IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TAMMY J. BOYD, *et al.*,

Plaintiffs,

v.

ORDER

MERITER HEALTH SERVICES, INC., *et al.*,

10-cv-426-wmc

Defendants.

Before the court are three discovery motions filed by plaintiff, *see* dkts. 54, 59, 67 along with briefs and supporting documents (dkts. 55-56, 60-61, 68) and a request to file a reply (dkt. 76) all opposed by defendants, *See* dkts. 65-66, 73-75). For the reasons stated below, I am denying the motions docketed as 54 and 59 and granting the motion docketed as 67.[1]

Dkts. 54 & 59: Plaintiff's motions to compel more discovery in response to RFPs 1-39

Perhaps the court is guilty of having invited these motions, *see* transcript of June 8, 2011 telephonic motion hearing, dkt. 53 at 13, 19, but the depth and breadth of the disputes flagged in these motions is remarkable (and accounts for the court not ruling on this dispute with its usual promptness). On June 17, 2011, plaintiff filed a 35 page motion to compel immediate production of hard copy documents (dkt. 54), followed a week later by their 31 page motion for immediate production of electronically stored information (dkt. 59), each accompanied by supporting documents and declarations (dkts 55, 56, 60 and 61). Both motions seek information in response to plaintiffs' requests for productions of documents (RFPs) 1-39. Defendants filed a consolidated 43 page response in opposition, along with supporting documents. (Dkts. 65-66).

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[1] The parties agree that plaintiff's most recent motion to compel, dkt. 79, is moot, *see* dkts 85 and 89, and the court has denied it on that basis in a text only order.

The parties' diametric characterizations of the discovery breakdown coupled with their palpable irritation with each other and strident finger pointing show that the court's exhortations of compromise and accommodation are dust in the wind. Each side firmly believes that it is more sinned against than sinning, and nothing the court says in this order will shake either side's belief in that regard. Having read and re-read all of the briefs, affidavits, letters and other exhibits filed by the parties, having considered each of plaintiff's myriad complaints about defendants' discovery responses, and having considered defendants' explanations and defenses of how it has proceeded and why, I am denying in their entirety both of plaintiff's motions to compel, dkts. 54 and 59. Although neither side is blameless, I find and conclude that plaintiff is not entitled to court-ordered compulsion of additional disclosures from the defendants on RFPs 1-39.

So how did we get to this dysfunctional juncture? Plaintiff's attorneys' specialize in challenging the type of retirement plan at issue here, and these lawsuits usually involve extensive discovery of documents and ESI going back many years, complex economic analyses, dueling experts and the lawsuits often result in the exchange of large sums. This might explain the punctiliousness and thoroughness of plaintiff's RFPs, which at least as written, cannot be faulted in a case of this nature. Less commendable is counsel's repetitive, inflexible and often disdainful methodology for obtaining and attempting to obtain the requested discovery.

Plaintiff filed her lawsuit on July 30, 2010; defendants put a litigation hold on its documents in September 2010; then plaintiff actually served defendants with her complaint on November 23, 2010.[2] Plaintiff served a six-part RFP 1 on January 10, 2011, seeking core plan

[2] Plaintiffs probably suspected that a lawsuit was in the wind in April 2010 when the plaintiffs in the *Ruppert* class action lawsuit (also represented by the Gottesdiener Law Firm) served a Rule 45 subpoena on Meriter, even though the court quashed the subpoena. Plaintiff suggests that defendants should have known as early as 2001 that a lawsuit was possible; to the extent that plaintiff is implying that defendants should have put a hold on their documents nine years before plaintiff sued them, defendants had no such obligation. As discussed in the next section, there were a lot of ways this matter could have played out without resulting in a lawsuit.

documents dating back to 1987 under which plan participants accrued benefits, including all versions of the plan, all amendments relating to the indexing rate, summary plan descriptions, and summary material modifications. The parties met and conferred twice in mid-January, with defendants explaining their known universe of information and the efforts being made to collect it. In mid-February, 2011, defendants responded to plaintiff's six-part RFP 1 by producing about 834 hard-copy documents culled from 41 boxes of about 39,000 documents.

