

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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<b>U.S. DEPARTMENT OF THE</b>	)	<b>No. 1:12-mc-00100-EGS</b>
<b>TREASURY,</b>	)	<b>PETITIONER'S CROSS MOTION FOR</b>
	)	<b>EXTENSION OF TIME</b>
<b>Petitioner,</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>PENSION BENEFIT GUARANTY</b>	)	
<b>CORPORATION,</b>	)	
	)	
<b>Interested Party,</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>DENNIS BLACK, et al.,</b>	)	
	)	
<b>Respondents.</b>	)	
	)	

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Petitioner U.S. Department of the Treasury hereby moves for an order extending through August 14, 2015, its time to file its response to respondents' motion to compel (ECF No. 30) and denying respondents' motion to expedite (ECF No. 31). The grounds for Treasury's motion are set forth in the memorandum submitted herewith. Counsel for respondents advises that he opposes any extension of Treasury's time to respond to respondents' motion to compel.

Respectfully Submitted,

BENJAMIN C. MIZER  
Principal Deputy Assistant Attorney General  
VINCENT H. COHEN, JR.  
Acting United States Attorney  
JACQUELINE COLEMAN SNEAD  
Ass't Branch Dir., Dep't of Justice, Civ. Div.

s/ David M. Glass

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Email: david.glass@usdoj.gov  
Attorneys for Petitioner

Dated: July 12, 2015

**CERTIFICATE OF SERVICE**

I hereby certify that on July 12, 2015, I served the within motion, the memorandum in support of the motion, the exhibits to the motion, and the proposed order on all counsel of record by filing them with the Court by means of its ECF system.

s/ David M. Glass

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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	)	No. 1:12-mc-00100-EGS
<b>U.S. DEPARTMENT OF THE TREASURY,</b>	)	<b>MEMORANDUM IN SUPPORT OF PETITIONER'S CROSS MOTION FOR EXTENSION OF TIME AND IN OPPOSITION TO RESPONDENTS' MOTION TO EXPEDITE</b>
<b>Petitioner,</b>	)	
<b>v.</b>	)	
)	)	
<b>PENSION BENEFIT GUARANTY CORPORATION,</b>	)	
)	)	
<b>Interested Party,</b>	)	
)	)	
<b>v.</b>	)	
)	)	
<b>DENNIS BLACK, et al.,</b>	)	
)	)	
<b>Respondents.</b>	)	
	)	

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**PRELIMINARY STATEMENT**

Respondents Dennis Black, Charles Cunningham, Kenneth Hollis, and Delphi Salaried Retiree Association have filed a motion to compel petitioner U.S. Department of the Treasury (Treasury) to produce all material that Treasury has withheld pursuant to claim of privilege from more than 900 documents. Respondents have also filed a motion to expedite by which they seek to limit to eight calendar days the time of Treasury to respond to respondents' motion to compel. No reason exists, however, why Treasury should not be given the opportunity to defend its privilege claims with the clarity and detail that those claims require. Respondents' motion to expedite should therefore be denied and Treasury should be given through August 14, 2015, to file its response to respondents' motion to compel.

## STATEMENT OF FACTS

This action involves two subpoenas of this Court issued to Treasury by respondents. One of the subpoenas (Document Subpoena) asks Treasury to produce documents allegedly relevant to the claim against interested party Pension Benefit Guaranty Corporation (PBGC) that respondents assert in *Black v. PBGC*, No. 2:09-cv-13616-AJT-MKM (E.D. Mich.) (*Black I*). ECF No. 1 at 230-31. The other subpoena (Deposition Subpoena) asks Treasury to produce one or more deposition witnesses pursuant to Fed. Civ. P. 30(b)(6) to testify about matters allegedly relevant to respondents' claim against PBGC. ECF No. 13-4 at 7. Respondents' claim against PBGC involves the agreement into which PBGC entered in 2009 with Delphi Corporation (Delphi) to terminate the defined-benefit pension plan maintained at one time by Delphi for certain of its salaried employees. ECF No. 1 at 109-14.

By memorandum opinion dated June 19, 2014, this Court denied Treasury's renewed motion to quash the two subpoenas. ECF No. 27 at 1. On November 4, 2014, the Court approved a stipulation and order providing as follows:

(1) Treasury would be considered to have complied in full with the Document Subpoena if it conducted certain specific searches for records and "produced to Counsel all non-privileged portions of all documents responsive to the Document Subpoena located as a result of those searches";

(2) Treasury would use its best efforts to make its final production of documents under the stipulation and order within 135 days of the date upon which the stipulation and order was approved by the Court;

(3) Treasury would have 60 days from the date of its final production of documents under the stipulation and order "to provide counsel with a privilege log covering all documents or

portions of documents encompassed by this stipulation and order but withheld pursuant to claim of privilege”; and

(4) the Deposition Subpoena would be “withdrawn with prejudice contingent upon the appearance of Matthew A. Feldman and Harry J. Wilson for deposition by respondents in connection with their prosecution of *Black I.*” ECF No. 29 ¶¶ 2, 4, 7, 19. Messrs. Feldman and Wilson worked on the restructuring of General Motors in 2009 as employees of Treasury but now work in the private sector.

Treasury completed its production of documents under the stipulation and order on March 31, 2015. Ex. A at 1.<sup>1</sup> More than 3500 documents were produced without redaction. See ECF No. 31 at 5. Twelve hundred seventy-three documents or portions of documents were withheld pursuant to claim of privilege under one or more of the following privileges: the presidential communications privilege, the deliberative process privilege, the attorney-client privilege, or the work product doctrine. ECF No. 30-2 at 2-58.

By email dated June 1, 2015, Treasury produced a privilege log covering 768 of the documents withheld in whole or part pursuant to claim of privilege. Ex. B. By email dated June 10, 2015, Treasury produced a privilege log covering the additional 505 documents withheld in whole or part pursuant to claim of privilege. Ex. C.

On July 2, 2015, the parties agreed that the deposition of Mr. Feldman would take place in New York, New York, on July 27, 2015, and that the deposition of Mr. Wilson would take place in White Plains, New York, on August 7, 2015. On July 9, 2015, respondents moved to compel Treasury to produce 917 of the documents withheld in whole or part pursuant to claim of privilege. ECF No. 30 at 1; ECF No. 30-1 at 2-23. By motion to expedite filed on July 10, 2015, respondents moved to make July 17, 2015, the deadline for Treasury’s response to respondents’

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<sup>1</sup> References to exhibits are to the exhibits to this motion.

motion to compel instead of July 27, 2015, the deadline under LCvR 7(b) and Fed. R. Civ. P. 6(a)(1)(C) and (d).

## **ARGUMENT**

### **RESPONDENTS' MOTION TO EXPEDITE SHOULD BE DENIED AND TREASURY SHOULD BE GIVEN THROUGH AUGUST 14, 2015, TO FILE ITS RESPONSE TO RESPONDENTS' MOTION TO COMPEL.**

Treasury should be given through August 14, 2015, to file its response to respondents' motion to compel. As is customary when challenges are made to claims of privilege asserted by the government, Treasury anticipates responding to respondents' motion to compel by filing a memorandum of law supported by declarations from those components of the Executive Branch having equities in the documents that are the subject of that motion. Those components are Treasury and, in the case of the documents as to which a claim of privilege has been asserted under the presidential communications privilege, the White House. Respondents' motion to compel seeks to invalidate claims of privilege asserted as to more than 900 documents. ECF No. 30-1 at 2-23. For that reason alone, the drafting, coordination, and review of the Treasury and White House declarations that Treasury anticipates filing is likely to take most, if not all, of the time available to Treasury under LCvR 7(b) and Fed. R. Civ. P. 6. A memorandum of law to which the declarations will be exhibits will also have to be prepared and all of these materials will have to be drafted and finalized at the same time that Treasury is preparing for and defending the Feldman and Wilson depositions. Treasury therefore asks that it be given through August 14, 2015, to file its response to respondents' motion to compel. August 14 is seven days after the end of the Feldman and Wilson depositions and 18 days after the deadline for the filing of Treasury's response to respondents' motion to compel that Treasury would have under LCvR 7(b) and Fed. R. Civ. P. 6.

Respondents ask that Treasury be given less than half of the time that it would have under LCvR 7(b) and Fed. R. Civ. P. 6 to file its response to respondents' motion to compel. ECF No. 31-1. That request should be denied. Respondents claim that they need to obtain immediately the material that Treasury has withheld pursuant to claim of privilege so that they can use that material to depose Messrs. Feldman and Wilson before the discovery deadline in *Black I* expires. ECF No. 31 at 7. Respondents, however, have already obtained multiple extensions of the discovery deadline in *Black I*. See Ex. D at 1, 9 (motion of respondents to establish July 1, 2011, as the discovery deadline in *Black I*); Ex. E at 6, 7 (granting respondents' aforesaid motion but establishing April 30, 2012, as the discovery deadline in *Black I*); Ex. F at 2, 3 (extending the discovery deadline in *Black I* through September 30, 2012); Ex. G at 2 (extending the discovery deadline through April 30, 2013); Ex. H at 2 (extension of the deadline through July 31, 2013); Ex. I at 2 (extension through October 31, 2013); Ex. J at 2 (extension through February 1, 2014); Ex. K at 2, 3 (extension through April 1, 2014); Ex. L at 1, 2 (extension through June 2, 2014); Ex. M at 2, 3 (extension for 90 days "following the resolution of the 2013 Rule 72 Objections"); Ex. N at 1, 2 (extension through July 31, 2015); Ex. O at 1-2 (extension through August 14, 2015).

