

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-14439-CIV-GRAHAM/LYNCH

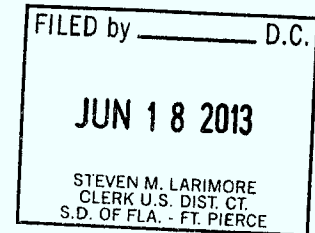
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

BAY STATE MILLING CO.,

Defendant.



ORDER ON DEFENDANT'S MOTION TO COMPEL (DE 32)

THIS CAUSE comes before this Court upon the above Motion. Having reviewed the Motion, Response, and Reply, this Court finds as follows:

1. The instant Motion concerns the Defendant's First Set of Interrogatories and First Request for Production. Given the complexity of the resulting discovery disputes, this Court requested the parties to brief them in lieu of a hearing. The parties now have fully briefed the various issues, and this Court has considered the parties' respective arguments.

2. On April 8, 2013 the Plaintiff answered the above two discovery requests, including raising objections and asserting privileges (along with a privilege log). From that point through the filing of the instant Motion to Compel on May 24th, the parties have been trying to resolve disputes regarding those answers. This effort included supplemental answers on May 3rd and

additional supplemental answers after the filing of the Motion to Compel. It appears that the main areas of dispute concerned the Plaintiff's statement of damages and the appropriateness of particular assertions of privilege.

3. It appears that the supplemental productions, both before and after the filing of the Motion to Compel, have mooted many of the Defendant's arguments. Therefore this Court limits the scope of the instant ruling to those matters that the Defendant addresses in its Reply.

4. To begin with, there is the Defendant's continued objection to what it characterizes as the Plaintiff's "formulaic" use of objections in its discovery answers. The Plaintiff disagrees with this characterization. Ultimately, however, this particular issue is moot. The Plaintiff states that it has produced all responsive and non-privileged documents in its possession. Moreover the briefing of the Motion clarifies what underlying disputes remain. Nor does this Court find certain answers by the Plaintiff—in which it refers to the document production on the whole—sufficiently egregious under the full circumstances to warrant relief. This Court therefore will focus on the substantive matters in dispute.

5. Perhaps the main underlying issue concerns the propriety of the Plaintiff's assertion of two particular privileges. (This Court overrules the Defendant's claims that

the initial or amended privilege logs are procedurally defective.) This Court begins with the Plaintiff's assertion of the Governmental Deliberative Process Privilege. By the close of briefing on this issue, the Defendant's remaining argument is that its assertion is technically untimely. The Defendant argues that a governmental party does not fully invoke the privilege until the relevant departmental head has produced an affidavit and that, here, the Plaintiff did not do so until its Response to the Motion to Compel. (Otherwise, this Court observes, the Plaintiff consistently has asserted the privilege.) Under the full circumstances, this Court does not find the Defendant's argument persuasive. In the case upon which the Defendant mainly relies in support of its argument, even if it were binding authority, the court there waived the procedural defect and proceeded to consider the privilege on its merits. This Court exercises that same discretion here, and it finds no prejudice to the Defendant from any late filing of the department head affidavit.

6. In the event that this Court accepted the late-filed affidavit, the Defendant argues that the Plaintiff's assertion of privilege nonetheless does not vouch for three particular Bates-stamped pages of documents and thus the Defendant asks at the minimum that the Plaintiff be compelled to produce them. Whether this omission was simple oversight or not is unclear.

However this Court is confident that the parties can resolve the issue of these three pages of documents on their own with the benefit of the instant ruling.

7. The other privilege in dispute is the Plaintiff's assertion of Rule 408, Fed. R. Evidence, as a privilege. Briefing on this dispute has refined the issue to the question of whether this rule, which bars the admissibility of settlement-related evidence at trial, also applies to discovery. The Plaintiff seeks to invoke this privilege to protect it from disclosing documents generated during the course of an administrative-level conciliatory proceeding (akin to settlement). Even if the Defendant is correct that Rule 408 does not apply to the discovery context, its argument still fails. The Defendant's argument fails because it still must demonstrate that the information at issue otherwise is discoverable. That is, that the settlement-related information is reasonably calculated to lead to the discovery of admissible evidence. The Defendant does not make this additional showing. It must be remembered that assertions and deliberations made during a settlement or settlement-like undertaking are (and should be) motivated by the spirit of compromise. Thus any assertion made in that context—for example, the amount of a damages claim—does not necessarily reflect that party's actual position. Because the Defendant does not explain what assertions or other

information produced during the course of the conciliatory effort constitutes evidence that can be used to prove the same in the fact-finding context, its argument fails. Moreover this Court finds the case law cited by the Defendant distinguishable.

8. Affirming the Plaintiff's invocation of the above two privileges renders moot much of the discovery dispute. Another underlying core issue concerns the Plaintiff's production of discovery regarding damages (an issue which overlaps greatly with the above privilege disputes). The Defendant complains about the sufficiency of the Plaintiff's answers, namely, the fact that it has not revised its original assertion of \$72,000 and does not provide calculations to support that figure. The Defendant seeks to compel a complete and comprehensive quantification of all damages that the Plaintiff is seeking. Regardless of the various arguments and disputes surrounding this issue, the dispositive point remains that the Plaintiff cannot be compelled to produced something that it does not have. The Plaintiff affirmatively states that it has produced all information regarding damages that it has available (and that is not otherwise privileged or not discoverable).

9. The remaining point in issue is whether the Defendant is entitled to recover its fees and costs for pursuing its Motion to Compel. After carefully considering both parties'

positions on this matter, this Court finds that under the full circumstances, a fee and cost award is not warranted here.

Based on the foregoing, it is hereby,

ORDERED AND ADJUDGED that the Motion to Compel is **DENIED**.

DONE AND ORDERED in Chambers at Fort Pierce, Florida, this

18th day of June, 2013.



FRANK J. LYNCH, JR.
UNITED STATES MAGISTRATE JUDGE

cc: Jennifer A. Schwartz, Esq.
Aarrin Golson, Esq.