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

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

PLAINTIFFS' OPPOSITION TO DEFENDANT PENSION BENEFIT GUARANTY CORPORATION'S MOTION TO CERTIFY JULY 2014 ORDER FOR APPEAL AND REQUEST FOR STAY

Defendant Pension Benefit Guaranty Corporation ("PBGC") asks the Court to certify for interlocutory appeal the Court's July 21, 2014 Order, Dkt. No. 257, Overruling Defendant's Objections to Magistrate Judge's Order of August 21, 2013, and Mooting Plaintiffs' Motion Requesting the Magistrate Judge Dissolve the Partial Stay of the August 21, 2013 Order (the "July 2014 Order"), and to stay the July 2014 Order pending the interlocutory appeal.

The motion lacks merit and should be denied. Interlocutory appeals of this sort should issue only where the resolution of a novel and important question of law might otherwise alter the course of the litigation. The July 2014 Order meets none of these criteria; it was merely a review of a fact-intensive discovery ruling

applying established principles of law, whose resolution on appeal would not materially advance the outcome of the litigation. Nor is a stay appropriate; the PBGC does not have a likelihood of success on an appeal of the July 2014 Order, and that order arises in a context in which the Supreme Court has held that irreparable harm cannot occur. In addition, the balance of harms clearly favors Plaintiffs, who have suffered through years of PBGC delay and footdragging in the discovery process. This Court should deny the PBGC's motion.

PROCEDURAL HISTORY

From the time the Court first ordered this case into discovery in September 2010, the PBGC has been a recalcitrant and defiant litigant. For over a year, the PBGC insisted that the Court supposedly had not ordered discovery when the Court unequivocally had, culminating in this Court's September 2, 2011 Order clarifying that Plaintiffs were indeed entitled to obtain full discovery under the Federal Rules of Civil Procedure. *See* Dkt. No. 193. Plaintiffs subsequently issued two sets of document requests to the PBGC, which the PBGC responded to in October and November of 2011 respectively. Both of the PBGC's responses contained a "boilerplate" objection that stated: "PBGC also objects to the Requests to the extent they seek documents that: (i) are subject to the attorney-client privilege; (ii) constitute work product; or (iii) are otherwise privileged or protected from discovery under state or federal law." Ex. C to Dkt. No. 218 at 5; Ex. D to

Dkt. No. 218 at 2. No specific documents or privileges were cited, and no privilege log accompanied the responses.

In December 2011, Plaintiffs filed their Second Motion to Compel Discovery from the PBGC (the "Second Motion to Compel"), in which they argued, *inter alia*, that:

> [t]he PBGC has not voiced any of its boilerplate objections with the specificity necessary, and the Court should deem those objections waived. To the extent the PBGC had any legitimate objections to the Discovery Requests, it was obligated to state them in their responses, on pain of waiver, so as to avoid the dangers and costs associated with piecemeal litigation.

Dkt No. 197 at 13.

On March 9, 2012 Magistrate Judge Majzoub overruled the PBGC's objections and ordered the PBGC to provide "full and complete" responses to Plaintiffs' discovery requests within 90 days. Dkt. No. 204 (the "March 2012 Order") at 2. Throughout the remainder of 2012 the parties entered into stipulated agreements to extend the discovery period because of delays by the PBGC in meeting its deadlines under the March 2012 Order. During this time, Plaintiffs were steadfast in their position that the PBGC had waived its right to assert privileges by failing to object with the timeliness and specificity required under the Federal Rules of Civil Procedure, and the PBGC never asked or obtained any agreement from Plaintiffs or the Court to forgive this lapse or otherwise extend the

time period to raise any specific privilege objections. On December 20, 2012, the PBGC made what it described as its final production of documents. No privilege log accompanied this final production.

In January 2013, counsel for the parties held a conference call, during which the PBGC indicated it had identified approximately 29,000 responsive documents that it was withholding on grounds of privilege or work-product, and that it planned to produce a privilege log describing these documents by the middle of April 2013. On February 20, 2013, Plaintiffs filed a motion pursuant to Fed. R. Civ. P. 37 (the "Rule 37 Motion"), in which they asked the Court to order the PBGC to produce these 29,000 responsive documents that it had unjustifiably withheld on the basis of unspecified privileges. Dkt. No. 218. Both parties noted that the PBGC still had produced no privilege log as of the completion of the briefing on Plaintiffs' Rule 37 Motion.

On August 21, 2013, Magistrate Judge Majzoub held that the PBGC waived its right to assert privileges with respect to the documents requested in Plaintiffs' First and Second Requests for Documents by failing to produce a privilege log as of the briefing of the Rule 37 Motion. *See* Dkt. No. 231 (the "Waiver Order"). The Magistrate Judge's ruling made clear that the waiver was appropriate even assuming, *arguendo*, that the PBGC's position was correct, that it need not have begun logging its privileges until after her March 9, 2012 Order, given that more

than a year had passed since that time and the PBGC still had failed to produce a privilege log.[1] Dkt. No. 231 at 7.