The reason given by respondents for the most recent extension of the discovery deadline in *Black I* was to "allow time to resolve any privilege disputes arising from the Treasury's privilege log, and to account for the depositions of Matthew Feldman and Harry Wilson." Ex. P at 5. Respondents admit that no impediment exists to their seeking another extension of the deadline, saying merely that "they wish to avoid doing so if at all possible." ECF No. 31 at 7. Treasury has already expressed its willingness postpone the Feldman and Wilson depositions pending the resolution of respondents' motion to compel. Ex. Q at 1. No reason therefore exists

why respondents ought not to take whatever steps are required to obtain a further extension of the discovery deadline in *Black I* that will permit Treasury to respond to respondents' motion to compel with the care that that motion demands; permit this Court to resolve that motion and its earliest convenience; and permit respondents to depose Messrs. Feldman and Wilson after that motion is resolved, thereby ensuring that neither individual has to be deposed by respondents again.

### **CONCLUSION**

For the foregoing reasons, Treasury's cross motion for extension of time should be granted and respondents' motion to expedite should be denied.

Respectfully Submitted,

BENJAMIN C. MIZER  
Principal Deputy Assistant Attorney General  
VINCENT H. COHEN, JR.  
Acting United States Attorney  
JACQUELINE COLEMAN SNEAD  
Ass't Branch Dir., Dep't of Justice, Civ. Div.

s/ David M. Glass  
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Attorneys for Petitioner

Dated: July 12, 2015

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

	)	No. 1:12-mc-00100-EGS
<b>U.S. DEPARTMENT OF THE TREASURY,</b>	)	<b>EXHIBITS TO PETITIONER'S CROSS MOTION FOR EXTENSION OF TIME</b>
<b>Petitioner,</b>	)	
)	)	
<b>v.</b>	)	
)	)	
<b>PENSION BENEFIT GUARANTY CORPORATION,</b>	)	
)	)	
<b>Interested Party,</b>	)	
)	)	
<b>v.</b>	)	
)	)	
<b>DENNIS BLACK, et al.,</b>	)	
)	)	
<b>Respondents.</b>	)	
	)	

- Ex. A        Letter Kathleen Cochrane to Michael N. Khalil (Mar. 31, 2015)
- Ex. B        Email David Glass to Michael N. Khalil (June 1, 2015)
- Ex. C        Email Kathleen Cochrane to Michael N. Khalil (June 10, 2015)
- Ex. D        *Black v. Pension Benefit Guaranty Corp.*, No., 2:09-cv-13616-AJT-MKM (E.D. Mich.) (*Black I*), Plaintiffs' Motion for Adoption of Scheduling Order, with Exhibit List & Ex. A (Oct. 28, 2010)
- Ex. E        *Black I*, Order Sustaining Plaintiffs' Objections [172] to Magistrate Judge's Scheduling Order, Granting Plaintiff's [sic] Motion for Adoption of Scheduling Order [152], Administratively Terminating PBGC's Motion for Protective Order [178], Administratively Terminating Plaintiffs' Motion to Compel Discovery [179], and Entering Scheduling Order (Sept. 1, 2011) (also filed in this action as ECF No. 15-4)
- Ex. F        *Black I*, Stipulated Order Amending September 1, 2011 Scheduling Order (Apr. 20, 2012)
- Ex. G        *Black I*, Stipulated Order Regarding Discovery Deadlines (Oct. 5, 2012)
- Ex. H        *Black I*, Stipulated Order Regarding Discovery Deadlines (Mar. 13, 2013)

- Ex. I        *Black I*, Stipulated Order Regarding Discovery Deadlines (June 18, 2013)
- Ex. J        *Black I*, Stipulated Order Regarding Discovery Deadlines (Oct. 10, 2013)
- Ex. K        *Black I*, Stipulated Order Regarding Discovery Deadlines (Dec. 17, 2013)
- Ex. L        *Black I*, Interim Scheduling Order (Mar. 19, 2014)
- Ex. M        *Black I*, Stipulated Order (May 20, 2014)
- Ex. N        *Black I*, Revised Scheduling Order (Feb. 10, 2015)
- Ex. O        *Black I*, Revised Scheduling Order (June 10, 2015)
- Ex. P        *Black I*, Plaintiffs' Unopposed Motion to Modify Discovery Deadlines (June 6, 2015)
- Ex. Q        Email string ending with David Glass to Michael N. Khalil (July 9, 2015)

*U.S. Dep't of the Treas. v. Pension Benefit  
Guar. Corp.*

No. 1:12-mc-00100-EGS

Pet. Cross Mot. Ext. Time

Ex. A



DEPARTMENT OF THE TREASURY  
WASHINGTON, D.C. 20220

**BY FEDERAL EXPRESS  
FOR DIRECT DELIVERY TO MR. OWEN**

Michael N. Khalil, Esq.  
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655 15th Street, N.W., Suite 900  
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(202) 626-5937  
mkhalil@milchev.com

C. Wayne Owen  
Assistant Chief Counsel  
Office of the Chief Counsel  
Pension Benefit Guaranty Corporation  
1200 K Street, N.W., 3d Floor  
Washington, D.C. 20005  
(202) 326-4000, ext. 3204  
owen.wayne@pbgc.gov

March 31, 2015

Re: *U.S. Dep't of the Treas. v. Black*, No. 1:12-mc-00100-EGS (D.D.C.)

Dear Counsel:

The documents on the enclosed disc are hereby produced to you pursuant to the stipulation and protective order concerning respondents' subpoenas to petitioner dated November 4, 2014 (ECF No. 29). This is our final document production under the stipulation and order.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Kat Cochrane".

Kathleen Cochrane

Encl.

cc (w/encl.):

David M. Glass  
Senior Trial Counsel  
Department of Justice, Civil Division

20 Massachusetts Avenue, N.W. Room 7200  
Washington, D.C. 20530  
(202) 514-4469  
[david.glass@usdoj.gov](mailto:david.glass@usdoj.gov)

*U.S. Dep't of the Treas. v. Pension Benefit  
Guar. Corp.*

No. 1:12-mc-00100-EGS

Pet. Cross Mot. Ext. Time

Ex. B

**Glass, David (CIV)**

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**From:** Glass, David (CIV)  
**Sent:** Monday, June 01, 2015 8:18 PM  
Michael N. Khalil (mkhalil@milchev.com); John A. Menke (menke.john@pbgc.gov); Michael S. Schachter (mschachter@willkie.com)  
**Subject:** Black: Privilege Log & Depositions  
**Attachments:** Treas. Priv. Log (Docs. 1-768) (June 1, 2015).pdf

Mike/John –

Attached is a privilege log covering 768 of the documents from which Treasury has made withholdings. Because of a processing error, Treasury's contractor is continuing to work on a draft privilege log covering the other documents from which Treasury has made withholdings, which are estimated currently to total approximately 650. We propose to provide you with that log on or before June 10. We also propose to provide you at that time with any material initially marked as privileged that we have determined not to be privileged and are no longer withholding. I apologize for the delay and can give you further information if you wish.

Mike Schachter advises that Matthew Feldman will be available for deposition on July 22 and that Harry Wilson will be available for deposition on July 23 from 9 a.m. to 1 p.m., provided that those four hours constitute the entirety of his deposition. Please let me know if those dates and times and that limitation are acceptable.

Thanks, David

cc: Mike Schachter

*U.S. Dep't of the Treas. v. Pension Benefit  
Guar. Corp.*

No. 1:12-mc-00100-EGS

Pet. Cross Mot. Ext. Time

Ex. C

**Glass, David (CIV)**

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**From:** Kathleen.Cochrane@treasury.gov  
**Sent:** Wednesday, June 10, 2015 9:03 PM  
  **To:** mkhilal@milchev.com; menke.john@pbgc.gov; mschachter@willkie.com  
**Subject:** Glass, David (CIV)  
**Attachments:** Black: Privilege Log  
Treas Priv Log (Docs 769-1273) (June 10, 2015).pdf

Mike and John,

The attached privilege log covers the remaining documents from which Treasury has made withholdings. Treasury is producing to you under separate cover the remaining material that it previously withheld as privileged but is no longer withholding.

cc: Mike Schachter

Best,  
Kathleen

Kathleen M. Cochrane  
Department of the Treasury  
Office of Financial Stability  
(202) 927-0339 (O)  
(571) 265-2185 (C)

*U.S. Dep't of the Treas. v. Pension Benefit  
Guar. Corp.*

No. 1:12-mc-00100-EGS

Pet. Cross Mot. Ext. Time

Ex. D

Case 2:09-cv-13616-AJT -DAS Document 152 Filed 10/28/10 Page 1 of 6

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

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

**PLAINTIFFS' MOTION FOR ADOPTION OF SCHEDULING ORDER**

Plaintiffs hereby move for the adoption of Plaintiffs' proposed scheduling order with respect to the claims against Defendant Pension Benefit Guaranty Corporation ("PBGC").

Plaintiffs' proposed scheduling order attached here as Ex. A, and a brief in support of this motion follows. Counsel for the PBGC does not consent to this motion and will file an opposition within the time permitted by the Local Rules, along with its own proposed scheduling order.

