UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 1134 / December 31, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15446

In the Matter of

J.S. OLIVER CAPITAL
MANAGEMENT, L.P.,
IAN O. MAUSNER, and
DOUGLAS F. DRENNAN

ORDER ON THIRD-PARTY MOTION FOR A PROTECTIVE ORDER AND RESPONDENT DOUGLAS F. DRENNAN'S REQUEST FOR A SUBPOENA DUCES TECUM

On August 30, 2013, the Securities and Exchange Commission (Commission) issued an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) alleging violations of the federal securities laws and rules by Respondents. During the time of the allegations at issue, Ian O. Mausner (Ian Mausner) was the founder, president, head portfolio manager, and sole control person of J.S. Oliver Capital Management, L.P. (J.S. Oliver), and Douglas F. Drennan (Drennan) was an employee of, and/or a research analyst for, J.S. Oliver. OIP at 2-3; Respondents' Answers. The hearing will begin at 9:30 a.m. on January 6, 2014, in the Edward J. Schwartz United States Courthouse, Courtroom 4B, 221 West Broadway, San Diego, California 92101.

On December 20, 2013, non-party Instinet, LLC (Instinet), moved under seal pursuant to Rule 322 of the Commission's Rules of Practice (Motion) for a protective order that would: (1) preclude the use by any party of unredacted copies of a string of May 8, 2009, e-mails among Instinet employees and Instinet's in-house attorney[1]; (2) require the parties to return to Instinet or destroy any and all copies of the unredacted e-mails; and (3) require the parties to redact the privileged communications from any document used in this proceeding or disclosed to any third party. Motion at 1, 4, 8, Exhibit A. Attached to the Motion are: Exhibit A, which includes four e-mails among Instinet employees on May 8, 2009; Exhibit B, two pages of the investigative testimony of Jonathon Ranello (Ranello) on November 8, 2011; Exhibit C, a March 22, 2012, letter from the Division of Enforcement (Division) to Instinet's counsel; Exhibit D, a March 29, 2012, letter from Instinet's counsel to Ian Mausner; Exhibit E, a March 29, 2012, letter from

[1] The e-mail string is identified as INST-4th 025952 through INST-4th 025954. The Commission's in-house case filing system indicates that the Motion was filed under seal.

Instinet's counsel to the Division; Exhibit F, an April 9, 2012, letter from Ian Mausner's and J.S. Oliver's counsel to Instinet's counsel; Exhibit G, an April 11, 2012, letter from the Division to Instinet's counsel; Exhibit H, an April 25, 2012, letter from Instinet's counsel to the Division; and Exhibit I, an April 30, 2012, letter from Instinet to Ian Mausner's and J.S. Oliver's counsel.

On December 26, 2013, the Commission issued an Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act) and Section 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order in Instinet, LLC, Exchange Act Release No. 71191. Instinet's settlement with the Commission involved allegations of improper soft-dollar payments by Instinet to J.S. Oliver.

On December 23, 2013, Drennan requested issuance of a Subpoena Duces Tecum requesting that Instinet produce to him on January 1, 2014, "All documents related to the decision to authorize the payment of soft dollars to Gina Mausner."

Arguments

Instinet's Motion argues that: (1) the May 8, 2009, e-mail string consists of legally protected attorney-client confidential information that Ranello, a 23-year old, low-level Instinet employee mistakenly provided to Drennan at J.S. Oliver in May 2009; (2) Instinet neither waived the privilege nor ratified Ranello's unauthorized disclosure by waiting until December 15, 2011, to inform the Division of the existence of the privilege and still later informing J.S. Oliver that the information was privileged; and (3) J.S. Oliver's production to the Division of the unredacted copy of the e-mail string was not a waiver of Instinet's privilege. Motion at 2, 4-8.

On December 23, 2013, Drennan filed his Opposition to the Motion and a Motion to Compel Instinet's Production of All Materials Relating to Its Decision to Authorize Payment to Gina Mausner (Opposition), which is made in support of its Subpoena Duces Tecum. The Opposition argues that Instinet's Motion should be denied and Instinet should be required to produce all internal communications relating to its decision to authorize the payment of soft dollars to Gina Mausner.[2] The Opposition claims that the unredacted document contains an internal e-mail chain at Instinet regarding the information Instinet had in connection with J.S. Oliver's soft-dollar payment to Gina Mausner, a former J.S. Oliver employee and Ian Mausner's ex-wife. Opposition at 1. According to the Opposition, Drennan is charged in the OIP with aiding and abetting misrepresentations by J.S. Oliver and Ian Mausner to Instinet, and the information that Instinet had when it authorized the soft-dollar payment to Gina Mausner is at the heart of this administrative proceeding. Id. at 1, 4. The Opposition represents that the unredacted e-mail string was sent to Drennan before the payment to Gina Mausner was consummated, and Drennan relied heavily on the unredacted Instinet e-mails because "Ranello represented to him that Instinet's in-house attorneys and soft dollar experts had fully vetted the transaction." Id. at 1.