The next week, on August 30, 2013, the PBGC filed a motion for reconsideration with Judge Majzoub. Dkt. No. 232. On September 4, 2013 the PBGC filed objections to the Waiver Order pursuant to Fed. R. Civ. P. 72 (the "Rule 72 Objections"), raising precisely the same arguments presented in its motion for reconsideration. Dkt. No. 234. Five days later, on September 5, 2013, Judge Majzoub denied the PBGC's motion for reconsideration, addressing each of the PBGC's fact-bound arguments in turn in a thorough order and memorandum (Dkt. No. 237). On July 21, 2014, the Court issued the July 2014 Order overruling the PBGC's objections to the Waiver Order, holding that "[t]he Magistrate Judge's conclusion that PBGC waived the right to claim privilege here was based on well-settled law and the Court will not disturb it." Dkt. No. 257 at 5. The PBGC's motion to certify followed.

LEGAL STANDARDS FOR CERTIFICATION AND STAY

A district court "may certify an issue for interlocutory appeal if the case 'involves a controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal from the order may materially

[1] Two days later, on August 23, 2013, the PBGC produced the "first half" of its privilege log, ostensibly identifying the documents for which it wishes to assert the attorney-client or work-product privilege.

advance the ultimate termination of the litigation.'" Order Denying Defendant's Motion for Reconsideration and Interlocutory Appeal (Dkt. No. 195) at 3 (quoting 28 U.S.C. § 1292(b)). "Certification should be ordered 'sparingly and only in exceptional cases.'" *Id*. (quoting *W. Tenn. Chapter of Assoc. Builders & Contractors, Inc. v. City of Memphis, (In re City of Memphis)*, 293 F.3d 345, 350 (6th Cir. 2002) and citing *Kraus v. Board of County Comm'rs*, 364 F.2d 919, 922 (6th Cir. 1966)).

"Even a properly made application for permissive review 'shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.'" *Erie Indem. Co. v. Keurig, Inc.*, Case 1:10-cv-2899, 2011 U.S. Dist. LEXIS 105925, *10 (N.D. Ohio Sept. 19, 2011) (quoting 28 U.S.C. § 1292(b)). In considering whether to grant a stay pending appeal, a district court should consider four factors: (1) whether the moving party has a strong or substantial likelihood of success on the merits; (2) whether the moving party will suffer irreparable harm if the lower court order is not stayed; (3) whether staying the lower court order will substantially injure other interested parties; and (4) where the public interest lies. *Family Trust Found. of Ky., Inc. v. Ky. Judicial Conduct Comm'n*, 388 F.3d 224, 227 (6th Cir. 2004). "In order to justify a stay of the district court's ruling, the [Appellant] must demonstrate at least serious questions going to the merits and irreparable harm that decidedly outweighs the

harm that will be inflicted on others if a stay is granted." *Id.* (citing *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985)).

ARGUMENT

I. THE PBGC'S MOTION FOR CERTIFICATION MUST BE DENIED

28 U.S.C. § 1292(b) "applies to interlocutory orders that are not otherwise appealable of right and requires the existence of four elements: (1) The question involved must be one of 'law'; (2) it must be 'controlling', (3) there must be substantial ground for 'difference of opinion' about it; and (4) an immediate appeal must 'materially advance the ultimate termination of the litigation.'" *Cardwell v. Chesapeake & O. R. Co.*, 504 F.2d 444, 446 (6th Cir. 1974) (quoting 28 U.S.C. § 1292(b)). The July 2014 Order does not satisfy any of these conditions and is in no way appropriate for certification.

A. The July 2014 Order Does Not Involve a Controlling Question of Law

A question of law is "controlling" if "resolution of the issue on appeal could materially affect the outcome of the litigation in the district court." *Tampone v. Richmond*, No. 10-11776, 2013 U.S. Dist. LEXIS 30358, *8 (E.D. Mich. Mar. 6, 2013) (quoting *In re Baker & Getty Fin. Servs.*, 954 F.2d 1169, 1172 (6th Cir. 1992)). The PBGC argues that the "controlling" question for certification is "[w]hether the drastic sanction of denying PBGC's right to claim any privilege is warranted in the absence of unjustified delay, inexcusable contact, and bad faith."

