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

PENSION BENEFIT GUARANTY CORPORATION'S REPLY IN SUPPORT OF ITS MOTION TO CERTIFY THE PRIVILEGE WAIVER ORDER FOR APPEAL AND REQUEST FOR STAY

Barbara L. McQuade, United States Attorney Peter A. Caplan, Assistant United States Attorney UNITED STATES ATTORNEY'S OFFICE FOR THE EASTERN DISTRICT OF MICHIGAN 211 West Fort Street, Suite 2001 Detroit, MI 48226 Telephone: (313) 226-9784	Israel Goldowitz, Chief Counsel Karen L. Morris, Deputy Chief Counsel John A. Menke, As. Chief Counsel C. Wayne Owen, Jr., As. Chief Counsel Craig T. Fessenden Erin C. Kim Jared S. Wiesner Cassandra B. Caverly PENSION BENEFIT GUARANTY CORPORATION Office of Chief Counsel 1200 K Street, N.W. Washington, D.C. 20005 Telephone: (202) 326-4020 ext. 3204 Fax: (202) 326-4112 Emails: owen.wayne@pbgc.gov and efile@pbgc.gov

Attorneys for the Defendant Pension Benefit Guaranty Corporation

Faced with a particularly injurious and novel ruling by this Court that denies the Pension Benefit Guaranty Corporation ("PBGC") its right to claim privilege on over 10,000 documents, PBGC has requested that this Court certify the July 21, 2014 order, Docket Number 257 ("Order") for appeal and grant PBGC's request for a stay.

The issue before this Court is not a run-of-the-mill privilege dispute involving the production of a handful of documents after *in camera* review by the Court. To the contrary, the Court has, sight unseen, ordered PBGC, a federal government agency, to turn over more than 10,000 privileged documents, created over a multi-year period in the bankruptcy case involving the second largest plan terminations in PBGC's history. The privileged documents address numerous sensitive legal and strategic issues that arose over the course of that multi-billion dollar case. But few, if any, have any relevance to the single, narrow legal issue that plaintiffs have raised in their Amended Complaint – whether ERISA authorizes PBGC to terminate a pension plan by agreement with the plan's sponsor.

Plaintiffs claim that PBGC has no right to have the Sixth Circuit Court of Appeals review whether such a massive abrogation of PBGC's legal right to claim privileges is appropriate. They argue that certification under 29 U.S.C. § 1292(b) is never warranted in cases involving disputes over privilege, because such

discovery disputes can never involve a "controlling question of law" in that the parties will have to present their arguments for summary judgment on the underlying merits of the case, regardless of the outcome of this discovery dispute. Plaintiffs justify their radical position, which would effectively bar any appellate court review of discovery issues before final judgment, on the Supreme Court's decision in *Mohawk Industries v. Carpenter*.[1]

Plaintiffs' reliance upon the *Mohawk* decision is misplaced. The Supreme Court did not adopt plaintiffs' absolutist argument against allowing permissive appellate review of privilege decisions; rather, it rejected that view. In the words of the Supreme Court: "The preconditions for § 1292(b) review – 'a controlling question of law,' the prompt resolution of which 'may materially advance the ultimate termination of the litigation' – are most likely to be satisfied when a privilege ruling involves a new legal question or is of special consequence, and district courts *should not hesitate to certify* an interlocutory appeal in such cases."[2]

The July 21 Order falls squarely within the category of privilege rulings the Supreme Court directs that district courts not hesitate to certify. The magnitude of the Order itself, ruling that PBGC must disclose over 10,000 privileged documents

[1] 558 U.S. 100 (2009).

[2] 558 U.S. at 110-111 (emphasis added).

without any court review of PBGC's grounds for claiming privilege on those documents, is extremely rare and unusual.

The July 21 Order also raises new legal issues, which are themselves of special and significant consequence. The Court's ruling that PBGC's initial reservation of its right to claim privilege was "mere boilerplate," and its holding that PBGC was required to produce the detailed privilege log required under Fed. R. Civ. P. 26(b)(5)(a) within 30 days of plaintiffs' initial discovery demands or forever waive any right to claim privilege, is contrary to the holdings of the Sixth Circuit Court of Appeals and of other jurisdictions. Those courts have explicitly "reject[ed] a *per se* waiver rule that deems a privilege waived if a privilege log is not produced" within Rule 34's 30-day limit.[3] Instead of applying the *per se* rule that this Court has adopted, the other courts have considered several factors in ruling on a privilege waiver, including the magnitude of the document production and whether documents were previously the subject of discovery before making

