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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16649

In the Matter of

Ironridge Global Partners, LLC,
Ironridge Global IV, Ltd.

Respondents.

DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENTS' RENEWED REQUEST FOR A SUBPOENA TO THE COMMISSION

The Division of Enforcement ("the Division") respectfully submits this memorandum opposing the renewed request of Respondents Ironridge Global Partners, LLC and Ironridge Global IV, Ltd., ("Respondents") for the issuance of a document subpoena to the Securities and Exchange Commission ("Commission") (the "subpoena request") seeking Division staff notes taken during investigative interviews of Ken Hobbs, William Miertschin and Bruce Harmon.[1] The Court should deny the subpoena request because the staff-prepared witness interview notes Respondents seek are opinion attorney work product. They do not contain a verbatim recitation of witness statements. Rather, to the extent they reflect, in part, Division attorneys' understanding of certain points made by the witnesses, they constitute the attorneys' selection of what seemed significant to them. What Respondents seek to discover from the notes is the Division's legal strategy, not fact work product. Moreover, Respondents have failed to demonstrate either a substantial need for the staff notes or an undue hardship in the event they do not receive them.

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[1] The witnesses at issue are principals of securities issuers that completed a Section 3(a)(10) transaction with Respondents.

ARGUMENT AND CITATION TO AUTHORITY

Respondents here seek those portions of the Division staff's notes relating to investigative interviews of Messrs. Hobbs, Miertschin and Harmon that "do not reflect attorney-opinion work product." October 15, 2015 Second Order on Subpoenas ("Oct. 15 Order"), at 2.[2] The interview notes were prepared in anticipation of litigation and, thus, are protected work product. Id., at 3.

Based on the analysis set forth in the Oct. 15 Order, whether the notes are subject to production turns on two issues: (1) whether the staff interview notes are opinion or fact work product, and (2) if the notes are determined to be fact work product, whether Respondents have demonstrated a special need for their production. Id. As set forth below, Respondents are not entitled to production of the interview notes because the notes are opinion work product, and even if they were not, Respondents have not demonstrated a substantial need for the notes, or undue hardship if they do not receive them.

A. The Staff's Interview Notes are Opinion Work Product

When the work product at issue reflects the opinions and thought processes of the attorney, the document "is virtually undiscoverable." Oct. 15 Order at 3, quoting Dir., Office of Thrift Supervision v. Vinson & Elkins, 124 F.3d 1304, 1307 (D.C. Cir. 1997) and citing Cox v. Adm'r U.S. Steel & Carnegie, 17 F.3d 1386, 1422 (11th Cir. 1994). For that reason, courts have been skeptical of requests for discovery of attorney interview notes because those notes

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[2] Rule 230(b)(1)(ii) authorizes the Division to withhold internal notes and memoranda from production. See 17 C.F.R. § 201.230(b(1)(ii). This Court concluded that Rule 230(b)(1)(ii) is not "a blanket shield from disclosure" for staff interview notes, but instead codifies Fed. R. Civ. P. 26(b). Oct 15 Order at 1. Another ALJ reached a contrary conclusion. See David F. Bandimere, et al., SEC Rel. No. 746, 2013 WL 10967609 at *2 (Feb. 5, 2013) (in quashing subpoena request for "factual portion" of staff interview notes, ALJ opined "The Commission's Rules of Practice . . . provide for the withholding of internal memoranda, notes or writings prepared by Commission employees . . . unless they constitute Brady material"; cases applying "the Federal Rules of Civil Procedure . . . do not govern this proceeding.")

inherently reflect the thoughts of the attorney. Upjohn Company v. U.S., 449 US 383, 399 (1981) (requiring production of "notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes").

In a few instances a court has decided that portions of notes, particularly segments containing a verbatim recitation of a witness statement, constitute fact work product, which could be discovered, upon a showing of substantial need by the requesting party and inability to obtain the substantial equivalent from other sources without undue hardship. FTC v. Boehringer Ingelheim Pharm., Inc., 778 F.3d 142, 151-52 (D.C. Cir. 2015); Vinson & Elkins, 124 F.3d at 1308 ("under certain circumstances, **purely factual material embedded in attorney notes** may not deserve the super-protection afforded to a lawyer's mental impressions") (emphasis added); In re HealthSouth Corp. Sec. Litig., 250 F.R.D. 8, 11-12 (D.D.C. 2008). However, the scope of the fact work product exemption is very limited – if the facts recited in the notes reflect the attorney's thought process (e.g., which facts the attorney thought were important to the case), then those portions are opinion work product and not subject to disclosure. Vinson & Elkins, 124 F.3d at1308 ("At some point, . . . a lawyer's factual selection reflects his focus; in deciding what to include and what to omit, the lawyer reveals his view of the case.").

