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

ALVIN BALDUS, CARLENE BECHEN, ELVIRA BUMPUS, RONALD BIENDSEIL, LESLIE W. DAVIS, III, BRETT ECKSTEIN, GLORIA ROGERS, RICHARD KRESBACH, ROCHELLE MOORE, AMY RISSEEUW, JUDY ROBSON, JEANNE SANCHEZ-BELL, CECELIA SCHLIEPP, TRAVIS THYSSEN, CINDY BARBERA, RON BOONE, VERA BOONE, EVANJELINA CLEERMAN, SHEILA COCHRAN, MAXINE HOUGH, CLARENCE JOHNSON, RICHARD LANGE, and GLADYS MANZANET,

Plaintiffs,

Case No. 11-CV-00562
JPS-DPW-RMD

TAMMY BALDWIN, GWENDOLYNNE MOORE and RONALD KIND,

Intervenor-Plaintiffs,

Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, and TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants,

F. JAMES SENSENBRENNER, JR., THOMAS E. PETRI, PAUL D. RYAN, JR., REID J. RIBBLE, and SEAN P. DUFFY.

Intervenor-Defendants.

VOCES DE LA FRONTERA, INC.,
RAMIRO VARA, OLGA VARA,
JOSE PEREZ, and ERICA RAMIREZ,

Plaintiffs,

v.

Case No. 11-CV-1011
JPS-DPW-RMD

Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants.

RESPONSE TO PLAINTIFFS' MOTION TO EXTEND TIME IN WHICH TO MOVE TO COMPEL PRODUCTION OF DOCUMENTS AND TESTIMONY

The defendants, Michael Brennan, David Deininger, Gerald Nichol, Thomas Cane, Thomas Barland, Timothy Vocke, and Kevin Kennedy (the "Government Accountability Board"), by their attorneys, J.B. Van Hollen, Attorney General, and Maria S. Lazar, Assistant Attorney General, and Reinhart Boerner Van Deuren s.c., by Patrick J. Hodan, Daniel Kelly and Colleen E. Fielkow, provide this response to the plaintiffs' Motion To Extend Time In Which To Move To Compel Production Of Documents And Testimony.

Introduction

If this motion is really just about gaining more time to file a motion to compel, it is unnecessary. The parties agreed, within minutes of the plaintiffs' request last week, to stipulate to the extension they said they wanted. Thus, this motion must be about more than extending a deadline.

The only thing this motion accomplishes, other than requesting what it has already been given, is to drag the Government Accountability Board into a discovery dispute between the plaintiffs and the Legislature. The plaintiffs' filing creates the misperception that the Government Accountability Board's objections to some of the plaintiffs' deposition questions are somehow impacted by this Court's discovery-related orders. They are not, nor can they be, because this Court has never addressed the Government Accountability Board's attorney-client privilege, nor the privilege against producing their attorneys' work product.

I. The Parties Already Stipulated To The Requested Extension

Sometimes, apparently, "yes" is not enough. Last week (on December 22), plaintiffs requested an extension of time to file discovery motions.[1] All parties immediately agreed, which made this motion superfluous. (Kelly Dec. at ¶3.) The Government Accountability Board submits this response to counter the suggestion – implicit in a motion of this nature – that it would not grant plaintiffs the common courtesy of a brief extension.

Mr. Poland proposed a stipulation to memorialize the parties' agreement. (Kelly Dec. ¶4, Ex. 2001.) But because the draft invited the Government Accountability Board

[1] Declaration of Daniel Kelly In Support Of The Defendants' Response To Plaintiffs' Motion To Extend Time In Which To Move To Compel Production Of Documents And Testimony at ¶2 ("Kelly Dec.").¶

to stipulate to part of the plaintiffs' discovery-related arguments, and because it mischaracterized events, the Government Accountability Board could not sign the document. (*Id*.)

The Government Accountability Board circulated a revised stipulation that simply stated that all parties had agreed to the requested extension. (Kelly Dec. ¶5, Ex. 2002.) When the plaintiffs rejected that straightforward document, the defendants circulated another draft that left most of plaintiffs' original language, and merely corrected some of their mischaracterizations. (Kelly Dec. ¶6, 7, Ex. 2003.) The defendants authorized plaintiffs to submit either version of the revised stipulation. (*Id*.)

