

**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 Mona K. Majzoub |
|                               | ) |                                  |
| PENSION BENEFIT GUARANTY      | ) |                                  |
| CORPORATION, <i>et al.</i> ,  | ) |                                  |
|                               | ) |                                  |
| Defendants.                   | ) |                                  |
|                               | ) |                                  |

**PENSION BENEFIT GUARANTY CORPORATION’S MOTION TO  
STRIKE OR, IN THE ALTERNATIVE, DENY PLAINTIFFS’  
MOTION REQUESTING THAT JUDGE MAJZOUB DISSOLVE THE  
PARTIAL STAY OF HER AUGUST 21, 2013 ORDER**

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|---|--|

*Attorneys for the Defendant Pension Benefit Guaranty Corporation*

## **INTRODUCTION**

Pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, Plaintiffs' Motion Requesting Judge Majzoub's Dissolve the Partial Stay of her August 21, 2013 Order – requiring PBGC to disclose its privileged documents by September 30, 2013 – should be struck because plaintiffs are seeking reconsideration of the Court's stay order months after the deadline for pursuing such relief.

Alternatively, the Court should not dissolve the stay because it was correctly ordered and remains appropriate for this case's current posture.

On August 30, 2013 the Pension Benefit Guaranty Corporation ("PBGC") filed an Emergency Motion for Stay Pending Reconsideration of Magistrate Judge Majzoub's August 21 Order (DE #233). After filing its objections to Magistrate Judge Majzoub's Order ("Objections"), PBGC similarly filed an Emergency Motion to Stay the disclosure of these documents until the Court resolved its Objections (DE #235). On September 5, 2013, Magistrate Judge Majzoub issued an order denying PBGC's Motion for Reconsideration, but granting PBGC's Emergency Motion to Stay (DE #237) ("September 5 Stay Order"). The stay was put in place "until such time as Judge Tarnow rules on Defendant PBGC's

objection on the August 21, 2013 order, or until the Court orders otherwise.”<sup>1</sup> The stay was granted “in consideration of the fact that Defendant PBGC has recently filed an objection to the August 21, 2013 order.”<sup>2</sup> Under the applicable Federal and Local Rules, the plaintiffs had 14 days after September 5, 2013 to object or to seek reconsideration of the September 5 Stay Order. In failing to act timely in seeking dissolution of the stay, the Plaintiffs have waived their right to the relief they seek.

### **ARGUMENT**

#### **I. Plaintiffs’ Motion Should Be Struck Because It Is An Out-Of-Time Motion For Reconsideration.**

Rule 12(f) provides, in pertinent part, that “on motion by a party . . . the court may strike from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter.” Although a motion to strike is considered a drastic remedy, courts have “liberal discretion to strike such filings as it deems appropriate under Rule 12(f),” and a motion to strike should be granted “where the relief requested is unavailable.”<sup>3</sup>

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<sup>1</sup> September 5 Order, Dkt. No. 237, filed September 5, 2013.

<sup>2</sup> *Id.*

<sup>3</sup> *Johnson v. Co. of Macomb*, No. 08-10108, 2008 WL 2064968, at \*1 (E.D. Mich., May 13, 2008).

Under Local Rule 7.1(h), a “motion for rehearing or reconsideration must be filed within 14 days after entry of the judgment or order,” and under Fed. R. Civ. P. 72(a), a party must serve and file any objections to a magistrate judge’s pretrial order regarding a non-dispositive matter within 14 days.<sup>4</sup> In failing to timely exercise their rights, plaintiffs have waived their opportunity to overturn the stay.<sup>5</sup>

Now – *five months after Magistrate Judge Mazjoub’s September 5 Stay* – plaintiffs have filed a brief styled as a motion to request the dissolution of the stay. Plaintiffs cite no case law in which a magistrate judge “dissolved” a stay in this procedural posture, months after all deadlines for objection to the stay or its reconsideration have passed.

In reality, plaintiffs’ brief is an untimely motion for reconsideration.

Magistrate Judge Mazjoub’s stay as written remains in force until such time as

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<sup>4</sup> Instead of objecting to the fully-valid stay ordered by Magistrate Judge Mazjoub, Plaintiffs improperly filed a Brief In Opposition to Defendant’s Emergency Motion to Stay Pending Resolution of its Objections to the Magistrate Judge’s Order of August 21, 2013 (DE#240), in which they argued the order created merely an “administrative stay.” The matter is currently pending before the District Judge.