In early March, 2011, plaintiff served RFP 2, seeking benefit calculation data, including foundational documents. The response to RFP 2 required defendants to re-cull the 41 boxes of documents examined to respond to RFP 1. In mid-March, plaintiff served RFPs 3-12 seeking documents relevant to plaintiff's contentions that failed properly to convert the plan into a cash balance plan. In early April, defendants provided their response to RFP 2, including objections. Defendants advised plaintiff that they would not create new documents to respond to 2A but would produce the data as it had been maintained; even so, defendants were willing to redact and replace confidential information if the parties could agree on how to split the cost of doing so. Defendants produced 273 Excel spreadsheets in native format as they existed on defendants' systems, after having defendants' vendor manually redact and replace identifying information. Plaintiff objected to this as worthless and unusable, and has insisted that defendants create a unified document that would be easier for plaintiff and her expert(s) to analyze.

On May 20, 2011, plaintiff served RFPs 13-39, which plaintiff characterizes as a "broader, more diverse range of requests." Defendants' response to these requests could have required another review by defendants of documents already searched, unless the parties could agree on search terms. Plaintiff did not propose any search terms with these RFPs. Defendants' response to RFPs 13-39 were due on June 20, 2011, three days after plaintiff filed her first motion to compel, but plaintiff included them prophylactically, based on her prediction that she would be just as unhappy with defendants' production as she was with the production that defendants had provided in response to her earlier RFPs. *See* dkt. 54 at 34-35.

On June 29, 2011, plaintiff served defendants with another discovery request which is not included in these motions.

From January through June, 2011, the parties exchanged long, detailed letters about discovery, with the writing party invariably defending its words and deeds while taking umbrage at the opposing party's words and deeds. There were several meet-and-confer sessions, some with ESI liaisons present; these meetings played out similarly to the fractious letters and emails but in real time. During this period, some information *did* manage to change hands, with each side now characterizing itself as the victim of relentless discovery abuse and misconduct by the other side.

It is now late August, 2011, which means that additional discovery has occurred[3] that has affected the contours of the disputes that led to these two motions, but clearly the parties' fundamental disputes about how to conduct discovery have not gone away and are not going away. Having considered the evidence and arguments presented by both sides on these two motions to compel, I conclude that defendants have adequately met their discovery obligations to plaintiffs. They are not blameless in this discovery war, but they not "clearly stonewalling," they have not "clearly intentionally snookered Plaintiff into not moving to compel sooner," they are not "doing anything they can to interfere with Plaintiff's investigation . . . of this case," and they are not "in pure stonewall mode." Defendants are not required in response to RFP 2A to convert their 273 Excel spreadsheets into one spreadsheet for so that they are more convenient for Mr. Deutsch to analyze. They are not required to manually review their ESI (without using keywords) in order to allay plaintiff's concerns that responsive documents might be overlooked.

[3] In their response to plaintiff's August 11, 2011 motion to compel production, defendants proffer that they have made seven supplemental document productions totaling 39,954 pages of ESI and hard copy documents, with document review and production ongoing. *See* dkt. 85 at 2, n.1.

The court will not order certain keyword searches to take place in a certain order, but will leave that to the parties to sort out, if they haven't already. From the court's perspective, there is nothing for the court to order that would cause discovery to proceed more smoothly, fairly, or efficiently. Like the *Ruppert* case, this lawsuit looks to be a slugfest from start to finish, with the only consolation being that the court has not imposed a $300/hr special master on the parties to referee discovery, at least not yet.

Dkt. 67: Plaintiffs' Motion To Unseal

In September, 2002, someone at Meriter generated a two page memorandum to the Meriter Health Service Executive Compensation and Pension Committee (ECPC) flagging concerns with the method by which defendants had been making lump sum payouts to terminated employees. *See* dkt. 61-7 (Exh. 6), under seal. Defendants claim to have disclosed this memo inadvertently (as MER00001574 - 75) and now seek to claw it back under both the attorney-client and work-product privileges. *See* dkts. 62-63 The court granted the motion to seal pending further input from the parties. *See* dkt. 64. Plaintiff then filed a 50-page motion to unseal, and for the court to find that the memo never was or is not now privileged. *See* dkt. 67. Defendants filed a 17-page opposition, with supporting documents, *see* dkts. 73-75, to which plaintiff seeks leave to reply in a series of documents totaling over 31 pages (not counting the 42-page 2002 valuation report attached as an exhibit), *see* dkt. 76.

