TAX COURT OF NEW JERSEY

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OF THE TAX COURT COMMITTEE ON OPINIONS

January 5, 2017

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Re: HD Supply Waterworks Group, Inc.
v. Director, Division of Taxation
Docket No. 003035-2015

HD Supply Power Solutions Group, Inc. (f/k/a HD Supply Utilities Group, Inc.)
v. Director, Division of Taxation
Docket No. 003488-2015

HD Supply Facilities Maintenance Group, Inc.
v. Director, Division of Taxation
Docket No. 003492-2015

Dear Mr. Rimkunas, Mr. Smith, Mr. Allan and Deputy Attorney General Lam:

This matter comes before the court by motions of plaintiffs, HD Supply Waterworks Group, Inc., HD Supply Power Solutions Group, Inc. and HD Supply Facilities Maintenance

Group, Inc. (collectively referred to herein as "plaintiffs"), seeking entry of a protective order and to quash the notices in lieu of subpoena to take oral deposition of Joseph J. DeAngelo, plaintiffs' President, and Chairman, President and Chief Executive Officer of plaintiffs' parent corporation, HD Supply Holdings, Inc.

For the reasons stated below, the court grants plaintiffs' motions seeking entry of a protective order and quashes the notices in lieu of subpoena to take oral deposition of Joseph J. DeAngelo.

I. Factual Findings and Procedural History

This matter arises from the Director, Division of Taxation's ("defendant"), denials of plaintiffs' claims for refunds of taxes paid under the New Jersey Corporation Business Tax Act, N.J.S.A. 54:10A-1 to -40 ("CBT" or "CBT Act"), for the 2007 to 2011 tax years. In their Complaints, plaintiffs allege that they are Delaware corporations that were limited partners, and thus, passive investors in Florida limited partnerships which conducted business in New Jersey during the tax years at issue and therefore, did not have the necessary substantial nexus with New Jersey to be subject to CBT. Conversely, defendant argues that plaintiffs' business activities in New Jersey were sufficient to subject plaintiffs to the requirements of the CBT Act.

Joseph J. DeAngelo ("DeAngelo") serves as plaintiffs' President, and as Chairman, President and Chief Executive Officer of HD Supply Holdings, Inc. ("HD Supply"), a publicly traded Fortune 500 company engaged in industrial distribution services across North America. HD Supply is the owner of HD Supply Holdings, LLC ("HD Supply Holdings"), a single member limited liability company, which during the tax years at issue, also held a limited partnership interest in the partnerships. HD Supply Holdings owns 100% of plaintiffs' stock.

On or about August 22, 2016, defendant served upon plaintiffs notices in lieu of subpoena to take oral deposition ("notices in lieu of subpoena") of DeAngelo. According to the notices in lieu of subpoena, defendant sought information "with respect to all matters relevant to the subject matter involved in this action. . ."

In response to defendant's notices in lieu of subpoena, plaintiffs filed the instant motions seeking to quash the notices in lieu of subpoena, and entry of a protective order barring DeAngelo's deposition. In support of the motions, plaintiffs initially raised three principal arguments: (1) DeAngelo is a "high-level corporate officer" of HD Supply, and as such, is responsible for overseeing operations and management of a publicly traded operating company, thus, his personal knowledge of plaintiffs' specific structures and day-to-day operations is minimal; (2) the information which DeAngelo may possess is not exclusive or unique to him, and may be obtained by defendant by less burdensome, costly, and harassing means, and from designated individuals who possess knowledge of the specific topics at issue; and (3) plaintiffs have already provided defendant with voluminous documents and information and have produced a designated representative, who is one of plaintiffs' corporate officers, who offered testimony involving the matters at issue. Accordingly, plaintiffs maintain that defendant has been afforded ample opportunity during pretrial discovery to obtain the information sought.