<sup>5</sup> See *Burket v. Hyman Lippitt, P.C.*, Nos. 05-CV-72110-DT, 05-CV-72171-DT, 05-CV-72221-DT, 2006 WL 2309843, at \*1 (E.D. Mich., Aug. 9, 2006) (Mazjoub, J.) (motion for reconsideration was timely because it was filed within 10 days of the decision); *Altman v. Grant Country School Dist.*, No. 2009-185(WOB-JGW), 2012 WL 845294, at \*1 (E.D. Ky., Mar. 12, 2012) (failure to appeal nondispositive issue to district court judge within 14 days as required under Rule 72(a) waives right to object).

Judge Tarnow rules on PBGC's objection to the underlying discovery ruling. Because plaintiffs have waived their right to object or move for reconsideration, the relief requested in this motion is unavailable and should be struck pursuant to Rule 12(f).

**II. In The Alternative, Plaintiffs' Motion Should Be Denied Because The Stay Was Correctly Granted And Remains Appropriate.**

Even if plaintiffs had timely filed a reconsideration motion, their motion should be denied because Magistrate Judge Majzoub's stay is fully enforceable and remains in full effect under the terms of the stay granted.

Plaintiffs mischaracterize Magistrate Judge Majzoub's ruling by calling the relief a "partial stay" (previously they argued it was merely an "administrative stay"), and thus inferring it somehow lacks the force, length and validity of a hypothetical "full stay." Plaintiffs contend that the stay is "no longer appropriate" because it was only meant as a "temporary stopgap" to give Judge Tarnow a short time to review PBGC's objection without the threat of the disclosure of privileged documents. There is nothing in the language of the September 5 Stay Order to suggest that the Magistrate was placing any time limit upon the District Court. Moreover, PBGC has the right under Fed. R. Civ. 72(a) to have its objections considered by the District Court. If the September 5 Stay Order is lifted, PBGC

will be effectively denied that right if it must reveal its privileged documents to the plaintiffs.

In support of their motion, plaintiffs reproduce the same arguments advanced in their Brief In Opposition to Defendant's Emergency Motion to Stay (DE#240) – arguments that the Magistrate properly rejected in the first instance. PBGC's arguments in favor of the stay that the Magistrate granted are set forth in PBGC's briefs in support its original stay motion.<sup>6</sup>

Plaintiffs argue the lack of a resolution of PBGC's objection to the relief they seek has delayed resolution of this case to their detriment. However, in their proceedings before the U.S. District Court for the District of Columbia, plaintiffs informed that Court that their inability to obtain discovery from the Department of Treasury is the cause for the delay of their lawsuit before this Court. In fact, plaintiffs asked PBGC to extend the discovery deadlines in this lawsuit to give them time to obtain discovery from Treasury. And plaintiffs recently asked for and

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<sup>6</sup> See PBGC's Emergency Motion to Stay (DE #233) at 6-7; PBGC's Reply In Support of Emergency Motion for Stay Pending Resolution of its Objections to the Court's Order of August 21, 2013 (DE # 243) at 2-4 (including reference to plaintiffs' use of the *Holt-Orstead* and *Mohawk Indust., Inc.* cases reargued by plaintiffs in the motion at issue here). Copies of these briefs are attached as Exhibits A and B.

received a one-month extension of time for a hearing in the District of Columbia proceeding.

### **CONCLUSION**

Under the same rules that apply to all parties in cases before this Court, Plaintiffs had 14 days to request reconsideration of, or object to, the September 5 Stay Order, just as PBGC did with respect to the August 21 Order. After the 14 days had passed, plaintiffs waived their right to seek modification of the September 5 Stay Order. PBGC respectfully requests that the Court strike or, in the alternative, deny plaintiffs' motion and leave in place the Magistrate's September 5 Stay Order .

Dated: February 19, 2014

Washington, D.C.

Respectfully Submitted:

/s/ C. Wayne Owen, Jr.

