

ADMINISTRATIVE PROCEEDING
FILE NO. 3-11471

SECURITIES & EXCHANGE COMMISSION
MAILED FOR SERVICE

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
July 14, 2004.

JUL 14 2004

FIRST CLASS

In the Matter of :
: ORDER ON MOTIONS TO
KEITH M. ROBERTS :
: QUASH SUBPOENAS
:

The Securities and Exchange Commission (“Commission”) initiated this cease-and-desist proceeding pursuant to Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”) on April 30, 2004. The Order Instituting Proceedings (“OIP”) alleges that while Keith M. Roberts was Chief Financial Officer, Vice President, and General Counsel of QuadraMed Corporation (“QuadraMed”), he caused QuadraMed, a publicly traded health-care technology company, to violate Sections 13(a) and 13(b)(2)(A) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-13 thereunder, and that Respondent Roberts violated Section 13(b)(5) of the Exchange Act and Rules 13b2-1 and 13b2-2. On May 19, 2004, I ordered the hearing to begin at 10:00 a.m. on July 19, 2004, at the Ninth Circuit Court of Appeals (Courtroom Three), 95 Seventh Street, San Francisco, California.

On June 14, 2004, I issued six subpoenas at Respondent Roberts’s request, returnable June 25, 2004, to the offices of Morrison & Foerster LLP in Palo Alto, California. One subpoena was directed to Deloitte & Touche (“Deloitte”) and another was directed to QuadraMed. On June 25, 2004, QuadraMed filed separate motions to quash the subpoenas issued to it and Deloitte pursuant to Rule 232(e)(1) of the Commission’s Rules of Practice and memoranda in support.¹ 17 C.F.R. § 201.232(e)(1).

On July 9, 2004, the Division of Enforcement (“Division”) filed an Opposition to Motion to Quash the subpoena to Deloitte, and Respondent Roberts filed a Response to Motion to Quash Subpoena Served on QuadraMed and a Response to Motion to Quash Subpoena Served on [Deloitte].

¹ Despite filing the motions to quash, QuadraMed has furnished responses to Respondent Roberts. (Motion to Quash Subpoena Served on QuadraMed, Appendix A, B, & C; letters to Morrison & Foerster LLP from Skadden, Arps, Slate, Meagher & Flom, LLP (“Skadden”) dated July 6 and July 8, 2004.)

QuadraMed's Motion to Quash Subpoena Served on Deloitte

Respondent Roberts's subpoena to Deloitte sought "[a]ll documents concerning Deloitte's forensic accounting investigation of QuadraMed Corporation, to the extent that any of those documents concern Health+Cast, or any transaction between QuadraMed and Health+Cast, or revenue recognition by QuadraMed."

According to QuadraMed, it decided in July and August 2002 that it might have to restate the financial statements that it had filed with the Commission. It retained Skadden to advise it with respect to these issues, including an anticipated Commission investigation and related litigation. QuadraMed maintains that the documents at issue are the results of forensic accounting work that Deloitte performed at the request of Skadden in anticipation of the Commission's investigation and litigation. These documents are said to reflect Deloitte's mental impressions, conclusions, and opinions concerning the accounting issues in litigation based on its analysis of documents and employee interviews, and as such are protected attorney work product. Fed. R. Civ. P. 26(b)(3); U.S. v. Nobles, 422 U.S. 225, 238-39 (1975).

