

**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, <i>et al.</i> ,)	
)	
Defendants.)	

**PENSION BENEFIT GUARANTY CORPORATION’S REPLY IN
SUPPORT OF ITS OBJECTIONS TO MAGISTRATE JUDGE’S ORDER
OF AUGUST 21, 2013, GRANTING IN PART PLAINTIFFS’ RULE 37
MOTION TO ENFORCE COURT ORDER**

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Attorneys for the Defendant Pension Benefit Guaranty Corporation

Plaintiffs claim that PBGC has flouted the rules of discovery, but the opposite is true. PBGC has, in good faith, complied with all Federal Rules of Civil Procedure and orders of this Court regarding all discovery issues. PBGC has produced over a million pages of documents in response to plaintiffs' discovery requests and has now given plaintiffs a complete log of all documents for which PBGC claims privilege. That PBGC was somehow required, and supposedly able, to review the over one million pages of documents encompassed by plaintiffs' broad discovery requests and produce a privilege log within 30 days of those requests, is an impossible standard, and is unsupported by law. Plaintiffs' contentions ignore reality – a reality that includes the Federal Rules of Civil Procedure, the joint stipulated orders entered by this Court, and the volume of documents at issue.

Within thirty days after receiving plaintiffs' discovery demands, PBGC served timely initial responses; objected to the breadth of those demands on relevance grounds; and, at the same time, expressly preserved its rights to claim privilege for any documents it might ultimately be ordered to produce – exactly as the Federal Rules required.¹ Only after the Magistrate Judge overruled PBGC's relevance objections was PBGC required to begin producing documents. PBGC's

¹ See Fed. R. Civ. P. 34(b)(2).

subsequent efforts to comply with the Magistrate Judge's Order were undertaken in close consultation with plaintiffs and with the express approval of this Court. The Magistrate Judge's finding that PBGC had waived its rights to claim any privilege whatsoever, despite the fact that PBGC proceeded in accordance with the rules and orders of this Court, is clearly erroneous and contrary to law and must be vacated.²

Finding that a party has waived privilege due to the amount of time it took that party to produce a privilege log compliant with Fed. R. Civ. P. 26(b)(5) would be a draconian sanction. In determining whether such an extraordinary finding is appropriate, courts evaluate the facts and circumstances of each case, including reasons for delay, prejudice to the opposing party, the facial propriety of the discovery requests, and the magnitude of the document production.³ Waiver is

² On September 25, 2013, PBGC gave plaintiffs a copy of the Delphi Salaried Plan census data and documents relating to the value of PBGC's recovery in the Delphi bankruptcy. With that production, PBGC has fully complied with the portions of the Magistrate Judge's Order to which PBGC did not object.

³ See *Burlington & Santa Fe Railway Co. v. U.S. Dist. Ct. for the Dist. of Montana*, 408 F.3d 1142, 1149-1150 (9th Cir. 2005) (Rejecting a *per se* waiver rule, and instead finding that courts should make a case-by-case determination by taking into account multiple factors, including the magnitude of the document production); *Carfagno v. Jackson Nat'l Life Ins. Co.*, No. 99-118, 2001 US. Dist. LEXIS 1768, *4 (W.D. Mich. Feb 13, 2001) ("To be sure, courts will examine the circumstances of each case, including the reason for tardy compliance, prejudice to the opposing party, and the facial propriety of the discovery requests, to determine whether enforcement of the waiver is equitable").

found only in the absence of substantial justification based on such factors.⁴ The facts of this case clearly establish that there is such substantial justification.

PBGC timely filed its detailed objections to plaintiffs' document requests on relevance grounds, and plaintiffs then asked the Court to overrule those objections. PBGC was not required to see into the future and begin the process of document review and privilege logging while its objections were pending before the Court.⁵ After the Magistrate Judge overruled PBGC's objections, PBGC quickly consulted with plaintiffs to determine the most efficient way to proceed with document production. That process took into account two very important factors, which necessarily had an impact on the production timetable: (1) the great volume of documents plaintiffs demanded, and (2) the resources available to PBGC. These factors provide substantial justification against finding waiver of privilege.

⁴ Decisions on this issue, including those cited by plaintiffs, greatly diverge on the appropriate timeframe, revealing that there are no bright line rules in determining the timeliness of a privilege log and whether finding waiver of privilege is appropriate. Rather, the facts of each case determine the outcome of a court's finding. *See id.* and footnote 3 of Plaintiffs' Response to PBGC's Rule 72 Objections, Dkt. No. 239, filed September 23, 2013.

⁵ *See* 1993 Advisory Committee Notes to Fed. R. Civ. P. 26(d)(5); *U.S. v. Philip Morris, Inc.*, 347 F.3d 951, 954 (D.C. Cir. 2003) (party is required to note its privilege objection and to describe document only when document is "otherwise discoverable"); 6-26 MOORE'S FEDERAL PRACTICE - CIVIL § 26.47[1][b].

