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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 1653/July 25, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15766

In the Matter of CLEAN ENERGY CAPITAL, LLC AND SCOTT A. BRITTENHAM	ORDER QUASHING SUBPOENAS DIRECTED TO DIVISION ATTORNEYS

On February 25, 2014, the Securities and Exchange Commission issued an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP). Respondents were served with the OIP on March 3, 2014, and filed an answer on March 26, 2014. A hearing is scheduled to begin on August 11, 2014, in Los Angeles, California.

On July 17, 2014, Respondents Clean Energy Capital, LLC, and Scott A. Brittenham filed a request that I issue subpoenas to seven individuals. Among those seven individuals were Payam Danialypour and Marshall Sprung. On July 18, 2014, the Division of Enforcement filed a motion for a protective order, asking that I quash Respondents' subpoenas as to Mr. Danialypour and Mr. Sprung. In its motion, the Division represents that Mr. Danialypour is one of its attorneys in this case and that Mr. Sprung is his supervisor. I received Respondents' opposition on July 23, 2014.

For the reasons stated below, I GRANT the Division's motion. I decline to issue the requested subpoenas as to Mr. Danialypour and Mr. Sprung. Respondents may not call them to testify.

Ruling

In its motion, the Division argues that its attorneys cannot be required to testify because their testimony would be privileged under the work-product doctrine and as "governmental deliberative process." The Division also asserts that its attorneys' testimony would be irrelevant. Finally, the Division argues that Respondents have "other means available to present relevant evidence."

In opposition, Respondents state that they would "not seek any privileged testimony" and argue that the evidence they seek is relevant. I disagree with their argument.

Motions to quash a subpoena are governed by Rule of Practice 232(e). Under that rule, "[i]f compliance with the subpoena would be unreasonable, oppressive, or unduly burdensome, the hearing officer . . . shall quash or modify the subpoena." 17 C.F.R. §201.232(e)(2).

In determining whether Respondents' request is "unreasonable, oppressive, or unduly burdensome," I am guided by analogous precedent addressing a party's attempts to depose an opponent's counsel. Courts generally take a dim view of such attempts. *See Nguyen v. Excel Corp*., 197 F.3d 200, 209 & n.26 (5th Cir. 1999); *Shelton v. Am. Motors Corp*., 805 F.2d 1323, 1327 (8th Cir. 1986); *Coleman v. District of Columbia*, 284 F.R.D. 16, 18 (D. D.C. 2012). Under *Shelton*, which is generally regarded as the leading case on this issue,

> [a] party seeking to take the deposition [must] show[] that (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case.

805 F.2d at 1327.[1]

As the movant, the Division has the initial burden to show that issuing the subpoenas at issue would be "would be unreasonable, oppressive, or unduly burdensome." *See* 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 275-81 (1994). In light of the precedent noted above, I find that by showing that Respondents' subpoena request concerns its attorneys, the Division has met its burden. Respondents thus have the burden to show that issuing the subpoenas would not "be unreasonable, oppressive, or unduly burdensome." Respondents have not met their burden under this standard.

Essentially, Respondents' opposition rests on the arguments that the Division exceeded its authority and that Respondents' actions do not amount to violations of the provisions alleged in the OIP. Respondents argue that Mr. Sprung:

> pursued this investigation and prosecution in order to enlarge the Division's scope of power to encompass what traditionally has been the purview of state limited partnership law. Where

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[1] The Second Circuit has taken a slightly different view, opining that the federal rules of civil procedure, which do not apply in this proceeding, "require a flexible approach to lawyer depositions" such that a judge should "take[] into consideration all of the relevant facts and circumstances to determine whether the proposed deposition would entail an inappropriate burden or hardship." *In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 72 (2d Cir. 2003) (Sotomayor, J.). As the Second Circuit expressly recognized, its discussion of this matter was entirely *obiter dictum*. *Id*. at 72 n.4.

> Congress has not granted such authority, the Commission may not seize it on its own initiative, and any attempt by it to do so—as Respondents contend this proceeding is—may be reviewed by an appellate court.

Opposition at 6.

Contrary to Respondents' argument, the "scope of" the Division's "power" does not depend on the views of its attorneys. If Respondents are correct that the Division lacks the authority to do that which it has done, their argument will not depend on Mr. Sprung's motivation; it will depend on the text of whatever unnamed statute they believe the Division exceeded. The same can be said of Respondents' argument that the Division's course in pursuing this action "reflects a policy of administrative overreach" that "is not justified by the statute." Opposition at 7. Moreover, the question whether Respondents violated the provisions alleged in the OIP will not depend on the motivation of the Division's attorneys. Rather, it will depend on the text of those provisions and the evidence adduced concerning Respondents' actions.

By way of analogy, when a prosecutor applies a criminal statute in a novel context, the defendant's remedy is not to call the prosecutor to testify. Her remedy is instead to challenge the application of the statute through briefing and argument before the district court and, failing there, on appeal. *E.g.*, *McNally v. United States*, 483 U.S. 350, 358-61 (1987), *superseded on other grounds by* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508.

Furthermore, Respondents cite no precedent or rule that would support their argument that they should be able to take testimony from the Division's attorneys to inquire into the Division's motivation. To the extent they believe the Division's investigation was flawed, they will have ample opportunity to present evidence showing that the Division's allegations lack merit.[2] *See Kevin Hall, CPA*, Securities Exchange Act of 1934 Release No. 61162 (Dec. 14, 2009), 97 SEC Docket 23679, 23710-13. Whatever the motivation of the Division's attorneys, that motivation is not relevant to this proceeding. *Id.* at 23712-13.

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[2] Respondents allege various irregularities regarding the Division's production of documents under Rule of Practice 230. Opposition at 5. The alleged irregularities, however, do not support Respondents' request for subpoenas.

Respondents also argue that they must raise their argument now in order to preserve it in the event of possible appellate review. Opposition at 4. Be that as it may, *see Darby v. Cisneros*, 509 U.S. 137, 152-53 (1993), the fact that they wish to preserve this issue is a not a reason for me to issue the subpoenas they have requested.

In sum, Respondents have shown neither that the "information" they seek "is relevant and nonprivileged," nor that "the information is crucial to the preparation [or presentation] of the[ir] case." *Shelton*, 805 F.2d at 1327. As a result, I conclude that they have failed to rebut the determination that issuing the subpoenas they seek would be "unreasonable, oppressive, [and] unduly burdensome." 17 C.F.R. § 201.232(e)(2).

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James E. Grimes
Administrative Law Judge