Plaintiff contends that: (1) defendants' vague assertion of the privileges does not comply with Rule 26(b)(5); (2) the document, on its face, does not fit within either claimed privilege; (3) even if there were some privileged snippets in the memo, the fiduciary exception to the privilege applies to plaintiff's discovery of the memo; and (4) defendants waived any privilege claim by their lackadaisical attempts to claw back the memo eleven days after plaintiff thanked them for disclosing a proverbial smoking gun.

Having read the parties submissions, I conclude that defendants have not met their burden of persuading the court that this document ever was, or is now, privileged.

The Seventh Circuit uses the “Wigmore” formulation of the attorney client privilege:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in [her] capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at [the client's] instance permanently protected (7) from disclosure by [the client] or by the legal adviser, (8) except the protection be waived.

United States v. Evans, 113 F.3d 1457, 1461 (7th Cir. 1997). The party seeking to invoke the privilege has the burden of proving all of its essential elements. Courts are to construe the privilege narrowly because it fetters the search for truth. *Id. See also United States v. Lawless*, 709 F.3d 485, 487 (7th Cir. 1983)(“The scope of the privilege should be strictly confined within the narrowest possible limits.”) When lawyers are consulted as business advisors the privilege does not apply. *Burden Weeks v. Welch*, 319 F.3d 897, 899 (7th Cir. 2003)(“hiring lawyers to do consultants' work does not bring a privilege into play”); *Evans,* 113 F.3d at 1463. A third party's presence during the consultation usually waives the privilege unless that party's presence was needed to make the conference possible or to assist the attorney in rendering legal services. *Id.* at 1464. As element (5) of the Wigmore formulation provides, the privilege generally attaches only to statements made by the *client*; however, statements made by the lawyer *to* the client will be protected in circumstances where those communications rest on confidential information obtained from the client. *Rehling v. City of Chicago*, 207 F.3d 1009, 1019 (7th Cir. 2000).

Starting with plaintiff's fourth, procedural point, defendants proffer that some sort of “vendor error” led to inadvertent disclosure, but they provide no detail and no evidence that would allow the court to confirm the accuracy of this assertion. Similarly, the court is unimpressed by the defendants' excuse for not catching this "error" for eleven days after being alerted to it by plaintiff. On June 15, 2011 plaintiff's attorney e-mailed a letter to 12 members of the defense team, including nine lawyers, slapping them about the head and shoulders with the disputed memo, characterizing it as a "true smoking gun" (in the context of keyword searching) and chastising defendants for "cynically weighing the 'Pro's and Con's' of whether or not to follow the law and make participants whole for the amounts by which Meriter knew it had underpaid them." Dkt. 61-4 at 3. In a case with so many fractious disputes, perhaps when the nine lawyers all got the same long letter from Attorney Gottesdiener, each of them expected/hoped that someone else would deal with it; but in light of the dispute that now is before the court, plaintiff's characterization of the memo was a bright red flag that should have prompted someone promptly to look into what in the world plaintiff was crowing about. Granted, 11 days is not a long time, even in a court that moves as quickly as this one, but this delay, coupled with defendants' vague privilege claims, do not militate toward finding that a clawback would be appropriate here.

This segues to defendants' claim in response to plaintiff's motion that this document is Entry 19 on their privilege log, *see* Exh. E, dkt. 75-5. Plaintiff observes in reply that the lack of Bates numbers and the absence of the "accompanying agenda" listed with that entry indicate that this memo is not the listed document. Further, the log does not identify who wrote the memo or to whom it was distributed, two important points in determining whether the privilege applies. This are curious omissions, although perhaps there is a reasonable explanation for them (which defendants have not offered).