The volume of plaintiffs' discovery demands exceeded that of any other demand in this agency's litigation history. Plaintiffs requested every document that contained the word "Delphi" that PBGC possessed spanning a period of four years, without limitation.⁶ PBGC's search for these documents yielded well over a million pages, each one of which PBGC was then required to review and either prepare for production or log for privilege.

The magnitude of plaintiffs' requests forced PBGC to procure an outside contractor, who determined that 50 contract attorneys were needed to assist with the review and production of non-privileged documents. Even with those additional resources added to the thousands of hours spent by PBGC attorneys, the collection, review, and production of more than one million pages took more than nine months and cost PBGC more than \$2 million.

After the million-page production was completed, the process of compiling the privilege log that followed was particularly complex and time-consuming. During the initial review process, the contract attorneys flagged almost 30,000 potentially privileged documents, but final privilege determinations, as well as the assembly of a privilege log, rested with PBGC attorneys. The volume of potentially privileged documents was very large because the Delphi matter was a multi-year-long, litigated bankruptcy case requiring the presence of PBGC

⁶ See Exhibit A, Declaration of John A. Menke, at ¶ 7.

attorneys at every step. Because of the tens of thousands of documents involved, PBGC attorneys working on the Delphi case sought help from and educated several attorneys new to the case about the events of the previous several years. At various points in time, PBGC had up to 10 of its 60 attorneys in the Office of the Chief Counsel reviewing and cataloging documents.⁷ The PBGC attorneys were required to carefully analyze each of the thousands of documents and record them on the privilege log, describing each document with the level of specificity required by Fed. R. Civ. P. 26(b)(5). Finally, PBGC was required to undertake an additional level of review through its General Counsel in order to assert claims for deliberative process privilege.⁸

Given the challenges presented in reviewing the volume of documents generated by plaintiffs' demands, the parties engaged in regular discussions about how PBGC's document collection and production would proceed.⁹ Further, these

⁷ *See id.* at ¶¶ 13, 14, 15, and 18. This process, along with plaintiffs' January 30, 2013 request to exclude attorney-only and pre-August 2008 documents, allowed PBGC to reduce the number of documents on the privilege log. *See id.* at fn. 14. Plaintiffs' assertion that PBGC is withholding a subset of additional responsive non-privileged documents, when that subset is comprised of documents plaintiffs specifically instructed PBGC to exclude from the log, is false.

⁸ *See generally* Exhibit B, Declaration of Judith R. Starr.

⁹ *Consistent with plaintiffs' stated preference*, instead of compiling a privilege log simultaneously with the rolling production of documents, PBGC first produced the most quickly reviewable documents first, then moved to documents requiring

discussions, and modifications to the discovery timetable, were documented in a series of five joint stipulated orders, which the Court approved without comment. Ultimately, and in accord with that agreed-upon process, PBGC produced over one million pages of non-privileged data and produced its privilege log in two tranches: the first on August 23, 2013, and the second on September 26, 2013.¹⁰

Based on the volume of documents at issue, the evidence demonstrating PBGC's constant discussions with plaintiffs and reports to the Court about the status of the document production, and PBGC's compliance with a Court-ordered production timetable, there is no justification for finding that PBGC has waived its rights to claim privilege. In fact, it would be grossly inequitable for the Court to sanction PBGC for acting exactly as contemplated by the Court and the parties.

Nor have plaintiffs been prejudiced by the timing of PBGC's privilege log production, because it has not delayed resolution of this litigation to plaintiffs' detriment. As plaintiffs have repeatedly informed this Court, they believe that they must have document and deposition discovery from the U.S. Department of the

additional processing such as redaction, and then lastly, compiled the log of the privileged documents. *See* Exhibit A at ¶¶ 10-19.

¹⁰ *See id.* at ¶¶ 20-21.

Treasury before they can proceed to the merits. That discovery has been stayed by the U.S. District Court for the District of Columbia.¹¹

Therefore, given the enormous number of documents at issue, the joint stipulated discovery orders entered by the Court, and PBGC's good faith efforts to compile and produce the privilege log, sanctioning PBGC by enforcing privilege waiver is clearly erroneous and contrary to law.

Conclusion

For these reasons and those stated in the Objection, PBGC respectfully requests that the Court vacate the Magistrate Judge's Order of August 21, 2013, and deny plaintiffs' Rule 37 Motion to Enforce this Court's Order Granting Plaintiffs' Second Motion to Compel Discovery with respect to assertions of privilege.

Dated: October 3, 2013

Washington, D.C.

Respectfully Submitted:

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¹¹ See Plaintiffs' Supplemental Discovery Statement, filed October 3, 2012, Dkt. No. 216.

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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2013, I electronically filed the foregoing **Pension Benefit Guaranty Corporation's Reply in Support of its Objections to Magistrate Judge's Order of August 21, 2013, Granting in Part Plaintiffs' Rule 37 Motion to Enforce Court** via the court's CM/ECF system which will send notification of such filing to all registered users, including the following:

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