Securities And Exchange Commission v. Berry Doc. 200

**** E-filed April 1, 2011 ****

NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

United States District Court
For the Northern District of California

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

LISA C. BERRY,

Defendant.

______________________________/

No. C07-04431 RMW (HRL)

ORDER GRANTING THE SEC'S MOTION TO COMPEL INTERROGATORY RESPONSES

[Re: Docket No. 169]

BACKGROUND

The Securities and Exchange Commission ("SEC") filed this civil enforcement action in 2007 in relation to alleged improper stock option backdating at Juniper Networks, Inc. ("Juniper"). Defendant Lisa Berry ("Berry") was General Counsel of Juniper from June 1999 to January 2004, and the SEC alleges that she oversaw Juniper's stock option granting process.

The relevant facts are summarized in chronological order below:

- **April 29, 2009**: The SEC served its First Set of Interrogatories (containing Interrogatory Nos. 3, 4, 8, 9, 10, 11, and 12). LaMarca Decl., Ex. C. These interrogatories ask Berry to describe in detail each communication regarding the process by which stock options were granted at Juniper that she had with any of the following: (1) any member of Juniper's board of directors; (2) any auditors from Ernst & Young LLP; (3) former Juniper CFO Marcel Gani; (4) any person with the law firm of Wilson Sonsini Goodrich & Rosati PC; (5) former

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Juniper CEO Scott Kriens; (6) former Juniper Stock Administrator Leilani Eames; and (7) former Juniper Stock Administrator Brienne Taloff Fisher. Id.

- **June 1, 2009**: Berry served her original responses to the SEC's First Set of Interrogatories. Id., Ex. A. Along with incorporating her general objections, Berry objected to Interrogatory Nos. 3, 4, 8, 9, 10, 11, and 12 on the following grounds: (1) that the phrase "the process" was vague and ambiguous; (2) that the interrogatories were overly broad and subject her to undue burden, oppression, and expense; (3) that the interrogatories call for information protected by the attorney-client privilege and attorney work product doctrine; and (4) that Berry "has not been informed that Juniper Networks has waived its attorney-client privilege and therefore is unable to respond" to the interrogatories. Id.
- **Last week of December 2010**: SEC learned that Berry would no longer invoke her Fifth Amendment privilege, so it noticed her deposition. Id. ¶ 9.
- **January 29, 2011**: Berry served her amended responses to the SEC's First Set of Interrogatories. Id., Ex. B. She objected to Interrogatory Nos. 3, 4, 8, 9, 10, 11, and 12 on the same grounds as before. Id.
- **February 7-8, 2011**: Berry was deposed. Id. ¶ 9.
- **February 22, 2011**: Berry's counsel stated in an email that she believed that Interrogatory Nos. 3, 4, 8, 9, 10, 11, and 12 either were, or should have been, asked during Berry's February 7-8, 2011 deposition, such that further responses would be duplicative. Id., ¶ 12.
- **March 7, 2011**: During a meet and confer telephone call, Berry's counsel tells the SEC that she would not respond to Interrogatory Nos. 3, 4, 8, 9, 10, 11, and 12 because the questions were the type that would have been better posed during her February 7-8, 2011 deposition. Id.

With depositions of other witnesses scheduled to take place soon, the SEC now moves for an order compelling Berry to respond to Interrogatory Nos. 3, 4, 8, 9, 10, 11, and 12. Docket No. 169 ("MTC"). Berry opposed the motion. Docket No. 186 ("Opp'n").

LEGAL STANDARD

A party in a civil case may serve written interrogatories on another party, and the responding party must serve its answers and any objections within thirty days. FED. R. CIV. P. 33. Any untimely objection to an interrogatory is waived unless the court finds good cause for excuse. FED. R. CIV. P. 33(b)(4). If no response is made, the propounding party may apply for an order compelling a response. FED. R. CIV. P. 37(a)(3)(B)(iii).

Subject to the limitations imposed by subsection (b)(2)(C), under Federal Rule of Civil Procedure 26, "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . ." FED. R. CIV. P. 26(b)(1). "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Id. However, "[o]n motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." FED. R. CIV. P. 26(b)(2)(C).

DISCUSSION

Berry puts forth several reasons why she should not have to respond to the interrogatories at issue.

A. Whether the Interrogatories Are Overbroad and Unduly Burdensome

In her interrogatory responses, Berry objected to the interrogatories as being overbroad and unduly burdensome. She renews that objection here. "By its very nature," Berry contends, "the SEC's demand that Ms. Berry describe 'each communication' regarding the stock option process with more than a dozen individuals is overbroad and unduly burdensome." Opp'n at 5. In order to respond, she says she will be required "to recall and describe communications with more than a dozen people that occurred over a three-and-a-half year period [that was] as much as twelve years ago . . . ." Id. at 4.