Dated: October 28, 2010

Respectfully submitted,

/s/ Anthony F. Shelley

Anthony F. Shelley

(admitted E.D. Michigan Dec. 22, 2009)

Timothy P. O'Toole

(admitted E.D. Michigan Dec. 22, 2009)

Michael N. Khalil

(admitted E.D. Michigan Sept. 24, 2010)

MILLER & CHEVALIER CHARTERED

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*Attorneys for Plaintiffs*

Case 2:09-cv-13616-AJT -DAS Document 152 Filed 10/28/10 Page 2 of 6

**PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR  
ADOPTION OF SCHEDULING ORDER**

On September 24, 2010, this Court held a hearing on two dispositive motions filed by Defendant Pension Benefit Guaranty Corporation Plaintiffs ("PBGC"). The Court denied both motions. *See* Dkt. No. 147. Underlying both rulings was the Court's finding that the motions were premature because the Plaintiffs had not yet had the chance to engage in discovery. *See, e.g.*, Tr. of Mot. to Dismiss and Mot. to Show Cause (attached as Ex. B) at 26:1-3 (Sept. 24, 2010) (the Court: "Well, that's again why this might be a premature discussion, because we really don't know all the facts, do we?"); 58:8-16 (the Court: "Aren't we getting into fact questions that really aren't in the record? \* \* \* I'm looking at nothing to substantiate who is right and who is wrong. And that's because you haven't had your discovery yet."). At the conclusion of the hearing, the Court raised the question of whether the parties were ready to discuss the scheduling order. Counsel for the parties offered to work together to present the Court with a proposed order.

Unfortunately, the parties are unable to agree on a scheduling proposal. Plaintiffs' proposed scheduling order with respect to claims against the PBGC is attached as Ex. A. Among other things, Plaintiffs' proposed order seeks to complete all discovery related to claims 1-4 of the second amended complaint by June 1, 2011, and would set the deadline for all dispositive motions as July 1, 2011. This would allow Plaintiffs and the PBGC approximately seven months to complete discovery on what are, without question, very complex issues.

Defendant PBGC has proposed a much shorter discovery period, an impermissibly narrow scope for discovery, and ultimately a much different scheduling order. The PBGC's proposal, as presented to Plaintiffs, would have allowed only three months for discovery, would

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dispense with basic requirements like initial disclosures, and would seek to limit discovery solely to determining the completeness of the PBGC's administrative record. Most if not all of the differences between the parties' proposed orders can be attributed to their respective interpretations of this Court's ruling in denying the PBGC's motions. Plaintiffs believe that this Court found that the dispositive motions on all the claims were premature because there had not yet been discovery, and further that the Court anticipated a scheduling order which would allow discovery of the usual sort on all four claims. The PBGC has indicated that it opposes Plaintiffs' proposed scheduling order because it believes this Court left open the question of whether any discovery will be allowed on the Plaintiffs' claims at all. The PBGC has also stated that, to the extent that the Court finds any discovery to be allowed, it would be limited to claim 4, and should only address alleged deficiencies in the administrative record.

Plaintiffs' proposed order is in keeping both with the Court's ruling and general rules of discovery. As noted above, the Court denied the PBGC's motions on all four claims on the grounds that no discovery had yet been completed. Moreover, under the Rules of Civil Procedure, "[u]nless otherwise limited by court order," parties are allowed discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). This Court has not indicated that discovery should be limited to claim 4; in fact, the Court's ruling indicated that discovery is necessary on all four claims. *See, e.g.,* Tr. at 26:1-3 (in which the Court, in discussing its decision as to claim 1, stated: "Well, that's again why this might be a premature discussion, because we really don't know all the facts, do we?").

This Court found that Plaintiffs needed an opportunity to ascertain the actual facts underlying the agency decisions taken with respect to their pension plan and vested benefits. It is Plaintiffs' opinion that the Court further concluded that there are basic factual questions whose

Case 2:09-cv-13616-AJT -DAS Document 152 Filed 10/28/10 Page 4 of 6

answers will assist the Court in determining whether Plaintiffs' claims should go forward and succeed, as a legal or factual matter. To take just one example, this Court noted the necessity for additional facts regarding the bases and propriety of the PBGC's actions in entering into agreements concerning termination of the pension plan, as well as the information that prompted the PBGC's July-August 2009 termination of the pension plan. As noted in the briefing on the PBGC's motions and at the September 24 hearing, Freedom of Information Act responses that the PBGC has so far produced indicate that the PBGC engaged in extensive communications on these matters with not only Delphi and New GM, but also federal officials from the Treasury Department and the Auto Task Force. As a result, discovery will be necessary from multiple governmental and private entities. The shorter time frame and miserly scope of discovery (focused simply on the completeness of the administrative record) favored by the PBGC would simply be insufficient to accomplish the necessary inquiry and is, in the end, entirely at odds with the Court's ruling on the PBGC's motions.

#### CONCLUSION

The Court found that there were material facts in dispute requiring it to deny the PBGC's dispositive motions on the record before it. In order for this case to progress, a scheduling order should be entered that will allow sufficient time for discovery of these disputed material facts and that will not improperly restrict the scope of that discovery. For all these reasons, Plaintiffs' proposed scheduling order should be adopted by the Court.

Case 2:09-cv-13670-AJT -DAS Document 152 Filed 10/28/10 Page 5 of 6

Dated: October 28, 2010

Respectfully submitted,

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Facsimile: 248-649-2920  
E-mail: alan@jacobweingarten.com

/s/ Anthony F. Shelley  
Anthony F. Shelley  
(admitted E.D. Michigan Dec. 22, 2009)  
Timothy P. O'Toole  
(admitted E.D. Michigan Dec. 22, 2009)  
Michael N. Khalil  
(admitted E.D. Michigan Sept. 24, 2010)  
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*Attorneys for Plaintiffs*

Case 2:09-cv-13618-AJT -DAS Document 152 Filed 10/28/10 Page 6 of 6

**CERTIFICATE OF SERVICE**

I hereby certify that on October 28, 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:

owen.wayne@pbgc.gov (C. Wayne Owen)  
david.glass@usdoj.gov (David M. Glass)  
susan.ashbrook@ohioattorneygeneral.gov (Susan E. Ashbrook)

/s/ Anthony F. Shelley

Anthony F. Shelley

Case 2:09-cv-13616-AJT -DAS Document 152-1 Filed 10/28/10 Page 1 of 1

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

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

**EXHIBIT LIST TO PLAINTIFFS' MOTION FOR  
ADOPTION OF SCHEDULING ORDER**

Exhibit A - Proposed Scheduling Order

Exhibit B - Transcript of Motion to Dismiss and Motion to Show Cause (Sept. 24, 2010)

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# **Exhibit A**

Case 2:09-cv-13616-AJT -DAS Document 152-2 Filed 10/28/10 Page 2 of 3

**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
v.	)	Hon. Arthur J. Tarnow
Pension Benefit Guaranty Corporation, <i>et al.</i> ,	)	Magistrate Judge Donald A. Scheer
Defendants.	)	

**[PROPOSED] SCHEDULING ORDER**

The following dates constitute the Order of this Court as to the scheduling of discovery on claims 1-4 of Plaintiffs' Second Amended Complaint. The Court anticipates that it may issue an additional Scheduling Order regarding discovery on claim 5, depending on the resolution of the anticipated motion to dismiss that claim.

1. Defendant Pension Benefit Guaranty Corporation ("PBGC") filed its answer to the Second Amended Complaint on October 12, 2010, as required by Fed. R. Civ. P. 12(a)(4).
2. Plaintiffs and Defendant PBGC shall serve the initial disclosures which are required by Fed. R. Civ. P. 26(a)(1) by November 12, 2010.
3. All discovery related to claims 1-4 shall be served in time to be completed by July 1, 2011.
4. All discovery motions related to claims 1-4 shall be filed by June 1, 2010.
5. Plaintiffs and the PBGC shall exchange names of all witnesses, lay and expert, by May 1, 2011.

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6. Each party shall be entitled to serve a maximum of 25 interrogatories upon another party, with responses thereto required to be served in accordance with the Federal Rules of Civil Procedure.

7. Plaintiffs and the PBGC shall each be allowed 10 depositions on claims 1-4 without leave of Court. Additional depositions on claim 5 may be allowed depending on the resolution of the anticipated motion to dismiss that claim.

8. All dispositive motions related to claims 1-4 shall be filed no later than August 1, 2010, with the understanding that any party may so move prior to that time.

Date: \_\_\_\_\_

Hon. Arthur J Tarnow

*U.S. Dep't of the Treas. v. Pension Benefit  
Guar. Corp.*

No. 1:12-mc-00100-EGS

Pet. Cross Mot. Ext. Time

Ex. E

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

DENNIS BLACK, ET AL.,

Case No. 09-13616

v.  
Plaintiffs,

SENIOR UNITED STATES DISTRICT  
JUDGE  
ARTHUR J. TARNOW

PENSION BENEFIT GUARANTY  
CORPORATION, ET AL.,

UNITED STATES MAGISTRATE JUDGE  
MONA K. MAJZOUB

Defendants.

---

**ORDER SUSTAINING PLAINTIFFS' OBJECTIONS [172] TO MAGISTRATE JUDGE'S  
SCHEDULING ORDER, GRANTING PLAINTIFF'S MOTION FOR ADOPTION OF  
SCHEDULING ORDER [152], ADMINISTRATIVELY TERMINATING PBGC'S  
MOTION FOR PROTECTIVE ORDER [178], ADMINISTRATIVELY TERMINATING  
PLAINTIFFS' MOTION TO COMPEL DISCOVERY [179], AND ENTERING  
SCHEDULING ORDER**

Now before the Court is the Magistrate Judge's Order [169] denying Plaintiffs' Motion for Adoption of Scheduling Order.

On April 11, 2011, Plaintiffs filed objections [172] to the order. Defendant PBGC filed a response [173] to the objections on April 25, 2011 and Plaintiffs filed a reply [174] on May 2, 2011.

**I. Plaintiffs' Objections**

**A. Standard of Review**

The standard of review set forth in F.R.C.P. 72(a) governs this nondispositive matter.

