

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS

CITY OF PONTIAC GENERAL)	No. 5:12-cv-05162-SOH
EMPLOYEES' RETIREMENT SYSTEM,)	
Individually and on Behalf of All Others)	<u>CLASS ACTION</u>
Similarly Situated,)	
)	
Plaintiff,)	
)	
vs.)	
)	
WAL-MART STORES, INC., et al.,)	
)	
Defendants.)	

PLAINTIFF'S MOTION FOR ORDER TO SHOW CAUSE

I. INTRODUCTION

Plaintiff, City of Pontiac General Employees' Retirement System ("plaintiff" or "PGERS") respectfully requests that the Court issue an order directing defendant Wal-Mart Stores, Inc. ("Wal-Mart") to show cause as to why it should not be adjudged to be in contempt of this Court for failure to comply with the Court's September 28, 2016 Order granting in part and denying in part PGERS' Motion to Compel Production of Documents Provided by Defendants to the Securities and Exchange Commission ("SEC") and the Department of Justice ("DOJ"). Dkt. No. 287 (the "Production Order"). *See* Fed. R. Civ. P. 37(b)(2)(A)(vii); *see also Chaganti & Assocs., P.C. v. Nowotny*, 470 F.3d 1215, 1224 (8th Cir. 2006) ("A district court may impose civil contempt sanctions for one of two purposes: to compensate parties aggrieved by contumacious conduct or to coerce compliance with the court's orders."). The Production Order required Wal-Mart to "produce all relevant, non-privileged documents submitted to the SEC and the DOJ as part of their investigation into the Mexico bribery investigation, along with an affidavit and privilege log." Dkt. No. 287 at 7. Wal-Mart has defied each of these three directives.

The Production Order expressly requires production of a discrete set of documents: "***all*** relevant, non-privileged documents submitted to the SEC and the DOJ as part of their investigation into the Mexico bribery investigation." Dkt. No. 287 at 7.¹ The ***only*** category of documents within this set that the Production Order allows Wal-Mart to withhold are privileged documents. In direct defiance of the Production Order, however, in addition to withholding purportedly privileged documents, defendants withheld all other documents, except those for specific custodians, within a specific date range, ***and*** containing specific search terms – the very limitations Wal-Mart sought and lost when opposing plaintiff's motion to compel.

¹ Citations and footnotes are omitted and emphasis is added unless otherwise noted.

II. BACKGROUND

On November 25, 2015, PGERS filed a Motion to Compel Production of Documents Provided by Defendants to the Securities and Exchange Commission and the Department of Justice (“Motion to Compel”). Dkt. No. 246. PGERS’ Motion to Compel sought:

an order compelling the production of all documents concerning the “Suspected Corruption” alleged in PGERS’ Amended Complaint for Violation of the Federal Securities Laws which defendant Wal-Mart Stores, Inc. (“Walmart”) previously produced to the United States Securities and Exchange Commission and the United States Department of Justice (together, “Government Productions”) by December 30, 2015, or, in the alternative, production of all relevant, non-privileged documents contained in the Government Productions, along with an affidavit and privilege log, by December 30, 2015.

Dkt. No. 246 at 1.

On December 14, 2015, Wal-Mart filed an opposition to PGERS’ Motion to Compel. Dkt. No. 250. Wal-Mart argued that the Government Productions – which were compiled, ready to be produced, and admittedly contained non-privileged, relevant documents – should be ignored in favor of a lengthy from-scratch collection and review process using custodian, date range, and search term restrictions. Dkt. No. 250 at 12-14. Wal-Mart specifically argued that they should not “be ordered to review the entirety of the [Government Productions], and produce all relevant, non-privileged documents from that production.” Dkt. No. 250 at 18-19. Wal-Mart argued that doing so would be “redundant and cumulative of Defendants’ reasonable counter proposal” – the from-scratch custodian, date range, and search term collection and review. Dkt. No. 250 at 19.

