

Exhibit B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DENNIS BLACK, et al.,

Plaintiffs,

vs.

CIVIL ACTION NO. 09-CV-13616

DISTRICT JUDGE ARTHUR J. TARNOW

PENSION BENEFIT GUARANTY
CORP., et al.,

Defendants.

MAGISTRATE JUDGE MONA K. MAJZUB

FILED
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U.S. DIST. COURT
EAST DIST. MICH.
DETROIT

ORDER GRANTING IN PART PLAINTIFFS' RULE 37 MOTION TO ENFORCE
COURT ORDER (DOCKET NO. 218)

This matter comes before the Court on Plaintiffs' Rule 37 motion to enforce this Court's order granting Plaintiffs' second motion to compel discovery from Defendant Pension Benefit Guaranty Corporation ("PBGC"). (Docket no. 218). Defendant PBGC filed a response. (Docket no. 223). Plaintiffs filed a reply. (Docket no. 226). The motion has been referred to the undersigned for action pursuant to 28 U.S.C. § 636(b)(1)(A). (Docket no. 219). The motion being fully briefed, the Court dispenses with oral argument pursuant to E.D. Mich. LR 7.1(f). This matter is now ready for ruling.

Plaintiffs, participants in a pension plan formerly maintained by Delphi for salaried employees ("Delphi Salaried Plan"), commenced this lawsuit against the PBGC and others challenging the termination of the Plan. The Plan was terminated in or around July 31, 2009 after Delphi Corporation entered into an agreement with the PBGC that placed the Plan under the trusteeship of the PBGC. Plaintiffs' five count Second Amended Complaint alleges violations of

ERISA (Counts 1, 2, and 4), the Due Process Clause of the Fifth Amendment (Count 3), and the Equal Protection Clause of the Fifth Amendment (Count 5). (Docket no. 145). Counts 1 through 4 of the Second Amended Complaint are asserted against Defendant PBGC only.

On September 24, 2010, Judge Tarnow held a hearing on two dispositive motions filed by Defendant PGBC. In a bench ruling Judge Tarnow denied both motions on the grounds that they were premature because the parties had not had a chance to engage in discovery. (Docket no. 152, TR at 58:15-16). According to the transcript, no further discussion was had concerning the scope of discovery or whether discovery should proceed on all claims.

Several weeks after the hearing Plaintiffs filed a motion for adoption of a scheduling order which was referred to the undersigned. (Docket no. 152). The motion asked the Court to interpret Judge Tarnow's bench ruling in Plaintiffs' favor and adopt a scheduling order setting a deadline for initial disclosures and permitting eight months for discovery on Counts 1 through 4 of the Second Amended Complaint. (Docket no. 152). Defendant PBGC objected to the motion and offered a different interpretation of the bench ruling, requesting a much more limited three month discovery period limited to Count 4 only with no initial disclosures and limited to determining the completeness of the PBGC's administrative record. Ultimately, the undersigned denied Plaintiffs' motion in March 2011 and entered a scheduling order which allowed three months for discovery as to Count 4 only relative to determining the completeness of the administrative record. (Docket no. 170).

On September 1, 2011 Judge Tarnow ruled that discovery should proceed on Counts 1 through 4 of the Second Amended Complaint. (Docket no. 193). He further concluded that he had not decided that his review would be limited to the administrative record. In addressing the scope

of discovery, he stated that his initial focus was on Count 4 “and whether termination of the Salaried Plan would have been appropriate in July 2009 if ... Defendants were required under 29 U.S.C. § 1342(c) to file before this Court ‘for a decree adjudicating that the plan must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund.’ ” (Docket no. 193 at 4). Judge Tarnow stated that a finding by the Court that termination was proper under 29 U.S.C. § 1342(c) would moot the remainder of the complaint pertaining to PBGC. He further stated that he would consider the remaining issues in the complaint if he found that termination of the Plan was not supported under 28 U.S.C. § 1342(c). Citing the broad scope of discovery under Fed. R. Civ. Pro. 26(b), and stating that he would conduct a *de novo* review of the PBGC’s decision to terminate the Plan, Judge Tarnow ordered the parties to serve their initial disclosures by September 16, 2011 and he set April 30, 2012 as the date by which all discovery related to Counts 1 through 4 should be completed.