Pursuant to that rule, "The district judge in the case must consider timely objections and modify or set aside any part of the [Magistrate Judge's] order that is clearly erroneous or is contrary to law."

**B. Analysis**

Upon review of the record, this Court makes the following findings:

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By denying Plaintiff's Motion for Adoption of Scheduling Order, the Magistrate Judge erred.

On December 22, 2009, at a hearing held on Plaintiffs' Motion for Preliminary Injunction [7], this Court questioned counsel regarding what Plaintiffs would be required to show if it were assumed that they were correct that they were entitled to a hearing prior to the termination of the Salaried Plan. The Court ultimately ordered the parties to submit supplemental briefing addressing the termination of the Plan.

On September 24, 2010, the Court held a hearing on various motions in this matter, including PBGC's Motion to Dismiss Counts 1 through 3 of the Second Amended Complaint [23] and PBGC's Motion for Summary Judgment on Count 4 [45]. The Court again questioned counsel as to what would be shown at a hearing to terminate the Plan that Plaintiffs asserted was required. The Court denied PBGC's dispositive motions without prejudice and specifically permitted discovery to proceed as to Plaintiffs' complaint. The Court did not address the full scope of discovery that would be permitted.

Plaintiffs then filed their Motion for Adoption of Scheduling Order [152] seeking to set a schedule for conducting discovery on Counts 1 through 4. PBGC opposed the motion, arguing that discovery should not be permitted. On March 28, 2011, the Magistrate Judge entered an order [169] concluding that this "is an action for review on an administrative record" and denying discovery as to Counts 1 through 3. The only discovery permitted related to Count 4 and whether any deficiencies existed in the administrative record. Defendants were permitted to object to this discovery.

In the instant objections, Plaintiffs assert that the Magistrate Judge erred in not allowing discovery on Counts 1 through 3 of the complaint. Plaintiffs also maintain that the Magistrate Judge improperly concluded that this is an action for review on an administrative record.

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The Court finds that the Magistrate Judge erred in concluding that discovery is not permitted on Counts 1 through 3 of the complaint since the Court previously concluded on September 24, 2010 that this case may proceed to discovery.<sup>1</sup> The Court did not limit that discovery to only certain counts of the complaint.

The Court further concludes that the Magistrate Judge erred in finding that this is an action for review on an administrative record, as the parties have disputed whether this action only concerns the administrative record and this Court has never concluded that it will only focus on the administrative record in considering Plaintiffs' complaint.

As Plaintiffs correctly point out, the Sixth Circuit has concluded that “[t]he scope of discovery under the Federal Rules of Civil Procedure is traditionally quite broad.” *See Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 402 (6th Cir. 1998). Fed. R. Civ. P. 26 states, “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense.... Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” Since “discovery itself is designed to help define and clarify the issue,’ the limits set forth in *Rule 26* must be ‘construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case.’” *Conti v. Am. Axle & Mfg., Inc.*, 326 Fed. Appx. 900, 904 (6th Cir. 2009) (unpublished) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)).

In terms of addressing the scope of discovery for purposes of entering a scheduling order—The Court’s initial focus, keeping the above case law in mind, is on Count 4 and whether

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<sup>1</sup> Following the hearing, neither party filed a motion asking the Court to reconsider its ruling.

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termination of the Salaried Plan would have been appropriate in July 2009<sup>2</sup> if, as Plaintiffs contend, Defendants were required under 29 U.S.C. §1342(c) to file before this court “for a decree adjudicating that the plan must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund.” Plaintiffs maintain in their objections that addressing this question may allow the Court to avoid constitutional and statutory questions raised within the Second Amended Complaint in an exercise of judicial restraint. The Court agrees. Such a finding by the Court that termination was proper under 29 U.S.C. §1342(c) would moot the remainder of the complaint pertaining to the PBGC, as it would be irrelevant whether ERISA and the Due Process Clause require that a hearing be held under 29 U.S.C. §1342(c) before termination of a plan (since with or without a hearing, termination would have been proper). Certainly, this matter, which the Court will address, “bear[s] on” the case issues. *Oppenheimer*, 437 U.S. at 351; *see also Conti*, 326 Fed. Appx. at 904. Proceeding in this manner is also an appropriate application of judicial restraint.<sup>3</sup> See *Firestone v. Galbreath*, 976 F.2d 279, 285-286 (6th Cir. 1992) (court, quoting Supreme Court precedent, notes, “If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality... unless such adjudication is unavoidable. Deciding constitutional issues only after considering and rejecting every nonconstitutional ground for the decision is a fundamental rule of judicial restraint”) (citations

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<sup>2</sup> The Plan termination date, as per the agreement reached between PBGC and the plan administrator, was July 31, 2009.

<sup>3</sup> Of course, the PBGC may still prevail in this lawsuit even if the evidence demonstrates that termination would not have been proper after a hearing under 28 U.S.C. §1342(c), as the Court would consider at that time the relevant statutory and constitutional questions; these questions could ultimately be decided in the PBGC’s favor.

and internal quotation marks omitted).

In addressing termination in Count 4 under 28 U.S.C. §1342 and assuming that a hearing was required before termination, this Court, pursuant to *In re UAL Corp.*, 468 F.3d 444 (7th Cir. 2006), will conduct a *de novo* review of the PBGC's decision to terminate the Plan. Such a review is not characterized as an APA review limited to the administrative record, with the agency's decision receiving deference. As the Court concluded in *UAL*:

Deference is appropriate when agencies wield delegated interpretive or adjudicatory power—the former usually demonstrated by rulemaking and the latter by administrative adjudication (which also may yield rules in common-law fashion). The PBGC did not use either rulemaking or adjudication to decide that United's plan should be wrapped up at the end of 2004. Its decision was made unilaterally and was not self-executing. The only authority that the PBGC has under §1342 is to ask a court for relief. That implies an independent judicial role. When making its decision a court must respect any regulations issued after notice-and-comment rulemaking, but the PBGC has not promulgated any rules pertinent to this subject. Nor has it issued the sort of interpretive guidelines that deserve the court's respectful consideration even though they lack the power to control. All the PBGC had done is commence litigation, and its position is no more entitled to control than is the view of the Antitrust Division when the Department files suit under the Sherman Act. As the plaintiff, a federal agency bears the same burden of persuasion.

Nothing in 29 U.S.C. §1342(c), which describes the judicial function after the PBGC files an action seeking termination, suggests that the court must defer to the agency's view.

*See UAL Corp.*, 468 F.3d at 449-450 (citations omitted).<sup>4</sup>

Once again, a finding by the Court in the PBGC's favor on Count 4 after this review would render moot the remainder of the complaint pertaining to the PBGC. In the event that the Court finds that termination of the plan was not supported by the factors set forth in 28 U.S.C.

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<sup>4</sup> The Court of course recognizes that unlike in *UAL*, the PBGC did not move here for a court decree seeking termination; rather, the PBGC and the plan administrator reached an agreement to terminate the plan. However, the same principles enunciated in *UAL* apply to the review the Court is conducting here. Defendant has not offered the Court any Supreme Court or Sixth Circuit case that has addressed the specific issue considered in *UAL*. The Court finds the Seventh Circuit's analysis of the issue persuasive.

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§1342(c), the Court will consider the remaining issues raised in the complaint.

**II. Defendant's Motion for a Protective Order [178] and Plaintiffs' Motion to Compel Discovery [179]**

Also pending before the Court are Defendant's Motion for a Protective Order [178] and Plaintiffs' Motion to Compel Discovery [179]. These motions were filed following the Magistrate Judge's order denying Plaintiffs' Motion for Adoption of Scheduling Order. Plaintiffs' objections have now been sustained and the Motion for Adoption of Scheduling Order has been granted. Therefore, the issues raised in the motion may now be mooted based on the Court's ruling.

The Court concludes that these motions should be deemed administratively terminated and closed without prejudice. If necessary, the parties may file discovery motions at some later date that account for the instant ruling.

**III. Conclusion**

Accordingly,

**IT IS HEREBY ORDERED** that Plaintiffs' Objections [172] to the Magistrate Judge's Scheduling Order and Order Denying Plaintiffs' Motion for Adoption of Scheduling Order are **SUSTAINED**. As the Court previously ruled, this case will proceed to discovery.

**IT IS HEREBY ORDERED** that Plaintiffs' Motion for Adoption of Scheduling Order [152] is **GRANTED**.

**IT IS HEREBY ORDERED** that Defendant's Motion for a Protective Order [178] and Plaintiffs' Motion to Compel Discovery [179] are **HEREBY ORDERED** administratively terminated by this Court. The Motions shall be closed without prejudice. The parties may file, if necessary, discovery motions at a later date that account for the Court's ruling in this order.

**IT IS FURTHER ORDERED** that these proceedings as to Plaintiffs and the PBGC will

continue as follows:

1. Plaintiffs and Defendant PBGC shall serve the initial disclosures which are required by Fed. R. Civ. P. 26(a)(1) by September 16, 2011.
2. All discovery related to claims 1-4 shall be served in time to be completed by April 30, 2012.
3. All discovery motions related to claims 1-4 shall be filed by March 30, 2012.
4. Plaintiffs and the PBGC shall exchange names of all witnesses, lay and expert, by February 29, 2012.
5. Each party shall be entitled to serve a maximum of 25 interrogatories upon another party, with responses thereto required to be served in accordance with the Federal Rules of Civil Procedure.
6. Plaintiffs and the PBGC shall each be allowed 10 depositions on claims 1-4 without leave of the Court.
7. All dispositive motions related to claims 1-4 shall be filed no later than May 31, 2012. These motions, consistent with the above discussion in this order, must address under Count 4 whether termination of the Salaried Plan would have been appropriate in July 2009 if, as Plaintiffs contend, Defendants were required under 29 U.S.C. §1342(c) to file before this court "for a decree adjudicating that the plan must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund."