In early 2003, QuadraMed's auditors, who were working on a possible restatement, requested a document that summarized the procedures that Deloitte had conducted in the course of its investigation. Deloitte prepared a Summary Report in response to this request. The Summary Report was not prepared to assist Skadden; rather, Deloitte prepared the Summary Report to "permit QuadraMed to provide information to its auditors to be considered in the conduct of the audit examination of QuadraMed's restated and adjusted financial statements, and to provide the SEC with information related to its investigation." (Motion to Quash Subpoena Served on QuadraMed at 5.) QuadraMed claims no privilege for the Summary Report that was distributed to the outside auditors and to the Commission staff. Deloitte did not provide QuadraMed's auditors or the Commission staff with the work product that it prepared in the course of its consulting work for Skadden. QuadraMed cites Fed. R. Civ. P. 26(b)(3) and numerous cases in support of its position that Deloitte's work for Skadden was classic opinion work product that merits almost absolute protection. In re Cendant Corp. Sec. Litig., 343 F.3d 658, 665 (3d Cir. 2003); Duplan Corp. v. Deering Milliken, Inc., 540 F.2d 1215, 1219 (4th Cir. 1976); Garcia v. City of El Centro, 214 F.R.D. 587, 591 (S.D. Cal. 2003); Kintera, Inc. v. Convio, Inc., 219 F.R.D. 503, 507 (S.D. Cal. 2003); Varel v. Banc One Capital Partners, Inc., No. CA3:93-CV-1614-R, 1997 WL 86457, at *2 (N.D. Tex. Feb. 25, 1997); In re Pfizer Inc., Sec. Litig., No. 90 Civ. 1260 (SS), 1993 WL 561125, at *15 (S.D.N.Y. Dec. 23, 1993).

QuadraMed argues that as a matter of law there is no broad "subject mater" waiver for work product. QuadraMed argues that In re Woolworth Corp. Sec. Class Action Litig., No. 94 CIV. 2217 (RO), 1996 WL 306576 (S.D.N.Y. 1976), which rejects attempts to distinguish between "anticipation of litigation" and "business purpose," is applicable to this situation. QuadraMed cites United States v. Torf (In re Grand Jury Subpoena), 357 F.3d 900 (9th Cir. 2004) for the proposition that documents created for a dual purpose are covered by the work product doctrine.

QuadraMed's Motion to Quash Subpoena Served on QuadraMed

Respondent Roberts's subpoena to QuadraMed requested fifteen separate items that included "memos, transcripts, and other documents, received from or created by [Skadden] relating to any transaction between QuadraMed and Health+Cast," various files relating to Health+Cast kept by four individuals, and "[a]ll documents concerning Health+Cast received by QuadraMed from Steven Rowles or Morrison & Foerster LLP."

QuadraMed objects to the subpoena because it (1) seeks the production of material that is subject to the attorney-client privilege and the work product protection doctrine based on the same legal reasoning advanced by QuadraMed's motion to quash the subpoena to Deloitte, and (2) is unreasonable, burdensome, and unduly oppressive in that it duplicates Commission subpoenas, responses to which have been made available to Respondent Roberts. QuadraMed specifies that the request is burdensome because it is duplicative, and it also requires QuadraMed to attempt to locate documents that were used more than five years ago, that most of the people who created these documents have left QuadraMed, many QuadraMed offices have relocated, and QuadraMed's headquarters has moved from California to Virginia.

Division's Opposition to Motion to Quash Subpoena to Deloitte

The Division opposes quashing the subpoena served on Deloitte by Respondent Roberts. The Division wants to obtain documents relating to Deloitte's review and analysis of the Health+Cast transactions, and to question John Labella, a Deloitte partner on this subject, because it disputes a claim by Respondent Roberts that Deloitte independently found a \$5 million sale to Health+Cast properly recorded as revenue.

The Division rejects QuadraMed's position that the work, which is the subject of the subpoena, is covered by the work product doctrine, and contends that QuadraMed has failed to show that the withheld testimony and materials were prepared "principally or exclusively to assist in anticipated or ongoing litigation." United States v. Construction Prods. Research, Inc., 73 F.3d 464, 473 (2d Cir. 1996); In re Kidder Peabody Sec. Litig., 168 F.R.D. 459, 464-67 (S.D.N.Y. 1996). The Division argues that Deloitte's work was not driven by a defense to shareholder litigation, but to provide outside auditors with sufficient information to consider and implement a restatement and to indicate cooperation with the Commission.