[2] The Division's Prehearing Brief refers to Gina Mausner as Gina Kloes.

The Opposition further claims that: (1) Ranello's transmittal of the unredacted e-mail string to Drennan on May 8, 2009, was a waiver of the privilege; (2) Instinet's decision to wait after it learned of Ranello's disclosure on February 1, 2011, was an intentional waiver of the privilege, and, moreover, Instinet cannot undo its waiver after failing to take prompt and reasonable steps to protect the privilege, citing Rule 502(a) and (b) of the Federal Rules of Evidence (F.R.E.)[3]; and (3) the unredacted material is an integral part of the record, citing F.R.E. 612,[4] because witnesses, including Drennan, used it to refresh their recollections when they gave investigative testimony. Id. at 2-3.

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[3] F.R.E. 502(a) and (b) provide:

> (a) Disclosure Made in a Federal Proceeding or to a Federal Officer or Agency; Scope of a Waiver. When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:
> (1) the waiver is intentional;
> (2) the disclosed and undisclosed communications or information concern the same subject matter; and
> (3) they ought in fairness to be considered together.
>
> (b) Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:
> (1) the disclosure is inadvertent;
> (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
> (3) the holder promptly took reasonable steps to rectify the error . . . .

[4] In pertinent part, F.R.E. 612 provides:

> Writing Used to Refresh a Witness's Memory
> (a) Scope. This rule gives an adverse party certain options when a witness uses a writing to refresh memory:
> (1) while testifying; or
> (2) before testifying, if the court decides that justice requires the party to have those options.
>
> (b) Adverse Party's Options; Deleting Unrelated Matter. . . . [A]n adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony.

Rulings

Motion for Protective Order

Commission Rule of Practice 322(a) provides that any person who is the owner or creator of a document subject to a subpoena or which may be introduced as evidence "may file a motion requesting a protective order to limit from disclosure to other parties or to the public documents or testimony that contain confidential information." 17 C.F.R. § 201.322(a). A motion for a protective order shall be granted only upon a finding that the harm resulting from disclosure would outweigh the benefits of disclosure. 17 C.F.R. § 201.322(b).

The issue is whether Instinet should be granted a protective order for material in a string of e-mails that it does not want to appear in the public record of this proceeding, which it claims is covered by the attorney-client privilege, i.e., "[t]he client's right to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and the attorney." Black's Law Dictionary 1215 (7th ed. 1999); see also Upjohn Co. v. United States, 449 U.S. 383, 389, 394-97 (1981). Instinet claims that the privilege exists because this material reveals information and a request for legal advice by an Instinet employee to Instinet's in-house counsel, the in-house counsel's legal advice in response to the request, and finally, a message from the employee to another employee reflecting the legal advice. Motion at 4.

The Opposition does not dispute that the material is covered by the attorney-client privilege. The dispute is whether Instinet waived the privilege. As noted in a scholarly article on the subject, "the client or the attorney must communicate with the other *in confidence*, and subsequently that confidentiality must have been maintained." Paul R. Rice, Attorney-Client Privilege: The Eroding Concept of Confidentiality Should be Abolished, 47 Duke L.J. 853, 853-55 (1998).

On these facts it is clear that Instinet waived the attorney-client privilege because it did not maintain the confidentiality of the material. See United States v. de la Jara, 973 F.2d 746, 750 (9th Cir. 1992) ("[W]e will deem the privilege to be waived if the privilege holder fails to pursue all reasonable means of preserving the confidentiality of the privileged matter."); cf. United States v. Rigas, 281 F. Supp. 2d 733, 741 (S.D.N.Y. 2003) ("Inadvertent disclosure has been held to be remedied when the privilege is asserted immediately upon discovery of the disclosure and a prompt request is made for the return of the privileged documents." (internal quotation marks omitted)). A waiver is "[t]he voluntary relinquishment or abandonment – express or implied – of a legal right or advantage." Black's Law Dictionary 1574. An implied waiver is "evidenced by a party's decisive, unequivocal conduct reasonably inferring the intent to waive." Id. at 1575.

