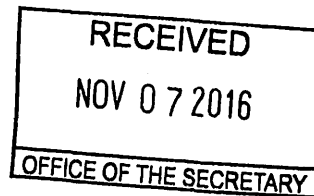


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GIBSON DUNN



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November 4, 2016

VIA HAND DELIVERY

The Honorable Carol Fox Foelak
100 F Street, N.E.
Washington, D.C. 20549

Re: *In the Matter of Lynn Tilton et al.*, Administrative Proceeding File No. 3-16462

Dear Judge Foelak:

I write regarding the Amended Privilege Log that the Securities and Exchange Commission's Office of Litigation and Administrative Practice ("OLAP") served on us in court yesterday afternoon. After months of Respondents trying to obtain discovery from the SEC and nine days into the trial, OLAP's dressed-up privilege log seeking to shield responsive inter-agency documents from disclosure is unavailing.

Although we received the Amended Privilege Log fewer than 24 hours ago, even a quick review of its entries reveals that OLAP's invocations of privilege remain unsupported and improper.

First, several entries (Log, Doc. #s 2-11) reflect communications between the Division of Enforcement and various Department of Justice personnel concerning "granting immunity to an individual who was being interviewed during the investigation." Mitchell Decl., ¶ 8. OLAP's claim that "[t]he individual does not appear on Respondents' or the Commission's witness lists," *see* Log, Doc. # 2, completely—but not surprisingly—misses the point. While the individual in question may not have appeared on any party's witness list, the entity employing that person very well may have, thereby constituting classic *Brady* and/or *Giglio* material. Respondents deserve to know who cooperated with the Division and what information that person provided. Further, the request for witness immunity was approved. *Id.*, Doc. #10. To the extent that any person executed a non-prosecution agreement or other document affording them immunity in exchange for testimony against Respondents, we are hard pressed to understand why that material was not produced to us weeks ago. There can be no more paradigmatic example of exculpatory material than a grant of immunity to a witness, even if the individual is not a testifying witness for the Division at this hearing.¹

¹ This is especially so if the Division chose to call another witness from the same employer, making the choice to avoid having to call a witness given immunity.

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Moreover, OLAP conveniently fails to apprise Your Honor that dozens of the entries on the privilege log (*see id.*, Doc. #s 12-66) concern a long-concluded investigation that resulted in the conviction of former Army colonel Norbert Vergez. Mr. Vergez pled guilty on April 20, 2015, and was sentenced on August 25, 2015. *See* Memorandum of Opinion and Order on Victim Status at 1, 7, *United States v. Vergez*, Case No. 5:15-cr-00086-LSC-HGD (N.D. Ala. Feb. 22, 2016). Although the law enforcement privilege can be used to protect “ongoing” investigations, OLAP cannot block Respondents’ access to long-overdue discovery where, as here, such investigations have been concluded and OLAP “ha[s] not provided any legitimate reason why disclosing this information will jeopardize future investigations.” *Morrissey v. City of N.Y.*, 171 F.R.D. 85, 91 (S.D.N.Y. 1997). Indeed, the declarations provided by Brent Mitchell, an attorney with the Division of Enforcement, and Richard Humes, the Associate General Counsel for OLAP, lack any credible explanation how privilege could possibly attach to a dormant, long-concluded investigation. *Compare, e.g.*, Declaration of Brent S. Mitchell (“Mitchell Decl.”), ¶ 8 (reciting the law enforcement entities with which the SEC communicated) with *In re City of N.Y.*, 607 F.3d 923, 944 (2d Cir. 2010) (“[T]he party asserting the law enforcement privilege bears the burden of showing that the privilege applies to the documents in question.”).

In any event, OLAP ignores the Division’s voluntary and deliberate production of several exchanges between the Division of Enforcement and the Department of Defense’s Office of Inspector General, including requests for access to the Division’s investigative file. *See, e.g.*, Exs. A-B (e-mails between Department of Defense Special Agent Lance Stamper and various Division lawyers, including Mr. Mitchell and Ms. Sumner). As a result, the Division has waived any claim of privilege over such communications. *See, e.g., U.S. Fidelity & Guaranty Co. v. Braspetro Oil Servs. Co.*, 2000 WL 744369 (S.D.N.Y. June 8, 2000). In one, for example, Mr. Stamper shares his understanding of Ms. Tilton’s imminent investment plans with the Division lawyers. *See* Ex. A.²

Finally, the Division also has not met its obligation to demonstrate that the work product doctrine extends to any of the documents on the Amended Privilege Log, let alone each and every one. The Division claims that the work product doctrine is applicable because each document listed was prepared by various legal and investigative staff “as part of then-ongoing investigations and in anticipation of bringing enforcement actions, civil proceedings, criminal proceedings, or other litigation.” Mitchell Decl., ¶¶ 13-14. Yet a blanket claim as to the applicability of the work product doctrine “does not satisfy the government’s burden of proof.” *In re Putnam Invest. Mgmt., LLC*, Administrative Proceedings Release No. 613, at 2

² Not only does OLAP necessarily know that the Vergez investigation is long over, but OLAP offers no reason to believe that there is any ongoing investigation by the U.S. Attorney’s Office for the Southern District of New York, who apparently last communicated with the Division in July 2015. *See* Mitchell Decl., ¶ 8; *see also* Log, Doc. #s 67-113 (reflecting communications between SDNY and Division).

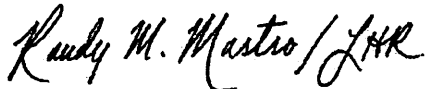
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(Mar. 26, 2004) (emphasis added). Indeed, certain of the documents, such as communications “concerning contact information for Respondent Lynn Tilton’s and Patriarch Partner’s [sic] counsel,” could not possibly contain work product. *See* Log, Doc. #s 75-82.