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 19, 2014, I electronically filed the foregoing **Pension Benefit Guaranty Corporation's Motion to Strike or, in the Alternative, Deny Plaintiffs' Motion Requesting that Judge Majzoub Dissolve the Partial Stay of Her August 21, 2013 Order** via the court's CM/ECF system which will send notification of such filing to all registered users, including the following:

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# EXHIBIT A

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

|                               |   |                                  |
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| _____                         | ) |                                  |
| DENNIS BLACK, <i>et al.</i> , | ) |                                  |
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| Plaintiffs,                   | ) | Hon. Arthur J. Tarnow            |
|                               | ) | Magistrate Judge Mona K. Majzoub |
|                               | ) |                                  |
| v.                            | ) |                                  |
|                               | ) |                                  |
| PENSION BENEFIT GUARANTY      | ) |                                  |
| CORPORATION, <i>et al.</i> ,  | ) |                                  |
|                               | ) |                                  |
| Defendants.                   | ) |                                  |
| _____                         | ) |                                  |

**PENSION BENEFIT GUARANTY CORPORATION’S  
EMERGENCY MOTION FOR STAY PENDING RECONSIDERATION OF  
THE COURT’S ORDER OF AUGUST 21, 2013**

Defendant PBGC hereby submits an Emergency Motion to Stay Magistrate Judge Majzoub’s Order Granting in Part Plaintiffs’ Rule 37 Motion to Enforce Court Order, dated August 21, 2013 (the “Order”).

On August 30, 2013, PBGC filed a Motion for Reconsideration of the Order on the basis that there are palpable defects in the Order. The Magistrate Judge failed to consider PBGC’s understanding with plaintiffs regarding production of the privilege log, the parties’ report to District Judge Tarnow explaining the parties’ understanding and the Court’s Order acknowledging and approving it, the practicalities of producing the privilege log in a case involving discovery of the magnitude ordered by the Magistrate Judge here, and, in waiving PBGC’s privilege claims, the level of sanction that such a ruling embodies. Correction of these defects will result in a different disposition of the plaintiffs’ motion to compel.

PBGC respectfully requests that the Court stay the Order until resolution of the Motion for Reconsideration.

A brief in support of this motion is attached in accordance with L.R. 7.1.

Dated: August 30, 2013

Respectfully submitted,

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

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DENNIS BLACK, *et al.*,  
  
Plaintiffs,  
  
v.  
  
PENSION BENEFIT GUARANTY  
CORPORATION, *et al.*,  
  
Defendants.

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Case No. 2:09-cv-13616  
Hon. Arthur J. Tarnow  
Magistrate Judge Mona K. Majzoub

**PENSION BENEFIT GUARANTY CORPORATION'S MEMORANDUM IN SUPPORT  
OF ITS EMERGENCY MOTION FOR STAY PENDING RECONSIDERATION OF  
THE COURT'S ORDER OF AUGUST 21, 2013**

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**Statement of Issues**

1. PBGC has legitimate grounds for reconsideration of the Magistrate Judge's Order compelling production of documents for which PBGC claims privileges. The deadline imposed by the Magistrate Judge to comply with her Order effectively eliminates PBGC's ability to have the Magistrate Judge reconsider the Order. If PBGC must comply with the Order before the Order can be reconsidered, PBGC will have waived privilege due to the production of the privileged documents. PBGC's opportunity to seek reconsideration of the Magistrate Judge's Order will be permanently lost, and PBGC will be irreparably harmed as a consequence. Where there is no prejudice to the plaintiffs, should this Court grant a stay pending resolution of PBGC's Motion for Reconsideration of the Magistrate Judge's Order?

**Controlling Authority**

*Baker v. Adams County/Ohio Valley Sch. Bd.*, 310 F.3d 927 (6th Cir. 2002)

*Grutter v. Bollinger*, 247 F.3d 631 (6th Cir. 2001)

*Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150 (6th Cir. 1991).

Local Rule 72.2

### **Statement of Facts**

In its August 21, 2013 Order Granting in Part Plaintiffs' Rule 37 Motion to Enforce Court Order ("Order"), the Court found that PBGC had waived its right to assert attorney-client, work product, and deliberative process privilege claims for certain documents. The Order directed PBGC to produce all of its privileged documents to the plaintiffs by September 30, 2013, along with documents pertaining to plan participant census data and PBGC recoveries.