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#09-13616

Black et al v. Pension Benefit Guaranty Corporation

**SO ORDERED.**

Dated: September 1, 2011

s/Arthur J. Tarnow

Arthur J. Tarnow

Senior United States District Judge

I certify that a copy of the foregoing document was sent to parties of record on September 1, 2011 by U.S./electronic mail.

s/Michael Williams

Relief Case Manager for the

Honorable Arthur J. Tarnow

*U.S. Dep't of the Treas. v. Pension Benefit  
Guar. Corp.*

No. 1:12-mc-00100-EGS

Pet. Cross Mot. Ext. Time

Ex. F

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

---

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

---

**STIPULATED ORDER  
AMENDING SEPTEMBER 1, 2011 SCHEDULING ORDER**

On September 1, 2011, this Court entered a scheduling order setting forth certain deadlines related to the resolution of Plaintiffs' Second Amended Complaint, including a deadline of February 29, 2012 for the parties to exchange witness names, a deadline of May 31, 2012 for the parties to file dispositive motions related to claims 1-4, and a discovery completion date of April 30, 2012. *See* ECF No. 193 at 7 (the "September 1, 2011 Order").

Shortly after the issuance of the September 1, 2011 Order, a dispute arose over the scope of discovery authorized in this case, which prevented discovery from moving forward under the schedule set forth in this Court's original scheduling order. On March 9, 2012, Magistrate Judge Majzoub entered an Order requiring that Defendant Pension Benefit Guaranty Corporation ("PBGC") provide full and complete responses to Plaintiffs' discovery requests 2-17 within 90 days. *See* ECF No. 204 (the "Magistrate Judge's Order"). The PBGC has filed objections to the

Magistrate Judge's Order (see ECF No. 209), and those objections remain pending before this Court.<sup>1</sup>

In light of these developments, the parties are in agreement that the current deadlines stated in the September 1, 2011 Order are no longer appropriate. Therefore, it is hereby stipulated and agreed as follows by and among the undersigned:

1. All discovery related to claims 1-4 shall be served in time to be completed by September 30, 2012.
2. All discovery motions related to claims 1-4 shall be filed by August 30, 2012.
3. Plaintiffs and the PBGC shall exchange names of all witnesses, lay and expert, by August 5, 2012.
4. All dispositive motions related to claims 1-4 shall be filed no later than November 1, 2012.

It is further stipulated and agreed that, as concerns the Magistrate Judge's Order, the PBGC shall begin a rolling production of documents in response to Plaintiffs' discovery requests 2-17, and shall use its best efforts to produce all responsive documents received, produced or reviewed by the PBGC from August 2008 through September 2009 by June 7, 2012. The PBGC will thereafter produce, on a rolling basis, responsive documents received, produced, or reviewed from January 2006 through August 2008. The PBGC will use its best efforts to finish its production of documents responsive to Plaintiffs' discovery requests 2-17 by September 30, 2012, understanding that the parties shall work together to mutually ensure that this search and production are accomplished in as efficient a manner as possible.

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<sup>1</sup> The PBGC has joined this stipulation in the interest of judicial economy, but its joinder should not be read in any way to suggest that it agrees with the Magistrate Judge's Order. Should the Court uphold the PBGC's objections in whole or in part, the PBGC reserves the right to seek modifications to this scheduling order.

**IT IS SO ORDERED.**

s/Arthur J. Tarnow

Hon. Arthur J. Tarnow  
Senior United States District Judge

Dated: April 20, 2012

Agreed to By:

/s/ John A. Menke (with email permission)

ISRAEL GOLDOWITZ, Chief Counsel  
KAREN L. MORRIS, Deputy Chief Counsel  
JOHN A. MENKE, Assistant Chief Counsel  
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Guar. Corp.*

No. 1:12-mc-00100-EGS

Pet. Cross Mot. Ext. Time

Ex. G

2:09-cv-13616-AJT-MKM Doc # 217 Filed 10/05/12 Pg 1 of 3 Pg ID 10020

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

---

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

---

**STIPULATED ORDER REGARDING DISCOVERY DEADLINES**

Plaintiffs Dennis Black, Charles Cunningham, Ken Hollis, and the Delphi Salaried Retirees Association (collectively “Plaintiffs”) and Defendant Pension Benefit Guaranty Corporation (“PBGC”) (together with Plaintiffs, the “Parties”) do hereby present the Court with this Stipulated Order.

On September 1, 2011, this Court entered a scheduling order setting forth certain deadlines related to the resolution of Plaintiffs’ Second Amended Complaint. ECF No. 193 at 7. The deadlines in the September 1, 2011 Order were amended by stipulated order on April 20, 2012. ECF No. 212 at 2. On August 20, 2012, the Parties presented the Court with a Joint Discovery Report and Stipulated Order. ECF No. 215. In the Joint Discovery Report, the Parties reported on the PBGC’s progress in responding to Plaintiffs’ discovery requests. *Id.* at 3. Because the Parties agreed that the deadlines established in the April 20, 2012 Order were no longer appropriate, the Parties stipulated and agreed that the existing discovery schedule should be vacated, and further that they would provide to the Court firm discovery deadlines by October 1, 2012, while in the meantime continuing to proceed diligently with discovery. *Id.* at 4.

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Since the filing of the August 20, 2012 Joint Discovery Report, the PBGC has made two productions to Plaintiffs totaling approximately 25,000 documents, such that it believes it has produced roughly 70% of the total responsive non-archived documents in its possession for which it will not claim a privilege or protection. Additionally, the PBGC believes that it should be able to complete its production of documents and privilege logs by the end of November 2012. Based on these facts and representations, it is hereby stipulated and agreed as follows by and among the undersigned:<sup>1</sup>

1. All discovery related to claims 1-4 shall be served in time to be completed by April 30, 2013.
2. All discovery motions related to claims 1-4 shall be filed by March 31, 2013.
3. Plaintiffs and the PBGC shall exchange names of all witnesses, lay and expert, by February 5, 2013.
4. All dispositive motions related to claims 1-4 shall be filed no later than June 1, 2013.

**IT IS SO ORDERED.**

s/Arthur J. Tarnow  
Hon. Arthur J. Tarnow  
Senior United States District Judge

Dated: October 5, 2012

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<sup>1</sup> Plaintiffs note that, in addition to discovery from the PBGC, Plaintiffs have sought discovery from certain non-parties. As discussed in Plaintiffs' forthcoming Supplemental Discovery Statement, Plaintiffs believe that this non-party discovery could ultimately affect the discovery schedule in this case.

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Agreed to By:

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*Attorneys for Plaintiffs*

*U.S. Dep't of the Treas. v. Pension Benefit  
Guar. Corp.*

No. 1:12-mc-00100-EGS

Pet. Cross Mot. Ext. Time

Ex. H

**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.	)	
	)	

---

**STIPULATED ORDER REGARDING DISCOVERY DEADLINES**

Plaintiffs Dennis Black, Charles Cunningham, Ken Hollis, and the Delphi Salaried Retirees Association (collectively “Plaintiffs”) and Defendant Pension Benefit Guaranty Corporation (“PBGC”) (together with Plaintiffs, the “Parties”) do hereby present the Court with this Stipulated Order.

On September 1, 2011, this Court entered a scheduling order setting forth certain deadlines related to the resolution of Plaintiffs’ Second Amended Complaint. ECF No. 193 at 7. The deadlines in the September 1, 2011 Order were amended by stipulated order on April 20, 2012. ECF No. 212 at 2. On August 20, 2012, the Parties presented the Court with a Joint Discovery Report and Stipulated Order. ECF No. 215. In the Joint Discovery Report, the Parties reported on the PBGC’s progress in responding to Plaintiffs’ discovery requests. *Id.* at 3. In October 2012, the Parties subsequently presented the Court with new proposed deadlines, which the Court entered as a Stipulation and Order Regarding Discovery Deadlines on October 5, 2012. ECF No. 217. The deadlines therein were based on the Parties’ hope that the PBGC’s production could be completed by the end of November 2012. *Id.* at 2.

The Parties agree that the current discovery deadlines are no longer appropriate. As such, it is hereby stipulated and agreed as follows by and among the undersigned:<sup>1</sup>

1. All discovery related to claims 1-4 shall be served in time to be completed by July 31, 2013.
2. All discovery motions related to claims 1-4 shall be filed by June 28, 2013.
3. All dispositive motions related to claims 1-4 shall be filed no later than September 1, 2013.

**IT IS SO ORDERED.**

s/Arthur J. Tarnow  
Hon. Arthur J. Tarnow  
Senior United States District Judge

Dated: March 13, 2013

---

<sup>1</sup> Plaintiffs note that, in addition to discovery from the PBGC, Plaintiffs have sought discovery from certain non-parties. As discussed in Plaintiffs' Supplemental Discovery Statement, ECF No. 216, Plaintiffs believe that this non-party discovery could ultimately affect the discovery schedule in this case.

Agreed to By:

/s/ John A. Menke (per email consent)

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*U.S. Dep't of the Treas. v. Pension Benefit  
Guar. Corp.*

No. 1:12-mc-00100-EGS

Pet. Cross Mot. Ext. Time

Ex. I

**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
v.	)	Hon. Arthur J. Tarnow
Pension Benefit Guaranty Corporation,	)	Magistrate Judge Mona K. Majzoub
Defendant.	)	

---

**STIPULATED ORDER REGARDING DISCOVERY DEADLINES**

Plaintiffs Dennis Black, Charles Cunningham, Ken Hollis, and the Delphi Salaried Retirees Association (collectively “Plaintiffs”) and Defendant Pension Benefit Guaranty Corporation (“PBGC”) (together with Plaintiffs, the “Parties”) do hereby present the Court with this Stipulated Order.