In deciding whether interview notes are opinion or fact work product, courts have considered a variety of factors. For example, notes can be considered fact work product if they "merely describe the facts as they occurred so that [counsel] would have a recorded understanding of the information exchanged at these interviews." HealthSouth Corp Sec. Litig., 250 F.R.D. 8, 12 (N.D. Al. 2008). Also, if the notes reflect verbatim statements of a witness, or if there were efforts to ensure that the notes accurately reflected the witness' statements, the

notes should be viewed as fact work product. Clemens, 793 F. Supp.2d at 254. See also Lopez v. City of New York, No. 05-CV-3624 (ARR)(KAM), 2007 WL 869590 at *2 (E.D.N.Y. 2007).

In contrast, if the interview is taken as "part of a litigation-related investigation," the notes are more likely to be opinion work product because the facts elicited during the interview "*necessarily* reflected a focus chosen by the lawyer." Sealed Case, 124 F.3d 230, 236 (DC Cir. 1997), rev'd on other grounds sub nom. Swidler & Berlin v. U.S., 524 U.S. 399 (1998). See also SEC v. Nadel, No. 11-CV–215 (WFK)(AKT), 2012 WL 1268297 at *8 (E.D.N.Y. April 16, 2012) ("Although the notes generally consist of summaries of the witnesses statements, as opposed to analysis by the note takers, they still reflect the mental thought processes of the SEC attorneys."); SEC v. Cavanagh, No. 98 Civ. 1818 (DLC), 1998 WL 132842 at *4 (S.D.N.Y. Mar 23, 1998). If the attorney only covers select topics and documents with a witness, the notes of that interview are more likely to be opinion work-product. U.S. v. Tailwind Sports Corp., 303 F.R.D. 429, 431–32 (D.D.C. 2014).

Several facts show that the staff's interview notes that Respondents seek are opinion work product. All of these interviews were conducted after the staff obtained a formal order of investigation. See Declaration of Division of Enforcement Assistant Director Matthew F. McNamara ("McNamara Decl."), ¶4. The interviews of Ken Hobbs and Bruce Harmon occurred after the staff had taken sworn testimony from Ironridge principal John C. Kirkland. Id., ¶5. During Kirkland's testimony, the staff explored in detail the mechanics of Ironridge's 3(a)(10) program. Id., ¶6. To further assist its evaluation of whether any aspects of Respondents' acquisition and distribution of the shares obtained in the exchange transactions violated the federal securities laws, the staff interviewed representatives of various issuers that had participated in that program. Id., ¶7.

Mr. McNamara, Staff Attorney Kyle Bradley and Staff Attorney Melissa Mitchell, who are attorneys for the Division, participated in the interviews.[3] Id., ¶8. Mr. McNamara, Mr. Bradley and Ms. Mitchell spent time preparing for the interviews they conducted, and the staff was exploring whether any aspects of Respondents' acquisition and subsequent distribution of the shares obtained in the 3(a)(10) exchange transactions violated the federal securities laws. Id., ¶9. Typewritten notes were prepared after each interview. Id., ¶10. The notes were not intended to reflect everything that was discussed during the interview, or the verbatim statements of the interviewee. Id., ¶11. Rather, the notes reflect the information that the staff thought might be relevant in deciding whether to make an enforcement recommendation based on the manner in which Respondents acquired and distributed the shares they received. Id., ¶12. There was no effort by the staff to confirm the accuracy of the notes with the respective interviewee after the notes were prepared.[4] Id., ¶13.

These facts show that the information contained in the interview notes reflect the thought processes of the Division staff, not a verbatim recitation of witness statements. Accordingly, the notes are opinion work product that is not subject to disclosure.

