

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-cv-20301-LENARD/GOODMAN

UNITED STATES SECURITIES	:
AND EXCHANGE COMMISSION	:
	:
v.	:
	:
MATHIAS FRANCISCO SANDOVAL	:
HERRERA and MARIA D. CIDRE	:
	:

**DEFENDANTS’ MOTION TO COMPEL THE LAW FIRM OF
MORGAN LEWIS & BOCKIUS, LLP, TO PRODUCE DOCUMENTS**

Defendants MATHIAS SANDOVAL HERRERA (“Sandoval”) and MARIA CIDRE (“Cidre”), through counsel, and pursuant to Fed.R.Civ.P. 45(d)(2)(B)(i), respectfully move the Court to compel Morgan Lewis & Bockius, LLP (“Morgan Lewis”) to comply with a subpoena duces tecum (attached as Exhibit 1) and produce interview memoranda and notes it generated during its internal investigation of General Cable Corporation (“GCC”).

I. INTRODUCTION

This motion seeks to level the playing field. For five years, the SEC has utilized work product generated and voluntarily provided by Morgan Lewis – including oral “downloads” of witness interviews – to help focus its investigation, examine witnesses, and formulate the theory of the Defendants’ liability in this case. The Defendants now seek access to the same information through subpoena, yet Morgan Lewis is invoking the very work-product privilege it has already waived. The motion to compel should be granted.

II. BACKGROUND

1. This is a case brought by the SEC alleging that Defendants Sandoval and Cidre violated various securities laws by failing to promptly inform their superiors at GCC about accounting discrepancies in GCC's inventory in Brazil.

2. GCC is a publicly-traded, global manufacturer of copper, aluminum, and fiber optic wire and cable products. One of GCC's divisions is known as GCC-Rest of World ("GCC-ROW"), which oversees GCC's operations in Brazil. Until late 2012, Defendants Sandoval and Cidre were company executives with GCC-ROW.

3. At all times relevant, Deloitte was GCC's independent auditor. Deloitte issued unqualified opinions for GCC's financial statements for 2009-2011.

4. In October 2012, GCC announced that it had identified accounting errors relating to inventory at its Brazil operations, that its previously issued financial statements for 2009-2011, audited by Deloitte, should not be relied upon, and that it intended to issue a restatement of financials.

5. GCC commenced an internal investigation and retained Morgan Lewis to lead it. The Morgan Lewis team consisted of the following attorneys, among others: Matthew Siembieda, Christian Mixter, Alan Singer, Thoth Weeda, Alison Tanchyk, Timothy Katsiff, and Maria Arbona. Morgan Lewis enlisted the assistance of FTI Consulting as its forensic accountants, under *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961).

6. Morgan Lewis attorneys interviewed dozens of witnesses and prepared notes and memoranda of those interviews. Morgan Lewis also prepared memoranda relating to various other aspects of the investigation. Many of the witnesses interviewed live in Brazil, outside of the jurisdiction of this Court.

A. Disclosure to the SEC

7. After retaining Morgan Lewis, GCC reported the accounting errors to the SEC, which launched its own investigation led by the following SEC personnel: Anita Bandy, Conway Dodge, Gerald Hodgkins, Rachel Nonaka, Colin Rand, and Eric Hubbs. This investigation ultimately led to a Cease and Desist Order entered against GCC in December 2016, which required the payment of a civil monetary penalty in the amount of \$6,500,000. See Order Instituting Cease-And-Desist Proceedings (attached as Exhibit 2).

8. During the internal investigation, Morgan Lewis attorneys regularly communicated with the SEC, voluntarily produced documents, and routinely made Brazil-based witnesses available for interviews with the SEC. See Exh. 2, at pp.7-8, ¶¶31-32. Beyond that, Morgan Lewis also shared much of its work product with the SEC, orally and in writing, as demonstrated below and in the attached documents. For example:

a. On April 15, 2013, Morgan Lewis made a power point presentation to the SEC. See SEC Presentation (attached as Exhibit 3). Among other things, the presentation contained an events timeline, the names of witnesses whom Morgan Lewis had already interviewed, (Exh. 3, at pp.9-11), a breakdown of the transactions deemed to be at the heart of the accounting discrepancy, and the results of its investigation.

b. On Monday, September 23, 2013, SEC counsel Anita Bandy thanked the Morgan Lewis attorneys for “meeting with us last Friday and taking the time to further explain the criteria used for categorizing the inventory transactions.” See E-mail of Sept. 23, 2013 (attached as Exhibit 4). SEC counsel requested that Morgan Lewis provide certain documents and information, “as discussed” at that meeting, including **“[a]n oral recitation of what each (relevant) witness stated during interviews.”**

(Exh. 4) (emphasis added). The SEC sought that information to prepare for its own interviews of certain GCC personnel.

