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' SUR-REPLY IN OPPOSITION TO DEFENDANT'S MOTION TO CERTIFY

Plaintiffs file this sur-reply in response to a new argument raised in the Defendant Pension Benefit Guaranty Corporation's Reply in Support of its Motion to Certify the Privilege Waiver Order for Appeal and Request for Stay (the "Reply"). Dkt. No. 262. In the Reply, the PBGC argues, for the first time, and without citation to the Order it seeks to certify, that the Court adopted a "*per se*" waiver rule that would deem a privilege waived if a privilege log is not produced within Rule 34's 30-day limit. *Id*. at 4. This argument is plainly without merit (as the Court's waiver ruling was expressly not based on a *per se* waiver rule), and is yet another desperate attempt by the PBGC to manufacture a certifiable question by mischaracterizing one of this Court's Orders.

As noted above, the PBGC does not cite to any part of either the Magistrate Judge's Waiver Order (Dkt. No. 231) or the Court's July 21, 2014 Order (Dkt. No. 257) in support of its argument that the Court adopted the *per se* rule the PBGC argues is worth immediate appellate review. This is not surprising, as the Orders do not adopt, imply, or mention such a rule. Indeed, not only did Magistrate Judge Majzoub explicitly decline to adopt a *per se* waiver approach, she instead measured the reasonableness of the PBGC's delay *from the point that the PBGC argued it should be measured – i.e.*, not until after the Court overruled the PBGC's objections to the document requests and ordered production. Dkt. No. 231 at 7 ("[e]ven 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"). Because the PBGC had conceded that it still had not produced a privilege log as of the briefing of Plaintiffs' motion to compel (the PBGC's brief was filed in March 2013), Magistrate Judge Majzoub found the PBGC's delay unreasonable. *Id*. Magistrate Judge Majzoub expressly considered and rejected the PBGC's nonsensical arguments as to its supposed court-approved "agreement" with Plaintiffs, Dkt. No. 237 at 2-3, and the allegedly herculean task of producing a privilege log (which the PBGC was miraculously able to produce in two days once Magistrate Judge Majzoub issued the Waiver Order). *Id*. at 4.

Similarly, the Court's July 21, 2014 Order (which is ostensibly the Order the PBGC seeks to certify) did not adopt a *per se* waiver rule, but simply upheld the Waiver Order's reasoning that a one-year delay from the time of the Court's March 2012 was unreasonable, finding it neither clearly erroneous as a factual matter nor contrary to law. *See* Dkt. No. 257 at 2 ("[p]art of the basis of the Magistrate Judge's privilege ruling was that the PBGC's failure to produce a privilege log for more than one year after the Court ordered the PBGC to comply with Plaintiffs' 2011 discovery requests waived its ability to assert any privileges or protections as to those document requests").

In short, this Court has plainly not adopted a *per se* waiver rule. Why, then, would the PBGC go to such lengths arguing about an imaginary holding? Because interlocutory appeal is only available in extremely rare cases: where there is "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 advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The July 21, 2014 Order, and the Waiver Order before it, involve no such question, and the PBGC is now desperate to avoid the consequences flowing from its imprudent decision to play chicken with the Federal Rules of Civil Procedure. The PBGC gambled that it could, with impunity, indefinitely withhold 29,000 relevant documents without identifying a single document, or providing Plaintiffs with the ostensible basis for a

privilege. It miscalculated. Giving the PBGC the benefit of the doubt that it need not have begun logging its privileges until after the Magistrate Judge overruled its frivolous objections to the discovery requests, the Magistrate Judge, applying well-settled law, concluded that a year-long failure to produce a privilege log after that time was not reasonable, even in light of all the facts and circumstances the PBGC brought to the Court's attention. This holding is not novel, and certainly not worthy of certification.

Conclusion

The July 21, 2014 Order does not meet the criteria for interlocutory appeal under 28 U.S.C. § 1292(b). The PBGC's motion should be denied.

Dated: August 18, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on August 18, 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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