In the end it doesn't matter, because defendants have a more fundamental problem: they have not established that this memo ever was privileged from disclosure, either in general or from plaintiffs as beneficiaries of the plan. In their opposition to plaintiff's motion, defendants assert for the first time that the memo was written by William L. Morgan, the then-Vice President of Human Resources at Meriter, after having previously identified a different Meriter HR employee (Kristi Perelli) as the author. Neither Morgan nor Perelli has averred to this court that s/he authored the memo and that the information in the memo fits within the Wigmore formulation of the attorney-client privilege. Instead, one of defendants' attorneys, Tom Hoffner, has submitted a declaration (dkt. 74) averring that he and his retained actuary, Gordon Enderle, provided legal advice nine months before the memo was written, and that the disputed memo "contains some of the legal advice and other information" that Hoffner and Enderle provided to Morgan in December 2001, that Morgan apparently incorporated this advice into the memo, and Hoffner "reviewed a draft" and "provided comments" to Morgan before Morgan circulated the memo to the ECPC in September 2002, nine months after Hoffner reports giving advice to Morgan. That's it. Hoffner has provided no specifics, no interstitial detail and has made no attempt to line up the memo with the Wigmore template to establish which sentences/paragraphs/charts in Morgan's memo might possibly fit elements (1) through (5).

Then there's the fact that Morgan was not only a Meriter employee, but also the Plan Administrator, who apparently had fiduciary responsibilities to the plan. Further, Attorney Hoffner was counsel not just to Meriter, but to the Meriter Plan. The memo was presented to the ECPC, which is the Plan Administrator, which has fiduciary responsibilities to Plan members, namely plaintiff and others like her. There is no clear indication in the record whether the Plan or Meriter paid for the advice that Attorney Hoffner now claims to have given to Morgan on this point, so it may be that Plan participants, such as plaintiff, have the right, straight up, to see the advice that they paid for. This all is relevant to plaintiff's third point, in which she invokes the fiduciary exception to the privilege, which might be more accurately characterized as the "breach of fiduciary"exception, *see Bland v. Fiatallis North America, Inc.* 401 F.3d 779, 787 (7th Cir. 2005). Under this exception, a fiduciary of an ERISA plan must make available to the beneficiary, upon request, any communication with an attorney that is intended to assist in the administration of the plan. The exception is premised on the theory that the attorney-client privilege should not be used as a shield to prevent disclosure of information relevant to an alleged breach of fiduciary duty. *Id.* Even if there were smatterings of privileged information in this memo–which defendants have not adequately established–the topic covered and the information provided establish that the memo cannot be withheld from the beneficiaries. They had–and have–the right to know how the Plan Administrator was addressing the question whether the plan's lump sum payouts had been too low.

Which leads to the question whether this information *was* disclosed to beneficiaries or other third parties at the time; it appears that Meriter disclosed to the IRS and the U.S. Department of Labor much of the information in the memo that it now seeks to claw back. To the extent that there is sensitive information in the memo that was not also disclosed to the IRS or DOL, Attorney Hoffner's declaration waving the privilege wand over the memo does not provide any basis for the court to find that Hoffner made these statements as part of his legal advice to Morgan, as opposed to Morgan providing his own business and public relations opinions to the ECPC about the pros and cons of various responses to the payout problem.

Finally, defendants' attorney work product claim also fails. The evidence shows that this memo was not prepared in anticipation of litigation. It was prepared to identify a potential problem with the plan, to suggest possible responses, and then to predict possible outcomes of those responses, one of which might be litigation. Nowhere in his declaration does Attorney Hoffman claim that he or Morgan anticipated litigation over this issue. The issue was a business problem that Meriter could attempt to solve in a variety of ways, as suggested by the memo.

In short, defendants have not established that any part of the memo is protected by attorney-client privilege or the work product privilege. It is not subject to clawback and it need not be retained under seal by the court.

ORDER

It is ORDERED that:

(1) Plaintiff's two motions to compel discovery, dkts. 54 and 59, are DENIED.

(2) Plaintiff's motion to file a reply in support of her motion to unseal, dkt. 76, is GRANTED;

(3) Plaintiff's motion to unseal, dkt. 67, is GRANTED; and

(4) The parties will bear their own costs on all of these motions.

Entered this 23rd day of August, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge