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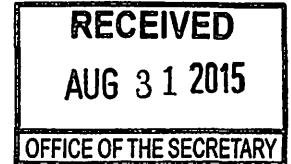


UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of

TRACI J. ANDERSON, CPA
TIMOTHY W. CARNAHAN
AND CYIOS CORPORATION,

Respondents.

ADMINISTRATIVE PROCEEDING
File No. 3-16386

DIVISION OF ENFORCEMENT'S MOTION *IN LIMINE*

The Division of Enforcement (the "Division") respectfully moves this Court for an order preventing Respondent Timothy Carnahan from calling Division Trial Counsel Chris Davis as a witness at the upcoming September 2-3 hearing. Carnahan noticed Davis as a witness on Friday August 28, 2015. Carnahan seeks to introduce testimony from Davis that is entirely irrelevant to the issues to be tried at the hearing—specifically, on arguments that have already been rejected by this Court. Because there is simply no legitimate basis for the testimony sought, and because this appears to be an improper attempt to harass Division counsel on the eve of trial, Carnahan should be barred from offering it.

Factual Summary and Argument

On June 9, 2015, the Court entered its Order on Motions for Summary Disposition. Rel. No. 2786. In that Order, the Court found that: (i) Respondent Traci Anderson violated Sarbanes-Oxley Section 105(c)(7)(B) and received ill-gotten gains totaling $244,835.48; (ii) CYIOS violated, and Carnahan caused CYIOS' violations of, Exchange Act Section 13(a) and Rules 13a-1 and 13a-13, and CYIOS and Carnahan acted in deliberate disregard of a regulatory requirement; (iii) Carnahan violated Exchange Act Rules 13a-14 and 13a-15, and acted in deliberate disregard of

a regulatory requirement; and (iv) CYIOS made, and Carnahan caused CYIOS to make, repeated untrue statements in interstate commerce. *Id.* at 8.

The Court ordered that a hearing be held on only the following issues: (i) Anderson's state of mind; (ii) whether Carnahan knew or should have known of the PCAOB Order, and therefore whether CYIOS violated, and Carnahan caused CYIOS' violation of, Sarbanes-Oxley ("SOX") Section 105(c)(7)(B); (iii) whether CYIOS' untrue statements in periodic Commission filings were material and in the offer or sale of securities, and whether CYIOS obtained money or property by means of such untrue statements; and (iv) the proper measure of disgorgement for any Securities Act Section 17(a) violation. *Id.*

On June 15, 2015, the Respondents filed a motion asking that the Court's June 9 Order be certified for interlocutory appeal. See Dkt. 21. In that motion, the Respondents argued that a PCAOB settlement with Deloitte supported their interpretation of SOX Section 105(c)(7)(B)—an interpretation that this Court rejected in its June 9 order. *Id.* On June 17, the Court again rejected the argument, noting that the Respondents were merely rearguing their position on SOX § 105(c)(7)(B). Rel. No. 2826 at 1. The Court thoroughly explained why the Respondents' reliance on the Deloitte settlement was misplaced:

> The PCAOB's conclusion that a suspended auditor should not have been permitted to participate in a public accounting firm's audit practice does not mean, as Respondents suggest, that the associational bar extends to only audit work. The PCAOB simply did not address the issuer associational bar, nor would it have as the cited PCAOB matter involved misconduct by a public accounting firm. The issuer associational bar is not limited to audit work or public accounting firms, but prohibits association with an issuer "in an accountancy or a financial management capacity." 15 U.S.C. § 7215(c)(7)(B). *Id.* at 3.

In defiance of the Court's June 17 order, Carnahan obviously plans to reargue this irrelevant point at the hearing. This is evident by his inclusion of Davis on his witness list: "Mr.

Davis will testify to the phone calls about the case specifically the Deloitte Case (see exhibits)."[1] See Exhibit A.

This testimony is improper for several reasons. First, it is completely irrelevant to the narrow issues to be addressed at the hearing. The Court has twice rejected the Respondents' interpretation of SOX § 105(c)(7)(B). In its most recent rejection, the Court specifically held that the Deloitte settlement did not support the Respondents' interpretation. And even if that wasn't the case, Davis's opinion of the Deloitte case and any conversations regarding it are completely irrelevant. Other "phone calls about the case" are similarly irrelevant. Thus, adding Division counsel to the witness list is nothing more than an attempt to manipulate the process and harass the Division on the eve of trial.[2] *In the Matter of Bebo*, Rel. No. 2490 (April 3, 2015) ("demanding the deposition or examination of opposing trial counsel is almost always pure gamesmanship").

