

**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,)	
)	
Defendant.)	

**PENSION BENEFIT GUARANTY CORPORATION’S MOTION TO
CERTIFY THE PRIVILEGE WAIVER ORDER FOR APPEAL AND
REQUEST FOR STAY**

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Attorneys for Defendant Pension Benefit Guaranty Corporation

Pension Benefit Guaranty Corporation (“PBGC”) requests that this Court certify its July 21, 2014 order, docket number 257 (“Order”) and grant a stay pending the appeal. Pursuant to Local Rule 7.1, PBGC has consulted with plaintiffs’ counsel, who have informed PBGC that they will oppose this request.

I. THE COURT SHOULD CERTIFY ITS RULING FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(b).

PBGC requests that the Court certify the Order so that PBGC may appeal the ruling under 28 U.S.C. § 1292(b). A court may certify an otherwise nonappealable order if it finds that: (1) the order involves a controlling question of law; (2) on which there is substantial ground for difference of opinion; and (3) an immediate appeal may materially advance the ultimate termination of the litigation. For the reasons that follow, the order meets all three requirements.

A. The Court’s Ruling Raises a Controlling Question of Law.

A question of law is controlling if interlocutory reversal might save time for this Court and time and expense for the litigants.¹ A question of law is also

¹ See *Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991).

controlling if it is serious to the litigation, either practically or legally,² or if it “materially affects the outcome of the case.”³ Each of these standards is met here.

Whether 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, is a controlling question of law. If the Court of Appeals reverses the Order, the irreparable harm PBGC will incur by disclosing privileged documents can be avoided. In addition, the parties can conserve substantial time and expense associated with producing the privileged documents and the plaintiffs’ review of over 10,000 documents for which PBGC has claimed privileges. This issue not only seriously affects this litigation, but also greatly impacts the public interest of preserving the most fundamental protections in our legal system.

B. There is Substantial Ground for Difference of Opinion About This Court’s Interpretation of When Finding Waiver of Privilege is Warranted.

The ground for difference of opinion is apparent. This Court states that it is “well-settled law” that a party’s “boilerplate objections” to discovery requests

² *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974).

³ *In re Baker & Getty Fin. Services, Inc.*, 954 F.2d 1169, 1172 n.8 (6th Cir. 1999); *City of Dearborn v. Comcast of Mich. III, Inc.*, No. 08-10156, 2008 U.S. Dist. LEXIS 107527 at *6-7 (E.D. Mich. Nov. 24, 2008) (citing *In re Baker & Getty Fin. Services, Inc.*, 954 F.2d at 1172; *See also Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990) *vacated on other grounds by*, 937 F.2d 44 (1991); *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1981).

warrants the finding of waiver of privilege.⁴ But PBGC did not provide solely boilerplate objections. It preserved its privilege claims, reached a written, Court-approved agreement with plaintiffs for dealing with the magnitude of PBGC's anticipated production, and prepared and, over 9 months ago, served a privilege log on Plaintiffs in accordance with that Court-approved agreement. The Court's finding that PBGC has nonetheless "waived" its privilege stands in stark contrast to the Sixth Circuit's statement that, "[i]f we eat away at the privilege by expanding the fiction of 'waiver' (which normally requires an intelligent and knowing relinquishment), pretty soon there will be little left of the privilege."⁵ This Order's expansion of the grounds for a privilege "waiver" adversely affects the long-standing public policy of preserving a party's right to claim privilege.⁶

⁴ Order at 4-5.

⁵ *In re Lott*, 424 F.3d 446, 451 (6th Cir. 2005).

⁶ See *Hunt v. Blackburn*, 128 U.S. 464, 470, (1888); *Upjohn Co. v. U.S.*, 449 U.S. 383, 389, (1981); *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 90 (3d Cir. 1992); *Denius v. Dunlap*, 209 F.3d 944, 954 (7th Cir. 2000); *Am. Nat'l Bank & Trust Co. v. Equitable Life Assur. Soc'y of the U.S.* 406 F.3d 867, 878-879 (7th Cir. 2005); *NLRB v. Jackson Hosp. Corp.*, 257 F.R.D. 302, 308 (D.D.C. 2009).

C. Interlocutory Review Will Materially Advance the Ultimate Termination of this Litigation.

PBGC has complied with all of Plaintiffs' discovery demands and if the Sixth Circuit rules that finding waiver of privilege is unwarranted, the Court can decide the questions of law raised by the Plaintiffs in 2009, and addressed by PBGC in its earlier Motion to Dismiss and for Summary Judgment and quickly bring this litigation to a conclusion. Further discovery delays will be avoided and the final resolution of this case materially advanced.⁷

II. GROUNDS FOR STAYING THE PROCEEDINGS

This Court's dismissal of PBGC's objections to the August 2013 Order has lifted the stay issued by Magistrate Judge Majzoub. It is clear that this Court believes the issue is settled, leaving PBGC no alternative but to appeal. PBGC's right to do so should not be denied by requiring it to comply with the Magistrate Judge's disclosure order before the Court of Appeals can consider the significant legal issues raised by denying to PBGC its fundamental right to rely upon established legal privileges.

