

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

COX ENTERPRISES, INC., a)
Delaware corporation,)
)
Plaintiff,)

vs.)

CASE NO.: 6:04-CV-698-JA-DAB

NEWS-JOURNAL CORPORATION, a)
Florida corporation, HERBERT)
M. DAVIDSON, JR., MARC L.)
DAVIDSON, JULIA DAVIDSON)
TRUILO, JONATHAN KANEY, JR.,)
DAVID KENDALL, ROBERT TRUILO,)
GEORGIA KANEY, and PMV, INC.,)
a Florida corporation,)
)
Defendants.)

**THE PENSION BENEFIT GUARANTY CORPORATION'S
OBJECTION AND MEMORANDUM OF LAW IN OPPOSITION TO
COX ENTERPRISES, INC.'S MOTION TO COMPEL**

The Pension Benefit Guaranty Corporation (“PBGC”) objects to Cox Enterprises, Inc.’s (“Cox”) Motion to Compel Certain Documents Withheld as Privileged and Memorandum of Law (the “Motion”), docket number 772. Cox seeks an order compelling PBGC to submit to the Court for *in camera* inspection documents withheld on the basis of attorney-client privilege, attorney work product privilege, and/or deliberative process privilege. Since the documents PBGC withheld are irrelevant and Cox has not shown any applicable exception to the asserted privileges, or any prejudice resulting from the unavailability of the documents, the Court should deny the Motion.

BACKGROUND

The discovery at issue in the Motion was sought by Cox in preparation for an evidentiary hearing ordered by the Court.¹ The Court authorized the parties “to engage in limited discovery [. . . concerning, in relevant part,] the issues of the amount of the claim(s) of the Pension Benefit Guaranty Corporation.”²

A. PBGC’s claims and the PBGC-NJC Receivership settlement

This case solely concerns the amount of PBGC’s claims that matured upon termination of the Pension Plan of News-Journal Corporation (“Pension Plan”). On April 16 2010, PBGC timely filed claims with the Receiver for the (1) unfunded benefit liabilities of the Pension Plan under 29 U.S.C. §§ 1362 and 1368 in the estimated amount of \$15,102,012.00, (2) unpaid premiums due to PBGC under 29 U.S.C. §§ 1306 and 1307 in the estimated amount of \$4,203,750.00, (3) unpaid minimum funding contributions due to the Pension Plan under 26 U.S.C. §§ 412, 430, and 29 U.S.C. § 1082 in the estimated amount of \$650,142.00, and (4) statutory liability for the shortfall and waiver amortization charge under 29 U.S.C. § 1362(c) in the estimated amount of \$6,504,080.00. PBGC calculated these estimated claims in accordance with Title IV of ERISA and PBGC’s regulations thereunder, following the same process that PBGC routinely uses to calculate its claims for bankruptcy and other insolvency proceedings.

After the Receiver filed his initial Report and Recommendation, PBGC and the Receiver engaged in extensive settlement negotiations concerning the amount of PBGC’s claims. PBGC’s

¹ The evidentiary hearing has been continued to January 14 and 15, 2014.

² Order and Notice of Hearing, June 11, 2013, (Doc. No. 751).

and the Receiver's respective estimated claims formed the basis for these negotiations,³ leading to a settlement of the amount of PBGC's claims against NJC for the Pension Plan's unfunded benefit liabilities in the amount of \$14,272,500 and unpaid funding contributions owed to the Pension Plan in the amount of \$455,000.⁴ Only after PBGC and the Receiver reached a settlement did the Receiver sign the trusteeship agreement terminating the Pension Plan, establishing March 23, 2010 as the Pension Plan's termination date, and appointing PBGC as the Pension Plan's statutory trustee.⁵

More than three years have passed since the settlement between PBGC and the Receiver. During that time, PBGC undertook its final seriatim valuation of the Pension Plan's benefit liabilities, as it does for every pension plan trusted by PBGC.⁶ This final valuation, which was completed on August 22, 2013, calculates the Pension Plan's unfunded benefit liabilities in the amount of \$13,887,822. ***This amount, which is slightly lower than the settlement amount, represents PBGC's final calculation of the Pension Plan's unfunded benefit liabilities and will***

³ During these negotiations, PBGC continued to refine its estimated claim amounts to account for additional information from the Receiver. PBGC further revised its claim for the Pension Plan's unfunded benefit liabilities to reflect the proposed termination date of March 23, 2010.

