

**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,	)	
	)	
Defendant.	)	
	)	

**PLAINTIFFS’ UNOPPOSED MOTION TO  
EXTEND DISCOVERY DEADLINES**

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**STATEMENT OF ISSUE PRESENTED**

Whether the Court should grant Plaintiffs' unopposed motion to extend the discovery deadlines in this case, given that the PBGC has an objection pending from Magistrate Judge Majzoub's August 21, 2013 order compelling the production of certain documents (the production of which has been stayed in the meantime), and the United States Treasury has a motion to quash pending before the United States District Court for the District of Columbia concerning discovery Plaintiffs originally requested in January 2012 and August 2013.

**STATEMENT OF COMPLIANCE WITH L.R. 7.1(a)**

On March 13, 2014, counsel for the parties conferred by telephone concerning the relief requested in this motion, during which counsel for the PBGC advised that the PBGC does not oppose the relief requested herein.

**STATEMENT OF RELEVANT AUTHORITY**

1. Fed. R. Civ. P. 16(b)(4) -- a scheduling order should be “modified only for good cause and with the judge’s consent.”
2. *Marcilis v. Twp. of Redford*, 693 F.3d 589, 597 (6th Cir. 2012) -- Good cause to modify a scheduling order exists where “a deadline cannot reasonably be met despite the diligence of the party seeking the extension.”

## **INTRODUCTION**

Under the current discovery schedule in this case, fact discovery is to be completed by April 1, 2014, and dispositive motions are to be filed by May 1, 2014. ECF No. 244 at 2. However, there are two long-standing discovery disputes that are unlikely to be resolved prior to the close of discovery: one pending before this Court, involving the PBGC's appeal of an order compelling production of discovery that was originally requested in 2011; and the other pending before the United States District Court for the District of Columbia, involving a motion by the U.S. Department of Treasury ("Treasury") to quash a January 2012 Rule 45 document subpoena, and an August 2013 deposition subpoena.

Because the outstanding discovery is important to a determination of whether the Delphi Salaried Plan needed to be terminated in July 2009 pursuant to 29 U.S.C. § 1342(c), Plaintiffs request that the Court extend the discovery schedule to allow time for both of the pending discovery disputes to be resolved and for Plaintiffs to receive and review any outstanding discovery to which they are entitled. In order to achieve this result, Plaintiffs request this Court grant an interim extension of the current discovery schedule by two months, and that it hold a scheduling conference with the Parties in the near future to help arrive at a more concrete discovery schedule. Counsel for the PBGC has confirmed that the PBGC does not oppose this relief.

## **Background**

### **A. The September 1, 2011 Order**

On September 1, 2011 this Court entered an Order clarifying the scope of discovery in this case, and establishing certain deadlines related to the resolution of Plaintiffs' Second Amended Complaint.<sup>1</sup> ECF No. 193 (the "September 1, 2011 Order"). Under the terms of the September 1, 2011 Order, all discovery related to claims 1-4 was to be completed by April 30, 2012, and all dispositive motions related to claims 1-4 were to be filed by May 31, 2012.<sup>2</sup> *Id.* at 7.

### **B. The 2011 Discovery Requests to the PBGC**

Plaintiffs promptly served the PBGC with two sets of document requests, on September 23, 2011 and October 14, 2011 respectively, containing a total of seventeen categories of documents (the "2011 Discovery Requests"). The PBGC disagreed that Plaintiffs were entitled to any discovery under the September 1, 2011 Order, resulting in Plaintiffs' Second Motion to Compel Discovery from the PBGC ("Plaintiffs' Second Motion to Compel"). ECF No. 197. On March 9, 2012, Magistrate Judge Majzoub granted Plaintiffs' Second Motion to Compel,

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<sup>1</sup> The September 1, 2011 Order followed an almost year-long discovery dispute between the Parties in which the PBGC asserted that Plaintiffs were not entitled to conduct any discovery. *See, e.g.*, ECF No. 154.

<sup>2</sup> While the PBGC asked the Court to reconsider its September 1, 2011 Order, or in the alternative, to certify it for appeal, *see* ECF No. 194, the Court denied the PBGC's motion. ECF No. 195.

ordering the PBGC to produce full and complete responses to Plaintiffs' Document Requests 2-17 by June 7, 2012.<sup>3</sup> ECF No. 204.

Given that the discovery schedule was set to close before the PBGC's document production would be complete, the Parties agreed to enter into a stipulated order extending the discovery deadlines in the case. ECF No. 212. As 2012 progressed, the PBGC reported additional difficulties in being able to meet production deadlines, and the Parties entered into additional stipulations to further extend the deadlines. *See* ECF Nos. 215, 217.