In December 2011 Plaintiffs filed a second motion to compel discovery which was referred to the undersigned for determination. (Docket no. 197). In the motion Plaintiffs asked the Court to compel responses to their First Requests for Production of Documents nos. 1-14 and Second Requests for Production of Documents nos. 15-17. During the hearing on this motion the undersigned informed the parties that the Court had fully reviewed the parties’ briefs on this matter and was familiar with the parties’ arguments and with the objections to discovery raised by Defendant. After discussing Judge Tarnow’s reliance on the broad scope of discovery under Rule 26(b) and the fact that he had not placed any limitations on discovery as it related to Counts 1 through 4 of the Second Amended Complaint, the undersigned granted the motion. (Docket nos.

204, 205). The March 9, 2012 order states that Defendant PBGC must produce full and complete responses to Plaintiffs' First and Second Requests for Production of Documents nos. 2 through 17 within ninety days of issuance of the order, or by June 9, 2012. Plaintiffs filed objections to the March 9, 2012 order. (Docket no. 209). Those objections have not yet been resolved.

Almost one year later Plaintiffs filed the instant Rule 37 motion to enforce the Court's March 9, 2012 order. (Docket no. 218). In their motion Plaintiffs state that Defendant PGBC has produced a portion of the responsive documents in its possession but has withheld almost 30,000 documents on the basis of an unspecified privilege, along with other key data and documents central to the merits of the case. Plaintiffs argue that the time for asserting privilege has long since passed. They ask the Court to impose sanctions under Rule 37(b) in light of Defendant's disregard of the Court's orders. They also seek an order compelling Defendant to produce documents responsive to Document Request nos. 12 and 13.

Document Request no. 12 asks Defendant to produce "[a]ll documents and things received, produced or reviewed by the PBGC since January 1, 2006 related to the PBGC's potential or actual liability for any benefit payments under Delphi's Pension Plans." Plaintiffs argue that Defendant PBGC refuses to produce Census Data in response to this request. They argue that a Plan's liabilities depend in part on the Census Data, which looks at how many participants are in the Plan, their ages and service histories, whether and when they began receiving benefits under the Plan, and the benefit each is entitled to under the Plan's formula. They contend that Defendant PBGC assumed the role of trustee of the Salaried Plan and has access to the Census Data.

Defendant argues that the Privacy Act of 1974 prohibits it from producing the Census Data without a court order because the documents contain sensitive personally identifiable information.

They argue that the Court must conduct an *in camera* review to examine the documents in light of the Privacy Act's requirements prohibiting disclosure of sensitive personally identifiable information, then craft an appropriate protective order for any Privacy Act protected information contained in the documents that must be disclosed.

In addition to the Census Data, Plaintiffs argue that Defendant PBGC has not produced any information responsive to Document Requests 12 and 13 that was received, produced, or reviewed by the PBGC subsequent to the Plan's termination. Document Request no. 12 is set forth above. Document Request no. 13 asks Defendant PBGC to produce "[a]ll documents and things received, produced or reviewed by you since January 1, 2009 related to potential PBGC recoveries in connection with the Delphi Pension Plans, including, but not limited to, the estimates of the potential recovery for each claim and the value the PBGC assigned to such claims in the valuation of the Salaried Plan's assets." Plaintiffs argue that Request no. 13 is directly relevant to the § 1346(c) determination in that it will go to show what funds were potentially available to fund the Delphi Plans. They argue that the information sought in Request nos. 12 and 13 will confirm the accuracy of the PBGC's initial 2009 estimates. In response, Defendant argues in part that Plaintiffs' Request no. 13 asking for "estimates of the potential recovery for each claim and the value the PBGC assigned to such claims" demands information contained in documents that have not yet been created.

The Privacy Act states that "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be ... (11) pursuant to the order of a court of

competent jurisdiction.” 5 U.S.C. § 552a(b)(11). “The majority of courts that have addressed Exception (11) have held that the Privacy Act does not create any privilege against discovery and that ... the relevancy standard of Fed. R. Civ. P. 26(b) governs the court’s discretion in ordering disclosure of government records.” *Stiward v. United States*, No. 05-1926, 2007 WL 2417382, at *1-2 (E.D. La. Aug. 24, 2007) (citing cases). *See also Vinzant v. United States*, No. 06-10561, 2010 WL 2674609, at *6-7 (E.D. La. June 30, 2010); *Lynn v. Radford*, No. 99-71007, 2001 WL 514360, at *3 (E.D. Mich. March 16, 2001).