The Division argues that QuadraMed waived the privilege because it provided the Commission a report, which included seven pages of discussion regarding the Health+Cast transactions. Republic of Philippines v. Westinghouse Electric Corp., 132 F.R.D. 384, 387-88 (D.N.J. 1990).

Respondent Roberts's Response to Motion to Quash Subpoena Served on QuadraMed

Respondent Roberts does not object to QuadraMed withholding documents that it deems protected by the attorney-client privilege or work product protection, provided it supplies an

adequate privilege log. Respondent Roberts rejects QuadraMed's arguments that the subpoena imposes an undue burden and is oppressive. Respondent Roberts maintains that the subpoena is substantially different from the one issued by the Commission during the investigation because it is addressed to specific individuals and it is important for Respondent Roberts to know which individual had which documents. Respondent Roberts claims that the fact that QuadraMed has produced and identified documents subject to the subpoena shows that responsive materials exist that were not captured by the Commission subpoena. Respondent Roberts requests that I require QuadraMed to (1) continue its attempt to comply with the subpoena and (2) identify which of the documents it has already produced are responsive to each subpoena request.

Respondent Roberts's Response to Motion to Quash Subpoena Served on Deloitte

Respondent Roberts does not object to QuadraMed's motion to quash the subpoena it served on Deloitte on grounds of the attorney-client privilege and work product doctrine but he requests a privilege log that identifies each document withheld, the basis upon which the document was withheld, and the facts that support use of the attorney-client privilege or work product protection.

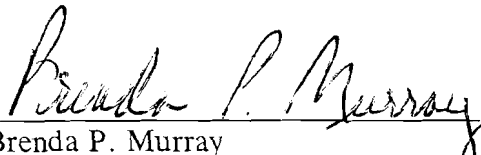
Ruling

I will not consider the Division's arguments because in this situation under Rule 232(e) it has no standing to file an opposition to the motions to quash. 17 C.F.R. § 201.232(e).

I reject Respondent Roberts's arguments that his request is substantially different from the earlier subpoena. Last year, QuadraMed responded to a Commission subpoena for "[a]ll documents or communications relating to any transactions between Healthcast LLC and QuadraMed that occurred after January 1, 1998." Eight of the fifteen items in Respondent Roberts's subpoena to QuadraMed request (1) any files kept in the offices of Bernard Murphy, Respondent Roberts, John Cracchiolo, and James Durham concerning or relating to Health+Cast without any time limitations, and (2) any files kept in the offices of these four individuals concerning or relating to correspondence with Steve Rowles concerning Health+Cast. This portion of Respondent Roberts's subpoena is substantially similar to the Commission's earlier subpoena.

The Commission's Rules of Practice state that the standard for deciding motions to quash subpoenas is whether compliance would be unreasonable, oppressive, or unduly burdensome. 17 C.F.R. § 201.232(e)(2). I GRANT the motion to quash the subpoena to QuadraMed for the following reasons. In these circumstances, Respondent Roberts's subpoena to QuadraMed is unreasonable, oppressive, and unduly burdensome. Respondent Roberts has not shown a substantial need for the materials to prepare his case. See Fed. R. Civ. P. 26(b)(3). Respondent Roberts has had the Division's investigative file that contains subpoenaed materials available for some time. QuadraMed has voluntarily supplied Respondent Roberts with materials since it received the subpoena. Finally, responding to the subpoena before the hearing begins on next Monday, July 19, 2004, would be extremely difficult.

In view of Respondent Roberts's position, I GRANT the motion to quash the subpoena to Deloitte and ORDER Deloitte to provide Respondent Roberts with a privilege log that identifies each document covered by the subpoena that it has withheld, the legal basis for withholding the material, and a factual description that supports each claim. Deloitte should produce the privilege log as soon as it is practicable to do so.


Brenda P. Murray
Chief Administrative Law Judge