IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DENNIS WALTER BOND, SR., *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No. RWT-10-1256**
	)	
MARRIOTT INTERNATIONAL, INC., *et al.*	)	
	)	
Defendants.	)	
	)	

ORDER

Upon consideration of Plaintiffs' Local Rule 104.7 filing (consisting of Plaintiffs' Motion to Compel, Defendants' Opposition and Plaintiffs' Reply), IT IS this 23rd day of July, 2014 by the United States District Court for the District of Maryland, **ORDERED**:

1. That Plaintiffs' Local Rule 104.7 [Motion to Compel] (ECF No. 152), BE, and the same hereby is **GRANTED** for the reasons stated below;

2. That, by way of background, in the Second Amended Complaint Plaintiffs allege, although the 1970 Marriott Corporation Deferred Stock Incentive Plan (the "1970 Plan") was designed to reward individuals Marriott Corporation considered *key employees*, in practice, "all salaried employees were eligible to participate in the 1970 Plan at Marriott Corporation's discretion." ECF No. 69 ¶ 20;

3. That Plaintiffs allege Marriott Corporation's Retirement Awards program and the whole 1970 Plan fell squarely within the regulatory mandate of the Employee Retirement Income Security Act of 1974 ("ERISA"). Marriott Corporation however took no action to ensure the 1970 Plan complied with ERISA. "Instead, Marriott Corporation chose to leave the 1970 Plan in its pre-ERISA form. The vesting terms of many Retirement Awards issued after

ERISA's effective date[1] violated ERISA because they produced a vesting schedule that was less generous than any of ERISA's minimum vesting schedules." *Id.* ¶ 27;

4. That it is undisputed that Congress allows certain plans limited exemption from ERISA's vesting requirements. Such an exemption applies to plans known as "top hat", defined by statute as "a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees [.]" 29 U.S.C. § 1051(2);

5. That Plaintiffs contend Marriott Corporation's Retirement Awards do not qualify for the top hat exemption because they "were uniform, non-negotiable, and issued to thousands of employees with an extremely broad range of job titles and salaries." ECF No. 69 ¶ 29;

6. That Plaintiffs assert Marriott Corporation failed to submit a top hat letter to the Department of Labor ("DOL") claiming the 1970 Plan as exempt. *Id.* ¶ 30;

7. That Marriott Corporation amended and restated the 1970 Plan as the 1978 Plan. *Id.* ¶ 33;

8. That, according to Plaintiffs, the 1978 Plan, similar to the 1970 Plan, did not limit eligibility for deferred stock awards to specific classes of employees. "Instead, the 1978 Plan was designed to reward anyone who Marriott Corporation considered a 'key employee.' In practice, all salaried employees were eligible to participate in the 1978 Plan at Marriott Corporation's discretion." *Id.* ¶ 34;

9. That the 1978 Plan authorized three types of deferred stock awards: (a) deferred stock bonus awards (pre-retirement awards), (b) deferred stock bonus awards (retirement awards) and (c) deferred stock agreements. *Id.* ¶ 35;

[1] January 1, 1976.

10. That according to Plaintiffs, the deferred stock agreements were individually negotiated between the recipient and Marriott Corporation. *Id.* ¶ 41. Between 1978 and 1989 less than 100 deferred stock agreements were issued to a few dozen highly compensated executives. Plaintiffs contend these deferred stock agreements "were exempt from ERISA's vesting requirements under the top hat exemption because they were individually negotiated and limited to a select group of a few dozen highly compensated executives." *Id.* ¶ 42;

11. That, in contrast, the deferred stock bonus awards (retirement awards) had uniform, non-negotiable terms. The recipients held a variety of job titles and had varying levels of salaries. *Id.* ¶¶ 37-38;

12. That Plaintiffs allege, throughout the existence of the 1978 Plan, Marriott Corporation never submitted a top hat letter to the DOL;

13. That in 1991 Marriott Corporation adopted the 1991 Plan which severely curtailed the class of employees eligible to receive Retirement Awards. *Id.* ¶ 45. "Specifically, the 1991 Plan restricted eligibility for Retirement Awards to only those employees with a pay grade of 56 or above. This amendment reduced the number of Retirement Award recipients in any given year from several thousand, to less than one hundred." *Id.* ¶ 46. Plaintiffs recognize, with the restriction to highly compensated employees, the 1991 Plan falls within the exemption from ERISA's vesting requirements. *Id.;*

14. That, in light of the significant change in the Retirement Awards plan as of 1991, whereby it is undisputed the 1991 Plan is restricted based on an objective, compensation-based eligibility, and further, since it is undisputed that the pre-1991 Plans, *i.e.,* the 1970 Plan and the 1978 Plan, were **not** restricted based on an objective, compensation-based eligibility, the

undersigned finds Plaintiffs' requested discovery for the 1991-1993 participant data is relevant to Plaintiffs' claims;

15. That the undersigned further finds as relevant Plaintiffs' requested discovery concerning *other* plans for the 1976-1993 period to determine their purported eligibility for" top hat" exemption and contrast the eligibility requirements of these *other* plans to the challenged pre-1991 versions of Marriot Retirement Award plans;