Dkt. No. 258 at 3. The first infirmity with the PBGC's argument is that the question posited by the PBGC is not presented in the Order it seeks to certify. In fact, both Judge Majzoub's Waiver Order, and the Court's July 2014 Order upholding the Waiver Order, explicitly found that the PBGC's assertion of any purported privilege was, as a factual matter, *unjustifiably delayed*.[2] These Orders noted that the PBGC had failed to meet the Federal Rules' thirty-day requirement and had failed to produce a privilege log for more than a year following the Court's Order to make a full and complete production of documents. Additionally, both Magistrate Judge Majzoub and the Court rejected the PBGC's various arguments about why its delay was justified. Dkt. No. 237 at 2-4 and Dkt. No. 257 at 3-4. In short, the PBGC has tried to manufacture a controlling legal question by mischaracterizing the Court's Order, and this is not a basis for certification. *See, e.g.*, Dkt. No. 195 at 4 (denying the PBGC's motion for certification because "[t]his Court's Order [] did not involve the controlling question of law for which Defendant seeks certification.").

[2] *See* Dkt. No. 231 at 7 ("Even assuming Defendant is correct in arguing that it was not required to begin logging its privileged documents until after the March 9, 2012 order was entered, the order was entered well over one year ago. The parties both state in their briefing of this motion that Defendant still has not produced a privilege log."); Dkt. No. 257 at 4 ("PBGC has been under court order since March 9, 2012 to respond to Plaintiff's discovery requests and has only asserted boilerplate objections.").

The second problem with the PBGC's "controlling question" is that it is not a question of "pure law." *Adler v. Dell, Inc.*, No. 08-cv-13170, 2009 U.S. Dist. LEXIS 18329, *4 (E.D. Mich. Mar. 10, 2009). The PBGC did not dispute that it failed to produce a privilege log within the time specified by the Federal Rules of Civil Procedure, and the only question left for this Court to decide (which the PBGC here seeks to certify) was whether a finding of waiver was appropriate in light of all the facts and circumstances surrounding the PBGC's delay. Because this is not a pure legal question, but rather one that would require a reviewing court to "delve beyond the surface of the record in order to determine the facts," the July 2014 Order is entirely inappropriate for certification. *Neff v. U.S. Xpress, Inc.*, No. 2:10-cv-948, 2013 U.S. Dist. LEXIS 158973, *5-6 (S.D. Ohio Nov. 6, 2013).[3]

The final infirmity with the PBGC's theory is that the question is not in any way "controlling," in that appellate resolution of the question will not materially affect the outcome of the litigation in the district court. *In re Baker & Getty Fin. Services, Inc.*, 954 F.2d at 1172 n.8. As one court has noted, this analysis is "closely tied" to the statute's requirement that an interlocutory appeal must

[3] Moreover, "[a] legal question of the type envisioned in § 1292(b), [] generally does not include matters within the discretion of the trial court." *In re City of Memphis*, 293 F.3d at 351. As the Supreme Court has noted, "[m]ost district court rulings on [matters like privilege waiver] involve the routine application of settled legal principles [and t]hey are unlikely to be reversed on appeal, particularly when they rest on factual determinations for which appellate deference is the norm." *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 110 (2009).

materially advance the ultimate termination of the litigation. *City of Dearborn v. Comcast of Mich. III, Inc.*, No. 08-10156, 2008 U.S. Dist. LEXIS 107527, *6-8 (E.D. Mich. Nov. 24, 2008). This Court has stated that, upon the conclusion of discovery, the parties are to present arguments for summary judgment. Dkt. No. 193 at 7. If neither party prevails on dispositive motions, a trial will be required. Nothing in this discovery dispute could possibly alter the course of the litigation, or work to advance its termination. Because the July 2014 Order does not present a controlling issue of law, the PBGC's motion must be denied.

B. There Is Not a Substantial Ground for Disagreement About the Court's July 2014 Order

"Generally, a substantial difference of opinion exists if an issue is one of first impression or other circuits are split on the issue." *In re Phipps*, No. 13-0503, 2013 U.S. App. LEXIS 24814, *2 (6th Cir. Sept. 11, 2013) (citing *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010)). The July 2014 Order presents no such issue. In the Waiver Order, Judge Majzoub found that the PBGC had waived its right to assert privileges by relying on boilerplate assertions of privilege in its responses, and unjustifiably failing to supplement those assertions with the specificity required by the Federal Rules of Civil Procedure for more than a year after the Court granted Plaintiffs' motion to compel. The Magistrate Judge's finding of waiver did not depend upon any novel interpretation of law; rather, as the Court noted in the July 2014 Order, "[t]he Magistrate Judge's conclusion that

[the PBGC] has waived the right to claim privilege here was based on well-settled law." Dkt. No. 257 at 5; *see also* Dkt. No. 239 at 14 n.2, 17 n.3 (listing cases where courts have found waiver). Given the overwhelming authority upon which the Waiver Order relied, and the sheer absence of authority underlying the PBGC's objections, there is no reasonable ground to disagree with the July 2014 Order's conclusion that the Waiver Order was neither clearly erroneous nor contrary to the law.