⁴ See Receiver's Resp. to Objs. to Receiver's Report & Recommendation, Aug. 5, 2010, (Doc. No. 669 at 2-4). As part of this settlement, PBGC agreed to withdraw its claims for statutory premiums and the 29 U.S.C. § 1362(c) shortfall and waiver amortization charge.

⁵ See *id.* at 3 ("As consideration for PBGC's [agreement on treatment of its claims], the Receiver agreed to drop his procedural objection and to execute documents which would terminate the pension plan").

⁶ The seriatim valuation for the Pension Plan, as with every terminated pension plan, is a calculation of the final benefit amounts for each participant and beneficiary in accordance with Title IV of ERISA and PBGC's regulations thereunder. See *Davis v. PBGC*, 571 F.3d 1288, 1291 (D.C. Cir. 2009); see also Transcript of Proceedings, Hearing on Motion for Approval of Sale, (Doc. No. 594 at 104, lines 7-16). It normally takes PBGC between two and three years to make the final determination of benefits for each participant. See *Davis*, 571 F.3d at 1291.

form the basis for PBGC's expert testimony concerning the amount of its corresponding claim.

PBGC offered to stipulate with Cox that the settlement amount has been superseded by the final seriatim calculation of PBGC's claim, which would moot any issue surrounding PBGC's settlement with the Receiver, but Cox has not agreed, preferring instead to complicate matters by litigating the issue.⁷

B. Attorney-client privilege

The attorney-client privilege is one of the oldest recognized privileges and encourages open communication and full disclosure between an attorney and his client.⁸ The party invoking the privilege has the burden of proving that the privilege applies.⁹ The attorney-client privilege protects from disclosure confidential communications a client makes to his attorney, acting in his capacity as such, for the purpose of obtaining legal advice.¹⁰ According to the U.S. Supreme Court, "the Government may invoke the attorney-client privilege in civil litigation to protect confidential communications between Government officials and Government attorneys."¹¹

⁷ Email from Colin Albaugh to John DeVault (copying others) (Oct. 3, 2013, 10:45 am EDT), attached as Exhibit A.

⁸ *United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313, 2320 (2011).

⁹ *Bogle v. McClure*, 332 F.3d 1347, 1358 (11th Cir. 2003).

¹⁰ *United States v. Schaltenbrand*, 930 F.2d 1554, 1562 (11th Cir. 1991); *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1414 (11th Cir. 1994).

¹¹ *Jicarilla Apache Nation*, 131 S.Ct. at 2321; *see also In re Lindsey*, 158 F.3d 1263, 1268 (D.C. Cir. 1998) (recognizing that the attorney-client privilege applies to a government agency client and an agency lawyer).

C. Work product privilege

The work-product privilege protects documents that reveal an attorney's mental impressions and legal theories and that were prepared by the attorney in anticipation of litigation.¹² The privilege can be overcome if the party seeking disclosure can show that "it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means."¹³ Opinion work product, however, which discloses the opinions, mental impressions and legal theories of an attorney, enjoys near absolute immunity, and is only disclosed in rare and extraordinary circumstances.¹⁴

D. Deliberative process privilege

The deliberative process privilege protects pre-decisional, deliberative documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated...."¹⁵ The purpose of the privilege is to protect "open and frank" communication among those who make agency decisions.¹⁶ A document is "pre-decisional" if it assisted the decision-maker in arriving at his decision.¹⁷ A document is "deliberative" if disclosure would "expose an agency's decision-making process in

¹² *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947); *Nadler v. U.S. Dep't of Justice*, 955 F.2d 1479, 1490 (11th Cir. 1992); Fed.R.Civ.P. 26(b)(3).