In considering a stay motion, the Sixth Circuit has stated that the Court should balance the traditional factors governing injunctive relief:

- (1) whether the defendant has a strong or substantial likelihood of success on the merits;
- (2) whether the defendant will suffer irreparable

⁷ See *City of Dearborn*, 2008 U.S. Dist. LEXIS 107527 at *6-7.

harm if the district court proceedings are not stayed; (3) whether staying the district court proceedings will substantially injure other interested parties; and (4) where the public interest lies.⁸

In order to justify a stay, “the defendant 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.”⁹

A. PBGC Has Demonstrated a Substantial Likelihood of Success on The Merits.

Given that the attorney-client, work product, and deliberative process privileges provide the most fundamental protections in our legal system, a finding that a party has waived those privileges is considered a serious sanction that is generally applied only in cases of unjustified delay, inexcusable conduct, and bad faith. Here, without taking any intermediate steps – without rescinding its earlier Order fully approving the steps that PBGC was undertaking to comply with the Plaintiffs discovery requests – the Court has imposed this most severe sanction upon PBGC, denial of its right to claim any privilege. Indeed, PBGC was sanctioned despite being in full, good faith compliance with all discovery orders.

⁸ *Baker v. Adams Cnty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2002). See also *Grutter v. Bollinger*, 247 F.3d 631, 632 (6th Cir. 2001); *Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991).

⁹ *Baker*, 310 F.3d at 928.

This Court's Order is clearly erroneous under the applicable law and thus PBGC's appeal has a substantial likelihood of success.

B. PBGC Will be Irreparably Injured Unless a Stay is Issued.

The Order will cause irreparable harm that cannot be cured on appeal from final judgment or any other intermediate appeal. This Court has ordered PBGC to produce all documents for which the agency has claimed a privilege. Because of the unclear time frame in which to comply with the Court's ruling, PBGC is left with two options, barring a stay by this Court: (1) release all of its privileged documents to the Plaintiffs, thus permanently waiving all privilege claims and rendering any appeal moot, or (2) refuse to comply and face contempt. Because the first option will result in PBGC's potential loss of its right to claim privilege and the second option is not appealable by PBGC, this constitutes irreparable harm to PBGC.

C. Plaintiffs Will Not Be Substantially Injured if a Stay is Issued.

Plaintiffs will not be substantially injured by a stay pending the resolution of PBGC's appeal, because Plaintiffs would not have otherwise been entitled to receive PBGC's privileged documents absent this Court's ruling and the stay would not delay resolution of this litigation to Plaintiffs' detriment. Plaintiffs in this case have repeatedly informed the District Court that they believe they must have document and deposition discovery from the U.S. Department of the Treasury

before they can proceed to the merits here and have asked for extensions of the discovery cut-offs based on that claim.¹⁰ Plaintiffs still have not received all of the documents they are seeking from the U.S. Department of Treasury, nor have they yet conducted any of the related depositions they have sought. The harm to PBGC that will result from disclosing its privileged documents is substantially outweighed by the harm, if there is any at all, to the Plaintiffs in the brief delay while the Sixth Circuit considers PBGC's appeal.

D. Public Interest Lies in Favor of Preserving Privilege Claims.

Courts have long recognized the vital role privilege plays in the administration of justice.¹¹ Therefore, the public interest weighs heavily in favor of preserving PBGC's rights to claim privilege for documents during the time required for resolution of PBGC's appeal to prevent the severe harm that would follow from PBGC's compliance with this Court's Order.

¹⁰ See Joint Request for Resolution of the PBGC's Objections to Magistrate Judge's Order of March 9, 2012, filed April 23, 2013, Dkt. No. 228; Statement of Supplemental Discovery Statement by All Plaintiffs, filed October 3, 2012, Dkt. No. 216; and Stipulated Order Regarding Discovery Deadlines, October 1, 2013, Dkt. No. 241.

¹¹ See, e.g., *Hunt v. Blackburn*, 128 U.S. 464, 470, (1888); *Upjohn Co. v. U.S.*, 449 U.S. 383, 389, (1981); *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 90 (3d Cir. 1992); *Denius v. Dunlap*, 209 F.3d 944, 954 (7th Cir. 2000); *Am. Nat'l Bank & Trust Co. v. Equitable Life Assur. Soc'y of the U.S.* 406 F.3d 867, 878-879 (7th Cir. 2005); *NLRB v. Jackson Hosp. Corp.*, 257 F.R.D. 302, 308 (D.D.C. 2009).

Conclusion

For these reasons, PBGC respectfully requests that the Court certify the Order for appeal and grant PBCC's request for a stay.

Dated: July 23, 2014
Washington, D.C.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July, 2014, the foregoing Notice was served on the following:

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/s/ C. Wayne Owen, Jr.
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