On September 28, 2016, the Court granted the following part of PGERS’ Motion to Compel:

Plaintiff’s Motion to Compel with respect to its request for Defendants to produce all relevant, non-privileged documents submitted to the SEC and the DOJ as part of their investigation into the Mexico bribery investigation, along with an affidavit and privilege log, is **GRANTED**.

Dkt. No. 287 at 7.

On December 30, 2016 and January 13, 2017 – three months after the Production Order – Wal-Mart produced documents purportedly in accordance with the Production Order. Wal-Mart stated that “[i]n response to the Court’s [Production] Order, Defendants collected all documents submitted to the SEC and DOJ as part of the investigation into allegations related to Mexico, applied the date range, custodian, and search terms in the parties’ May 4, 2016 agreement regarding discovery parameters, and de-duplicated documents against documents already produced in this matter.” *See* Declaration of Jason A. Forge in Support of Plaintiff’s Motion for Order to Show Cause (“Forge Decl.”), ¶3 filed concurrently herewith. In total, out of the thousands of documents in the Government Productions – which *all* concern investigations into possible violations of the Foreign Corrupt Practices Act by Wal-Mart – Wal-Mart produced very few documents in response to the Production Order and logged only 67 documents on a “supplemental” privilege log.

III. ARGUMENT

Wal-Mart has defied the Production Order. The only limitation the Court permitted Wal-Mart to apply to the Government Productions is plainly set forth in the Production Order: “all relevant, non-privileged documents submitted to the SEC and the DOJ as part of their investigation into the Mexico bribery investigation.” Dkt. No. 287 at 7. The order did not permit Wal-Mart’s application of custodian, date range, and search term limitations to the Government Productions – *despite Wal-Mart having argued for just such limits.*² *See* Dkt. No. 250 at 12-14. Nor did the Court find that a review of the Government Productions without those limitations would be unduly burdensome, as Wal-Mart had argued. *See* Dkt. No. 250 at 18-19.

² The Court’s May 24, 2016, scheduling order required that the “[p]roduction of documents should be substantially completed on or before August 1, 2016.” Dkt. No. 275 at 1. This was the deadline for Wal-Mart’s production of documents using the custodian, date range, and search term restrictions they used here. There were no such restrictions allowed in the Court’s September 28, 2016 Production Order.

Wal-Mart's defiance of the Production Order is further demonstrated by its failure to produce any of the eight e-mails concerning the Mexican bribery investigation that are plainly relevant (Dkt. Nos. 40-3, 40-6, 40-8, 40-10, 40-13, 40-15, 40-16, and 40-18), have been found to be non-privileged (Dkt. No. 127 at 3), and that Wal-Mart has expressly or impliedly confirmed that it produced to the government (Dkt. No. 97-1, ¶¶2, 4, 97-3, 97-4, 97-5 at 24, 97-6, and 97-7).

In addition, the Court ordered Wal-Mart to produce an affidavit establishing its privilege assertions. Instead, Wal-Mart produced a conclusory document based on the information and belief of an attorney who has absolutely no personal knowledge of the creation and maintenance of the documents at issue or the circumstances surrounding their creation. In a variety of contexts, courts routinely reject as insufficient to establish facts affidavits based on "information and belief." See, e.g., *Lee v. Wal-Mart Stores, Inc.*, No. 3:92CV0465 AS, 1994 WL 899240, at *6 (N.D. Ind. Apr. 12, 1994), *aff'd*, 78 F.3d 586 (7th Cir. 1996) ("a statement merely indicating that a purported affidavit is based upon 'information and belief' is insufficient"); *United States v. Simmons*, 508 F. Supp. 552, 552 (E.D. Tenn. 1980) ("Where facts must be set forth, an affidavit made upon information and belief is insufficient."); *United States v. Gillette*, 383 F.2d 843, 848 (2d Cir. 1967) ("affidavit submitted for appellant is insufficient in that it does not, for example, allege personal knowledge on the part of appellant's attorney").