Plaintiffs contend that because the text of R. 4:10-3 closely follows Fed. R. Civ. P. 26(c) and because "there are few New Jersey state court decisions that directly address the issue [of limiting depositions of high-level executives] it is appropriate [for the court] to examine federal decisions and rules." Plaintiffs maintain that consistent with the directives of Fed. R. Civ. P. 26(c), the depositions of "high-level" corporate officers, or "apex depositions," should be prohibited unless the party seeking the deposition has demonstrated that the executive: (1) has unique, non-

repetitive, first-hand knowledge of the facts at issue in the case, and (2) that other less intrusive means of discovery, such as interrogatories and depositions of other employees, have been exhausted without success.

Conversely, defendant asserts plaintiffs had "a constitutional presence in New Jersey because their businesses are 'integrally related' to their respective limited partnership businesses in New Jersey." Defendant charges that DeAngelo is the "only remaining officer" to hold overlapping positions both with plaintiffs and with the limited partnerships for the tax years at issue and therefore, it should be permitted to conduct an inquiry into: (1) whether a substantial intercompany-partnership relationship existed between plaintiffs, the limited partnerships, HD Supply and/or its subsidiaries and affiliates; (2) whether the limited partnership interest is the only or most substantial asset of plaintiffs corporations; (3) whether the limited partnership interest produces all or most of the income of plaintiffs corporations; (4) whether plaintiffs corporations and the limited partnerships are in the same line of business; (5) is there is a substantial overlapping of employees and offices; (6) is there is a sharing of operation facilities, technology and/or know how. Although defendant did not identify any specific areas of inquiry in its notices in lieu of subpoena, in opposition to plaintiffs' motions, defendant identified fourteen inquiries for which it sought to test DeAngelo's knowledge. The areas of inquiry identified by defendant include: (a) whether the officers of plaintiffs and the partnerships shared a common benefit plan (i.e. medical and 401k plans); (b) whether there was a common employee handbook across all entities; (c) whether plaintiffs' officers were aware of any service fee charged for any service rendered by the partnerships, or vice versa; (d) whether plaintiffs' officers determined whether to charge a royalty fee to the partnerships for use of any intellectual property; (e) whether the officers made any distinction between plaintiffs and the partnerships as separate and distinct entities; (f) whether the

officers dedicated any specific time of the day or days of the week to work on projects related to the plaintiffs as opposed to projects related to the partnerships; (g) whether the officers of HD Supply, the ultimate parent, approved all cash flow; (h) whether the officers of HD Supply determined what fees were charged to plaintiffs and what fees were charged to the partnerships; (i) when did the officers act on behalf of plaintiffs and when did they act on behalf of the partnerships; (j) whether plaintiffs' officers were aware of the business purpose of plaintiffs as opposed to that of the partnerships; (k) whether plaintiffs' officers were aware of what profits plaintiffs made and how profits were used; (l) whether plaintiffs had bank accounts with any commercial banks; (m) whether there were workspace shared by officers of plaintiffs and officers of the partnerships; and (n) whether there were technology and know-how shared by officers [of] plaintiffs and officers of the partnerships.

The court heard oral argument on plaintiffs' motions on October 4, 2016, and following oral argument afforded the parties the opportunity to submit supplemental certifications and briefs addressing issues raised by the court during oral argument.

On October 18, 2016, plaintiffs submitted an Affidavit from DeAngelo which affirms that: (1) from August 2007 until March 2015, he has served as Chief Executive Officer and President of HD Supply, and that, since March 2015, he has served as Chairman, Chief Executive Officer and President of HD Supply, in which role he is "responsible for overseeing the overall operations of the entire HD Supply enterprise"; (2) for "administrative ease," he and other members of the HD Supply senior leadership team have been named as officers of many of the HD Supply affiliates and subsidiaries, but that he relies on his team of subordinate officers, managers, and specialists to establish the structures of the various entities, to oversee their day-to-day operations and activities, to monitor their various tax and corporate compliance obligations, and to supervise their

