E-FILED 5/26/2009

NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

CARL W. JASPER,

Defendant.

/

No. C07-06122 JW (HRL)

ORDER GRANTING PLAINTIFF'S MOTION FOR A PROTECTIVE ORDER

[Re: Docket No. 40]

The Securities and Exchange Commission ("SEC" or "Commission") moves for a protective order precluding defendant Carl W. Jasper from proceeding with a Fed. R. Civ. P. 30(b)(6) deposition of the Commission. Jasper opposes the motion. Upon consideration of the moving and responding papers, as well as the arguments of counsel, this court grants the motion.

I. BACKGROUND

The SEC filed this lawsuit, alleging that Jasper violated federal securities laws by participating in a scheme to illegally backdate stock options during his tenure as Chief Financial Officer of Maxim Integrated Products, Inc. ("Maxim"). During the course of its pre-litigation investigation, the SEC deposed a number of witnesses and later produced transcripts of those depositions to Jasper. At issue in the instant discovery dispute are statements made by two individuals who reportedly were interviewed, but not deposed by the SEC before it filed this

suit: (1) John Gifford, Maxim's former Chief Executive Officer and (2) Michael Byrd, Maxim's Chief Financial Officer before Gifford. Both were identified as potential witnesses over a year ago in the SEC's Fed. R. Civ. P. 26 initial disclosures. (Fickes Decl., ¶ 3). Gifford died several months ago in January 2009.

During the course of discovery, and with the exception of a cross-notice for Gifford's deposition (discussed more fully below), Jasper did not attempt to obtain discovery from either Gifford or Byrd. Instead, he served document requests on the SEC, seeking, among other things, "All documents that refer to, relate to, or reflect any communications, discussions, statements, meetings, interviews, teleconferences involving" the SEC and Gifford and Byrd and their attorneys. (Fickes Decl., Ex. A at 5 and 6). He also served interrogatories asking that the SEC "[d]escribe in full all communications between the SEC" and Gifford and Byrd, or their representatives, from May 2006 to the present. (Id., Ex. C at 3). The SEC says that, with respect to Gifford, it produced all responsive, non-privileged documents. Other documents memorializing the Commission's communications with Gifford or his counsel – i.e., notes written by the SEC's attorneys and one of its staff accountants – have been identified on the SEC's privilege log as attorney work product. (Jamison Decl., Ex. K). As for Byrd, the Commission says that it is unaware of any non-privileged responsive documents that relate to stock option practices at Maxim, but it agrees to continue to search for such documents and to produce any that are found. The Commission answered Jasper's interrogatories by referring to its document production. (Fickes Decl, Exs. C and D). Neither the Commission's document production nor its interrogatory responses are at issue here.

In September 2008, the Commission served a notice for Gifford's deposition to take place on January 29, 2009. However, as noted above, he died in early January before the parties were able to agree on firm dates for his deposition.

Meanwhile, on December 9, 2008, Jasper served a Fed. R. Civ. P. 30(b)(6) deposition notice on the Commission, seeking testimony from the SEC on the following two topics:

(1) "Any and all statements made by John Gifford to the SEC regarding stock option practices and/or the alleged backdating of options at Maxim Integrated Products, Inc." and

(2) "Any and all statements made by Michael Byrd to the SEC regarding stock option practices and/or the alleged backdating of options at Maxim Integrated Products, Inc."

(Fickes Decl., Ex. E). The SEC now moves for a protective order on the ground that the deposition is merely an attempt by Jasper to intrude upon its attorneys' work product and privileged communications.

II. DISCUSSION

Upon a showing of "good cause," Fed. R. Civ. P. 26(c) authorizes courts "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" in discovery by "forbidding the disclosure or discovery" or "forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters." See FED. R. CIV. P. 26(c)(1)(A), (D). The party seeking a protective order has the burden of showing that the protection is warranted.

Preliminarily, the parties dispute whether Jasper really seeks to depose the Commission's attorneys at all. Jasper argues that a Fed. R. Civ. P. 30(b)(6) witness need not have personal knowledge of the matters on which examination is sought. Thus, he contends, the SEC is free to designate and prepare any non-attorney to testify on its behalf. Jasper adds that he merely wants factual information as to what Gifford and Byrd told the SEC. However, rather than seeking testimony directly from Gifford or Byrd, the record presented indicates that Jasper has devoted his energies in discovery to repeated attempts to ascertain what the Commission has to say about what Gifford and Byrd said. And, the Commission argues that because its attorneys are most knowledgeable about the topics of examination, any witness that is produced for deposition would necessarily have to be prepared by the Commission's attorneys. Thus, this court finds that what Jasper really seeks is the practical equivalent of an examination of the SEC's attorneys. See SEC v. Buntrock, 217 F.R.D. 441, 444 (N.D. Ill. 2003) ("The investigation in this matter was conducted by SEC attorneys and by SEC employees working under the direction of attorneys. Thus, the 30(b)(6) notice would necessarily involve the testimony of attorneys assigned to this case, or require those attorneys to

prepare other witnesses to testify."); see also SEC v. Rosenfeld, No. 97CIV1467, 1997 WL 576021, *2 (S.D.N.Y., Sept. 16, 1997) (same).

The Commission argues that this court should follow the three-part test set out by the Eighth Circuit in Shelton v. Am. Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986). In that case, the court recognized that, while there is no prohibition against deposing an attorney of record in a case, such depositions generally are disfavored. It held that attorney depositions therefore should be permitted only where the party seeking the deposition shows that (1) no other means exist to obtain the information; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case. Shelton, 805 F.2d at 1327.