Respectfully, the "affiant" was not a lawyer in the year 2005, let alone a lawyer representing Wal-Mart. Nevertheless, he purports to swear under penalty of perjury that:

In 2005, Wal-Mart's lawyers commenced an investigation to evaluate allegations of bribery in Mexico raised by a former employee, Sergio Cicero, and to provide legal advice to Wal-Mart in anticipation of potential litigation. Wal-Mart's lawyers led the internal investigation with the assistance of outside counsel and employees who operated at the direction of Wal-Mart's lawyers.

See Forge Decl., Ex. 1. This affiant's lack of personal knowledge and conclusory assertions are insufficient:

It is well-established that “[t]he burden is on the party claiming the protection of a privilege to establish those facts that are essential to the elements of the privileged relationship.” *von Bulow by Auersperg v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987) (internal quotation marks omitted). To carry its burden, a party must “show by affidavit or other competent evidence sufficient facts to bring the disputed documents within the confines of the privilege.” *United States v. Davis*, 131 F.R.D. 391, 402 (S.D.N.Y. 1990). “[M]ere conclusory or *ipse dixit* assertions,” therefore, are insufficient. *In re Grand Jury Subpoena Dated Jan. 4, 1984*, 750 F.2d 223, 225 (2d Cir. 1984) (internal quotation marks omitted).

Khan v. Midland Funding LLC, 956 F. Supp. 2d 515, 516 (S.D.N.Y. 2013). The affiant's lack of personal knowledge is particularly problematic here where Wal-Mart is asserting work-product protection, which is a fact-dependent inquiry: “The work-product privilege is intended to protect from disclosure materials prepared in anticipation of litigation. The inchoate possibility, or even the likely chance of litigation, does not give rise to the privilege.” *Lee v. Overbey*, No. 2:08-CV-02115, 2010 WL 161443, at *3 (W.D. Ark. Jan. 8, 2010). Therefore, Wal-Mart has failed to produce a valid affidavit as the Production Order requires.

Likewise, Wal-Mart failed to produce a privilege log setting forth each document that it withheld from the Government Productions. Instead, it produced a “supplemental” privilege log consisting of 67 documents, leaving plaintiff to guess, and the record incomplete as to, which of the thousands of documents on Wal-Mart's prior privilege log were among the Government Productions (*i.e.*, documents that Wal-Mart voluntarily provided to third parties). Therefore, Wal-Mart has failed to produce the privilege log that the Production Order requires.

“The court may hold a party violating a discovery order in contempt of court.” *Mackey v. Jutila*, No. 13-cv-432 (MJD/LIB), 2014 U.S. Dist. LEXIS 18003, at *5 (D. Minn. Jan. 31, 2014); Fed. R. Civ. P. 37(b)(2)(A)(vii); *see also Gleghorn v. Melton*, 195 F. App'x

535, 537 (8th Cir. 2006). Before imposing a sanction as severe as dismissal or default judgment, courts should issue orders to show cause to determine whether a lesser sanction would be more just and effective. *Gleghorn*, 195 F. App'x at 537; *Edgar v. Slaughter*, 548 F.2d 770, 772-73 (8th Cir. 1977). Plaintiff does not seek a sanction of dismissal, so the Court can provide the relief plaintiff ultimately seeks with or without first issuing an order to show cause.

IV. CONCLUSION

Plaintiff respectfully requests that the Court enter an Order (1) finding that Wal-Mart is in contempt of the Court's September 28, 2016, Production Order; (2) compelling Wal-Mart to produce immediately all relevant, non-privileged documents submitted to the SEC and the DOJ as part of their investigation into the Mexico bribery investigation, including (but not limited to) the non-privileged e-mails set forth in Dkt. Nos. 40-3, 40-6, 40-8, 40-10, 40-13, 40-15, 40-16, and 40-18, along with a competent affidavit based on personal knowledge, and a privilege log of all withheld documents submitted to the SEC and the DOJ as part of their investigation into the Mexico bribery investigation; and (3) any other relief that the Court deems just and proper to compel obedience to and compliance with the orders and decrees of this Court.

DATED: March 10, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2017, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on March 10, 2017.

s/ JASON A. FORGE

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