employees, agents and contractors; (3) he lacks personal knowledge of the details, structure or activities of every entity within the HD Supply corporate structure; (4) although he is generally aware that HD Supply provides medical and 401(k) plans to all of its eligible associates, he does not possess specific knowledge as to their terms or conditions, and is not aware of any common employee handbook utilized across all HD Supply affiliates and subsidiaries; (5) he has been advised and is generally aware that plaintiffs are holding companies, not operating entities, and administration of these entities is entrusted to other members of his management team. However, he does not have any specific knowledge of plaintiffs' day-to-day activities, and that, while he is generally aware that plaintiffs have sought to recover refunds of New Jersey CBT previously paid, he has no personal knowledge of the specific legal claims or issues relevant to the litigation and has relied upon HD Supply's Vice President of Taxation, Jeffrey Monday, and its General Counsel, Dan McDevitt, to coordinate with outside counsel to handle and oversee all aspects of that effort; (6) in response to defendant's counsel's proposed list of 14 specific areas of inquiry for his deposition, that other than as set forth in the Affidavit, he does not currently possess personal knowledge of specific facts relevant to the questions as they relate to the relevant time period; and (7) as Chairman, Chief Executive Officer and President of HD Supply, he is responsible for the entire business enterprise and his time is in high demand, and it would therefore be difficult for him to set aside the time necessary to prepare for and attend a deposition in the three lawsuits at issue.

In response to plaintiffs' post-oral argument submission, defendant asserts that DeAngelo's Affidavit fails to demonstrate that he lacks any personal familiarity with facts relevant to the instant matters, accordingly, defendant maintains that plaintiffs' motions should be denied. In substantiating this assertion, defendant highlights that: (1) DeAngelo does not affirm he has no

specific duties relevant to plaintiffs; (2) DeAngelo does not affirm that he does not participate personally in nor is responsible for developing or overseeing the implementation of a common benefits plan that is shared between plaintiffs and their respective partnerships; (3) DeAngelo does not state that he lacks any knowledge relative to plaintiffs' operations; and (4) although DeAngelo claims he has no personal knowledge of the specific legal claims or issues relevant to this litigation, he does not maintain that he lacks any information pertinent to the lawsuit that could lead to the discovery of relevant, admissible evidence. Thus, defendant maintains that it should be permitted the "opportunity for further probing. . ." of DeAngelo and to refresh his recollection at deposition.

II. Conclusions of Law

A. Motion to Quash

Our courts apply a standard of substantial liberality in providing access to information, documents and materials, favoring litigants' rights to "broad pretrial discovery." Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 535 (1996) (citing Jenkins v. Rainner 69 N.J. 50, 56 (1976)). See also Shanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 200, 215-216 (App. Div. 1987). In general, a party may obtain material which "appears reasonably calculated to lead to the discovery of admissible evidence" pertaining to the cause of action. In re: Liquidation of Integrity Ins. Co., 165 N.J. 75, 82 (2000). Our court rules afford litigants the right to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . ." R. 4:10-2(a). While not explicitly defined by our court rules, "relevant evidence" is defined as "evidence having any tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401. However, the relevancy of documents and materials is not predicated upon their admissibility at trial; instead it is founded upon whether the information sought is "reasonably calculated to lead to admissible evidence respecting the cause

of action or its defense." Pressler & Verniero, Current New Jersey Rules Governing the Courts, comment 1 on R. 4:10-2(a) (2016). Thus, disclosure of inadmissible evidence is nonetheless required "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." R. 4:10-2(a). See also Irval Realty Inc. v. Board of Public Utility Commissioners, 115 N.J. Super. 338, 346 (App. Div. 1971), aff'd, 61 N.J. 366 (1972); Berrie v. Berrie, 188 N.J. Super. 274, 278 (Ch. Div. 1983). Information which bears even a remote relevance to the subject matter of a cause of action is discoverable, if it is reasonably likely to lead to discovery of admissible evidence.

