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

Dennis Black, *et al.*, Plaintiffs, v. Pension Benefit Guaranty Corporation, *et al*., Defendants.	Case No. 2:09-cv-13616 Hon. Arthur J. Tarnow Magistrate Judge Donald A. Scheer

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR ADOPTION OF SCHEDULING ORDER

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In our Motion for Adoption of Scheduling Order, Dkt. No. 152 (the "Scheduling Motion"), Plaintiffs propose a discovery schedule consistent with the Court's ruling that Plaintiffs are entitled to conduct discovery on their claims against the PBGC. *See, e.g.*, Tr. of Mot. to Dismiss and Mot. to Show Cause Hearing ("Tr.") (attached as Ex. B to the Scheduling Motion) at 26:1-3; 31:23-32:4; 37:11-12; 38:12-17; 58:8-59:8; 63:14-25. In proposing that the parties be allowed until June 2011 to complete this discovery, Plaintiffs offer a very reasonable time frame for the parties to assemble a sufficient factual record. This should be the beginning and the end of the discussion. Unfortunately, the PBGC is, again, forcing Plaintiffs to expend their limited resources litigating what should be a routine matter.

In its Response to Plaintiffs' Motion for Adoption of Scheduling Order, Dkt. No. 154 (the "PBGC Response"), the PBGC argues that discovery in this case is "unwarranted." PBGC Response at 1. Of course, given the Court's unambiguous remarks concerning the necessity for discovery on these claims, the PBGC can make this argument only by ignoring the proceedings held on Counts One through Four, and not surprisingly, the PBGC Response never once cites the Court Transcript. Rather the Response argues against the propriety of discovery mainly by regurgitating arguments from the PBGC's dispositive motions. This is plainly inappropriate. The PBGC may not avoid its discovery obligations under the Federal Rules of Civil Procedure merely by restating arguments from its dispositive motions given that those motions were denied, "without prejudice to bringing it back later in the proceedings if the facts don't bear out the claims of the Plaintiff." Tr. at 32:2-4.

While not directly relevant to the resolution of the Scheduling Motion, Plaintiffs are obliged to correct a number of misrepresentations made by the PBGC in its Response. In its Response, the PBGC suggests, for the first time, that the relief sought against it is somehow

inconsistent with "the final order of the [Delphi] Bankruptcy Court." *See* PBGC Response at 2. This argument is plainly meritless, as evidenced by, among other things, the bankruptcy court's July 30, 2010 order, holding that the relief requested in the Second Amended Complaint against the PBGC does not violate "the Modified Plan, the Plan Modification Order, the Enforcement Order or any other order of this Court." Order Granting Am. Mot. of the Salaried Retirees for Order Confirming that Second Am. Compl. Does Not Violate the Modified Plan or the Plan Modification Order at 3 (Ex. B to Dkt. 139). The PBGC did not appeal the bankruptcy court's order.[1]

Similarly, in rearguing its summary judgment motion, the PBGC seriously misconstrues Count Four, arguing that: (1) Count Four only challenges the PBGC's findings under 29 U.S.C. § 1342(a); (2) Plaintiffs supposedly have conceded that Count Four is an "administrative review" claim; and (3) Count Four does not challenge the PBGC's negotiations with entities such as Delphi and GM in resolving the termination of the Salaried Plan. To be clear, Count Four plainly challenges the PBGC's ability to "satisfy the standards for termination of the Salaried Plan under 29 U.S.C.§ 1342(a) *and* (c)," given the "current termination terms it has negotiated and put in place." Second Am. Compl. ¶ 56 (emphasis added). The negotiations challenged include, "among other things: the PBGC's release of its liens against Delphi's foreign assets; its failure to place additional liens against Delphi's foreign assets despite the under-funding of the Salaried Plan; its waiver of actions against Delphi and GM entities; and its failure to obtain

[1] The PBGC makes the remarkable assertion that somehow Plaintiffs are precluded from raising Count Two because the bankruptcy court purportedly ruled on the propriety of terminating the Salaried Plan by agreement. If the bankruptcy court had done so, one wonders why the PBGC never mentioned this supposed fact throughout all of the many pages of dismissal and summary judgment briefing and preliminary injunction briefing already presented to this Court. The reality is that the bankruptcy court made no such findings, and expressly avoided ruling on the propriety of the termination, so that Plaintiffs -- with that court's blessing -- could subsequently challenge the termination here.

additional funding from Old and New GM for the Salaried Plan in exchange for the release of the liens." *Id.* Given the Second Amended Complaint's specific reference to those negotiations and agreements, it is hard to understand the PBGC's assertion that, "[t]hough plaintiffs spend a lot of time complaining about those latter settlement agreements, [with Delphi and GM], they are not challenged in plaintiffs' amended complaint." PBGC Response at 4 n.6. Moreover, the PBGC has already had a chance to argue that the negotiations it undertook with those third parties are irrelevant to Count Four, and this Court has rejected such assertions. *See, e.g.*, Tr. at 58:8-22. Additionally, notwithstanding the PBGC's assertions, Plaintiffs have demonstrated that the PBGC is required, by statute, to make a de novo showing to a court that one of the three statutory criteria (under 29 U.S.C. § 1342(c)) for termination is satisfied, and that in making this showing, the PBGC is not entitled to any deference. *See, e.g.*, Pl. Supp. Br. at 25-31, Dkt. No. 47.

CONCLUSION

This Court denied the PBGC's dispositive motions because it found that discovery was needed. The PBGC Response simply ignores this fact. Now again, the PBGC is forcing Plaintiffs to expend their limited resources in an effort to have the PBGC comply with this Court's rulings. For all the reasons noted in the Scheduling Motion and this Reply, Plaintiffs' proposed scheduling order should be entered by this Court.

Dated: November 19, 2010

Respectfully submitted,

/s/ Anthony F. Shelley

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 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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