UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re	:	
	:	**Chapter 9**
	:	
CITY OF DETROIT, MICHIGAN,	:	**Case No. 13-53846**
	:	
Debtor.	:	**Hon. Steven W. Rhodes**
	:	
	:	
	:	
CITY OF DETROIT, MICHIGAN,	:	**Chapter 9**
	:	
Plaintiff,	:	**Adversary No. 14-04112**
	:	
vs.	:	**Hon. Steven W. Rhodes**
	:	
DETROIT GENERAL RETIREMENT SYSTEM SERVICE CORPORATION, *et al.*,	:	
	:	
	:	
Defendants.	:	

FINANCIAL GUARANTY INSURANCE COMPANY'S OPPOSITION TO CITY OF DETROIT'S MOTION TO TAKE EXPEDITED DISCOVERY OF THE SERVICE CORPORATIONS

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Financial Guaranty Insurance Company ("FGIC") files this memorandum in opposition to the Motion of the City of Detroit (the "City") to Take Expedited Discovery of the Service Corporations [Docket No. 90] (the "Motion").

PRELIMINARY STATEMENT

Without good cause, the City requests unstructured and premature discovery that would deviate from the orderly discovery process contemplated by the Federal Rules of Civil Procedure (the "Federal Rules"), made applicable in this adversary proceeding (the "Adversary Proceeding") by the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and brush aside this Court's stated desire that the Adversary Proceeding run efficiently. *See* Intervention Order (defined below) 13. In its bare-bones three page pleading, the City includes just one line of text to support the argument that the relief requested is warranted: "Good cause exists in this case to permit the City to take the depositions of the Service Corporations due to the evasive and disingenuous manner in which the Service Corporations [the Detroit General Retirement System Service Corporation and Detroit Police and Fire Retirement System Service Corporation] answered the City's Complaint." Mot. 2. This purported wrong, however, provides no support for the City's request to seek piecemeal discovery of parties on an expedited basis at this early stage in the Adversary Proceeding. Beyond that, the City also fails to justify the need for this emergency relief at a time when all parties affected by this request are preparing for the confirmation hearing in the main action. The parties are involved in expedited discovery in connection with that hearing—which involves participating in dozens of depositions and reviewing over 77,000 documents produced by the City—and are in the process of preparing pre-trial briefs on the numerous issues in dispute in this confirmation trial, scheduled to begin just thirteen business days from today.

If the answer filed by the Service Corporations is truly inadequate, procedural mechanisms are available to address the issue, and expedited discovery is not one of them. Further, the City's proposed discovery requests are overbroad and seek information directly related to its causes of action, exemplifying the type of premature discovery the Federal Rules, including the required 26(f) conference, aim to prevent. Accordingly, the Motion should be denied, and the City – like the rest of the parties to this proceeding – should follow the well-established discovery guidelines set forth in the Federal Rules.

FACTUAL BACKGROUND

On January 31, 2014, the City filed its Complaint for Declaratory and Injunctive Relief [Docket No. 1] (the "Complaint"), thereby commencing this Adversary Proceeding against the Service Corporations and the Detroit Retirement Systems Funding Trust 2005 and the Detroit Retirement Systems Funding Trust 2006 (together, the "Trusts"). By order of this Court, dated June 30, 2014 [Docket No. 73] (the "Intervention Order"), FGIC and certain holders of certificates of participation (the "COPs Holders" and together with FGIC, the Service Corporations, and the Trusts, the "Defendants") were permitted to intervene in the Adversary Proceeding with limitations.[1] The Intervention Order also denied a pending motion to dismiss the Complaint filed by the Service Corporations. Intervention Order 9. On July 17. 2014, by order of the Court, FGIC, the COPs Holders, and the Service Corporations answered the Complaint. *See* Service Corporations' Answer and Affirmative Defenses [Docket No. 82] (the "Service Corporations' Answer") and Answer and Affirmative Defenses of FGIC [Docket No. 88]. In accordance with the Intervention Order, FGIC also recently filed a Motion to File

[1] "In the interests of judicial efficiency," the Court granted intervention for the limited purpose of defending against the City's claims in the Complaint and instructed the intervenors to obtain leave of the Court before filing counterclaims or third party complaints. Intervention Order 13.

