UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT of 1934
Rel. No. 77382 / March 16, 2016

In the Matter of	)
Brown v. Gardiner, Koch, Weisberg & Wrona (No. 2009-CA-042031) (Fla. Cir. Ct.)	)

ORDER DENYING PETITION FOR REVIEW

Pursuant to Rule 431(b)(2) of the Rules of Practice,[1] it is ORDERED that the Petition of Gardiner, Koch, Weisberg & Wrona; James Koch; and Katherine Lynn Raynolds (collectively "Gardiner Koch") seeking review of the August 21, 2015 decision by delegated authority of the Office of the General Counsel ("OGC") declining to authorize testimony requested in a subpoena to a current Commission staff member is hereby denied.

BACKGROUND

In May 2015, Gardiner Koch served a deposition subpoena on the Commission seeking testimony from Christopher Martin, a Trial Counsel in the Commission's Miami Regional Office. In response, OGC staff sent a letter to Gardiner Koch requesting that it explain how testimony from Mr. Martin would be relevant to its litigation and how the deposition would not vitiate applicable Commission privileges.

In a June 2, 2015 letter, counsel for Gardiner Koch explained that it was seeking Mr. Martin's testimony in a professional malpractice action that arose from Gardiner Koch's representation of Kenneth and Wendy Brown in an SEC civil injunctive action. *SEC v. K.W. Brown, et al*, Case No.: 05-80367-CIV (S.D. Fla.). In that action, the SEC alleged that Kenneth and Wendy Brown and other individuals and entities violated antifraud, books and records, and investment advisor reporting provisions of the federal securities laws by allocating favorable trades to a proprietary account instead of to advisory clients' accounts and by keeping deficient books and records. Mr. Martin represented the SEC throughout the litigation. After a nine-day bench trial, the district court entered a permanent injunction and final judgment against all of the defendants.

[1] 17 C.F.R. § 201.431(b)(2).

Counsel for Gardiner Koch further explained that they wanted to depose Mr. Martin because of his "involvement and role as lead counsel in the SEC's initial investigation and subsequent civil enforcement action." Counsel for Gardiner Koch listed twenty-two subjects about which they sought to depose Mr. Martin, including Gardiner Koch's representation of Kenneth and Wendy Brown in the SEC's investigation and civil enforcement action; communications between Mr. Martin and Gardiner Koch, between Mr. Martin and Kenneth or Wendy Brown, or between Mr. Martin and others; and records pertaining to the investigation or civil enforcement action. Counsel for Gardiner Koch did not provide any information about the malpractice action, identify any specific facts they sought to discover by deposing Mr. Martin, or explain how any of the subjects they identified would relate to specific issues in the legal malpractice case. Thus, OGC staff again requested an explanation of how Mr. Martin's testimony would be relevant to the malpractice action. Counsel for Gardiner Koch responded by stating:

> In this matter, the intended testimony of Mr. Martin is relevant because such testimony pertains to the legal representation provided to Mr. and Mrs. Brown by Gardiner, Koch, Weisberg & Wrong, Mr. James Koch, and Ms. Katherine Raynolds during both the initial SEC investigation and subsequent SEC civil enforcement action. In other words, the intended testimony of Mr. Martin likely tends to prove or disprove a material fact at issue (i.e., negligence of Gardiner, Lock, Weisberg & Wrong, Mr. James Koch, and Ms. Katherine Raynolds) and support the theory of defense.

Counsel for Gardiner Koch also stated that they were not seeking testimony protected by any privilege.

OGC staff responded in a letter dated July 20, 2015, stating that Gardiner Koch had not explained what material facts are at issue or the connection between the potential deposition subjects and the matter being litigated. OGC staff again requested information as to how the requested testimony would be relevant to the litigation. On July 24, 2015, counsel for Gardiner Koch called OGC staff and, according to OGC staff, offered to limit the requested deposition testimony to Mr. Martin's communications regarding any settlement discussions. Counsel for Gardiner Koch said that this testimony would buttress their defense, but did not further explain how it was connected to the litigation and did not otherwise respond to OGC's July 20, 2015 letter.

In determining whether to authorize staff to testify in response to a subpoena, OGC must consider "the desirability in the public interest of making available such information" and where appropriate "shall authorize the disclosure of non-expert, non-privileged, factual staff testimony." 17 C.F.R. § 200.735-3(b)(7)(iii). This standard requires balancing the public interest in allowing staff testimony against the burden on the Commission of having staff focus on a private dispute rather than on Commission business.