On September 1, 2011, this Court entered a scheduling order setting forth certain deadlines related to the resolution of Plaintiffs’ Second Amended Complaint. ECF No. 193 at 7. The deadlines in the September 1, 2011 Order were amended by stipulated order on April 20, 2012, ECF No. 212 at 2. On August 20, 2012, the Parties presented the Court with a Joint Discovery Report and Stipulated Order. ECF No. 215. In the Joint Discovery Report, the Parties reported on the PBGC’s progress in responding to Plaintiffs’ discovery requests. *Id.* at 3. In October 2012, the Parties subsequently presented the Court with new proposed deadlines, which the Court entered as a Stipulation and Order Regarding Discovery Deadlines on October 5, 2012. ECF No. 217. The deadlines therein were based on the Parties’ hope that the PBGC’s production

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could be completed by the end of November 2012. *Id.* at 2. These deadlines were again modified by Stipulated Order on March 13, 2013. ECF No. 222.

The Parties agree that the current discovery deadlines are no longer appropriate. As such, it is hereby stipulated and agreed as follows by and among the undersigned:<sup>1</sup>

1. All discovery related to claims 1-4 shall be served in time to be completed by October 31, 2013.
2. All discovery motions related to claims 1-4 shall be filed by September 30, 2013.
3. All dispositive motions related to claims 1-4 shall be filed no later than December 2, 2013.

**IT IS SO ORDERED.**

s/Arthur J. Tarnow  
Hon. Arthur J. Tarnow  
Senior United States District Judge

Dated: June 18, 2013

---

<sup>1</sup> Plaintiffs note that, in addition to discovery from the PBGC, Plaintiffs have sought discovery from certain non-parties. As discussed in Plaintiffs' Supplemental Discovery Statement, ECF No. 216, Plaintiffs believe that this non-party discovery could ultimately affect the discovery schedule in this case.

2:09-cv-13616-AJT-MKM Doc # 229 Filed 06/18/13 Pg 3 of 3 Pg ID 10209

Agreed to By:

/s/ John A. Menke (per email consent)  
Israel Goldowitz, Chief Counsel  
Karen L. Morris, Deputy Chief Counsel  
John A. Menke, Assistant Chief Counsel  
C. Wayne Owen, Jr.  
Craig T. Fessenden  
Erin Kim, Attorneys  
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*Attorneys for Plaintiffs*

*U.S. Dep't of the Treas. v. Pension Benefit  
Guar. Corp.*

No. 1:12-mc-00100-EGS

Pet. Cross Mot. Ext. Time

Ex. J

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

---

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

---

**STIPULATED ORDER REGARDING DISCOVERY DEADLINES**

Plaintiffs Dennis Black, Charles Cunningham, Ken Hollis, and the Delphi Salaried Retirees Association (collectively “Plaintiffs”) and Defendant Pension Benefit Guaranty Corporation (“PBGC”) (together with Plaintiffs, the “Parties”) do hereby present the Court with this Stipulated Order.

On September 1, 2011, this Court entered a scheduling order setting forth certain deadlines related to the resolution of Plaintiffs’ Second Amended Complaint. ECF No. 193 at 7. The Parties have asked the Court to modify those deadlines numerous times by Stipulated Order. ECF No. 212; ECF No. 217; ECF No. 222; and ECF No. 229.

The Parties agree that the current discovery deadlines are no longer appropriate. As such, it is hereby stipulated and agreed as follows by and among the undersigned:<sup>1</sup>

1. All discovery related to claims 1-4 shall be served in time to be completed by February 1, 2014.
2. All discovery motions related to claims 1-4 shall be filed by January 16, 2014.
3. All dispositive motions related to claims 1-4 shall be filed no later than March 1, 2014.

**IT IS SO ORDERED.**

s/Arthur J. Tarnow  
Hon. Arthur J. Tarnow  
Senior United States District Judge

Dated: October 1, 2013

---

<sup>1</sup> Plaintiffs note that, in addition to discovery from the PBGC, Plaintiffs have sought discovery from certain non-parties. As discussed in Plaintiffs' Supplemental Discovery Statement, ECF No. 216, Plaintiffs believe that this non-party discovery could ultimately affect the discovery schedule in this case.

Agreed to By:

/s/ John A. Menke (per consent)  
Israel Goldowitz, Chief Counsel  
Karen L. Morris, Deputy Chief Counsel  
John A. Menke, Assistant Chief Counsel  
C. Wayne Owen, Jr.  
Craig T. Fessenden  
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*Attorneys for Plaintiffs*

*U.S. Dep't of the Treas. v. Pension Benefit  
Guar. Corp.*

No. 1:12-mc-00100-EGS

Pet. Cross Mot. Ext. Time

Ex. K

**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
v.	)	Hon. Arthur J. Tarnow
Pension Benefit Guaranty Corporation,	)	Magistrate Judge Mona K. Majzoub
Defendant.	)	

---

**STIPULATED ORDER REGARDING DISCOVERY DEADLINES**

Plaintiffs Dennis Black, Charles Cunningham, Ken Hollis, and the Delphi Salaried Retirees Association (collectively “Plaintiffs”) and Defendant Pension Benefit Guaranty Corporation (“PBGC”) (together with Plaintiffs, the “Parties”) do hereby present the Court with this Stipulated Order.

On September 1, 2011, this Court entered a scheduling order setting forth certain deadlines related to the resolution of Plaintiffs’ Second Amended Complaint. ECF No. 193 at 7. The Parties have asked the Court to modify those deadlines numerous times by Stipulated Order. ECF No. 212; ECF No. 217; ECF No. 222; ECF No. 229; and ECF No. 241.

The Parties agree that the current discovery deadlines are no longer appropriate.

As such, it is hereby stipulated and agreed as follows by and among the undersigned:<sup>1</sup>

1. All discovery related to claims 1-4 shall be served in time to be completed by April 1, 2014.
2. The Parties shall provide an updated list of all witnesses, lay and expert, by March 5, 2014.
3. All discovery motions related to claims 1-4 shall be filed by March 17, 2014.
4. All dispositive motions related to claims 1-4 shall be filed no later than May 1, 2014.

Additionally, the Parties further stipulate and agree that:

5. The PBGC shall have until January 18, 2014 to provide responses and objections to Plaintiffs' First Set of Interrogatories to the PBGC Pursuant to the Court's September 1, 2011 Scheduling Order ; and
6. Plaintiffs shall have until February 1, 2014 to provide responses and objections to the PBGC's First Set of Requests for the Production of Documents to Plaintiffs.

**IT IS SO ORDERED.**

---

<sup>1</sup> Plaintiffs note that, in addition to discovery from the PBGC, Plaintiffs have sought discovery from certain non-parties. As discussed in Plaintiffs' Supplemental Discovery Statement, ECF No. 216, Plaintiffs believe that this non-party discovery could ultimately affect the discovery schedule in this case.

s/Arthur J. Tarnow

Hon. Arthur J. Tarnow  
Senior United States District Judge

Dated: December 17, 2013

/s/ John A. Menke (per email consent)

Israel Goldowitz, Chief Counsel  
Karen L. Morris, Deputy Chief Counsel  
John A. Menke, Assistant Chief Counsel  
C. Wayne Owen, Jr.  
Craig T. Fessenden  
Erin Kim, Attorneys  
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/s/ Anthony F. Shelley

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*Attorneys for Plaintiffs*

*Attorneys for Defendant*

*U.S. Dep't of the Treas. v. Pension Benefit  
Guar. Corp.*

No. 1:12-mc-00100-EGS

Pet. Cross Mot. Ext. Time

Ex. L

2:09-cv-13616-AJ1-MKM Doc # 249 Filed 03/19/14 Pg 1 of 2 Pg ID 10553

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

---

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

---

**INTERIM SCHEDULING ORDER**

THIS MATTER, having come before the Court on the Plaintiffs' Unopposed Motion to Extend Discovery Deadlines,

IT IS HEREBY ORDERED that the Motion is GRANTED.

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.

2:09-cv-13616-AJ1-MKM Doc # 249 Filed 03/19/14 Pg 2 of 2 Pg ID 10554

These dates are subject to further amendment upon a showing of good cause.

SO ORDERED this 19<sup>th</sup> day of March, 2014.

s/Arthur J. Tarnow

Arthur J. Tarnow

Senior United States District Judge

*U.S. Dep't of the Treas. v. Pension Benefit  
Guar. Corp.*

No. 1:12-mc-00100-EGS

Pet. Cross Mot. Ext. Time

Ex. M

**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.	)	
	)	

---

**STIPULATED ORDER**

Plaintiffs Dennis Black, Charles Cunningham, Ken Hollis, and the Delphi Salaried Retirees Association (collectively “Plaintiffs”) and Defendant Pension Benefit Guaranty Corporation (“PBGC”) (together with Plaintiffs, the “Parties”) do hereby present the Court with this Stipulated Order.