¹³ Fed. R. Civ. P. 26(b)(3)(A)(ii).

¹⁴ *Cox*, 17 F.3d at 1422.

¹⁵ *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001); *Moye, O'Brien, O'Rourke, Hogan & Pickert v. Nat'l R.R. Passenger Corp.* 376 F.3d 1270, 1277-78 (11th Cir. 2004).

¹⁶ *Klamath*, 532 U.S. at 8-9.

¹⁷ *Nat'l R.R.*, 376 F.3d at 1277-78.

such a way as to discourage candid discussion within the agency and, thereby, undermine the agency's ability to perform its functions."¹⁸

The privilege is not, however, without limits. For instance, factual material that is not inextricably connected to pre-decisional, deliberative material is not protected.¹⁹ Nor does the privilege apply to documents created subsequent to an agency decision.²⁰ Moreover, the privilege may not apply if the court determines that the party seeking discovery has a greater interest in disclosure of pre-decisional, deliberative documents than the government's interest in non-disclosure of those documents.²¹

Once the government makes a sufficient showing that the threshold requirements for the privilege are present, "the party seeking discovery bears the burden of showing that its need for the documents outweighs the government's interest."²² Factors that courts consider include, "(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the "seriousness" of the litigation and the issues involved, (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable."²³

¹⁸ *Klamath*, 542 U.S. at 8-9; *Nat'l R.R.*, 376 F.3d at 1278.

¹⁹ *Nadler*, 955 F.2d at 1491; *Redland Soccer Club, Inc. v. Dep't of Army*, 55 F.3d 827, 854 (3d Cir. 1995).

²⁰ *Redland Soccer Club*, 55 F.3d at 854.

²¹ *Jones v. City of College Park*, 237 F.R.D 517, 520 (N.D. Ga. 2006).

²² *Redland Soccer Club*, 55 F.3d at 854.

²³ *United States v. Pechiney Plastics Packaging, Inc.*, 2013 WL 1163514 (D. N.J. March 19, 2013); *Alabama Educ. Ass'n v. Bentley*, 2013 WL 124306 at *16 (N.D. Ala. Jan. 2, 2013); *First Eastern Corp. v. Mainwaring*, 21 F.3d 465, 468 n. 5 (D.C.Cir.1994); *In re Franklin Nat. Bank Secs. Lit.*, 478 F. Supp. 577, 582 (E.D.N.Y.1979).

ARGUMENT

Federal Rule of Civil Procedure 26 addresses the scope of discovery. Unless limited by court order, “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense”²⁴ Here, the Court has limited the scope of issues for discovery to “issues of the amount of the claim(s) of [PBGC].”²⁵ The NJC Receiver signed an agreement with PBGC terminating the Pension Plan as of March 23, 2010, and PBGC completed a seriatim valuation of the Pension Plan’s assets and liabilities based on that termination date, as required by Title IV of ERISA, and the regulations thereunder.

A. Settlement-related documents

i. The PBGC-NJC Receivership Settlement is Irrelevant

First and foremost, the documents Cox seeks relating to the settlement between PBGC and the NJC Receiver are now wholly irrelevant to the amount of PBGC’s claims in this case. The settlement was based on estimated claim amounts and resulted in claims against NJC for the Pension Plan’s unfunded benefit liabilities in the amount of \$14,272,500 and unpaid funding contributions owed to the Pension Plan in the amount of \$455,000.²⁶ However, the seriatim valuation PBGC completed on August 22, 2013 calculates the Pension Plan’s unfunded benefit liabilities at the slightly lower amount of \$13,887,822, about \$385,000 *less* than the settled

²⁴ Fed. R. Civ. P. 26(b)(1).

²⁵ Order and Notice of Hearing, June 11, 2013, (Doc. No. 751).