Putting the obvious irrelevance of the requested testimony aside, Carnahan cannot meet the heavy burden required to obtain the testimony he seeks.[3] Courts look with considerable disfavor on attempts to turn a party's counsel into a witness. *See, e.g., Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986) ("We view the increasing practice of taking opposing counsel's deposition as a negative development in the area of litigation, and one that should be employed

[1] The Deloitte settlement itself, which is included on Carnahan's Exhibit list, is also irrelevant—as are most of the exhibits offered by Carnahan. Division counsel plans to address this with the Court at the hearing.

[2] If required to testify, Davis would likely be required to withdraw under Texas Disciplinary Rule of Professional Conduct 3.08 (modeled after ABA Model Rule of professional conduct 3.7)—which would greatly prejudice the Division at this late hour.

[3] Though Respondent has not yet requested that the Court issue subpoenas to the Staff attorneys, this motion is analogous to a motion to quash a subpoena, which is 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). As the movant, the Division has the initial burden to show that issuing the subpoenas "would be unreasonable, oppressive, or unduly burdensome." *See* 5 U.S.C. § 556(d). If the Division satisfies this burden then the respondent has "the burden to show that issuing the subpoenas would not 'be unreasonable, oppressive, or unduly burdensome.'" *In the Matter of Clean Energy Capital, LLC and Scott A. Brittenham*, Administrative Proceedings Ruling Release No. 1653 (July 25, 2014), p. 2.

only in limited circumstances."); *Doubleday v. Ruh*, 149 F.R.D. 601, 612 (E.D. Cal. 1993) (explaining that attempts to depose attorneys implicate concerns beyond those relating to the potential disclosure of privileged information). As one court stated, "[d]eposing an opponent's attorney is a drastic measure and is viewed with a jaundiced eye and is infrequently proper." *Oil Express Nat'l, Inc. v. D'Alessandro*, 1997 WL 282899, *2 (N.D. Ill. May 16, 1997) (granting motion for protective order as to deposition of opposing counsel). And allowing a party's counsel to depose another lawyer involved in the case causes "the standards of the profession to suffer," and disrupts the adversarial process. *Hickman v. Taylor*, 329 U.S. 495, 513 (1947).

For this reason, courts have placed a heavy burden on parties seeking testimony from an opponent's attorneys. *See Shelton*, 805 F.2d at 1327. Specifically, to be permitted to place a Division attorney on the witness stand, Carnahan has the burden of establishing that: (i) the information sought from the attorney is actually relevant and non-privileged; (ii) the information is crucial to the case; and (iii) no other means exist to obtain the information than to take testimony from the attorney. *See id.*; *accord Guantanamera Cigar Co. v. Corp. Habanos, S.A.*, 263 F.R.D. 1, 8 (D.D.C. 2009) ("when seeking to depose opposing counsel, the cards are stacked against the requesting party from the outset and they must prove the deposition's necessity"); *Nat'l Western Life Ins. Co. v. Western Nat'l Life Ins. Co.*, 2010 WL 5174366, *3-4 (W.D. Tex. Dec. 13, 2010) (considering *Shelton* factors and quashing subpoena); *Lloyd Lifestyle Ltd. v. Soaring Helmet Corp.*, 2006 WL 753243, *2 (W.D. Wash. Mar. 23, 2006) (party seeking trial attorney deposition has "burden of establishing the right to discovery" under *Shelton* factors); *M&R Amusement Corp. v. Blair*, 142 F.R.D. 304, 305-06 (N.D. Ill. 1992) (denying motion to depose insured's counsel); *Harriston v. Chicago Tribune Co.*, 134 F.R.D. 232, 233 (N.D. Ill. 1990); *EEOC. v. HBE Corp.*, 157 F.R.D. 465, 466 (E.D. Mo. 1994); *SEC v. Morelli*, 143 F.R.D. 42, 47 (S.D.N.Y. 1992); *SEC v.*

World-Wide Coin Inv., Ltd., 92 F.R.D. 65, 67 (N.D. Ga. 1981) (denying motion to compel depositions of Commission trial counsel and investigator); *In the Matter of Clean Energy Capital, LLC and Scott A. Brittenham*, Administrative Proceedings Ruling Release No. 1653 (July 25, 2014), p. 4 (quashing subpoenas directed to Division attorneys). Carnahan cannot even remotely satisfy his burden under the first and second prongs of *Shelton.*