Defendant disagrees and urges this court to adopt a somewhat more flexible standard espoused by the Second Circuit in In re Subpoena Issued to Dennis Friedman, 350 F.3d 65 (2d Cir. 2003) and followed by a district court in this circuit in Younger Mfg. Co. v. Kaenon, Inc., 247 F.R.D. 586 (C.D. Cal. 2007). This approach also recognizes that while attorneys of record are not automatically insulated from being deposed, it is nonetheless "a circumstance to be considered." Younger Mfg. Co., 247 F.R.D. at 588. Under this framework, the court is to consider several factors, including (1) the need to depose the lawyer, (2) the lawyer's role in connection with the matter on which discovery is sought and in relation to the pending litigation; (3) the risk of encountering privilege and work product issues; and (4) the extent of discovery already conducted. Id.

The parties have not cited binding precedent; and, this court notes that Shelton generally is recognized as the leading case on attorney depositions by a number of district courts within this circuit, including several within this district.[1] Nevertheless, even under the Younger standard urged by Jasper, this court concludes that the requested deposition of the Commission is not warranted.

[1] See, e.g., Massachusetts Mutual Life Ins. Co. v. Cerf, 177 F.R.D. 472, 479 (N.D. Cal., 1998); Fausto v. Credigy Servs. Corp., No. C07-05658, 2008 WL 4793467 (N.D. Cal., Nov. 3, 2008); Graff v. Hunt & Henriques, No. C08-0908, 2008 WL 2854517 (N.D. Cal., July 23, 2008); Nocal, Inc. v. Sabercat Ventures, Inc., No. C04-0240, 2004 WL 3174427 (N.D. Cal., Nov. 15, 2004).

With respect to Byrd, Jasper claims that he has no choice but to proceed with plaintiff's deposition. However, the record shows that he has never sought discovery of Byrd's statements from Byrd himself. At oral argument, defendant acknowledged that (a) his "need" as to Byrd is not the same as it is with respect to Gifford; and (b) he can depose Byrd directly to obtain the information he wants, rather than seeking the information secondhand from the SEC.

As for Gifford, this court is unpersuaded by Jasper's assertions that he seeks only the factual contents of Gifford's statements. Instead, it appears that what defendant really seeks is a probing examination as to Gifford's (reconstructed) statements through the recollections of the SEC counsel who are prosecuting this matter – recollections which this court finds are not easily segregated from those attorneys' thoughts, mental impressions, opinions or conclusions about this case.[2] Indeed, Jasper's own papers indicate that he wants to obtain discovery as to "[t]he SEC's state of knowledge at the time it filed the Maxim and Jasper complaints – including what it learned from Mr. Gifford . . .." (Opp. at 6). Here, Jasper says that he needs the SEC's testimony in order to develop a judicial estoppel defense. In essence, Jasper contends that the SEC has taken inconsistent positions by alleging in the instant action that he engaged in intentional misconduct, while claiming in the lawsuit filed against Maxim and Gifford that Gifford did not. The SEC maintains that there is nothing suspect about its allegations and that it has simply alleged different levels of culpability as between Jasper and Gifford. It is not for this court to decide upon the validity of Jasper's defense. Suffice to say that for discovery purposes and on the record presented, this court is unpersuaded that the stated need for the SEC's deposition outweighs the SEC's interest in protecting its attorneys' work product.

Jasper nonetheless argues that, in view of Gifford's death a few months ago, he has no choice but to now proceed with a deposition of the SEC. But the record indicates that at no time did Jasper attempt to seek discovery from Gifford directly, save for an eleventh-hour

---

[2] Because this court concludes that a deposition of the SEC would unnecessarily intrude upon SEC counsel's work product, it does not reach the SEC's alternate arguments that the requested testimony is also protected by the governmental deliberative process privilege and the "settlement privilege."

"cross-notice" for his deposition, which reportedly was served in late December 2008 only after the Commission advised that it would be filing the instant motion. (Mot. at 3 n.1; Fickes Decl. ¶ 4). Moreover, while it may not be ideal, Gifford's attorneys are an alternate source of the information Jasper seeks.

III. ORDER

Based on the foregoing, IT IS ORDERED THAT the SEC's motion for protective order is GRANTED.

Dated: May 25, 2009

HOWARD R. LLOYD
UNITED STATES MAGISTRATE JUDGE

5:07-cv-6122 Notice has been electronically mailed to:

Christopher William Johnstone chris.johnstone@lw.com, #sfdocket@lw.com, sara.higgins@lw.com

David Michael Friedman david.friedman@lw.com, #sfdocket@lw.com, sara.higgins@lw.com

Erin E. Schneider schneidere@sec.gov

Heather Lynn Thompson heather.thompson@lw.com, #sfdocket@lw.com, gina.tercero@lw.com, Judy.Thomason@lw.com

Judith L. Anderson andersonju@sec.gov, alcairoe@sec.gov, johnstonj@sec.gov

Marc J. Fagel fagelm@sec.gov

Mark Philip Fickes fickesm@sec.gov, alcairoe@sec.gov, dewingm@sec.gov, huangw@sec.gov, johnstonj@sec.gov, maguirep@sec.gov

Risha Nickelle Jamison risha.jamison@lw.com, #sfdocket@lw.com

Robert Lootfi Tashjian tashjianr@sec.gov, alcairoe@sec.gov, johnstonj@sec.gov

Steven Bauer steve.bauer@lw.com, #sfdocket@lw.com, doreen.griffin@lw.com

Counsel are responsible for distributing copies of this document to co-counsel who have not registered for e-filing under the court's CM/ECF program.