Counterclaims [Docket No. 83] (the "Counterclaim Motion"), which is pending before the Court. Responses, if any, to the Counterclaim Motion, are due on July 31, 2014.

The Trusts filed their Answer with Affirmative Defenses and Counterclaims [Docket No. 10] in March. The City subsequently filed a Motion to Dismiss in Part the Funding Trusts' Counterclaims [Docket No. 23] (the "Motion to Dismiss"). The Court entered an order staying briefing on the Motion to Dismiss on April 25, 2014 [Docket No. 45]. At a July 14, 2014 status conference in this Court, the Trusts requested that, in order to promote judicial efficiency, the Court continue to hold the Motion to Dismiss in abeyance. *See* Hr'g Tr. 5:5-6:1, July 14, 2014 ("July 14 Tr."). The Court took this request under advisement and has not yet rendered a decision on whether the City's Motion to Dismiss will proceed at this time. July 14 Tr. 19:5-6.

ARGUMENT

I. The City has failed to demonstrate good cause for the expedited discovery it seeks.

Under Rule 26(d)(1) of the Federal Rules, made applicable to this Adversary Proceeding by Bankruptcy Rule 7026, a party may not seek discovery from any source before the parties have conferred as required by Federal Rule 26(f), except under "limited circumstances including when authorized by court order." *Bug Juice Brands, Inc. v. Great Lakes Bottling Co.*, No. 1:10-cv-229, 2010 WL 1418032, at *1 (W.D. Mich. April 6, 2010); Fed. R. Civ. P. 26(d)(1). Courts in the Eastern District of Michigan have adopted a good cause standard to determine when such premature discovery is warranted. *Psychopathic Records Inc. v. Anderson*, No. 08-13407, 2008 WL 4852915, at *1 (E.D. Mich. Nov. 7, 2008) ("Courts in this circuit require the party seeking . . . expedited discovery to show good cause."). To satisfy this standard, the moving party must demonstrate that its "need for expedited discovery outweighs the potential prejudice or hardship" to the other parties to the litigation. *Johnson v. U.S. Bank Nat'l Ass'n*, No. 1:09-cv-492, 2009 WL 4682668, at *1 (S.D. Ohio Dec. 3, 2009). In connection with this

inquiry, courts also consider whether "the proposed discovery is appropriately narrow and targeted" and necessary to move the case forward. *Id.*; *Caston v. Hoaglin*, No. 2:08-cv-200, 2009 WL 1687927, at *4 (S.D. Ohio June 12, 2009) (denying motion for leave to file subpoenas as overbroad); *Arista Records, LLC v. Does 1-4*, No. 1:07-cv-1115, 2007 WL 4178641, at *3 (W.D. Mich. Nov. 20, 2007) (finding good cause for plaintiffs to serve a premature subpoena because it would assist plaintiffs in determining the identity of the defendants and thus was necessary to move the case forward).

The City acknowledges that a good cause standard applies to its request for expedited discovery but fails to meet its burden under this standard. Mot. 1-2; *Diplomat Pharmacy, Inc. v. Humana Health Plan, Inc.*, No. 1:08-cv-620, 2008 WL 2923426, at *1 (W.D. Mich. July 24, 2008) ("A party seeking expedited discovery in advance of a Rule 26(f) conference . . . has the burden of showing good cause or need in order to justify deviation from the normal timing of discovery."). First and foremost, the City does not identify why the discovery it seeks is necessary at this time. The City argues that, because the Service Corporations' Answer was purportedly "evasive and disingenuous," it would be "most efficient" to take depositions on an expedited basis to remedy the purported deficiencies in the pleading. Mot. 2-3. A party's desire to conduct "efficient" discovery to remedy a purportedly defective pleading, however, does not constitute good cause. This standard is only met when expedited discovery is *necessary* to move the case forward or to protect the parties or preserve evidence. *Best v. Mobile Streams Inc.*, No. 1:12-cv-564, 2012 WL 5996222, at *2 (S.D. Ohio Nov. 30, 2012) (denying plaintiffs' motion because the discovery sought was not "necessary in order to advance this litigation"); *Gen. Ret. Sys. of City of Detroit v. Onyx Capital Advisors*, No. 10-cv-11941, 2010 WL 2231885, at *3 (E.D. Mich. June 3, 2010) (denying expedited discovery of