B. Respondents Have Not Shown a Substantial Need for the Staff's Interview Notes or Undue Hardship

Assuming, *arguendo*, that the interview notes contain fact work product, the notes should not be produced because Respondents have not shown a substantial need or undue hardship. Initially, it bears noting that Respondents seek disclosure of oral statements that potential

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[3] The interviews of Messrs. Hobbs and Harmon were conducted by Mr. McNamara and Mr. Bradley. The interview of Mr. Miertschin was conducted by Mr. Bradley. Ms. Mitchell assisted in taking notes during that interview.

[4] With respect to Mr. Harmon, the staff subsequently took sworn testimony from him that covered similar topic areas. The transcript from that testimony has been previously produced to Respondents in connection with this proceeding.

witnesses made to the staff during the investigation. When "the work product sought . . . is based on oral statements from witnesses, a far stronger showing is required than the 'substantial need' and 'without undue hardship' standard applicable to discovery of work-product protected documents and other tangible things." Sealed Case, 856 F.2d 268, 273 (D.C. Cir. 1988), citing Upjohn Company, 449 U.S. at 399. Even under the lower standard, the party seeking discovery of ordinary work product must make a detailed showing of need and hardship; a "broad, unsubstantiated assertion is not sufficient." Int'l Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1240 (5th Cir. 1982). Respondents cannot meet the "substantial need" standard, much less the heightened standard applicable to oral statements.

Here, Respondents seek objective facts that they already know, not information that only the interviewees know. Specifically, they seek to uncover information about their practices of selling shares received in 3(a)(10) transactions and the investment advice they provided. Renewed Request at 3. Obviously, Respondents are fully aware of how they sold the shares they received. And the Division has disclosed the type of investment advice that it alleges Respondents gave in response to the motion for summary disposition, and in the Division's expert report. See Division Response to Summary Disposition at p. 4; November 2, 2015 Expert Report of Robert W. Lowry.

What Respondents truly seek is disclosure of the Division's legal strategy. This is most evident by their request for the interview notes of Mr. Miertschin. They seek his notes even though he is apparently deceased (or at least incapacitated) and cannot possibly testify at the hearing. Thus, the only possible reason for seeking his notes is to expose what facts the Division staff thought were important to the case. Similarly, Respondents seek the interview notes for Hobbs, even though "his company recently litigated with Global IV over Global IV's alleged

selling practices." Renewed Motion at 4. Respondents thus had ample opportunity to depose Hobbs about that issue and should know what Hobbs has to say about Respondents' selling practices. Substantial need does not exist when the requesting party simply seeks to ascertain what information was provided to the SEC in an interview. Rather, substantial need for interview notes exists only when the requesting party has no other means of obtaining the underlying facts. See, e.g., Nadel, 2013 WL 1092144 at * 2 (finding no substantial need for staff interview notes because "[a]ll of the examples [of information needed by the movants] pertain to the interviews themselves, not the underlying facts of the case.") Here, because Respondents already know the underlying facts regarding their selling practices, and the Division has already disclosed the investment advice at issue, they do not have substantial need for the staff's interview notes.

The cases cited by Respondents are not to the contrary. Specifically, Respondents cite SEC v. Cuban, No. 3:08-CV-2050-D, 2013 WL 1091233 at *5-6 (N.D. Tex. Mar. 15, 2013) and SEC v. Trasher, No. 92 Civ. 6987 (JFK), 1995 WL 46681 at *8 (S.D.N.Y. Feb. 7, 1995). But, unlike here, the parties requesting the interview notes in those cases sought information that they did not already have. In Cuban, the court ordered the SEC to provide fact work product interview notes from an entirely separate investigation that touched on issues related to the Cuban case. That information was not available from other sources: a witness's recollection of statements Cuban made during a telephone conversation and the ensuing actions of the company, Mama.com. 2013 WL 1091233 at *5-6. Notably, the Court *declined* to order production of staff interview notes from the underlying investigation involving Cuban. Id., at *3-4. Similarly, in Trasher, the defendant sought interview notes that might disclose the witness's knowledge of

defendant's role in the transmission and receipt of insider information. Obviously, information about the witness's personal knowledge was not independently available to the defendant.[5]

In this matter, the purported information for which Respondents claim a substantial need is objective factual information already known to them. Thus, Respondents cannot demonstrate substantial need for the staff's notes of its interviews of Messrs. Hobbs, Miertschin or Harmon.

CONCLUSION

For the reasons stated herein, and any other reasons deemed appropriate by the Court, the Respondents' subpoena request should be denied.