The SEC correctly points out that none of the authority cited by Berry supports her claim that the interrogatories are, "by [their] nature," overbroad and unduly burdensome. Indeed, the cases cited by Berry are easily distinguished from the situation here. In JJCO, Inc. v. Isuzu Motors Am., Inc., CIV. NO. 08-00419 SOM/LEK, 2009 U.S. Dist. LEXIS 102121, at *12 (D. Haw. Oct. 30, 2009), the plaintiff sought "all correspondence between Isuzu and GM over a four-year period," all of which could not possibly relate to the plaintiff's claims. In Brown's Crew Car of Wyo. LLC v. State Transp. Auth., Case No.: 2:08-cv-00777-RLH-LRL, 2009 U.S. Dist. LEXIS 39469, at *14-15, 18-19 (D. Nev. May 1, 2009), the intervenor sought information that was "well beyond the scope and purpose of this action" and even appeared "calculated to needlessly increase the cost of litigation." And in In re Ebay Seller Antitrust Litig., No. C 07-1882 JF (RS), 2008 WL 5212170, at *2 (N.D. Cal. Dec. 11, 2008), the court determined that the defendant's contention interrogatories seeking "all facts" supporting the plaintiff's allegations were inappropriate at that time and so it denied the defendant's motion without prejudice after noting that there was no dispute that the plaintiff would have to respond fully to the interrogatories at some point.

In this case, though, the SEC's interrogatories request that Berry describe conversations she had with specific individuals about a specific topic that is directly relevant to this action. Moreover, Berry has been aware of these interrogatories for more than two years, so she cannot now claim that she has been caught off guard by them. Accordingly, the Court rejects Berry's "burdensome" argument.

B. Whether the Interrogatories Are Cumulative of Berry's Deposition Testimony

Berry next argues that answering the interrogatories would be cumulative of her deposition testimony. She cites her deposition testimony where the SEC asked whether, for instance, she had ever had discussions about stock options with the individuals mentioned in the interrogatories. Opp'n at 6 (citing Docket No. 187 ("Harris Decl."), Exs. B, C). "These questions and testimony," she contends, "demonstrates that the SEC is simply seeking what it already has." Id. at 7.

The SEC initially argues that Berry waived any "cumulative" objection since she did not include it in either her original or amended interrogatory responses and only mentions it now. Docket No. 195 ("Reply") at 4 (citing Fed. R. Civ. P. 33(b)(4) ("Any ground not stated in a timely

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objection is waived unless the court, for good cause, excuses the failure.")); see also MTC 3-4. The SEC's argument is well-taken.

Even if the Court excuses this failure, though, the SEC argues that defendant cannot be allowed to refuse to answer interrogatories, then attend a deposition, and then claim that the deposition testimony should suffice as a response to the interrogatories. Reply at 5; MTC at 5. Indeed, none of the cases cited by Berry support such a tactic. Instead, the cases she cites merely support the unremarkable proposition that Rule 26 is designed in part to limit discovery that is unreasonably cumulative or duplicative or that could be obtained from some other source that is more convenient, less burdensome, or less expensive. See Fed. R. Civ. P. 26(b)(2)(C); see also Sloan v. Oakland Police Dep't., No. C-00-4117 CW (JCS), 2006 U.S. Dist. LEXIS 25100, at *15 n.2 (N.D. Cal. Mar. 23, 2006) (noting, among other things, that should defendants bring a motion to compel responses to interrogatories served before plaintiff's deposition, such a motion will only be granted if the additional interrogatory responses sought are not duplicative of information already obtained, through deposition or otherwise); Pulsecard, Inc. v. Discover Card Services, Inc., Civ. A. No. 94-2304-EEO, 168 F.R.D. 295, 306 (D. Kan. 1996) ("That litigants may engage in successive forms of discovery 'is not a license to engage in repetitious, redundant and tautological inquiries.'") (quoting Richlin v. Sigma Design West, Ltd., 88 F.R.D. 634, 640 (E.D. Cal. 1980)) (internal quotation marks omitted); Penk v. Oregon State Bd. of Higher Education, 1983 U.S. Dist. LEXIS 10463, at *1-2 (D. Or. Dec. 23, 1983) (defendant had taken extensive depositions of most of plaintiffs' experts and also had the reports the experts prepared for use at trial, so defendant had had "complete access to the requested information through the other discovery devices it has chosen to use").