defendant's records where court had issued order mandating preservation of documents). For example, courts have held that expedited discovery may be warranted when it will assist a plaintiff in identifying otherwise unknown defendants whose participation is necessary for the case to proceed. *See, e.g.*, *Woodward v. Chetvertakov*, No. 2:13-cv-11943, 2013 WL 5836219, at *2 (E.D. Mich. Oct. 30, 2013) (one of the two cases cited by the City in the Motion); *McCluskey v. Belford High School*, No. 2:09-14345, 2010 WL 2696599, at *2 (E.D. Mich. June 24, 2010) (same). Courts have also held that limited expedited discovery may be warranted when there is a legitimate concern that physical evidence, relevant documents, or data in the possession of a third party will be destroyed. *See*, *e.g.*, *Johnson*, 2009 WL 4682668, at *1 ("Good cause is often found in cases where there is a concern that documents or other data will be lost or destroyed."); *Qwest Commc'ns Int'l v. WorldQuest Networks*, 213 F.R.D. 418, 419 (D. Colo. 2003) ("Expedited discovery may also be appropriate in cases where physical evidence may be consumed or destroyed with the passage of time, thereby disadvantaging one or more parties to the litigation.").

Here, no such necessity exists. The Service Corporations have actively participated in this litigation, filing a motion dismiss and answering the Complaint. In fact, all defendants to this litigation have been identified and have answered, no party has expressed concern that documents may be destroyed (indeed, much of the information the City purportedly seeks from the Service Corporations is available in publicly filed documents), and the discovery sought will not move the proceedings along but, to the contrary, would distract the parties and likely delay the adoption of an organized, reasonable discovery plan.

Further, even if the City had a valid reason for seeking the proposed expedited discovery, the City's Rule 30(b)(6) inquiries are overbroad and extend beyond the alleged

deficiencies in the Service Corporations' Answer. "In applying the 'good cause' standard under Rule 26(d), the court should consider the scope of the requested discovery." *Qwest*, 213 F.R.D. at 420. Even where good cause is found, expedited discovery will only be allowed if it is limited in scope; broad discovery requests seeking information necessary to establish the plaintiff's causes of action are *not* permitted. *Compare Johnson*, 2009 WL 4682668, at *1-2 (granting plaintiffs' motion for expedited discovery because the proposed subpoena was narrowly tailored to secure documents against destruction and did not impose an immediate obligation to produce documents on its recipient) *with Bug Juice*, 2010 WL 1418032, at *2 (denying plaintiffs' motion for expedited discovery because the "discovery requests broadly seek any and all information necessary for Plaintiffs to establish their cause of action") *and Qwest*, 213 F.R.D. at 421 (denying motion for accelerated discovery based on breadth of document requests). Here, the information the City seeks on an expedited basis, as set forth in its proposed deposition notices attached as Exhibit 6 to the Motion, belies any notion of limited discovery and instead broadly seek information related to the merits of the Complaint, including information that would not have been included in even the most thorough answer.[2] *See* Mot. Ex. 6. Such requests are more properly pursued within the structure and supervision of a court-approved scheduling order. *See* Fed. R. Civ. P. 16(b).

II. Expedited discovery is not the proper remedy here.

The City should not be permitted to jump start discovery, in brazen disregard of the Federal Rules, because it is dissatisfied with the Service Corporations' Answer. The City has recourse to other less burdensome means to remedy the alleged deficiencies in the Service

[2] For example, the City's proposed deposition topics include, among others, "[t]he creation of the position of Vice President" of each Service Corporation, information about individuals, including Norman White and David Baker Lewis, and the "duties and activities" of *each* officer of the Service Corporations. Motion Ex. 6. *None* of these individuals and topics was mentioned in the Complaint.