In short, OLAP has already had multiple bites of the apple with respect to its efforts to escape producing the SEC’s inter-agency communications about Respondents, and it is now attempting to take yet another one in the hope that the trial will conclude before Respondents can make effective use of the documents. We are about to start our case and are entitled to this evidence before we do. We therefore urge Your Honor to now order OLAP to produce the documents listed on its Amended Privilege Log.

Respectfully,

Handwritten signature of Randy M. Mastro in cursive script, with the initials "JHR" written at the end of the signature.

GIBSON, DUNN & CRUTCHER LLP

Randy M. Mastro

Attachments

cc: Dugan Bliss, Esq.
Nicholas Heinke, Esq.
Amy Sumner, Esq.
Mark Williams, Esq.

EXHIBIT A

From: Mitchell, Brent S. [MitchellB@SEC.GOV]
Sent: Thursday, October 31, 2013 2:55 PM
To: 'Stamper, Lance E., OIG DoD'
CC: Sumner, Amy A.
Subject: RE: New Tilton info

Great. I will circulate a dial-in so that all three of us can be on the line.

From: Stamper, Lance E., OIG DoD [mailto:Lance.Stamper@DODIG.MIL]
Sent: Thursday, October 31, 2013 2:54 PM
To: Mitchell, Brent S.
Subject: RE: New Tilton info

Yes, then I am heading out hunting!!

SA Lance Stamper
Defense Criminal Investigative Service
Huntsville Post of Duty
Bldg 3421 Gray Road
Redstone Arsenal, AL 35898
(256) 313-3262 office
[REDACTED] cell

From: Mitchell, Brent S. [mailto:MitchellB@SEC.GOV]
Sent: Thursday, October 31, 2013 1:53 PM
To: Stamper, Lance E., OIG DoD
Cc: Sumner, Amy A.
Subject: RE: New Tilton info

Lance -

Thank you for the email. We would be interested in hearing details, and I would like to introduce you to Amy Sumner, an attorney in our Denver office.

Would you be available Friday at 1 pm (DC) / 11 am (Denver)?

Brent

From: Stamper, Lance E., OIG DoD [mailto:Lance.Stamper@DODIG.MIL]
Sent: Thursday, October 31, 2013 2:25 PM
To: Mitchell, Brent S.
Subject: New Tilton info

Tilton is attempting to "buy out" the equity funds that hold MD Helicopters, Mobile Armored Vehicles and American LaFrance.

She is using \$600m of her own money and seeking to borrow \$800m from Bank of America. (She normally uses Wells Fargo, so not sure why she is going to B of A.)

She continues to worry about an SEC investigation.

Additionally, MD received a \$6m payment from a foreign country as a down payment on helicopters. Tilton transferred \$3m into her personal accounts. (Like you said previously, may be legal depending on how the agreements are written.)

Lance

SA Lance Stamper
Defense Criminal Investigative Service
Huntsville Post of Duty
Bldg 3421 Gray Road
Redstone Arsenal, AL 35898
(256) 313-3262 office
[REDACTED] cell

EXHIBIT B

From: Mitchell, Brent S. [MitchellB@SEC.GOV]
Sent: Thursday, April 18, 2013 8:25 AM
To: 'Stamper, Lance E., OIG DoD'
CC: Lee, Allison H.; Kelly, N. Creola; Metcalfe, Laura M.; Muoio, Reid
Subject: RE: Patriarch Access Request Form

Lance –

FYI: I confirmed with our IT folks that they've submitted the documents to be pulled and put on a hard drive. They handle a national flow of documents, so it should take two weeks.

Brent

From: Stamper, Lance E., OIG DoD [mailto:Lance.Stamper@DODIG.MIL]
Sent: Monday, April 08, 2013 12:34 PM
To: Mitchell, Brent S.
Subject: RE: Patriarch Access Request Form

Brent,
See attached.
Lance

SA Lance Stamper
Defense Criminal Investigative Service
Huntsville Post of Duty
Bldg 3421 Gray Road
Redstone Arsenal, AL 35898
(256) 313-3262 office
(256) 656-3753 cell

From: Mitchell, Brent S. [mailto:MitchellB@SEC.GOV]
Sent: Friday, April 05, 2013 3:39 PM
To: Stamper, Lance E., OIG DoD
Cc: Lee, Allison H.; Kelly, N. Creola
Subject: Patriarch Access Request Form

Lance –

Thanks again for getting in touch with us.

Attached is a template for an access request from a government agency to the SEC. You can put this on DOD letterhead and send it back to me as a PDF attachment. I'm travelling Monday and Tuesday, but I will be back for the rest of next week.

Brent

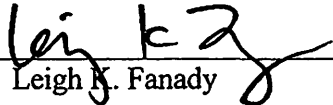
CERTIFICATE OF SERVICE

I hereby certify that I caused to be served true and correct copies of a letter from Randy Mastro to Judge Foelak, together with its exhibits, on this 4th day of November 2016 in the manner indicated below:

United States Securities and Exchange Commission
Office of the Secretary
Attn: Secretary of the Commission Brent J. Fields
100 F Street, N.E.
Mail Stop 1090
Washington, D.C. 20549
Fax: (202) 772-9324
(By facsimile and original and three copies by Federal Express)

Hon. Judge Carol Fox Foelak
100 F. Street N.E.
Mail Stop 2557
Washington, D.C. 20549
(By hand during court proceedings and by Federal Express)

Dugan Bliss, Esq.
Division of Enforcement
Securities and Exchange Commission
Denver Regional Office
1961 Stout Street, Ste. 1700
Denver, CO 80294
(By hand during court proceedings and by email pursuant to parties' agreement)



Leigh K. Fanady