16. That determining whether a retirement plan qualifies as a "top hat" involves a three step evaluation. The first factor requires the plan to be unfunded, a straight forward assessment. The court must determine whether the plan has a funding source separate from the general assets of the company. "If there is no separately maintained account distinct from the company's general assets, then the plan is unfunded." *Guiragoss v. Khoury*, 444 F. Supp. 2d 649, 660 (E.D. Va. 2006);

17. That the second factor requires an employer to maintain a plan primarily for providing deferred compensation to a select group of management or highly compensated employees. Such an inquiry is fact specific. There must be evidence the plan is offered to a select group. "Relevant factors include the percentage of the total workforce invited to join the plan (the quantitative factor) and the nature of their employment duties, the compensation disparity between top hat plan members and non-members, and the actual language of the plan agreement (the qualitative factors)." *Guiragoss*, 444 F. Supp. 2d at 660. Additionally, the select group must consist of management or highly compensated employees. "If plan participation is not based on employees' managerial status or compensation level, then the plan is not a top hat plan, regardless of participation rates." *Id.* at 661 (citing *Starr v. JCI Data Processing, Inc.*, 757 F. Supp. 390, 394 (D.N.J. 1991)). The plan must have a well-established basis for defining

eligible plan members as "high level." "[T]he mere fact that the employer intends the plan to be a reward to 'key' employees does not satisfy the degree of selectivity contemplated by the statutes." *Id.* (quoting *Carrabba v. Randalls Food Markets, Inc.*, 38 F. Supp. 2d 468, 477 (N.D. Tex. 1999), *aff'd* 252 F.3d 721 (5th Cir. 2001));

18. That the third factor for determining a plan's top hat status is the ability of the select group members to protect their own interests. "The assumption underlying top hat exemption from ERISA is simply that top-level executives are in a favorable bargaining position to negotiate the terms of an agreement and, therefore, do not need a comprehensive regulatory scheme, like ERISA, to protect their interests." *Id.* (citations omitted);

19. That based on the fact intensive inquiry required for determining top hat status, the discovery requested by Plaintiffs is not a "fishing expedition." Rather, the discovery Plaintiffs seek is relevant to Plaintiffs' claims (*i.e.*, the Plans were not top hat) and to Defendants' defenses (*i.e.*, the Plans were top hat);

20. That Defendants have not demonstrated the discovery requests are overly burdensome and Plaintiffs have refuted this assertion. For instance, in the Reply, Plaintiffs assert the overwhelming majority of information sought is contained within two electronic repositories, *i.e.*, "Marrpay[2]" and "FoxPro[3]." With regard to "Marrpay" Plaintiffs note,

> Not only can these data-points be extracted and produced to Plaintiffs without conducting a burdensome and time-consuming search-and-review process, but Marriott *has already extracted* the data Plaintiffs seek for the 1976-1993 period. Rather than producing it, however, Marriott is undertaking the burden and expense of deleting certain data before producing it to Plaintiffs.

[2] "Marrpay is Marriott's electronic payroll database, and it contains detailed employee information on compensation, job classification, location, hours worked, and various benefits that an employee was eligible for or received in any given year." Reply at 3.

[3] "FoxPro is a much smaller electronic database that contains detailed data on the benefits provided through the Marriott Plan." *Id.* at 4.

> For example, because Marriott has argued that data about "other plans" is irrelevant, it is deleting from the dataset information about whether employees were eligible for or participated in the Profit Sharing Plan, the EDC Plan, and all plans other than the Marriott Plan. Putting aside the disputed relevance of the data, there is no marginal burden associated with producing it.

Reply at 3-4. Similarly, with regard to "FoxPro" Plaintiffs contend,

> Because of its small size, Marriott has already produced that database to Plaintiffs—but not before deleting the 1991-1993 data that it argues is irrelevant and burdensome to produce. As with Marrpay, Marriott has voluntarily assumed the burden of searching for and deleting certain information from FoxPro rather than providing it to Plaintiffs. There is no marginal burden associated with producing the complete FoxPro dataset to Plaintiffs.

Id. at 4;

21. That Defendants are hereby **ordered** to produce 1991-1993 data responsive to Plaintiffs' discovery requests;

22. That Defendants are hereby **ordered** to produce plan documents for all other pension plans (*i.e.*, pension plans besides the Marriott Plan) during the 1976-1993 period;

23. That Defendants are hereby **ordered** to **re-answer** the contention interrogatories.[4] In accordance with Federal Rule of Civil Procedure 33(a)(2), Defendants must *re-answer* to the extent the interrogatories relate to fact or the application of law to fact. Defendants are not required to *re-answer* to the extent the interrogatories relate to issues of pure law;

24. That Defendants shall cease unilaterally redacting information Defendants consider irrelevant from otherwise relevant and responsive documents; and

25. That Defendants must supplement their discovery responses in accordance with

[4] Plaintiff Steigman's Second Set of Interrogatories Nos. 7, 8, 9, 10, 11, and 12.

this Order within twenty (20) days.

/s/

WILLIAM CONNELLY
UNITED STATES MAGISTRATE JUDGE