²⁶ See Receiver’s Resp. to Objs. to Receiver’s Report & Recommendation, Aug. 5, 2010, (Doc. No. 669 at 2-4). As part of this settlement, PBGC agreed to withdraw its claims for statutory premiums and the 29 U.S.C. § 1362(c) shortfall and waiver amortization charge.

amount.²⁷ That valuation was completed in accordance with Title IV of ERISA and the regulations thereunder.

At the evidentiary hearing, PBGC will present evidence solely relating to the *lower* final calculation of unfunded benefit liabilities of \$13,887,822, because that calculation supersedes the settlement between PBGC and the Receiver, which was based on *estimated* claim amounts. However, Cox has not accepted PBGC's request to stipulate that the final valuation does in fact supersede the settlement amount. It is a waste of the Court's and parties' resources to pursue discovery and present evidence regarding a settlement that is no longer relevant to the issue before the Court and, therefore, the Court should deny the Motion with respect to the settlement-related documents.

ii. The documents are protected by the attorney-client and work product privileges.

Even if documents relating to PBGC's settlement negotiations with the NJC Receiver are relevant, PBGC properly withheld the documents Cox seeks because they are protected by the attorney-client or work product privileges. Cox's argument against PBGC's assertion of privileges—that PBGC's right to is waived merely because the issues are important to the case²⁸—would eliminate the vitality of the attorney-client privilege in every case. Moreover, the waiver exception on which Cox relies applies only where an opposing party introduces privileged information as evidence to gain an advantage, but Cox fails to identify any privileged information that PBGC has or will use to gain an advantage in this case.²⁹

²⁷ PBGC's claim for due and unpaid contributions to the Pension Plan remains unchanged.

²⁸ Motion at 15 (“[T]hese [documents] are at the heart of the matter, and PBGC cannot use privilege to shield them.”) (Doc. No. 772). The sole case cited by Cox does not affirm this proposition.

²⁹ *Cox*, 17 F.3d at 1417 (waiver occurs “when a litigant places information protected by it in issue through some affirmative act for his own benefit”).

Cox further implies that PBGC “injected” issues relating to the settlement into the case. But PBGC offered to stipulate that the later, more precise and *lower* valuation should control, and Cox has refused.³⁰ Thus, Cox itself introduced the settlement into the case.

Cox seeks documents containing or evidencing confidential communications between PBGC staff and its counsel regarding settlement negotiations with the NJC receiver, including legal advice, strategy and direction in the context of NJC’s receivership and anticipated litigation with the Receiver. These communications are clearly privileged. Contrary to Cox’s unsubstantiated assertions, the documents are not simply direction as to the method of calculation, nor do they contain the actuarial calculations. For instance, the redacted portion of PBGC-005339 (attached to the Motion as Exhibit C) discusses PBGC counsel’s thoughts about settlement negotiations,³¹ not, as Cox implies, a discussion of an interest rate used in PBGC’s calculations.³² And PBGC-005333 reflects confidential communications between PBGC staff and counsel about legal considerations with respect to actuarial calculations.³³

Moreover, Cox has shown no need for these documents.³⁴ PBGC has given Cox all of the actuarial calculations relating to both the original estimated claims and the recent seriatim

³⁰ Email from Colin Albaugh to John DeVault (copying others) (Oct. 3, 2013, 10:45 am EDT), attached as Exhibit A; *see also* The Pension Benefit Guaranty Corporation’s Response to Cox Enterprises, Inc.’s Motion to Continue Evidentiary Hearing at 3 (Doc. No. 767).

³¹ See PBGC Privilege Log at 33.

³² Cox bases its assertions about the redacted and privileged content of the documents on the portions of the documents that PBGC disclosed, illogically concluding that PBGC was withholding the same information it was disclosing.

³³ To the extent that this was not clear in PBGC’s privilege log, PBGC will amend the log if necessary.

³⁴ *See Cox*, 17 F.3d at 1418 (denying discovery on a waiver argument because requesting party had shown no prejudice).

valuation of the Pension Plan. This data is more than adequate to enable Cox to verify PBGC's liability assertions. Cox is simply not entitled to privileged and confidential communications between PBGC staff and counsel, or to documents reflecting counsel's impressions or analysis in anticipation of litigation.