[3] *Berryman v. SuperValu Holding, Inc.*, No. 05-169, 2008 WL 4934007, at *10 (S.D. Ohio Nov. 18, 2008); *see Casale v. Nationwide Children's Hosp.*, No. 2:11-cv-1124, 2014 WL 1308748, at *8-9 (S.D. Ohio March 28, 2014); *Coalition for a Sustainable Delta v. Koch*, No. 1:08-cv-00397-OWW-GSA, 2009 WL 3378974, at *3 (E.D. Cal. Oct. 15, 2009); *Carl Zeiss Vision Int'l GmbH v. Signet Armorlite*, No. CIV 07-cv-0894-DMS-POR, 2009 WL 4642388, at *3 (S.D. Cal. Dec. 1, 2009)*; See also Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. of Mont.*, 408 F.3d 1142, 1149 (9th Cir. 2005).

such a determination.[4] In contrast with those pragmatic considerations, the July 21 Order would require PBGC to collect and review the over one million pages of documents encompassed by plaintiffs' discovery demands, identify and withhold all of PBGC's privileged documents, and prepare a detailed privilege log, all within 30 days of service of the discovery demands. As reflected in the parties five stipulated agreements extending discovery deadlines and sequencing PBGC's privilege log as the last thing PBGC would create and produce, PBGC's compliance with the ruling is and was impossible. Accordingly, the ruling is tantamount to removing all privilege protections from litigants in cases involving significant document productions, a result manifestly contrary to the intent of the federal discovery rules.

The July 21 Order raises a second novel legal issue, one of great import to litigants who attempt to act professionally by negotiating agreements with their opponents to resolve contentious discovery matters. The July 21 Order stated that PBGC could not rely upon such an agreement that it had negotiated with plaintiffs here, even though the agreement was reduced to writing and entered as an order of the Court. The Court stated that the agreement could be disregarded and that PBGC's reliance upon it was of no moment, because plaintiffs ignored its terms by

[4] *See, e.g., Koch*, 2009 WL 3378974 at *3; *Carl Zeiss Vision*, 2009 WL 4642388, at *3; *Burlington*, 408 F.3d at 1149.

filing motions to compel and denied that they had actually agreed to the words on the page in later pleadings. That a party could escape the burdens of a court-ordered agreement that they freely entered into by breaching that agreement and later claiming that they never actually intended to agree is entirely unprecedented.

Conclusion

For the above reasons and for the reasons stated in PBGC's Motion, the Court should accept the Supreme Court's direction and "not hesitate" to certify the July 21 Order for appeal pursuant to 29 U.S.C. § 1292(b).

Dated: August 15, 2014

Washington, D.C.

Respectfully Submitted:

/s/ C. Wayne Owen, Jr.
ISRAEL GOLDOWITZ
Chief Counsel
KAREN L. MORRIS
Deputy Chief Counsel
JOHN A. MENKE
C. WAYNE OWEN, JR
Assistant Chief Counsels
CASSANDRA B. CAVERLY
CRAIG T. FESSENDEN
ERIN C. KIM
JARED S. WIESNER
Attorneys

Attorneys for the Defendant
PENSION BENEFIT GUARANTY COPORATION
Office of Chief Counsel
1200 K Street, N.W.
Washington, D.C. 20005

Local Counsel:

BARBARA L. McQUADE
United States Attorney
PETER A. CAPLAN
Assistant United States Attorney
Eastern District of Michigan
211 West Fort Street, Suite 2001
Detroit, MI 48226
Phone: (313) 226-9784

Phone: (202) 326-4020 ext. 6767
Fax: (202) 326-4112
Emails: owen.wayne@pbgc.gov and
efile@pbgc.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of August, 2014, I electronically filed the foregoing Pension Benefit Guaranty Corporation's Reply in Support of its Motion to Certify the Privilege Waiver Order for Appeal and Request for Stay with the Clerk of the Court using the CM/ECF system and served the paper on the following:

Alan J. Schwartz Jacob and Weingarten 2301 West Big Beaver Road Suite 777 Troy, MI 48084 ***Plaintiffs' Attorney*** **via CM/ECF**	**Anthony F. Shelley** **Michael N. Khalil** **Timothy P. O'Toole** Miller & Chevalier 655 15th Street, N.W. Washington, D.C. 20005 ***Plaintiffs' Attorneys*** **via CM/ECF**
Barbara L. McQuade United States Attorney **Peter A. Caplan** Assistant United States Attorney United States Attorney's Office for the Eastern District of Michigan 211 West Fort Street, Suite 2001 Detroit, MI 48226 peter.caplan@usdoj.gov ***Local Counsel*** **via E-mail**	

/s/ C. Wayne Owen, Jr.
C. Wayne Owen, Jr.