On August 30, 2013, PBGC moved for reconsideration of the part of the Order requiring PBGC to produce privileged documents. PBGC intends to produce documents relevant to plan participant census data and PBGC recoveries that were the subject of the remainder of the Order.

PBGC now requests that the Court stay the part of the Order requiring production of privileged documents prior to the Court's consideration of PBGC's Motion for Reconsideration.

### **Argument**

#### **I. A Stay Pending Resolution of PBGC's Request for Reconsideration of the Magistrate Judge's Order is Appropriate and Justified.**

A stay is appropriate and proper in this case so that the Court may decide PBGC's Motion for Reconsideration of the Magistrate Judge's Order. In considering whether a stay is appropriate, the Sixth Circuit has stated that courts 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>1</sup>

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<sup>1</sup> *Baker v. Adams County/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>2</sup>

A. PBGC has demonstrated a substantial likelihood of success on the merits.

PBGC contends that the Magistrate Judge’s Order to waive PBGC’s privilege claims contains palpable defects requiring reconsideration. The Order did not take into account the facts – namely that PBGC and plaintiffs have been in regular communication about the status of PBGC’s production of documents, and the parties’ understanding that a privilege log would indeed follow the conclusion of that production. The Order also failed to take into account that the understanding of the parties was embodied in a written report directed to Judge Tarnow, and that he acknowledged and approved of that understanding when he “so ordered” the report and stipulation set forth therein.

Upon final completion of the document review and the production to the plaintiffs, PBGC has worked diligently over the past few months in constructing a detailed privilege log to identify documents being withheld. PBGC has produced the first part of its privilege log to plaintiffs on August 23, 2013, and plans to produce the second part of its privilege log to plaintiffs soon. Given the volume of documents at issue, over one million pages in total produced so far, it was impossible for PBGC to identify with specificity those documents for which it would claim privilege until all documents responsive to the plaintiffs’ document requests had been reviewed and cataloged. The argument made by plaintiffs in their Motion to Compel, and apparently accepted in the Magistrate Judge’s Order, that PBGC must prepare the detailed log of privileged documents described in Fed. R. Civ. P. 26(b)(5) within thirty days after

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<sup>2</sup> *Baker*, 310 F.3d at 928.

receiving the initial discovery request at the pain of waiving privilege ignores the facts of this case. Therefore, given that there is no unjustified delay, inexcusable conduct, or bad faith by PBGC in this case, the draconian sanction that PBGC waived all of its privilege claims while it arduously worked to review and catalog all responsive documents is inappropriate, and PBGC's Motion for Reconsideration is well taken.

B. PBGC will be irreparably injured unless a stay is issued.

Without the stay, the Magistrate Judge's Order will result in PBGC waiving any and all rights to privilege, before PBGC has obtained review of the Order by this Court, or an Appellate Court. Under Local Rule 72.2, the filing of a Motion for Reconsideration does not automatically stay the Magistrate Judge's Order. As a result, because of the short time frame in which to comply with the Magistrate Judge's ruling (by September 30, 2013), PBGC will be left with either releasing all of its privileged documents to the plaintiffs, thus waiving all privilege claims and rendering its Motion for Reconsideration moot, or not complying and facing contempt of the Court. PBGC's potential loss of its right to claim privilege constitutes irreparable harm to PBGC.

C. Plaintiffs will not be substantially injured if a stay is issued.

Plaintiffs will not be substantially injured by a stay pending the resolution of PBGC's Motion for Reconsideration because plaintiffs would not have otherwise been entitled to receive PBGC's privileged documents absent the Magistrate Judge's ruling. And the stay would not delay resolution of this litigation to plaintiffs' detriment. As plaintiffs have repeatedly informed this Court, they believe that they must have document and deposition discovery from the U.S. Department of the Treasury before they can proceed to the merits here. That discovery has been

stayed by, and is the subject of ongoing proceedings in, the U.S. District Court for the District of Columbia,<sup>3</sup> and there is no indication that the Treasury Department discovery issues will be resolved any time soon. The harm to PBGC that results from disclosing privileged documents is substantially outweighed by the harm, if there is any at all, to the plaintiffs in the brief delay while the Court reconsiders its Order.