As noted above, the information sought by Carnahan is not relevant—much less crucial. Further, it is possible—if not likely—that Carnahan will be seeking privileged information. While conversations between Davis and the Respondents are not privileged, details surrounding those conversations are. For instance, mental impressions formed in advance of, during, or after the conversations are privileged—as are notes of the conversations or other documents related to them. Work-product doctrine protects materials prepared or collected by an attorney "in the course of preparation for possible litigation." *Hickman*, 329 U.S. at 510; *see also* Fed. R. Civ. P. 26(b)(3) (court "must protect against disclosure of the mental impressions, conclusions, opinions or legal theories of a party's attorney"). Testimony from trial attorneys necessarily impinges upon attorney work product, and, for that reason, courts almost never permit a party to compel testimony from the opponent's lawyers. That is especially true in government enforcement actions, where courts routinely bar defendants from obtaining testimony from government attorneys. *See, e.g., SEC v. Buntrock*, 217 F.R.D. 441, 444 (N.D. Ill. 2003) ("the [Rule] 30(b)(6) notice is an inappropriate attempt to depose opposing counsel and to delve into the theories and opinions of SEC attorneys"); *SEC v. Rosenfeld*, 1997 U.S. Dist. LEXIS 13996, *5 (S.D.N.Y. Sept. 12, 1997) (granting protective order because deposition of Commission trial counsel "clearly calls for the revealing of information gathered by the SEC attorneys in anticipation of bringing the instant enforcement proceedings"); *Morelli*, 143 F.R.D. at 44-47 (denying defendant's request to depose Commission's

trial counsel because it was "impermissible attempt by defendant to inquire into the mental processes and strategies of the SEC" and appeared to be "intended to ascertain how the SEC intends to marshal the facts, documents and testimony in its possession"); *SEC v. Jasper*, 2009 WL 1457755, *3 (N.D. Cal. May 26, 2009) (same, because court was "unpersuaded that the stated need for the SEC's deposition outweighs the SEC's interest in protecting its attorneys' work product"); *SEC v. Monterosso*, 2009 WL 8708868, *1 (S.D. Fla. June 2, 2009) (same, because defendant "seeks the mental impressions of the SEC's attorneys"); *see also HBE Corp.*, 157 F.R.D. at 466-67 (granting motion for a protective order against Rule 30(b)(6) deposition of EEOC for a person having knowledge of the allegations in the complaint).

These principles are also expressly incorporated into the Commission's Rules of Practice. Rule 230(b)(1)(i) & (ii) provides:

> (b) *Documents that May Be Withheld.*
> (1) The Division of Enforcement may withhold a document if:
> (i) the document is privileged;
> (ii) the document is an internal memorandum, note or writing prepared by a Commission employee, other than an examination or inspection report as specified in paragraph (a)(1)(vi) of this rule, or is otherwise attorney work product and will not be offered in evidence....

Here, the testimony that Carnahan seeks would likely impinge upon the Division's work product—and therefore it is unreasonable, oppressive, or unduly burdensome. Respondent, therefore, cannot show that the testimony he seeks is not privileged and, for that additional reason, the Court should order that it be excluded from the hearing in this matter.

Finally, the Court should reject Carnahan's effort to make Davis a witness because other means exist to obtain the information than to take testimony from Davis. Carnahan wants Davis to testify about his conversations with Carnahan about the Deloitte case. Even if this subject matter were relevant—which it is plainly not—other means exist to obtain such information. Indeed,

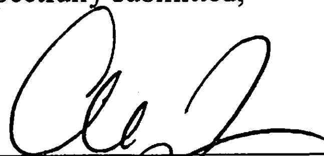
Carnahan participated in the conversations he purports to discuss. Yet he does not even include himself on his witness list.

Conclusion

Because the testimony he seeks is certainly irrelevant and likely privileged, Carnahan cannot carry his burden to obtain it. Therefore, the Division respectfully requests that the Court exclude the Staff attorneys' testimony and refuse to issue subpoenas for the testimony of the Staff attorneys.

Dated: August 28, 2015

Respectfully submitted,



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SERVICE LIST

Pursuant to Rule 150 of the Commission's Rules of Practice, I hereby certify that a true and correct copy of the Division of Enforcement's Motion in Limine was served on the following on August 28, 2015 via United Parcel Service, Overnight Mail:

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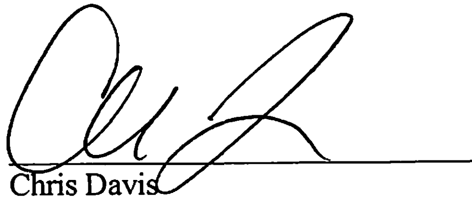

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