Upon review of the transcript (which has been filed under seal), the Court does not believe that Berry's responses to the interrogatories would be unreasonably cumulative or duplicative of her deposition testimony. Her answers to similar questions may well be different upon review of documents that could refresh her recollection about certain responsive conversations. In this situation, the Court believes it would be unfair to make the SEC, in its words, bear the consequences

of "the vicissitudes of a defendant's memory during a deposition, especially when the events at issue too place years ago." Reply at 5.

Accordingly, the Court rejects Berry's "cumulative" argument.

C. Whether the SEC Should Have Asked these Questions at Berry's Deposition Because of Privilege Complications

Berry also argues that, because the interrogatories (could[1]) implicate Juniper's attorney-client privilege, responding to written interrogatories is unworkable and so the SEC should have asked questions implicating Juniper's privilege at Berry's deposition. To respond to the interrogatories, Berry says that "[i]t would require Ms. Berry's counsel to sit down with counsel for a potentially adverse third-party (Juniper and Juniper's former employees) and to detail potentially years worth of communications to determine if Juniper would consider each communication to be privileged or if it would waive any specific privilege assertion in order to cooperate with the SEC." Opp'n at 8.

Berry now claims this is unworkable, but this is also the exact solution that Berry herself suggested multiple times (even as late as January 29, 2011) and to which Juniper's counsel (according to the SEC) has been open all along. Berry explains in her opposition that "[w]hile [she] initially offered this as a potential fix to the privilege issue, when the practical implications of the approach were explored it became apparent that it was not workable." Id. "In fact," she goes on in a footnote, "Ms. Berry's counsel did have such a meeting with counsel for Juniper prior to the deposition. That meeting involved a high-level discussion in which Juniper's counsel provided some general guidance as to the scope of its privilege assertions. However, the parties were not able to reach agreement on how to mechanically proceed in providing responses outside the context of a deposition." Id. at n.7 (citing Harris Decl. ¶ 5). For this reason, Berry contends that the SEC should have asked Berry about her conversations with the individuals at issue during her deposition.

This Court is not convinced that this solution is unworkable. First, as the SEC notes, this "very simple mechanism of simply showing her responses to Juniper before she shows them to the

[1] Berry's opposition seems to assume that any conversation she had about stock options would have been privileged. However, any such conversations may not have involved legal advice or have been maintained in confidence, so her assumption is a bit presumptuous.

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Commission" is the same thing that she has done repeatedly for her document productions. Reply at 6. Second, while Berry has raised the issue of Juniper's attorney-client privilege, Juniper — which holds any attorney-client privilege[2] and thus has the power to either assert or waive it — has done neither so far. Instead, Juniper's counsel has left open its offer to review Berry's proposed responses for privilege.[3]

Accordingly, the Court rejects Berry's "unworkable" argument.

CONCLUSION

Based on the foregoing, the Court GRANTS the SEC's motion to compel Berry to provide full responses to Interrogatory Nos. 3, 4, 8, 9, 10, 11, and 12. Berry shall provide her draft responses to Juniper's counsel by April 6, 2011, and Juniper's counsel shall have until April 9, 2011 to assert any privilege. To the extent that Juniper contends that there is privileged information contained within Berry's draft responses, that information shall be appropriately described on a privilege log. Berry shall serve full responses to the SEC by April 11, 2011.

IT IS SO ORDERED.

Dated: April 1, 2011

HOWARD R. LLOYD
UNITED STATES MAGISTRATE JUDGE

[2] On multiple occasions in her opposition, Berry asserts that she cannot or will not forego "her own attorney-client privilege." See Opp'n at 1:23-2:2, 2:15-17, 3:13-17, 8:17-19. While there is no doubt that Berry, as former General Counsel for Juniper, has an ethical obligation to maintain the confidentiality of privileged communications between her and Juniper, it is Juniper which holds the privilege.

[3] SEC attorney Susan LaMarca declares: "During the summer of 2009 . . . . the Commission contacted Juniper's counsel who informed the Commission that they would be willing to review any responses from the defendant before they were served upon the Commission to confirm that Juniper did not assert any privilege over information she provided in response. We informed defense counsel of Juniper's position, and we understood that defense counsel had similar conversations with Juniper's counsel." LaMarca Decl. ¶ 5. And "[u]pon receipt of [Berry's] Amended [Interrogatory] Responses [on January 29, 2011], the Commission's counsel contacted Juniper's counsel and was informed, once again, that Juniper was still willing to review any proposed responses by the defendant for privilege and had informed her attorneys of the same offer; however, no proposed responses had been provided to him by the defense. He also informed us that he would be available between then and the deposition to review any responses she wished to make." Id. ¶ 11.

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