Dated: November 5, 2015

Respectfully submitted,

Robert K. Gordon
W. Shawn Murnahan
Kyle Bradley
Attorneys for the Division of Enforcement

Securities and Exchange Commission
Atlanta Regional Office
950 East Paces Ferry Road NE, Suite 900
Atlanta, GA 30326
Telephone: (404) 842-7600
Fax: (404) 842-7679

[5] Trasher has been repeatedly distinguished by that court. See SEC v. Treadway, 229 F.R.D. 454 (S.D.N.Y. 2005); SEC v. Cavanagh, No. 98 Civ. 1818 (DLC), 1998 WL 132842 at *2, n.1.

CERTIFICATE OF SERVICE

The undersigned counsel for the Division of Enforcement hereby certifies that he has served the foregoing via email and overnight delivery:

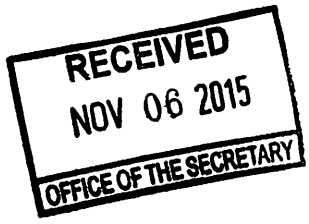
Brent J. Fields
Office of the Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Honorable James E. Grimes
Administrative Law Judge
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Stephen E. Hudson
Hillary D. Rightler
Josh C. Hess
Kilpatrick Townsend & Stockton, LLP
1100 Peachtree Street
Suite 2800
Atlanta, GA 30309

W. Shawn Murnahan

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-16649

In the Matter of **Ironridge Global Partners, LLC, Ironridge Global IV, Ltd.** **Respondents.**	**DECLARATION OF MATTHEW F. MCNAMARA IN SUPPORT OF THE DIVISION'S OPPOSITION TO RESPONDENTS' RENEWED REQUEST FOR A SUBPOENA TO THE COMMISSION**

DECLARATION OF MATTHEW F. MCNAMARA

I, Matthew F. McNamara, pursuant to 28 U.S.C. § 1746, do hereby declare as follows:

1. I am an attorney licensed in the state of Georgia. I have been licensed in Georgia since 2011. I was also licensed in the state of Illinois from 1998 until 2014.

2. I am employed as an Assistant Director in the Division of Enforcement (the "Division") of the United States Securities and Exchange Commission in the Atlanta Regional Office.

3. This declaration is submitted in support of the Division's Opposition to Respondents' Renewed Request for a Subpoena to the Commission. I have personal knowledge of the facts contained within this declaration.

4. In the investigation that resulted in this administrative proceeding, the interviews of Ken Hobbs, William Miertschin and Bruce Harmon were conducted after the staff obtained a formal order of investigation.

5. The interviews of Ken Hobbs and Bruce Harmon occurred after the staff had taken sworn testimony from Ironridge principal John C. Kirkland.

6. During Kirkland's testimony, the staff explored in detail the mechanics of Ironridge's 3(a)(10) program.

7. To assist its evaluation of whether any aspects of Respondents' acquisition and distribution of the shares obtained in the exchange transactions violated the federal securities laws, the staff interviewed representatives of various issuers that had participated in that program.

8. Staff Attorney Kyle Bradley, Staff Attorney Melissa Mitchell and I, who are attorneys for the Division, participated in the interviews. The interviews of Messrs. Hobbs and Harmon were conducted by Mr. Bradley and me. The interview of Mr. Miertschin was conducted by Mr. Bradley. Ms. Mitchell assisted in taking notes during that interview.

9. Mr. Bradley and I spent time preparing for the interviews, evaluating whether any aspects of Respondents' acquisition and subsequent distribution of the shares obtained in the 3(a)(10) exchange transactions violated the federal securities laws.

10. Typewritten notes were prepared after each interview.

11. The notes were not intended to reflect everything that was discussed during the interview, or the verbatim statements of the interviewee.

12. Rather, the notes reflect the information that the staff thought might be relevant in deciding whether to make an enforcement recommendation based on the manner in which Respondents acquired and distributed the shares they received.

13. There was no effort by the staff to specifically confirm the accuracy of the notes with the respective interviewee after the notes were prepared. With respect to Mr. Harmon, the

staff subsequently took sworn testimony from him that covered similar topic areas. My understanding from counsel for the Division is that the transcript from that testimony has been previously produced to Respondents in connection with this proceeding.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 5, 2015.

Matthew F McNamara / by WSM with express permission

Matthew F. McNamara
Assistant Director
United States Securities and Exchange Commission