The Court is persuaded that the Census Data is relevant and discoverable and may be produced under the “court order” exception to the Privacy Act. Similarly, the Court finds that information responsive to Document Requests 12 and 13 received, produced, or reviewed by the PBGC subsequent to the Plan’s termination is relevant to the claims at issue in this case. The Court is not persuaded by Defendant’s argument that Request no. 13 asks for information in documents that have not yet been created since the request clearly asks for documents that Defendant has received, produced or reviewed.

The Court will grant Plaintiffs’ motion to compel production of the Salaried Plan’s Census Data as well as documents responsive to Request nos. 12 and 13 generated subsequent to the Plan’s termination. In response to Plaintiffs’ argument that a protective order is necessary for protecting the sensitive information contained in the requested documents, the Court will order the parties to meet and confer on the terms of an appropriate protective order.

Next, Plaintiffs argue that Defendant violated the Court’s March 9, 2012 order by refusing to produce thousands of responsive documents on the basis of boilerplate privilege assertions. Defendant argues in response that it only agreed to produce non-privileged material and it expressly

reserved all rights to claim privilege in the future. Defendant also argues that it was not required to begin compiling its privilege log until after this Court's March 9, 2012 order.

Plaintiffs served the discovery requests at issue approximately two years ago in September and October 2011. Defendant served its objections and responses to the requests by November 2011. Defendant's written objections do not object on the basis of any particular privilege, but instead refer Plaintiffs to a string of boilerplate objections that generally and vaguely assert any privilege available under state or federal law. The Court has repeatedly found that the filing of boilerplate objections is tantamount to filing no objections at all. *See PML North Am., L.L.C. v. World Wide Personnel Servs. of Virginia, Inc.*, No. 06-14447, 2008 WL 1809133, at *1 (E.D. Mich. April 21, 2008); *Cumberland Truck Equip. Co. v. Detroit Diesel Corp.*, No. 05-74594 and 05-74930, 2007 WL 4098727, at *1 (E.D. Mich. Nov. 16, 2007). 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. The Court finds that Defendant has waived its right to assert privilege to the documents requested in Plaintiffs' First and Second Requests for Production of Documents.

Next, Plaintiffs ask the Court to impose Rule 37 sanctions should the PBGC fail to comply with an order compelling production. They also move for costs and attorney fees associated with this motion. The Court is aware that the scope of discovery in this case has been hotly contested and Defendant is awaiting resolution of its objections to the March 9, 2012 order. The Court has also read Defendant's assertions and the declaration of John Menke that state that Defendant has made a good faith effort to produce documents responsive to Plaintiffs' discovery requests. The Court will

deny Plaintiffs' request for sanctions at this time.

IT IS THEREFORE ORDERED that Plaintiffs' Rule 37 motion to enforce this Court's order granting Plaintiffs' second motion to compel discovery from Defendant Pension Benefit Guaranty Corporation ("PBGC") (docket no. 218) is **GRANTED IN PART**. On or before September 30, 2013 Defendant must produce the following:

- a) the Salaried Plan's Census Data as it is responsive to Request for Production nos. 12 and 13,
- b) documents responsive to Request for Production nos. 12 and 13 generated subsequent to the Plan's termination, and
- b) documents withheld on the basis of privilege as discussed in this order.

IT IS FURTHER ORDERED that the parties must meet and confer regarding the terms of an appropriate protective order that will protect the disclosure of personally identifiable sensitive information contained in the Census Data or other information deemed sensitive or confidential by the parties. The proposed stipulated protective order must be filed with the Court by September 6, 2013. If the parties are unable to agree upon the terms of an appropriate protective order, the parties are ordered to each file their own proposed protective order by September 9, 2013 and the undersigned will select one of the two orders for entry.

IT IS FURTHER ORDERED that Plaintiffs' request for sanctions, costs and attorney fees is denied.

NOTICE TO PARTIES

Pursuant to Fed. R. Civ. P. 72(a), the parties have a period of fourteen days from the date of this Order within which to file any written appeal to the District Judge as may be permissible under 28

U.S.C. § 636(b)(1).

Dated:

s/

MONA K. MAJZOUN

UNITED STATES MAGISTRATE JUDGE

PROOF OF SERVICE

I hereby certify that a copy of this Order was served upon Counsel of Record on this date.

Dated:

8/21/13

s/

Case Manager