Although pretrial discovery should be liberally granted, its range is not limitless. Meandering expeditions which seek irrelevant, duplicative, oppressive or burdensome discovery are not permitted. "The discovery rights provided by our court rules are not instruments with which to annoy, harass or burden a litigant or a litigant's experts." Gensollen v. Pareja, 416 N.J. Super. 585, 591 (App. Div. 2010). R. 1:9-2 permits the court "on motion made promptly [to] quash or modify the subpoena. . . if compliance would be unreasonable or oppressive and. . . may condition denial of the motion upon the advancement by the person in whose behalf the subpoena or notice is issued of the reasonable cost of producing the objects subpoenaed." R. 1:9-2. See also In re: Grand Jury Proceedings of Guarino, 104 N.J. 218 (1986); In re Addonizio, 53 N.J. 107 (1968); In re Grand Jury Subpoenas Duces Tecum Served by Sussex County, 241 N.J. Super. 18 (App. Div. 1989). These "principles that guide our courts in pretrial discovery matters. . . strive to avoid placing undue burdens upon litigants or imposing unfair conditions upon access to relevant information or potential witnesses." In re Pelvic Mesh/Gynecare Litigation, 426 N.J. Super. 167, 196 (App. Div. 2012).

Thus, our court rules afford trial courts expansive authority with respect to pretrial discovery matters, including directing that discovery not be had; limiting the scope of discovery to certain information; permitting discovery on specified terms and conditions, and by prescribed methods, or in the presence of only designated individuals. R. 4:10-3 allows a litigant or the person from whom discovery is sought "to obtain relief from the court to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . ." R. 4:10-3. Similarly, R. 4:10-2(g) provides that the scope of discovery may be limited by the court, if:

> (1) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (2) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; (3) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.
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> [R. 4:10-2(g).]

Thus, the "frequency or extent of use of the discovery methods otherwise permitted may be limited by the court if it determines that the discovery sought is unreasonably cumulative or duplicative, or the burden or expense of the proposed discovery outweighs its likely benefit." Horizon Blue Cross Blue Shield of New Jersey v. State, 425 N.J. Super. 1, 29 (App. Div. 2012).

However, the determination of what requests are relevant, reasonable and likely to lead to the discovery of admissible evidence, and what demands are annoying, cumulative, oppressive or unduly burdensome, rests with the trial court and must be cautiously navigated on a case-by-case basis. Berrie, supra, 188 N.J. Super. at 278.

B. Apex Deposition

The issue of whether and under what circumstances the deposition of a high-level or senior executive in a publicly traded corporation, or "apex deposition," may be obtained has not been directly addressed by any court in this state. Suffice it to say that there is no rule of law which causes senior executives to be intrinsically exempt from deposition regarding relevant, first-hand, non-privileged information. R. 4:14-1. Our court rules explicitly permit parties to "take the testimony of any person, including a party, by deposition upon oral examination." R. 4:14-1. Thus, seemingly, an "apex deposition" will be permitted when the individual being deposed possesses information which is "relevant to the subject matter involved in the pending action. . ." R. 4:10-2(a). However, when the deposition will cause "annoyance, embarrassment, oppression, or undue burden or expense. . ." the party to be deposed can seek protection from the court upon a showing of "good cause." R. 4:10-3. "Implicit in R. 4:10-3 is the notion that the movant bears the burden of persuading the court that good cause exists for issuing the protective order." Kerr v. Able Sanitary and Environmental Services, Inc., 295 N.J. Super. 147, 154-157 (App. Div. 1996) (citing D'Agostino v. Johnson & Johnson, 242 N.J. Super. 267, 281 (App. Div. 1990), rev'd on other grounds, 133 N.J. 516 (1993)). Thus, the party from which discovery is being sought bears the burden of establishing why an order should be entered protecting it from the discovery demands.

Plaintiffs submit that due to the lack of New Jersey authority directly addressing apex depositions, and because the text of R. 4:10-3 closely follows Fed. R. Civ. P. 26(c), it is appropriate for this court to look to federal decisional authority in addressing this issue.