Corporations' Answer. *See* 5 Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE § 1268 (3d ed.) ("[I]f the answer renders unclear which averments the answer is designed to place at issue, a motion to strike under Rule 12(f) may be appropriate."); *see also id.* § 1262 (stating that if the court finds that a party intends to make its pleading evasive, "the court may strike the relevant portion of the pleading, or treat the allegation as ineffective as a denial; should this occur, the adverse party's allegations will stand admitted unless leave is given to replead"). The City cites no authority indicating that it is entitled to discovery in advance of the Rule 26(f) conference on account of some alleged deficiency in a pleading.

III. The City's request will impose burdens and costs on other parties to the litigation.

In addition to departing from the "orderly approach to discovery contemplated by Rule 26," if permitted, the requested discovery will unnecessarily burden and distract all Defendants who will be forced to participate in such rushed discovery. *Qwest*, 213 F.R.D. at 420. There is no justification for imposing the burdens and costs of unstructured and piecemeal discovery on the parties at this early stage of the Adversary Proceeding, especially where the Court has yet to determine which claims will be addressed at this time. From a practical point, it would streamline the discovery – and prevent redundant and unnecessary discovery – if the parties hold their required Rule 26(f) conference after the Court determines the Counterclaim Motion and the Trusts' request to continue the stay of the Motion to Dismiss.[3] At minimum, however, prior to the onset of discovery, all parties should confer under Rule 26(f) and make a good-faith attempt to develop an appropriate discovery timeline, pursuant to which the City can

[3] The City provides no basis for its assertion that the Service Corporations would be uncooperative in a Rule 26(f) conference, or that such a conference would be futile.

serve interrogatories or employ other discovery procedures to ascertain the information needed to "frame the issues that it will be litigating."[4] *See* Mot. 3.

The Motion is particularly inappropriate if the City seeks expedited discovery in this Adversary Proceeding to use in connection with other ongoing matters, including the plan confirmation litigation, or to circumvent discovery limitations that the parties have agreed upon in connection with that litigation.[5] None of the factual issues identified in the Motion need to be proven now in connection with this Adversary Proceeding nor would they be appropriate to raise in connection with the confirmation litigation.

[Remainder of page intentionally left blank.]

[4] Notably, the City argued at the July 14, 2014 status conference before this Court that there were no genuine issues of material fact regarding the allegations in the Complaint and that the City intended to swiftly move for summary judgment on its Complaint after the answers were filed. July 14 Tr. 16:1-7, 14-17. If this were truly the City's position, then there is no basis for the City to seek discovery at all from the Service Corporations, let alone on an expedited basis.

[5] On May 28, 2014, the City unequivocally stated on the record, and this Court acknowledged, that the validity of the certificates of participation ("COPs") would not be litigated in connection with confirmation of the City's proposed plan of adjustment. Hr'g Tr. 94:20-95:4, 176:4-177:4, May 28, 2014. Subsequently, via stipulation, the City agreed to forgo discovery on that issue in connection with the plan confirmation litigation. *See* Order Approving Stipulation By and Between the City of Detroit, Michigan and the COPs Creditors Regarding Certain Facts and the Admission of Certain Exhibits for the Confirmation Trial, entered 7/14/2014, *In re City of Detroit, Michigan*, No. 13-53846 [Docket No. 6002]. Nevertheless, the City now—while the parties are in the thick of discovery related to plan confirmation—seeks "fact discovery" on an emergency basis that is intended to elicit information related to the validity of the COPs, an issue which the parties and this Court have recognized should *not* be raised in connection with plan confirmation. There is no reason the discovery sought in the Motion must proceed immediately if the City is in fact seeking this information solely in connection with the Adversary Proceeding.

CONCLUSION

For the foregoing reasons, FGIC respectfully submits that the City's Motion should be denied.

Dated: July 28, 2014

Respectfully submitted,

/s/ Mark R. James

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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2014 *Financial Guaranty Insurance Company's Opposition to City of Detroit's Motion to Take Expedited Discovery of the Service Corporations* was filed and served via the Court's electronic case filing and noticing system to all registered users that have appeared in this Adversary Proceeding.

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