B. Deliberative process privileged documents

PBGC withheld three documents under the deliberative process privilege because the documents contain pre-decisional, deliberative communications among PBGC staff about the possible termination of the Pension Plan. Deliberations about whether and how to terminate a pension plan go to the heart of the PBGC staff's responsibilities in carrying out PBGC's statutory duties under Title IV of ERISA. Each of the documents involves analysis, opinions, impressions and recommendations which assisted the decision-maker in arriving at his decision to terminate the Pension Plan.³⁵ Disclosure of the information would expose PBGC's decision-making process, thereby discouraging candid discussions and deliberations leading to decisions about the most efficient and effective administration of Title IV of ERISA.³⁶ Therefore, the deliberative process privilege applies to documents Bates numbered PBGC-005325-005326; PRIV-PBGC-00250-00251; and PRIV-PBGC-00252-00253.³⁷

Since PBGC has established that the deliberative process privilege applies, Cox has the burden of showing Cox's interest in disclosure of the documents outweighs PBGC's interest in

³⁵ See Starr Dec. ¶¶ 8-10, Nov. 4, 2013, attached as Exhibit B.

³⁶ See Starr Dec. ¶¶ 10-11, Nov. 4, 2013.

³⁷ See *Klamath*, 532 U.S. at 8-9; *Nat'l R.R.*, 376 F.3d at 1277-78.

non-disclosure of the documents.³⁸ As discussed above, the Court considers the following five factors in determining whether a party's interest in disclosure outweighs the government's interest in non-disclosure: "(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the "seriousness" of the litigation and the issues involved, (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable."³⁹

Here, Cox cannot meet its burden of showing that its interest in disclosure outweighs PBGC's interest in non-disclosure. First, the documents are not relevant to the amount of PBGC's claims. The documents involve communications regarding the decision to terminate the Pension Plan, a decision which is not at issue in this case. In fact, none of Cox's document requests sought information relating to the agency's decision to terminate or how it decided on a termination date. The single issue under review is the amount of PBGC's claims, which arose upon termination of the Pension Plan. Second, other evidence regarding the Pension Plan termination is available, including the Trusteeship Agreement terminating the Pension Plan as of March 23, 2010, which was signed by both PBGC and the Receiver.

The third and fourth factors also militate against disclosure. The dispute here does not implicate serious issues such as Constitutional infringement⁴⁰ or denial of voting rights,⁴¹ but

³⁸ *Jones v. City of College Park*, 237 F.R.D 517, 520 (N.D. Ga. 2006); *Redland Soccer Club*, 55 F.3d at 854.

³⁹ *Pechiney Plastics Packaging*, 2013 WL 1163514 (D. N.J. March 19, 2013); *Alabama Educ. Ass'n*, 2013 WL 124306 at 16 (N.D. Ala. Jan. 2, 2013); *First Eastern Corp. v. Mainwaring*, 21 F.3d 465, 468 n. 5 (D.C.Cir.1994); *In re Franklin Nat. Bank Secs. Lit.*, 478 F.Supp. 577, 582 (E.D.N.Y.1979); *Raffa v. Wachovia Corp.*, 2003 WL 21517778 at *3-5 (M.D. Fla. 2003).

⁴⁰ *See Thomas v. Cate*, 715 F. Supp. 2d 1012, 1020 n.4 (E.D. Ca. 2010) (the "seriousness of the litigation" weighed in favor of disclosure where Petitioner sought to present evidence that a section of the California Constitution created a risk of prolonging Petitioner's incarceration,

rather is a dispute between two creditors over monetary recovery. While Cox stands to lose out on a portion of its recovery against NJC's estate, Cox is a multibillion dollar company⁴² that will still, *as a shareholder*, receive more than \$28 million in recovery from NJC, even if PBGC's claims are paid in full. And, while PBGC has a role in the amount that Cox recovers on its shareholder interest in NJC, PBGC is not a named party in this litigation, but a mere creditor of NJC.⁴³ Finally, if PBGC was forced to disclose documents exposing deliberations about decisions to seek termination of pension plans, it would chill open and frank communications in future cases, thereby threatening fulfillment of the agency's duties under Title IV of ERISA.⁴⁴ On balance, the factors discussed above weigh in favor of non-disclosure.