Without any explanation for why neither of the drafts was acceptable, or why it was necessary for the Government Accountability Board to stipulate to their argument or (inaccurate) version of events, the plaintiffs filed this motion. (*Id*. at ¶8.) Inasmuch as the Government Accountability Board still does not oppose plaintiffs' request for an extension, this motion has been an entirely unnecessary exercise.

II. The Government Accountability Board Has No Part In Plaintiffs' Discovery Dispute With The Legislature.

Although this motion asks for nothing more than an already-granted extension, the defendants cannot ignore that it tries to cast the Government Accountability Board in an unfavorable light by insinuating that it prevented witnesses from producing documents or providing testimony related to events leading up to and including the Legislature's adoption of 2011 Acts 43 & 44. As the plaintiffs know, the defendants did no such thing, so this response is necessary to clear the record of the errors the plaintiffs introduced.

The plaintiffs incorrectly state that "[i]n addition to withholding the production of responsive, relevant documents, counsel for both the legislature and defendants instructed

the deponents not to answer questions at their depositions based on claims of attorney-client privilege, the work product doctrine, and legislative privilege." (Motion at ¶7 (Doc. 90).) This statement is inaccurate in two respects. First, although the *Legislature* withheld documents based on privilege objections, the *defendants* were not required to produce any documents at the depositions and so did not "withhold" any documents. (Kelly Dec. at ¶9.) Second, plaintiffs' statement fails to distinguish the objections raised by the Legislature from those raised by the Government Accountability Board (an independent agency within the Executive branch[2]).

While the Legislature instructed witnesses not to provide certain testimony relating to events leading up to and including the Legislature's adoption of Acts 43 & 44, the defendants raised no such objections. (Kelly Dec. at ¶10.) Instead, the defendants (as opposed to the Legislature) raised "privilege" objections only at Mr. Handrick's deposition, and then only to prevent plaintiffs' counsel from inappropriately invading the Government Accountability Board's attorney-client privilege, or its attorney's work product. (Declaration of Douglas Poland ¶11 & Ex. 9 (Doc. 89) ("Poland Dec."); Kelly Dec. at ¶11.) That privilege, of course, is separate and apart from any privilege belonging to the Legislature.

Reinhart Boerner Van Deuren s.c. ("Reinhart") was retained on November 22, 2011, to assist the Attorney General in representing the Government Accountability Board. (Kelly Dec. ¶12.) Mr. Handrick is a Reinhart employee who is assisting the

[2] "'Independent agency' means an administrative agency within the executive branch created under subch. III." Wis. Stat. §15.01(9). The Government Accountability Board was created as an independent agency by §15.60, which is within subchapter III of Chapter 15, Wis. Stats.

attorneys defending this case.[3] (*Id*. at ¶13.) To the extent any privilege covers his conversations and work product in that role, that privilege belongs to the Government Accountability Board, not the Legislature.

As plaintiffs' counsel himself notes, he tried on 34 occasions in one deposition alone to trespass on the Government Accountability Board's privileged information. (Poland Dec. ¶11 & Ex. 9) He did this by asking Mr. Handrick to disclose communications and information relating to his work for Reinhart on behalf of the defendants since November 22, 2011. (*Id*.) However, he never gave any explanation for his repeated and improper attempts to obtain information to which he must have known he had no right. (Kelly Dec. ¶16.) Nor has he explained why he seems to believe it proper to muddle the independent roles of the Legislature and the Executive branches of government with respect to the case at hand. (*Id*. at ¶17.)

Perhaps the plaintiffs will be more careful about the fundamental distinction between the different branches of government if they file the motion to compel foreshadowed by this motion. If not, the Government Accountability Board will address the matter at greater length then.

[3] Although Mr. Handrick previously provided consulting services to the Legislature through its attorneys (Michael Best & Friedrich), Mr. Handrick has provided no such services since at least November 22, 2011. (Kelly Dec. at ¶14.) Since November 22, 2011, Mr. Handrick's responsibilities, as they relate to redistricting, have been solely to assist the attorneys representing the Government Accountability Board in this case. (*Id*. at ¶15.)

Dated this 29th day of December, 2011.

REINHART BOERNER VAN DEUREN s.c.

s/ Daniel Kelly
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