In 2013, yet another discovery dispute emerged between the Parties concerning the 2011 Discovery Requests, relating to the PBGC's decision to withhold: (a) actuarial data and (b) approximately 29,000 documents on the basis of privilege without providing a privilege log. *See* ECF No. 218 ("Plaintiffs' Rule 37 Motion to Enforce Court Order"). In August 2013, Magistrate Judge Majzoub granted Plaintiffs' Rule 37 Motion to Enforce Court Order, ordering the PBGC to produce the disputed documents to Plaintiffs by September 30, 2013 (the "Waiver Order"). ECF No. 231 at 8. In response, the PBGC filed a motion for reconsideration of the Waiver Order (ECF No. 232), objections to the Waiver

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<sup>3</sup> The PBGC filed objections to the March 9, 2012 Order pursuant to Fed. R. Civ. P. 72 (the "First Rule 72 Objections"). ECF No. 209. The First Rule 72 Objections remain pending.

Order pursuant to Fed. R. Civ. P. 72 (the “Second Rule 72 Objections”) (ECF No. 234), an emergency motion for stay pending resolution of the motion for reconsideration (ECF No. 233), and an emergency motion for stay pending resolution of the Second Rule 72 Objections (ECF No. 235). The motion for reconsideration and its associated emergency stay motion were referred to Magistrate Judge Majzoub on September 5, 2013, *see* ECF No. 236, who denied the PBGC’s motion for reconsideration, but partially granted the emergency motion for stay pending reconsideration “until such time as Judge Tarnow rules on Defendant PBGC’s objection to the August 21, 2013 order, or until the Court orders otherwise.” ECF No. 237 at 4.

In the midst of these various discovery disputes, the Parties agreed to additional extensions of the discovery period in 2013. *See* ECF Nos. 222, 225, 229, 241, and 244. Under the last Stipulated Order, Discovery is to be completed by April 1, 2014 and dispositive motions are to be filed by May 1, 2014. ECF No. 244 at 2. On February 5, 2014, Plaintiffs filed a motion to dissolve the partial stay entered by Magistrate Judge Majzoub on production of the documents associated with the Waiver Order. ECF No. 245. That motion, along with the PBGC’s First and Second Rule 72 Objections, and the PBGC’s second emergency motion for stay, all remain pending before the Court.



### C. The Treasury Subpoenas

In January 2012, Plaintiffs served the Treasury with a subpoena pursuant to Fed. R. Civ. P. 45, asking the Treasury to produce relevant documents received, produced, or reviewed by three former Treasury officials (the “Document Subpoena”). The Treasury filed a motion to quash the Document Subpoena in the United States District Court for the District of Columbia (the “D.C. Court”) on February 17, 2012 (the “First Motion to Quash”), on the grounds that it is supposedly unreasonably cumulative, duplicative, and burdensome in light of the documents’ potential benefits to Plaintiffs. *See Treasury v. Black*, Case No. 1:12-mc-00100-EGS (D.D.C.) (“*Treasury v. Black*”), DE 1. In its reply brief, the Treasury modified its arguments to incorporate relevance arguments that had recently been raised by the PBGC in its first Rule 72 Objections. *Treasury v. Black*, DE 10.

On May 17, 2012 the D.C. Court entered a minute order stating that:

Upon review of the motion to quash, the response, and the reply thereto, it appears to the Court that a threshold issue in this matter is whether the court in the underlying action has permitted discovery regarding the factors enunciated in 29 U.S.C. 1342(c). In light of the fact that this precise issue is ripe for resolution before Judge Tarnow, the judge in the underlying action, the Court hereby STAYS this matter pending Judge Tarnow’s resolution of PBGC’s Objections to Magistrate Judge’s Order of March 9, 2012 Granting Plaintiffs’ Motion to Compel Discovery, Case 09-13616 (E.D. Mich.), Doc. No. 209. Plaintiffs are directed to notify this Court of Judge Tarnow’s decision within five calendar days after it issues. This Order is

subject to reconsideration for good cause shown. Any motion for reconsideration shall be filed by no later than May 31, 2012.

On August 13, 2013, Plaintiffs filed a motion in the D.C. Court to lift the stay (*Treasury v. Black*, DE 11), arguing that its continued imposition was no longer appropriate. On August 21, 2013, Plaintiffs served the Treasury with a second subpoena (the “Deposition Subpoena”), asking the Treasury to produce one or more deponents competent to testify as to certain relevant communications of two former Treasury officials. *See Treasury v. Black*, DE 13-4.

On September 16, 2013, the Treasury filed a renewed motion to quash (the “Renewed Motion to Quash”) (*Treasury v. Black*, DE 15), asking the Court to quash both the Document Subpoena and the Deposition Subpoena (collectively, the “Subpoenas”). In its Renewed Motion to Quash, the Treasury asserts the same grounds as in the First Motion to Quash, and adds an argument that Plaintiffs lack standing to pursue their claims against the PBGC in the case before this Court. The Renewed Motion to Quash was fully briefed on November 19, 2013. On December 9, 2013, Plaintiffs filed an unopposed motion for hearing on the Treasury’s Renewed Motion to Quash. *Treasury v. Black*, DE 22. The D.C. Court initially scheduled the hearing to occur on March 5, 2014; however, owing to scheduling conflicts, the hearing has been rescheduled for April 7, 2014.