At no time did Instinet label the information CONFIDENTIAL or warn that it should not be disclosed. Instinet's in-house counsel did not give it this label when transmitting her opinion, and Ranello, acting within the scope of his responsibilities, transmitted an unredacted copy of the e-mails to J.S. Oliver on or about May 8, 2009, again without any CONFIDENTIAL label. Even assuming the case law that Instinet cites for the proposition that Ranello lacked the authority to waive the privilege by his disclosure is on point, Instinet (presumably, its management)

"discovered" the release of the alleged privileged material on or around February 1, 2011. However, when Instinet's management learned of the disclosure on February 1, 2011, it did not quickly inform J.S. Oliver that it had inadvertently provided privileged material. Instead, it waited for over a year, until on or about March 29, 2012, to claim that the material was privileged and the disclosure to J.S. Oliver was without Instinet's authorization.[5] Motion at 2, Exhibits D, E. Instinet's failure to act to preserve the privilege in 2011-2012 occurred during a time when Instinet knew these matters were under scrutiny by the Commission because it responded to a Division subpoena request on December 15, 2011, and it knew lawyers on all sides would be examining the documents and that J.S. Oliver had copies of legal advice from its in-house counsel that were contained in the e-mail chain.[6]

For these reasons, I find that Instinet has waived the attorney-client privilege as to the May 8, 2009, e-mail chain.

Request for Subpoena Duces Tecum

Commission Rule of Practice 232(a) provides for the issuance of a subpoena requiring the production of documentary or other tangible evidence returnable at a designated time and place. 17 C.F.R. § 201.232(a). The terms of Rule 232(b) and (e) make clear that a subpoena request should be granted unless the request may be unreasonable, oppressive, excessive in scope, or unduly burdensome. 17 C.F.R. § 201.232(b), (e)(2).

There is nothing that indicates this request is unreasonable, oppressive, excessive in scope, or unduly burdensome. Accordingly, I will issue the subpoena but because I delayed signing it until I decided the Motion, I will postpone the return date from January 1, 2014, to January 4, 2014. Further, the documents produced pursuant to Drennan's subpoena shall be subject to the conditions set forth in the Order.

Additional Considerations

Unless provided by federal statute, the F.R.E. do not govern Commission administrative proceedings, but they are useful as a reference when the Commission's Rules of Practice are silent on an issue. See City of Anaheim, 54 S.E.C. 452, 454 & nn.5-6 (1999); Robert G. Weeks, Initial Decision Release No. 199, 76 SEC Docket 2609, 2614 n.3 (Feb. 4, 2002). That is the situation here and F.R.E. 502 and 612 support the determination made.[7]

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[5] Instinet's production of a redacted version of the e-mail chain to the Division on December 15, 2011, does not obviate the fact that it took no timely steps to rectify the unredacted disclosure of the e-mail chain to J.S. Oliver until March 29, 2012.

[6] According to Ian Mausner's and J.S. Oliver's Answer filed September 20, 2013, the investigation has gone on for over four years.

[7] F.R.E. 502(a) and (b) govern, inter alia, whether the attorney-client privilege may be waived with respect to disclosures made in a federal proceeding or to a federal agency. Here, however, Instinet's disclosure of the unredacted e-mail chain was to J.S. Oliver, not the Commission, and was during a business communication. F.R.E. 502 does not apply.

It is vital that Respondents have a full and fair opportunity to show that the allegations in the OIP are not true. See 17 C.F.R. § 201.300. In addition, the Commission has consistently made clear that administrative law judges should be inclusive in making evidentiary determinations. See City of Anaheim, 54 S.E.C. at 454 & n.7; Alessandrini & Co., 45 S.E.C. 399, 408 (1973); Charles P. Lawrence, 43 S.E.C. 607, 612-13 (1967).

Order

I DENY Instinet's Motion for a protective order that would: (1) preclude the use by any party of unredacted copies of a May 8, 2009, string of e-mails among Instinet employees and Instinet's in-house attorney; (2) require the parties to return to Instinet or destroy any and all copies of the unredacted e-mails; and (3) require the parties to redact the privileged communications from any document used in this proceeding or disclosed to any third party.

I GRANT Drennan's Subpoena Duces Tecum to Instinet, which will be returnable on January 4, 2014. It is ORDERED that Drennan's Subpoena Duces Tecum to Instinet shall be subject to the following conditions:

1) The documents produced pursuant to Drennan's Subpoena Duces Tecum to Instinet (Documents) shall be disclosed only to Drennan's counsel;

2) All persons who receive access to the Documents shall keep the Documents and information contained therein confidential and shall not divulge the Documents or information contained in them;

3) No person to whom the Documents are disclosed shall make any copies or otherwise use such documents or information, except in connection with this proceeding or any appeal thereof;

4) Any claim of privilege or confidentiality with respect to the Documents, other than the e-mail string that is the subject of this Order, shall be made at the time Instinet produces the Documents to Drennan, otherwise any claim of privilege or confidentiality will be deemed waived; and

5) Drennan shall inform Instinet if he intends to offer any of the Documents, other than the e-mail string that is the subject of this Order, at the hearing; I will hold off ruling on admissibility until Instinet has the opportunity to oppose the introduction into evidence of the material, provided that Instinet has preserved any claim of privilege or confidentiality as set forth under paragraph 4.

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Brenda P. Murray
Chief Administrative Law Judge