The PBGC's argument as to why it meets the substantial difference of opinion standard is hard to follow. The PBGC suggests at one point that there is "apparent" ground to disagree with the Court's holding regarding "boilerplate objections" of privilege, *see* Dkt. No. 258 at 3-4, but then fails to identify authority (from within or without this Circuit) that would contradict that holding. The PBGC then seems to suggest that other courts might have reached different conclusions as to whether the PBGC's 18-month refusal to produce a privilege log was justified, Dkt. No. 258. at 4, but, again, that is a factual question, and "[o]n interlocutory appeal the appellate court has no authority to review disputed questions of fact." *Foster Wheeler Energy Corp. v. Metropolitan Knox Solid Waste Authority, Inc.*, 970 F.2d 199, 202 (6th Cir. 1992). Additionally, "[t]here are not substantial grounds for difference of opinion under § 1292(b) when, conversely, a litigant merely disagrees with the [] court's order. Rather, the

difference of opinion must arise out of genuine doubt as to the correct legal standard." *MidFirst Bank v. Johnston*, No. 13-49, 2014 U.S. Dist. LEXIS 21978, 11-12 (N.D. Ohio Feb. 21, 2014). Finally, the PBGC cites a number of decisions that it claims support a "long-standing public policy of preserving a party's right to claim privilege," *id*. at 4, but then fails to explain how those decisions conflict with the July 2014 Order, especially given that none of those cases involves facts even remotely similar to those at bar. *See Tampone v. Richmond*, No. 10-11776, 2013 U.S. Dist. LEXIS 30358,*8 (E.D. Mich. Mar. 6, 2013) ("Sixth Circuit law establishes that 'substantial grounds for difference of opinion exist only when there is conflicting authority on an issue.'") (quoting *Serrano v. Cintas Corp.*, Nos. 04-40132, 06-12311, 2010 U.S. Dist. LEXIS 23203, 2010 WL 940164, at *3 (E.D. Mich. Mar. 10, 2010)). Because the PBGC has failed to show that there is a substantial ground for disagreement about the July 2014 Order, the PBGC's motion to certify should be denied.

C. An Appeal Would Not Materially Advance the Outcome of the Litigation

"When litigation will be conducted in substantially the same manner regardless of [the court's] decision, the appeal cannot be said to materially advance the ultimate termination of the litigation." *In re City of Memphis*, 293 F.3d at 351. Here, however, and as noted above, regardless of the outcome of an appeal, the litigation would proceed in exactly the same way: the parties will present

arguments for summary judgment, and if neither party prevails on dispositive motions, a trial will be required. Because nothing in this discovery dispute could possibly alter the course of the litigation, the PBGC's motion should be denied.[4]

II. No Stay Is Justified

There are no grounds for issuing a stay here. In the first place, even were the Court to grant the PBGC's motion, it is highly unlikely the Sixth Circuit would agree to hear the appeal. Nor has the PBGC demonstrated even a remote possibility of success. Discovery rulings, like the one here, are reviewed for abuse of discretion, *Serrano v. Cintas Corp.*, 699 F.3d 884, 899-900 (6th Cir. 2012), and the PBGC has not cited a single case suggesting that this Court's determinations were an abuse of its discretion. Additionally, the PBGC cannot show irreparable harm, as the Supreme Court has made clear:

> [P]ostjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege. Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence.

[4] The PBGC's argument that "[f]urther discovery delays will be avoided" if the appeal is granted has it entirely backward. Dkt. No. 258 at 5. A frivolous interlocutory appeal will result in additional delays, but once the PBGC produces the improperly withheld documents (which it should be able to do immediately given that no further review is required) the parties will be able to finish discovery and move onto summary judgment briefing once discovery closes.

Mohawk, 558 U.S. at 109; s*ee also Holt-Orsted v. City of Dickson*, 641 F.3d 230, 240 (6th Cir. 2011) (party dissatisfied with order requiring disclosure of purportedly privileged information "ultimately can avail themselves of a post-judgment appeal which, under *Mohawk*, suffices 'to protect the rights of the litigants and preserve the vitality of the attorney-client privilege'") (quoting *Mohawk*, 558 U.S. at 103).

Plaintiffs, on the other hand, have already suffered years of delay as the result of the PBGC's tactics. This is a significant burden to an aging group of retirees seeking to vindicate their lost pension rights. Finally, the public interest tilts heavily against a stay. It is worth reiterating here that the PBGC's behavior was truly outrageous, and the public interest will be served by moving this litigation forward. *Freeman v. City of Detroit*, 09-CV13184, 2011 U.S. Dist. LEXIS 68914, at *7 (E.D. Mich. June 24, 2011).

Dated: August 6, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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