## ARGUMENT

### **II. AN EXTENSION OF THE SCHEDULING ORDER IS APPROPRIATE**

The Federal Rules of Civil Procedure allow for a scheduling order to be modified “for good cause and with the judge’s consent.” Fed. R. Civ. P. 16(b)(4). Good cause exists where “a deadline cannot reasonably be met despite the diligence of the party seeking the extension.” *Marcilis v. Twp. of Redford*, 693 F.3d 589, 597 (6th Cir. 2012) (internal citations and quotations omitted). “An ‘important consideration for a district court deciding whether Rule 16’s good cause standard is met is whether the opposing party will suffer prejudice by virtue of the amendment.’” *Id.* (quoting *Leary v. Daeschner*, 349 F.3d 888, 906 (6th Cir. 2003)). Under this standard, there is clearly good cause to extend the scheduling order in this case.

As described above, despite Plaintiffs’ diligent efforts, the current deadlines cannot reasonably be met. Again, Plaintiffs initiated the discovery at issue years ago, in late 2011 and early 2012, and Plaintiffs have consistently sought to move the discovery forward in both this Court and the D.C. Court. *See, e.g.*, ECF No. 197 (Plaintiffs’ Second Motion to Compel); ECF No. 213 (Plaintiffs’ notice to the Court regarding the stay in the DC Court pending resolution of the PBGC’s First Rule 72 Objections); ECF No. 216 (Plaintiffs’ supplemental discovery statement to the Court regarding the discovery dispute with the Treasury); ECF No. 218

(Plaintiffs' Rule 37 Motion to Enforce Court Order); ECF No. 228 (Parties' Joint Request for Resolution of the PBGC's Rule 72 Objections); ECF No. 230 (Plaintiffs' second supplemental discovery statement to this Court noting that Plaintiffs had moved to lift the stay in the DC Court); ECF No. 240 (Plaintiffs' opposition to the PBGC's emergency request for stay); ECF No. 245 (Plaintiffs' Motion to Dissolve the Partial Stay of the August 21, 2013 Order).

Moreover, the PBGC does not oppose this motion, and will not suffer any prejudice from an extension of the deadlines to allow for the resolution of the pending discovery disputes. Indeed, the dispute pending before this Court is only delaying the progress of the litigation by virtue of the Partial Stay entered by Magistrate Judge Majzoub on September 5, 2013 (ECF No. 237), a stay that the PBGC advocated for and subsequently defended by arguing that the "stay would not delay resolution of this litigation to plaintiffs' detriment." ECF No. 233 at 6; *see also* ECF No. 243 at 4.

Plaintiffs have vigorously and conscientiously pursued discovery for the last four years; as such, Plaintiffs respectfully request that the extension be granted.

**III. THE COURT SHOULD ENTER AN INTERIM EXTENSION OF THE DISCOVERY DEADLINES TO BE FOLLOWED BY A SCHEDULING CONFERENCE TO SET MORE PERMANENT DATES; ALTERNATIVELY, IF THE COURT IS NOT INCLINED TO HOLD A SCHEDULING CONFERENCE, A LONGER EXTENSION IS WARRANTED**

The Plaintiffs propose that the Court enter an interim two-month extension of the discovery deadlines at this time, to assure that the discovery process does not suffer any further interruption resulting in additional delays,<sup>4</sup> and then hold a scheduling conference with the Parties to help ascertain a more permanent discovery schedule to govern the remainder of the case.

Under this interim extension:

1. All discovery related to claims 1-4 shall be served in time to be completed by June 2, 2014.
2. The Parties shall provide an updated list of all witnesses, lay and expert, by May 5, 2014.
3. All discovery motions related to claims 1-4 shall be filed by May 19, 2014.
4. All dispositive motions related to claims 1-4 shall be filed no later than July 1, 2014.

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<sup>4</sup> As noted above, the D.C. Court will hold a hearing on April 7, 2014 on Plaintiffs' discovery dispute with the Treasury.

Plaintiffs believe that the appropriate, more permanent discovery schedule in this case will depend upon the resolution of:

- a. The PBGC's First Rule 72 Objections to Magistrate Judge Majzoub's March 9, 2012 Order Granting Plaintiffs' Motion to Compel (ECF No. 209);
- b. The PBGC's Second Rule 72 Objections to Magistrate Judge Majzoub's Order of August 21, 2013 Granting in Part Plaintiffs' Rule 37 Motion to Enforce Court Order (ECF No. 234);
- c. The PBGC's Emergency Motion for Stay Pending Resolution of its Second Rule 72 Objections (ECF No. 235);
- d. Plaintiffs' Motion to Dissolve the Partial Stay of Judge Majzoub's August 21, 2013 Order (ECF No. 245); and
- e. The D.C. Court's resolution of Plaintiffs' discovery dispute with Treasury.

Thus, the purpose of the proposed scheduling conference would be to discuss the disposition of the aforementioned filings in an effort to craft a more permanent scheduling order. If, however, the Court is not inclined to hold a scheduling conference at this time, Plaintiffs request the Court grant a longer extension of the discovery period sufficient to allow for the resolution of the pending discovery disputes, as well as the production, review, and follow-up arising from that resolution.

**CONCLUSION**

The Court should extend by at least two months the discovery schedule to allow for the resolution of the still-pending discovery matters.

Dated: March 14, 2014

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 14, 2014, 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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