On May 12, 2014, the Court held a Status Conference to discuss the status of the case and establish an appropriate set of deadlines to supplement the Interim Scheduling Order entered on March 19, 2014. *See* ECF Nos. 250, 251. During the Status Conference, the Parties agreed that the deadlines set forth in the March 19, 2014 Interim Scheduling Order should be enlarged to allow for the resolution of the PBGC’s Rule 72 Objections to Magistrate Judge Majzoub’s August 21, 2013

Order Granting in Part Plaintiffs' Rule 37 Motion to Enforce Court Order (ECF No. 234) (the "2013 Rule 72 Objections").<sup>1</sup>

As such, it is hereby stipulated and agreed as follows by and among the undersigned:

1. All discovery related to claims 1-4 shall be served in time to be completed within 90 days following the resolution of the 2013 Rule 72 Objections.
2. The Parties shall provide an updated list of all witnesses, lay and expert, within 60 days of the resolution of the 2013 Rule 72 Objections.
3. All discovery motions related to claims 1-4 shall be served within 75 days of the resolution of the 2013 Rule 72 Objections.
4. All dispositive motions related to claims 1-4 must be filed no later than 120 twenty days after the resolution of the 2013 Rule 72 Objections.

---

<sup>1</sup> During the Status Conference, the Parties also discussed Plaintiffs' discovery dispute with the U.S. Department of the Treasury (the "Treasury"), pending before the U.S. District Court for the District of Columbia. See *U.S. Department of Treasury v. Black*, Case No. 1:12-mc-00100-EGS. Plaintiffs note that they may request a further extension of the discovery period if the dispute with the Treasury has not been concluded upon the expiration of the schedule ordered herein.

**IT IS SO ORDERED.**

**s/Arthur J. Tarnow**

Hon. Arthur J. Tarnow  
Senior United States District Judge

Dated: May 20, 2014

/s/ John A. Menke (per email consent)

Israel Goldowitz, Chief Counsel  
Karen L. Morris, Deputy Chief Counsel  
John A. Menke  
C. Wayne Owen, Jr.  
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*Attorneys for Plaintiffs*

*U.S. Dep't of the Treas. v. Pension Benefit  
Guar. Corp.*

No. 1:12-mc-00100-EGS

Pet. Cross Mot. Ext. Time

Ex. N

**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.	)	
	)	

---

**REVISED SCHEDULING ORDER**

THIS MATTER, having come before the Court on the Plaintiffs' Unopposed Motion to Modify Discovery Deadlines,

IT IS HEREBY ORDERED that the Motion is GRANTED.

1. All discovery related to claims 1-4 shall be served in time to be completed by July 31, 2015.
2. The Parties shall provide an updated list of all witnesses, lay and expert, by June 15, 2015.
3. All discovery motions related to claims 1-4 shall be served by June 30, 2015.
4. All dispositive motions related to claims 1-4 must be filed no later than September 1, 2015.

2:09-cv-13616-AJT-MKM Doc # 270 Filed 02/10/15 Pg 2 of 2 Pg ID 10716

These dates are subject to further amendment upon a showing of good cause.

SO ORDERED this day 10<sup>th</sup> Day of February, 2015.

s/Arthur J. Tarnow

Arthur J. Tarnow

Senior United States District Judge

*U.S. Dep't of the Treas. v. Pension Benefit  
Guar. Corp.*

No. 1:12-mc-00100-EGS

Pet. Cross Mot. Ext. Time

Ex. O

**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
v.	)	Hon. Arthur J. Tarnow
Pension Benefit Guaranty Corporation,	)	Magistrate Judge Mona K. Majzoub
Defendant.	)	

---

**REVISED SCHEDULING ORDER**

THIS MATTER, having come before the Court on the Plaintiffs' Unopposed Motion to Modify Discovery Deadlines,

IT IS HEREBY ORDERED that the Motion is GRANTED.

1. All discovery related to claims 1-4 shall be served in time to be completed by August 14, 2015.
2. The Parties shall provide an updated list of all witnesses, lay and expert, by June 30, 2015.
3. All discovery motions related to claims 1-4 shall be served by August, 14, 2015.
4. All dispositive motions related to claims 1-4 must be filed no later than September 22, 2015.

2:09-cv-13616-AJT-MKM Doc # 273 Filed 06/10/15 Pg 2 of 2 Pg ID 10732

These dates are subject to further amendment upon a showing of good cause.

SO ORDERED this day 10<sup>th</sup> day of June, 2015.

s/Arthur J. Tarnow  
Arthur J. Tarnow  
Senior United States District Judge

*U.S. Dep't of the Treas. v. Pension Benefit  
Guar. Corp.*

No. 1:12-mc-00100-EGS

Pet. Cross Mot. Ext. Time

Ex. P

**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  
MODIFY DISCOVERY DEADLINES**

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Timothy P. O'Toole  
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*Counsel for the Plaintiffs*

**STATEMENT OF ISSUE PRESENTED**

Whether the Court should grant Plaintiffs' unopposed motion to modify the discovery deadlines in this case?

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

On January 23, 2015, counsel for the parties conferred to discuss the relief requested in this motion, and on February 4, 2015, counsel for the PBGC confirmed 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."

In January 2012, and August 2013, Plaintiffs served the United States Department of the Treasury (the “Treasury”) with subpoenas to produce information relevant to the case. The Treasury moved to quash those subpoenas in the United States District Court for the District of Columbia (the “D.C. Court”).

*See U.S. Dep’t of the Treasury v. Black*, Case 1:12-mc-00100 (D.D.C.). The D.C. Court denied the Treasury’s motion to quash in June 2014, *see* ECF No. 256, and the Plaintiffs and the Treasury subsequently conferred regarding the manner and timing of the Treasury’s response to the Subpoenas.

On November 3, 2014, Plaintiffs, the Treasury, and the Defendant Pension Benefit Guaranty Corporation (“PBGC”) entered into a stipulation and protective order in the D.C. Court stating, *inter alia*, that the Treasury would have until March, 19, 2015 to complete the production of documents in response to the document subpoena, and until May 18, 2015 to provide a privilege log. D.D.C. ECF No. 28 at 2-3. Plaintiffs believe that the discovery schedule in this case should be modified to accommodate these deadlines. Specifically, in order to allow time to resolve any privilege disputes arising from the Treasury’s privilege log, and to account for the depositions of Matthew Feldman and Harry Wilson (which are to occur after the Treasury completes its document production), Plaintiffs propose modifying the discovery schedule as follows:

1. All discovery related to claims 1-4 shall be served in time to be completed by July 31, 2015.
2. The Parties shall provide an updated list of all witnesses, lay and expert, by June 15, 2015.
3. All discovery motions related to claims 1-4 shall be served by June 30, 2015.
4. All dispositive motions related to claims 1-4 must be filed no later than September 1, 2015.

Counsel for the Parties have conferred regarding the relief requested herein, and the PBGC has stated that it does not oppose the modification proposed above.

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). Because that standard is satisfied here, Plaintiffs respectfully request that the Court modify the discovery schedule accordingly. A proposed order is attached hereto.

**CONCLUSION**

The Court should modify the discovery schedule to allow for the completion of discovery from the Treasury.

Dated: February 6, 2015

Respectfully submitted,

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/s/ Anthony F. Shelley  
Anthony F. Shelley  
Timothy P. O'Toole  
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mkhalil@milchev.com

*Counsel for the Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that on February 6, 2015, 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:

owen.wayne@pbgc.gov (C. Wayne Owen)  
david.glass@usdoj.gov (David M. Glass)  
edward.w.risko@gm.com (Edward W. Risko)  
rswalker@jonesday.com (Robert S. Walker)

/s/ Anthony F. Shelley  
Anthony F. Shelley  
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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

---

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

---

**[PROPOSED] REVISED SCHEDULING ORDER**

THIS MATTER, having come before the Court on the Plaintiffs' Unopposed Motion to Modify Discovery Deadlines,

IT IS HEREBY ORDERED that the Motion is GRANTED.

1. All discovery related to claims 1-4 shall be served in time to be completed by July 31, 2015.
2. The Parties shall provide an updated list of all witnesses, lay and expert, by June 15, 2015.
3. All discovery motions related to claims 1-4 shall be served by June 30, 2015.
4. All dispositive motions related to claims 1-4 must be filed no later than September 1, 2015.

These dates are subject to further amendment upon a showing of good cause.

SO ORDERED this day \_\_\_\_\_, 2015.

---

Arthur J. Tarnow  
Senior United States District Judge

*U.S. Dep't of the Treas. v. Pension Benefit  
Guar. Corp.*

No. 1:12-mc-00100-EGS

Pet. Cross Mot. Ext. Time

Ex. Q

**Glass, David (CIV)**

---

**From:** Glass, David (CIV)  
**Sent:** Thursday, July 09, 2015 3:47 PM  
**To:** 'Khalil, Michael'; John A. Menke (menke.john@pbgc.gov); Michael S. Schachter (mschachter@willkie.com)  
**Cc:** O'Toole, Timothy; Murphy-Johnson, Dawn; Shelley, Anthony  
**Subject:** RE: Message

Tracking:	Recipient	Delivery	Read
	'Khalil, Michael'		
	John A. Menke (menke.john@pbgc.gov)		
	Michael S. Schachter (mschachter@willkie.com)		
	O'Toole, Timothy		
	Murphy-Johnson, Dawn		
	Shelley, Anthony		
	Glass, David (CIV)	Delivered: 7/9/2015 3:47 PM	Read: 7/9/2015 3:47 PM

Mike –

We will oppose your proposed motion to compel and your proposed motion for expedited treatment of that motion. We will also oppose, as I have told you before, any effort on your part to recall Messrs. Feldman or Wilson for deposition after the depositions that currently are scheduled. We do not object to the postponement of those depositions if that is what you wish.