Although variations exist between the text of R. 4:10-3 and Fed. R. Civ. P. 26(c), the substance of those rules is nearly identical and our court rules explicitly recognize that R. 4:10-3 "follows the text of Fed. R. Civ. P. 26(c)." Pressler & Verniero, Current New Jersey Rules

Governing the Courts, comment 1 on R. 4:10-3 (2016). Moreover, it is well settled that "[w]here the New Jersey rule is similar to or identical to a federal rule, our courts have often considered the reasoning of federal decisions when interpreting the New Jersey rule." In re Long Branch Manufactured Gas Plant, 388 N.J. Super. 254, 262 (Law Div. 2005) (citing Brown v. Brown, 86 N.J. 565, 581-83 (1981)).

As a general rule, our federal courts impose upon the party seeking the protective order the burden to "demonstrate particular and specific facts to establish 'good cause' for the order." Prozina Shipping Co. v. Thirty-Four Autos., 179 F.R.D. 41, 48 (D. Mass. 1998) (citing Anderson v. Cryovac, Inc., 805 F.2d 1, 7 (1st Cir. 1986). See also Salter v. Upjohn Co., 593 F.2d 649, 651 (5th Cir. 1979); Investment Properties Int'l, Ltd. v. IOS, Ltd., 459 F.2d 705, 708 (2nd Cir. 1972); Bucher v. Richardson Hospital Authority, 160 F.R.D. 88, 92 (N.D. Tex. 1994). This approach is not dissimilar from the approach adopted by the New Jersey courts. See R. 4:10-3.

Our federal courts have further observed that no per se rule exists barring depositions of senior corporate executives. See Salter, supra, 593 F.2d at 651; Mulvey v. Chrysler Corp., 106 F.R.D. 364, 366 (D.R.I. 1985); Lewelling v. Farmers Ins. of Columbus, Inc., 879 F.2d 212, 218 (6th Cir. 1989); Elvis Presley Enterprises. v. Elvisly Yours, Inc., 936 F.2d 889, 894 (6th Cir. 1991); Thomas v. IBM, 48 F.3d 478, 483 (10th Cir. 1995); Serrano v. Cintas Corp., 699 F.3d 884, 901 (6th Cir. 2012); B. Fernandez & Hnos., Inc. v. Int'l Bhd. of Teamsters, 285 F.R.D. 185 (D.P.R. 2012); Milione v. City Univ. of N.Y., 950 F. Supp. 2d 704 (S.D.N.Y 2013). However, when the deponent is a "high-level corporate officer who certifies that he has no personal knowledge of the facts, the court may grant a protective order requiring the deposing party to first seek discovery through less intrusive methods, e.g., from lower level employees who are more likely to have direct knowledge." 6-26 Moore's Federal Practice - Civil § 26.105 [2][a].

In determining whether to permit an apex deposition to proceed, our federal courts have considered: "(1) whether the deponent has unique first-hand, non-repetitive knowledge of the facts at issue in the case and (2) whether the party seeking the deposition has exhausted other less intrusive discovery methods." Apple Inc. v. Samsung Elecs. Co., 282 F.R.D. 259, 263 (N.D. Cal. 2012) (citing In re Google Litig., 2011 U.S. Dist. LEXUS 120905 (N.D. Cal. 2011)).

Nevertheless, the "party seeking to prevent a deposition carries a heavy burden to show why discovery should be denied." Ibid. If a "witness has personal knowledge of facts relevant to the lawsuit, even a corporate president or CEO is subject to deposition." Ibid. Thus, not unlike New Jersey courts, our federal courts, under Fed. R. Civ. P. 26(c), require the moving party to illustrate "with a particular and specific demonstration of fact" why "good cause" exists for preclusion of discovery. Nemir v. Mitsubishi Motors Corp., 381 F.3d 540, 550 (6th Cir. 2004). However, because an apex deposition presents a "tremendous potential for abuse or harassment," when presented with a protective order application for an apex deposition, in evaluating whether the movant has shown the requisite good cause, the court must consider whether the deponent has distinct, personal and non-repetitive knowledge of the facts at issue and whether less intrusive discovery methods are available. Apple Inc., supra, 282 F.R.D. at 263 (quoting Celerity, Inc. v. Ultra Clean Holding, Inc., 2007 U.S. Dist. LEXIS 8295, 2007 WL 205067 (N.D. Cal. 2007)).