While Cox correctly points out that the deliberative process privilege does not apply in cases where the governmental decisionmaking process itself is at issue,⁴⁵ Cox provides no

thereby violating the Petitioner's rights under the Ex Post Facto Clause of the United States Constitution.) (citing *Harris v. Nelson*, 394 U.S. 286, 292 (1969)); *Griffen-El v. Beard*, 2009 WL 1606891 at *9 (E.D. Pa. 2009).

⁴¹ See *United States v. Irvin*, 127 F.R.D. 169, 174 (C.D. Ca. 1989) (Plaintiff's sued under the Voting Rights Act to challenge a redistricting plan adopted by the County Board of Supervisors); *Comm. for a Fair and Balanced Map v. Illinois State Bd. of Elections*, 2011 WL 4837508 at *8 (N.D. Ill. 2011).

⁴² *Corporate Overview*, COX ENTERPRISES, <http://www.coxenterprises.com/about-cox/corporate-overview.aspx>, (last visited Oct. 29, 2013).

⁴³ See *Raffa v. Wachovia Corp.*, 2003 WL 21517778 at *4 (M.D. Fla. 2003) (that the government was not a party to or have a financial stake in the litigation weighed in favor of non-disclosure).

⁴⁴ See Starr Dec. ¶¶ 9-11, Nov. 4, 2013.

⁴⁵ See *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998) (the privilege does not apply where the government's intent is at issue, such as in a Title VII action or constitutional claim for discrimination); *Alabama Educ. Ass'n*, 2013 WL 124306 at *15-16 (the governmental decision-making process was "the issue" in an action alleging the defendants enacted legislation to punish plaintiffs for their political speech).

support for its cursory assertion that “the process” is at issue in this case. This case was not brought to challenge PBGC’s decision to seek termination of the Pension Plan, nor would Cox have standing to challenge that decision. Cox has never even questioned, the necessity of terminating the Pension Plan, which is the only subject of the communications in the deliberative process privileged documents. This is the exact type of case in which the privilege was fashioned, i.e., a case where “governmental decisionmaking is collateral to the plaintiff’s suit.”⁴⁶ In fact, a case cited several times by Cox, *Alabama Education Association v. Bentley*, illustrates this very point.⁴⁷

Because the deliberative process privilege applies to certain documents withheld by PBGC, and because Cox cannot meet its burden of showing that its interest in disclosure outweighs PBGC’s interest in non-disclosure, Cox’s Motion with respect to those documents should be denied.

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⁴⁶ *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998).

⁴⁷ There, the Plaintiffs challenged the constitutionality of an Alabama law that allegedly revoked the ability of employees to deduct contributions or membership dues to organizations that use funds for political activities. *Alabama Educ. Ass’n*, 2013 WL 124306 at *3. The Plaintiffs alleged that the law violated the First and Fourteenth Amendments, and served subpoenas on several government officials requesting documents that could have shown a causal relationship between the plaintiffs’ political speech during the 2010 Republican Party Primary and the Alabama law. *Id.* at *10. The court held that, because the documents sought provide evidence for the plaintiffs’ First Amendment retaliation claim that the defendants intended to punish plaintiffs for their political speech, the governmental decision-making process was in fact “the issue” in the case. *Id.* at *16.

CONCLUSION

For the foregoing reasons, the Motion should be denied.

DATED: November 5, 2013
Washington, D.C.

Respectfully submitted,

/s/ Colin B. Albaugh
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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of November 2013, the Pension Benefit Guaranty Corporation's foregoing Response and Memorandum of Law, was served electronically through the Court's CM/ECF system on all registered users.

/s/ Colin B. Albaugh

Colin B. Albaugh

Attorney