On August 21, 2015, OGC sent a letter to counsel for Gardiner Koch denying the request for Mr. Martin's deposition. The letter explained that any relevance of the testimony sought was outweighed by the burden on the SEC of providing the testimony. It also noted that Gardiner

Koch had not sufficiently explained why this testimony was necessary or why other evidence, including testimony from Gardiner Koch attorneys who were present at the settlement negotiations and settlement documents that were available to Gardiner Koch, was not sufficient to establish the facts they sought to prove. The letter noted that Gardiner Koch had said it was seeking testimony about settlement discussions, and the letter further explained that such discussions were limited and it seemed unlikely that Mr. Martin had meaningful information about interactions between Gardiner Koch and the Browns relating to settlement.

The OGC decision also concluded that because Mr. Martin would need to take time away from significant SEC matters to prepare for and attend the deposition, the burden on the SEC from the proposed deposition outweighed any limited relevance the testimony might have to Gardiner Koch's defense.

Gardiner Koch is now seeking Commission review of OGC's decision denying its request for a deposition from Mr. Martin. In its Petition, Gardiner Koch argues that OGC: (1) unduly minimized the relevance of Mr. Martin's testimony; and (2) overstated the burden on the Commission.

As to its first point, Gardiner Koch argues that a court, not the Commission, should make the determination as to whether Mr. Martin may have meaningful testimony to provide, particularly because the scope of the testimony is not yet known and the concept of relevance is broad in discovery. Gardiner Koch also argues that seeking testimony from Mr. Martin is reasonable because he "has personal firsthand knowledge regarding the underlying matter, specifically about whether defendants were negligent in their representation of plaintiffs in the underlying matter." Gardiner Koch also claims that it never intended to limit the scope of the testimony to settlement discussions, and that it seeks testimony related to all twenty-two subjects outlined in its June 2, 2015 letter. It further states that Mr. Martin had "frequent and substantive contact" with the Browns and that he "obtained valuable and insightful firsthand knowledge regarding, among other things, the defendants' representation of the [Browns] during the initial investigation and subsequent enforcement action." Gardiner Koch, however, does not explain how any of Mr. Martin's contacts with the Browns or others relate to any issues of fact in the legal malpractice case.

With respect to Gardiner Koch's second argument – that OGC's decision overstates the burden of the deposition on the Commission – Gardiner Koch asserts that Mr. Martin's deposition will not impose an undue burden on the Commission because it is "narrow in scope" and the twenty-two "specific topics" provided in the June 2, 2015 letter allow targeted discovery.

ANALYSIS

In considering whether to accept or reject the Petition, the Commission must consider the factors specified in Rule 411(b)(2) of the Rules of Practice.[2] These factors are whether:

(i) a prejudicial error was committed in the conduct of the proceeding; or

[2] 17 C.F.R. § 201.411(b)(2). Rule 431(b)(2) makes the factors in Rule 411(b)(2) applicable to a decision whether to review action taken pursuant to delegated authority.

(ii) the decision embodies:

(A) a finding or conclusion of material fact that is clearly erroneous; or

(B) a conclusion of law that is erroneous; or

(C) an exercise of discretion or decision of law or policy that is important and that the Commission should review.

Gardiner Koch's petition does not attempt to address these factors. Nevertheless, we have analyzed its arguments in light of these factors, and we conclude that review is not warranted in this case.

First, although the Petition does not specifically assert that any prejudicial error was committed in the conduct of the proceedings, it does contend that a court, not the Commission, should decide whether authorizing the requested testimony is appropriate. To the extent Gardiner Koch is asserting that agencies should not decide whether testimony is appropriate, it is mistaken. It is well established that federal government agencies have the authority to decide in the first instance whether their employees should be subject to a deposition (or other testimony). *See U.S. ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951) (a government employee cannot be held in contempt of court for failing to produce subpoenaed information where the agency has not authorized the employee to provide the information); *Smith v. Cromer*, 159 F.3d 875, 878 (4th Cir. 1998) ("Any doubt as to the validity of . . . [a] regulation's requirement of prior approval is foreclosed by the Supreme Court's decision in [*Touhy*]"); *Edwards v. Dep't of Justice*, 43 F.3d 312, 317 (7th Cir. 1994) ("a federal employee cannot be compelled to obey a subpoena . . . that acts against valid agency regulations").[3]