Here, plaintiffs have submitted an Affidavit from DeAngelo attesting that he does not possess "specific knowledge of these entities day-to-day activities," has "no detailed knowledge of the litigation," "was not personally involved in the restructuring efforts that resulted in the creation of these legal entities," and has "no personal knowledge of the specific legal claims or issues relevant to the litigation." Although DeAngelo may possess general knowledge regarding plaintiffs' existence and corporate structure, his Affidavit demonstrates that he likely does not

possess distinct, non-repetitive, or first-hand knowledge of key facts which are relevant and at issue in these matters.

Moreover, defendant's assertion that DeAngelo's deposition is pivotal because he is the only officer who continues to be employed or affiliated with plaintiffs, and who held overlapping positions with the partnerships, is erroneous. Plaintiffs' designated representative, Jeffrey Monday, Vice President of Taxation of HD Supply, who was deposed by defendant, also served as plaintiffs' assistant treasurer and as assistant treasurer to the general partner of the limited partnerships during the 2010 fiscal year. Additionally, the court's review of the deposition transcript of Mr. Monday reveals that Evan Levitt also served as an officer of plaintiffs – during three of the years at issue – and remains employed by HD Supply as Mr. Monday's supervisor. Further, Mr. Monday's deposition testimony reveals that he filed and signed plaintiffs' amended CBT returns for the tax years at issue which are the subject matter of plaintiffs' Complaints.

Additionally, defendant's claims that the DeAngelo Affidavit does not provide a basis for precluding his deposition because it "does not affirm that he lacks any knowledge relevant to plaintiffs" is misplaced. The standard by which the court will measure whether good cause exists to preclude an apex deposition, is whether the deponent has some unique, first-hand, non-repetitive knowledge of the relevant facts at issue. Because DeAngelo may possess a general knowledge of plaintiffs' corporate structure and the claims asserted herein, that does not rise to the level of enjoying specific knowledge which is relevant to the cause of action. Defendant has not demonstrated that DeAngelo possesses relevant information that is reasonably calculated to lead to the discovery of admissible evidence.

When the deponent is a senior corporate official of a publicly traded company, who has affirmed or certified that he or she has no personal knowledge of the specific facts involved in the

litigation, the principles espoused under R. 4:10-2(a) and R. 4:14-1 are not upended by entry of a protective order requiring the deposing party to first seek discovery through other less intrusive means.

Accordingly, the court is satisfied that based upon the content of the DeAngelo Affidavit, weighing the likelihood that the deposition will lead to the discovery of admissible evidence against the risk for harassment and annoyance of DeAngelo, and the court's review of the deposition transcript of Jeffrey Monday, that plaintiffs have established "good cause" for quashing the notices in lieu of subpoena.

The court is satisfied that defendant's rights will be fully preserved, as well as the rights of Mr. DeAngelo to be free from harassment, and that an orderly discovery process will be best served by affording defendant the opportunity to propound limited interrogatories directed to Mr. DeAngelo for his review and response, without prejudice to a subsequent oral deposition if the answers to the interrogatories so warrant.

III. Conclusion

The court grants plaintiffs' motions seeking entry of a protective order and hereby quashes the notices in lieu of subpoena to take oral deposition of Joseph J. DeAngelo.

However, defendant shall be afforded a period of thirty days from the date hereof to propound upon plaintiffs a total of fifteen interrogatories, containing no more than three sub-parts per interrogatory, which interrogatories may be directed to Joseph J. DeAngelo for his review and response. If the aforesaid interrogatories are propounded by defendant, plaintiffs shall provide fully responsive answers to the interrogatories within sixty days of receipt thereof.

An Order reflecting the foregoing opinion will be issued by the court.

Very truly yours,

/s/ Hon. Joshua D. Novin, J.T.C.