David

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**From:** Khalil, Michael [mailto:[mkhalil@milchev.com](mailto:mkhalil@milchev.com)]  
**Sent:** Thursday, July 09, 2015 1:04 PM  
**To:** Glass, David (CIV)  
**Cc:** O'Toole, Timothy; Murphy-Johnson, Dawn; Shelley, Anthony  
**Subject:** RE: Message

David,

I just left you a message on this subject, but wanted to follow up with an email. Having now reviewed the Treasury's privilege log in great detail, and keeping in mind the various clarifications that you've offered over the last few weeks, we've come to the conclusion that we don't believe that a large number of the Treasury's privilege assertions are well taken. While we appreciate your efforts to try and clarify some of the ambiguities presented by the Treasury's privilege log, many of the concerns raised in our previous correspondence have not been addressed. These are most problematic when it comes to the Treasury's assertions of the deliberative process and presidential communications privileges, which we don't believe the Treasury can assert properly here. Unless the Treasury is willing to withdraw those assertions and produce the relevant documents, we will need to move to compel. Our motion to compel would also implicate a small number of documents covered for

which the Treasury has asserted work product and attorney-client communications, but those would not be the main thrust of the motion. Given our previous discussions, it seems unlikely that the Treasury is willing to withdraw its privilege assertions for these documents, but we did want to check in with you to confirm that was definitely the case.

Also, as we mentioned in our earlier correspondence, given the looming depositions and deadlines in the underlying litigation, we are going to ask the Court to expedite the briefing for the motion to compel. Would you please let us know the Treasury's position on an expedited schedule along the following lines:

Opposition to Motion to Compel due by Friday, July 17, 2015  
Reply in Support of Motion to Compel due by Tuesday July 21, 2015

We are planning to file the motions to compel and expedite today, so please let us know the Treasury's position on them as soon as possible.

Best,  
Mike

Michael Khalil  
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655 15th Street, N.W.  
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[mkhalil@milchev.com](mailto:mkhalil@milchev.com)  
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\* \* \*

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**From:** Khalil, Michael  
**Sent:** Tuesday, June 23, 2015 4:10 PM  
**To:** 'Glass, David (CIV)'  
**Cc:** O'Toole, Timothy; Murphy-Johnson, Dawn; Shelley, Anthony  
**Subject:** RE: Message

David,

Attached please find our summary of today's call. Please let us know as soon as possible if you have any corrections or clarifications you want to make.

Best,  
Mike

Michael Khalil  
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**From:** Glass, David (CIV) [<mailto:David.Glass@usdoj.gov>]  
**Sent:** Monday, June 22, 2015 6:01 PM  
**To:** Khalil, Michael  
**Cc:** O'Toole, Timothy; Murphy-Johnson, Dawn; Shelley, Anthony  
**Subject:** RE: Message

Mike –

Thanks. Please give me a call at 11 a.m. tomorrow.

David

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**From:** Khalil, Michael [<mailto:mkhil@milchev.com>]  
**Sent:** Monday, June 22, 2015 4:02 PM  
**To:** Glass, David (CIV)  
**Cc:** O'Toole, Timothy; Murphy-Johnson, Dawn; Shelley, Anthony  
**Subject:** RE: Message

Dear David,

As I noted in last week's emails, we are concerned that the Treasury's refusal to forward its responses to our questions in writing will delay the resolution of this discovery dispute. Again, the Treasury's refusal to state its position in writing makes it impossible for us to accurately or efficiently evaluate the Treasury's privilege assertions. At this point, the Treasury has claimed privilege for approximately 1,200 documents and accordingly has the burden for demonstrating that privilege and to do so in writing. That justification was due with the privilege log on May 31, 2015. It is now June 22, 2015, we have already had to ask the Michigan Court to modify the discovery deadlines in the case because of the Treasury's failure to serve the privilege log on time, and we still have not seen (or heard) any sufficient justification for the vast majority of the Treasury's privilege assertions.

The only rationale you have offered for not providing written responses is your statement on Friday's voicemail that you don't have the time to write us letters regarding those responses. Yet, more than three weeks have now passed since the Treasury's written justification of privilege was due, and it seems to us that it will take significantly more time (both yours and ours) to discuss those response item by item, and for us to thereafter take your responses and use them to supplement the Treasury's facially deficient log. At best, the Treasury has answers to support its claims of privilege, but it is seeking to shift the burden of documenting those justifications to us. At worst, the Treasury has no good justifications for many of its privilege assertions, and is seeking to forestall judicial resolution of the dispute by engaging in telephone conversations that address our concerns with piece mail bits of information. Because of the impending discovery deadlines in the

underlying case, which, as you are aware, the PBGC has resisted extending any further, a prolonged parsing out of supplementary justifications is simply unacceptable to us.

Nevertheless, because you have represented that you have answers that will address all the concerns we have raised with you about the log's glaring deficiencies, and because we are loathe to file a motion to compel if there is a substantial chance that a good faith discussion can avoid the need for litigation, we are willing to try and have a call with you tomorrow without the benefit of written responses ahead of time. We are available for such a call at the following times tomorrow:

11:00 am  
11:30 am  
12:00 pm  
12:30 pm

We look forward to the discussion. After our call, we will review the Treasury's privilege log with the supplemental information you provide to us tomorrow to make a final determination as to the sufficiency of the Treasury's privilege assertions.

Best,  
Mike

Michael Khalil  
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**From:** Khalil, Michael  
**Sent:** Friday, June 19, 2015 11:27 AM  
**To:** Glass, David (CIV) ([David.Glass@usdoj.gov](mailto:David.Glass@usdoj.gov))  
**Cc:** Timothy P. O'Toole ([totoole@milchev.com](mailto:totoole@milchev.com)); Murphy-Johnson, Dawn ([dmurphyjohnson@milchev.com](mailto:dmurphyjohnson@milchev.com)); Anthony F. Shelley, Esq. ([ashelley@milchev.com](mailto:ashelley@milchev.com))  
**Subject:** RE: Message

David,

I think we are having a disconnect, so I'm sending this email to try and bridge the gap. Last Friday we sent you a letter laying out what we perceive as critical deficiencies in the Treasury's privilege log, deficiencies which lead us to believe that the Treasury has no justification for withholding most of the roughly 1,200 documents listed on the log. In our letter we asked that, to the extent you have any additional information you

would like us to be aware of in connection with the Treasury's privilege assertions, that you send that information to us no later than today.

On Tuesday, following an exchange of voicemails, we had a rather unproductive call to discuss the issues raised in our letter. In one of your voicemails, you stated that the Treasury would not be providing us with any supplemental filings or responses, though you did also state that you were working to get answers to at least some of the questions raised in our letter. During our call, you confirmed that you believed that the log you had provided was perfectly adequate, and that you did not intend to supplement it. You also informed us that, in evaluating the Treasury's assertions of the deliberative process and presidential communications privileges, we should understand that the governmental decision involved in all cases was "what do we do about GM." You also told us that every time "Team Auto" was mentioned on the privilege log, we should understand that all of the following individuals, in all cases, made up Team Auto:

Ron A. Bloom  
Clay Calhoon  
Brian Dees  
Diana Farrell  
Matthew Feldman  
Robert Fraser  
Sadiq Malik  
David Markowitz  
Paul Nathanson  
Brian Osias  
Steven Rattner  
Brian Stern  
Haley Stevens  
Harry Wilson

The information you relayed to us on this call did nothing to allay our concerns that the Treasury has improperly withheld documents under the guise of privilege, and the tenor of our phone conversation did nothing to suggest to us that continuing these conversations would be a productive use of anyone's time. Your voice mail from yesterday said that the Treasury has provided you with answers to all of the questions and concerns raised in last Friday's letter. If that is the case, then I would urge you to forward those responses to us as soon as possible, are at least those parts that you wish to share with us.

We ask that you send us these responses in writing (as opposed to going over them in a phone call) in the interest of clarity and efficiency, that is, to reduce the potential that we misunderstand your description of the Treasury's responses, to avoid any confusion between us as to what was and was not covered in the call, and also so that we do not waste each other's time reciting and transcribing information which has already been reduced to written form. That said, if you do produce supplemental responses to us today, we would be happy to arrange a call with you to discuss them, but again, only after we've had a chance to review them.

Best,  
Mike

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\* \* \*

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**From:** Khalil, Michael

**Sent:** Thursday, June 18, 2015 4:52 PM

**To:** Glass, David (CIV) ([David.Glass@usdoj.gov](mailto:David.Glass@usdoj.gov))

**Cc:** Timothy P. O'Toole ([totoole@milchev.com](mailto:totoole@milchev.com)); Murphy-Johnson, Dawn ([dmurphyjohnson@milchev.com](mailto:dmurphyjohnson@milchev.com))

**Subject:** Message

David,

Sorry I missed your call earlier. I'm happy to have a call with you, but I'd ask you send us the Treasury's letter ahead of the call, so that we can give it some thought prior to our conversation. If that works for you, we will plan on giving you a call tomorrow morning.

Many thanks,  
Mike

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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	)	No. 1:12-mc-00100-EGS
<b>U.S. DEPARTMENT OF THE</b>	)	
<b>TREASURY,</b>	)	[PROPOSED] ORDER
	)	
<b>Petitioner,</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>PENSION BENEFIT GUARANTY</b>	)	
<b>CORPORATION,</b>	)	
	)	
<b>Interested Party,</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>DENNIS BLACK, et al.,</b>	)	
	)	
<b>Respondents.</b>	)	
	)	

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Upon the cross motion of petitioner U.S. Department of Treasury (Treasury) for extension of time, the materials submitted in support thereof and in opposition thereto, and good cause having been shown, it is hereby ordered as follows:

1. The aforesaid motion of Treasury is granted.
2. The time of Treasury to file its response to respondents' motion to compel (ECF 30) is extended through August 14, 2015.
3. Respondents' motion to expedite (ECF No. 31) is denied.

Dated: \_\_\_\_\_

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE