, the obstacles it has encountered, and the justification for the particular relief requested. Additionally, given the history of the PBGC's "illogical" and inconsistent positions on plan asset audit materials in its possession, one would also expect this request to be supported by affidavit. The Extension Motion fails to provide this requisite support.

This failure is particularly problematic because, as Plaintiffs previously pointed out to the PBGC during the meet and confer process, it appears that the majority of the materials related to the PBGC's audit of the Plan's assets have already been identified and collected, meaning that all the PBGC should need to do for these documents is to have them "processed" and "produced," DE 286 at 1,

which in reality should consist of simply assigning the documents bates numbers and then electronically transferring them to Plaintiffs. The PBGC does not directly address this point in its Extension Motion, other than to assert vaguely that "it must have time to confirm that all documents it intends to produce are responsive to the 2016 Order." DE 286 at 6. According to the PBGC, "[f]ailing such a review, there is a risk that some collected documents may be nonresponsive, thus wasting the time plaintiffs will spend reviewing them, and the unreviewed documents may contain sensitive material regarding unrelated cases, and thus should not be disclosed to plaintiffs." *Id*. These unsubstantiated fears should not justify further delay.

In the first place, Plaintiffs are willing to take on the risk of "wasting" time reviewing non-responsive documents, especially when the alternative is to waste another four months waiting for the PBGC to conduct a responsiveness review, the need of which is far from clear. In the second place, the PBGC has offered no reason to expect that there is even a minimal risk that the documents it has collected contain non-responsive documents. Third, the PBGC can avail itself of the protections of the Stipulated Protective Order entered on October 20, 2014. To the extent the PBGC is concerned that materials might contain sensitive information, it can label them as "Protected Documents" while it conducts its responsiveness review so that if the PBGC inadvertently produces unresponsive

documents, those documents will not be generally released and will, upon a proper showing, be returned to the PBGC. Accordingly, the PBGC has failed to demonstrate good cause.

III. Plaintiffs Would Be Prejudiced By the Extension Request's Proposed Modification of The Court's Order

Plaintiffs are a group of retirees who are subsisting on reduced pensions as a result of the PBGC's termination of their pension plan. Every day that the PBGC prolongs the litigation by failing to honor its discovery obligations and comply with the Court's Orders prejudices Plaintiffs by delaying them the opportunity to have their pensions restored. The PBGC argues that Plaintiffs purportedly would not be prejudiced by granting the requested delay because Plaintiffs are also awaiting resolution of their discovery dispute with the U.S. Treasury Department (the "Treasury"). Ironically, the last time that the Treasury sought an extension in that dispute, it argued that Plaintiffs could not claim prejudice because they had already obtained multiple extensions of the discovery deadlines in this case (while failing to mention that these discovery deadlines were necessitated by the PBGC's repeated failures to produce discovery under the preexisting schedule). In other words, the two relevant federal agency actors in this case have each engaged in enormous delay, and then disclaimed any prejudice to Plaintiffs because of additional delays caused by the other. At some point, this cycle must end. Plaintiffs are in many instances elderly retirees and it should be beyond dispute

that additional delays cause them harm, particularly when those delays are caused by the "self-inflicted" conduct of the opposing party.

Conclusion

The Extension Motion should be denied, and the PBGC should be required to comply with the March 2016 Order, as written.

Dated: April 1, 2016

Respectfully submitted,

/s/ Anthony F. Shelley

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2016, I caused the foregoing electronically to be filed 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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