Second, the Petition does not provide any reason to believe that OGC's decision embodies a finding of material fact or a conclusion of law that is erroneous, and we find that no such errors occurred. The Petition contends that OGC erred by focusing only on Mr. Martin's knowledge of settlement discussions in its decision. It further contends that Mr. Martin's frequent and substantive contacts with Gardiner Koch, the Browns, and other persons involved in the Commission's civil injunctive action are enough to show that Mr. Martin has information relevant to the legal malpractice action. It is unnecessary to determine whether OGC's focus on settlement discussions was too narrow, because Gardiner Koch has never explained how any testimony that Mr. Martin might provide would relate to material issues of fact in the legal malpractice action. Specifically, Gardiner Koch never identified what those issues are, and never explained how Mr. Martin's knowledge of the civil injunctive action relates to any factual issue

[3] Gardiner Koch cites several cases to support its claim that Florida courts would find that Mr. Martin's testimony was sufficiently relevant and that sitting for a deposition would not be unduly burdensome. None these cases, however, addresses a subpoena to a federal agency or employee. Courts have not required federal agencies to submit to discovery when the agencies decline to provide the discovery and comply with regulations governing the disclosure of information. *See Edwards*, 43 F.3d at 317 ("the United States may restrict the release of its information").

in the legal malpractice action. The Petition describes Mr. Martin's many duties relating to the civil injunctive action, but does not discuss any claims or defenses in the legal malpractice action, and does not suggest how Mr. Martin's knowledge about the civil injunctive action could relate to issues in that action.

Third, the Petition does not show that OGC improperly concluded that the burden on the Commission outweighs the relevance of the testimony. Gardiner Koch argues that the deposition would be narrow in scope, yet Gardiner Koch has identified twenty-two subject areas about which it seeks to question Mr. Martin, and those subjects appear to encompass every communication Mr. Martin had in the course of the litigation. The subjects include "[r]ecords pertaining to the initial SEC investigation of Mr. and Mrs. Brown" and "[r]ecords pertaining to the SEC civil enforcement action." Thus, every document relating to the civil injunctive action could be the subject of deposition testimony. Requiring one of its trial counsel to prepare for such a broad deposition places a substantial burden on the Commission. Because Gardiner Koch failed to sufficiently establish that Mr. Martin's testimony would be relevant to the legal malpractice action, this burden outweighs any relevance it may have. OGC's decision is consistent with numerous judicial opinions finding that preserving federal resources for agency business is a legitimate basis for denying staff testimony in private litigation.[4]

Finally, the Petition does not contend that OGC decided an important issue of law or policy that warrants Commission review, and the Commission finds that no such issue exists here.

Because Gardiner Koch has not satisfied any of the factors in Rule 411(b)(2) of the Rules of Practice, their Petition for Review is denied.

By the Commission.

Brent J. Fields
Secretary

[4] Courts have consistently recognized that federal agencies and their staffs need to be shielded from the burden of testifying in cases in which they are not a party so that they can focus limited resources on their statutory duties. *See COMCAST Corp. v. National Science Found.*, 190 F.3d 269, 277-78 (4th Cir. 1999) ("As an agency official must, NSF's counsel also considered whether the public interest and the agency's taxpayer-funded mission would be furthered by compliance."); *Johnson v. Bryco Arms*, 226 F.R.D. 441 (E.D.N.Y. 2005) (quashing deposition subpoenas to ATF personnel where ATF was not a party to the case and had provided documents from an investigation conducted by the ATF that were relevant to the case); *Moran v. Pfizer*, No. 99 civ. 9969, 2000 WL 1099884, at *3 (S.D.N.Y. Aug. 4, 2000) ("Courts have regularly held that the public interest in insuring that agency employees spend their time doing the agency's work is a valid reason to decline to comply with a subpoena."); *Moore v. Armour Pharmaceutical Co.*, 129 F.R.D. 551, 556 (N.D. Ga. 1990) (noting that courts routinely consider "the policy of preserving the resources of governmental agencies from the flood of private litigation" in reviewing decisions not to authorize depositions); *Alex v. Jasper Wyman & Son*, 115 F.R.D. 156, 158-59 (D. Me. 1986) (noting "important public policy favoring the conservation of government resources and the protection of orderly government operations" in explaining why undue burden analysis allowed court to prohibit taking of deposition altogether).