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>4</sup> Therefore, the public interest weighs heavily in favor of preserving PBGC's rights to claim privilege for documents during the time required for PBGC to request reconsideration of the draconian sanction imposed by the Magistrate Judge's Order.

**Conclusion**

For these reasons, PBGC respectfully requests that the Court stay the Order of August 21, 2013, pending the resolution of PBGC's Motion for Reconsideration.

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<sup>3</sup> See *U.S. Department of Treasury v. Black*, No. 12-00100 (D.D.C. Feb. 17, 2010).

<sup>4</sup> See *Hunt v. Blackburn*, 128 U.S. 464, 470, (1888); *Upjohn Co. v. U.S.*, 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 Assur. Soc'y of the U.S.* 406 F.3d 867, 878-879 (7th Cir. 2005); *NLRB v. Jackson Hosp. Corp.*, 257 F.R.D. 302, 308 (D.D.C. 2009).

Dated: August 30, 2013

Washington, D.C.

Respectfully Submitted:

/s/ C. Wayne Owen, Jr.

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 30, 2013, I electronically filed the foregoing **Pension Benefit Guaranty Corporation's Emergency Motion for Stay Pending Reconsideration of the Court's Order dated August 21, 2013** via the court's CM/ECF system which will send notification of such filing to all registered users, including the following:

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/s/ C. Wayne Owen, Jr.  
C. WAYNE OWEN, JR

# EXHIBIT B

**IN THE UNITED STATES DISTRICT COURT  
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|                               | ) |                                  |
| Defendants.                   | ) |                                  |
|                               | ) |                                  |

**PENSION BENEFIT GUARANTY CORPORATION’S REPLY IN  
SUPPORT OF EMERGENCY MOTION FOR STAY PENDING  
RESOLUTION OF ITS OBJECTIONS TO THE  
COURT’S ORDER OF AUGUST 21, 2013**

|   |   |
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|---|---|

*Attorneys for the Defendant Pension Benefit Guaranty Corporation*

On August 30, 2013, the Pension Benefit Guaranty Corporation (“PBGC”) filed an Emergency Motion for Stay Pending Reconsideration of Magistrate Judge Majzoub’s August 21 Order (DE #233). After filing its objections to Magistrate Judge Majzoub’s Order, PBGC similarly filed an Emergency Motion to Stay the disclosure of the privileged documents until the Court resolved PBGC’s Objections (DE #235). On September 5, 2013, Magistrate Judge Majzoub issued an order denying PBGC’s Motion for Reconsideration, but granting in-part PBGC’s Emergency Motion to Stay (DE #237) (“September 5 Order”). Magistrate Judge Majzoub ruled that PBGC’s initial request for a stay until resolution of the Motion for Reconsideration was moot due to her ruling, but nevertheless granted PBGC the relief requested in its Motion to Stay.<sup>1</sup> Magistrate Judge Majzoub granted the stay explicitly “in consideration of the fact that Defendant PBGC has recently filed an objection to the August 21, 2013 order.” *Id.*

Plaintiffs’ Brief in Opposition to Defendant’s Emergency Motion to Stay (DE #240) (“Opposition”) mischaracterizes the status of this case, arguing as if there were not a stay already in place. Plaintiffs’ in-passing description of Magistrate Judge Majzoub’s ruling as an “administrative stay,” implies that it

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<sup>1</sup> DE #237 at 4 (“[T]he provision of the August 21, 2013 order requiring disclosure of documents withheld on the basis of privilege will be stayed until such time as Judge Tarnow rules on Defendant PBGC’s objection on the August 21, 2013 order, or until the Court orders otherwise.”).



somehow lacks the full force of a “regular” stay. To the contrary, Magistrate Judge Majzoub’s stay granted in the September 5 Order is as fully enforceable as any order granted by a Magistrate Judge of this Court. The Magistrate Judge’s stay may be overturned by this Court only pursuant to a ruling on objections filed by plaintiffs pursuant to Fed. R. Civ. P. 72(a). Plaintiffs have filed no such objections and have, therefore, waived their opportunity to seek to overturn the stay.

