

**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.)	

PBGC’S RESPONSE TO PLAINTIFFS’ MOTION FOR AN ORDER TO SHOW CAUSE

Plaintiffs have filed a Motion for an Order to show cause why PBGC should not be held in violation of this Court’s January 26, 2010 Order, which denied the plaintiffs’ motion for a preliminary injunction (“January 26 Order”). In their Motion, Plaintiffs attempt to rewrite the January 26 Order, and then ask the Court to find that PBGC has violated the terms of their rewritten order. Plaintiff’s Motion should be denied, however, because PBGC has not violated the actual terms of the January 26 Order.

Plaintiffs’ preliminary injunction motion sought an order enjoining PBGC from reducing the ongoing benefit payments from the terminated Delphi Salaried Plan to estimated guaranteed levels. Following briefing and argument, the Court refused to issue the injunction, ruling as follows:

Plaintiffs’ Motion for Preliminary Injunction is **DENIED contingent** on Defendant PBGC setting aside an escrow account containing funds made up of the difference between Plaintiffs’ current benefit levels paid under the Plan and

the reduced level of benefits Plaintiffs are set to begin receiving effective February 1, 2010. Alternatively, Defendant PBGC may file a stipulation with this Court specifying that if this Court finds, after a consideration of the merits of Plaintiffs' complaint, that PBGC improperly terminated the Plan and wrongfully reduced benefits, then the Plaintiffs are entitled in this action to (and will be compensated by PBGC with) the difference between their current benefit levels paid under the Plan and the reduced level of benefits Plaintiffs are set to begin receiving effective February 1, 2010.

Immediately after the Court issued its January 26 Order denying the injunction, 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. PBGC asked the Court to amend its Order to change the contingency to one that PBGC could legally implement, and which would fully protect the plaintiffs' economic interests. On February 17, the Court denied PBGC's request and left its original January 26 Order in place. Importantly, the Court did not alter its denial of plaintiffs' request for a preliminary injunction and, therefore, has not entered any order enjoining PBGC from implementing the required benefit cutbacks to estimated guaranteed levels. PBGC has continued to do so over the last three months.

On March 4, PBGC again informed the Court and the plaintiffs that PBGC could not, consistent with ERISA, implement either of the two contingences in the January 26 Order. PBGC explained, however, that it could stipulate that if termination of the Plan were overturned by a final and non-appealable court order, PBGC would relinquish the Plan and its more than \$2 billion in assets, along with payment and participant records that would allow the administrator to determine and pay the amount of Plan benefits owed to each participant to date.

In their show cause motion, plaintiffs assert that PBGC's actions violate the January 26 Order, which the plaintiffs would rewrite as follows: "the Court ruled that benefit reductions could take place as scheduled on February 1, 2010, **but only if** the PBGC took one of two

steps”¹ Plaintiffs’ rewrite is simply not accurate. Nothing in the Order prohibits PBGC from implementing the benefit reductions required by ERISA. Before plaintiffs can seek to enforce an order against PBGC, there must be “an operative command capable of enforcement.”² And that command, if in substance an injunction, must comply with Rule 65(d) of the Federal Rules of Civil Procedure.³

Contrary to the plaintiffs’ rewrite, in the actual language of the January 26 Order the Court **denied** Plaintiffs’ Motion, subject to the two contingencies. PBGC’s inability to implement either contingency does not result in the motion being granted. As the Supreme Court has stated, a motion for preliminary injunction cannot be granted in the absence of a Rule 65(d) order.⁴ At most, plaintiffs’ preliminary injunction motion remains pending before the Court.

PBGC recognizes the time and effort of both the parties and the Court that has been expended on the preliminary injunction motion. Meanwhile, PBGC’s Motion to Dismiss Counts 1-3 of Plaintiffs’ Complaint and its Motion for Summary Judgment on Count 4 have been fully briefed and are ripe for decision. PBGC therefore suggests that judicial economy would be better served by addressing the substance of those Motions and resolving the ultimate issue in this case -- whether PBGC’s termination of the Salaried Plan satisfied the requirements of ERISA and the Administrative Procedure Act.

¹ Plaintiffs’ Brief in Support at 1.

² *International Longshoremen’s Ass’n, Local 1291 v. Philadelphia Marine Trade Ass’n*, 389 U.S. 64, 74-76 (1967).

³ Fed. R. Civ. P. 65(d)(1) provides: “Every order granting an injunction and every restraining order must: (A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail – and not by referring to the complaint or other document – the act or acts restrained or required.”

⁴ *Id.*

For these reasons, PBGC respectfully requests that the Court deny Plaintiffs' Show Cause Motion.

Date: March 30, 2010

Respectfully submitted,

/s/ Ralph L. Landy
ISRAEL GOLDOWITZ
Chief Counsel
KAREN L. MORRIS
Deputy Chief Counsel
JOHN A. MENKE
Assistant Chief Counsel
RALPH L. LANDY
C. WAYNE OWEN
CRAIG T. FESSENDEN
Attorneys

Local Counsel:

BARBARA L. McQUADE
United States Attorney
PETER A. CAPLAN
Assistant United States Attorney
Eastern District of Michigan
211 West Fort Street, Suite 2001
Detroit, MI 48226
Phone: (313) 226-9784

Attorneys for the Defendant
PENSION BENEFIT GUARANTY
CORPORATION
Office of Chief Counsel
1200 K Street, N.W.
Washington, D.C. 20005
Phone: (202) 326-4020, ext. 6767
Fax: (202) 326-4112
Email: landy.ralph@pbgc.gov and
efile@pbgc.gov

CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2010 , I electronically filed the foregoing
PBGC'S RESPONSE TO PLAINTIFFS' MOTION FOR AN ORDER TO SHOW CAUSE on
all parties using the courts ECF system.

s/Ralph L. Landy
Ralph L. Landy