Even had the plaintiffs not waived their right to challenge the Magistrate Judge’s stay order, its validity is apparent. The stay should remain in effect until resolution of PBGC’s objections for the reasons explained in detail in PBGC’s opening brief: if PBGC were required to produce the documents at issue before PBGC’s Objections are resolved, PBGC would be forced to waive its right to assert any privilege. The protections afforded to PBGC by the attorney-client, work product, and deliberative process privileges would be permanently lost, and PBGC would be irreparably harmed as a consequence, whereas plaintiffs would not be harmed by merely awaiting this Court’s ruling.<sup>2</sup>

Plaintiffs cite to *Holt-Orsted v. City of Dickson*, 641 F.3d 230 (6th Cir. 2011), for the proposition that immediate disclosure of privileged documents will

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<sup>2</sup> See PBGC’s Emergency Motion to Stay (DE #233) at 6-7.

not irreparably harm PBGC.<sup>3</sup> In *Holt-Orsted*, the Sixth Circuit ruled that it did not have jurisdiction to hear an interlocutory appeal of a magistrate judge's order requiring a party's former attorney to testify over a claim of attorney-client privilege.<sup>4</sup> Importantly, the magistrate judge had ruled the attorney could testify because the court had previously reviewed the privilege claims asserted by the party and ruled that privilege did not protect the information sought.<sup>5</sup> In this case, there has been no Court review of the documents for which PBGC asserts privilege. Moreover, the *Holt-Orsted* court cited *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009) – as did plaintiffs here – for the proposition that circuit courts of appeal will not rule on discovery orders from parties in an interlocutory appeal.<sup>6</sup> But unlike *Holt-Orsted*, this Court does have jurisdiction under Rule 72 to consider PBGC's objections to a magistrate judge's decision.

In fact, rather than holding that forcing a party to reveal its privileged material causes no harm to that party, the Supreme Court and the Sixth Circuit have consistently held that the privileges at issue here are among our legal

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<sup>3</sup> Opposition at 10-11.

<sup>4</sup> *Holt-Orsted*, 641 F.3d. at 232.

<sup>5</sup> *Id.* at 233.

<sup>6</sup> *Id.* at 236-37.

system's most fundamental rights,<sup>7</sup> and that "an erroneous forced disclosure of confidential information [cannot] be adequately remedied on direct appeal because a court cannot restore confidentiality to documents after they are disclosed."<sup>8</sup> A privilege claim "operates to prevent the disclosure itself" and "[m]andatory disclosure [...] is the exact harm the privilege is meant to guard against."<sup>9</sup>

Finally, plaintiffs claim that the stay granted by the Magistrate Judge will cause them harm by delaying the progress of this litigation. But nothing could be farther from the truth. As plaintiffs have repeatedly told both this Court – as recently as this past Monday – and the District Court for the District of Columbia, plaintiffs believe that they must have extensive discovery from the U.S. Department of the Treasury. That discovery has been stayed, and is the subject of ongoing proceedings in the D.C. court. There is no certainty about when and if that discovery will occur.

Plaintiffs' attempts in their Opposition to mischaracterize the Magistrate's ruling and muddle the issue presented by this briefing should not distract the Court from the reality of the current posture: a valid and appropriate stay ordered by

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<sup>7</sup> See, e.g., *Hickman v. Taylor*, 329 U.S. 495 (1947); *In re Lott*, 424 F.3d 446, 449 (6th Cir. 2005).

<sup>8</sup> *In re Professionals Direct*, 578 F.3d 432, 438 (6th Cir. 2009).

<sup>9</sup> *In re Lott*, 424 F.3d 446, 451 (6th Cir. 2005).

Magistrate Judge Majzoub is currently in place until resolution of PBGC’s Objections. In light of the severity of the sanction imposed by the Magistrate Judge’s Order waiving PBGC’s privileges, the Magistrate Judge’s stay pending review by the District Court is appropriate and essential.

**Conclusion**

For these reasons, PBGC respectfully requests that the Court leave in place the stay granted by Magistrate Judge Majzoub pending the resolution of PBGC’s Objections to the August 21 Order.

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Washington, D.C.

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 3, 2013, I electronically filed the foregoing **Pension Benefit Guaranty Corporation's Reply in Support of Emergency Motion for Stay Pending Resolution of Its Objections to the Court's Order of August 21, 2013** via the court's CM/ECF system which will send notification of such filing to all registered users, including the following:

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