c. On October 29, 2013, Morgan Lewis attorneys met with SEC staff and, at a minimum, discussed their previous interviews of the following individuals: Evelyn Silva, Maria Cidre, Jose Antonio Miranda, Cesar Ungaretti, Angela Pugliese, Maria Longhi, Roseani Balarini, Danielle Costa, Murylo Alves, Luis Roz, Marcelo Osvaldo, and Alex Silva. See E-mail from Christian Mixter to Anita Bandy, Oct. 16, 2013 (scheduling the debriefing session) (attached as Exhibit 5); see Privilege Log (attached as Exhibit 6), at p.1, Entry #7 (confirming that Morgan Lewis met with SEC staff and discussed the interviews of the above-listed witnesses).

d. The SEC's Order Instituting Cease-and-Desist Proceedings confirms that GCC "provided complete and timely cooperation with the staff by providing detailed presentations on the key findings of the investigation, and promptly producing all relevant documents and information (including thousands of documents translated into English), chronologies, key document binders, **interview downloads**, and forensic accounting analyses." See Exhibit 2, at pp.7-8, ¶31 (emphasis added).

e. In a recent discovery letter sent to the defense, the SEC further confirmed the fact of the interview downloads when it advised that "**we do not intend to produce the notes we took of meetings with Morgan Lewis in which counsel relayed the content of witness interviews that the firm conducted.**" We note that the presentations by Morgan Lewis to SEC and Department of Justice staff contain references to statements of certain interviewees..." See Letter from Kevin Lombardi, Oct. 27, 2017 (attached as Exhibit 7), at p.4 (emphasis added).

B. Disclosure to Deloitte

9. During Morgan Lewis's internal investigation of GCC, Deloitte formed an Investigative Advisory Procedures ("IAP") team to independently evaluate whether the Morgan Lewis investigation was adequate, competent, and objective. The IAP team consisted of auditors including James Cottrell, Craig Westbay, and Omid Fardanesh.

10. During this same period, Deloitte itself had reason to fear that it would be charged by the SEC in regard to its audits of GCC and, in or about December 2013, through its own counsel, entered into a tolling agreement with the SEC to extend any applicable statute of limitations. See Tolling Agreement (unsigned version attached as Exhibit 8).

11. Morgan Lewis regularly shared its work product with Deloitte's IAP team, orally and in writing. This disclosure was likely even broader than the disclosure to the SEC, as demonstrated below and in the attached documents.

a. Deloitte and Morgan Lewis discussed the "[r]eading to Deloitte by ML of key interview notes." See Emails of Jan. 16, 2013 (attached as Exhibit 9). Attorney Matt Siembida read a "substantially detailed" memorandum to the IAP team, including "details around interviews, documents review and sampling/testing of questionable transactions." See Omid Fardanesh Notes of Meeting of Feb. 17, 2013 (attached as Exhibit 10).

b. Deloitte's "Summary Memo Regarding an Internal Investigation of General Cable Corporation" confirms that Morgan Lewis "provided Deloitte access to review" various documents, including Morgan Lewis's "[s]ummary memo of allegations and Investigative Team's findings" and "**[i]nterview notes for all individuals interviewed by the Investigative Teams.**" See Deloitte Memo (attached as Exhibit 11), at p.9 (emphasis added). Morgan Lewis read to Deloitte the interview notes of witnesses selected by Deloitte.

III. THE SUBPOENA DUCES TECUM

12. Morgan Lewis's work-product has afforded the SEC a decided advantage in this litigation. The SEC was able to focus its investigation and decide which of the nearly 40 witnesses – many of whom were GCC employees in Brazil – to interview and from whom to elicit sworn statements during the investigation. Morgan Lewis facilitated many of these interviews. The interview downloads informed the SEC of which witnesses potentially exculpated the defendants; they also likely provided potential impeachment evidence of witnesses (*e.g.*, prior statements). The interview downloads continue to assist the SEC in deciding which GCC employees it will seek, with Morgan Lewis's assistance and as Morgan Lewis has promised to the SEC as part of its settlement with the SEC, to make available as witnesses at trial.

13. The defendants do not have access to the same information. Moreover, the defendants have no ability to subpoena Brazilian witnesses for deposition or even to take voluntary depositions from them because Brazil is not a party to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters. Rather, the defendants would have to go through the lengthy, laborious, and expensive process of seeking letters rogatory which, even if granted, would result only in questioning by the local Brazilian court and only from a list of submitted questions, a highly insufficient approach. *See, e.g., United States v. Trout*, 633 F.Supp. 150, 151 (N.D.Ca. 1985).

14. Thus, on August 9, 2017, counsel for Defendant Sandoval (on behalf of the joint defense) issued a subpoena to Morgan Lewis, seeking production, pursuant to Fed.R.Civ.P. 45, of four categories of documents, including the interview memos. See Exhibit 1.

15. Morgan Lewis tendered its initial objections on August 23, 2017, and then followed up with a Privilege Log on September 22, 2017. See Privilege Log (Exh. 6). Defendants Sandoval and Cidre agreed to withdraw their request for any written documents that were actually provided by Morgan Lewis to the SEC because those documents would presumably be produced to the Defendants by the SEC.

16. Moreover, in the interest of further narrowing the issues, this motion to compel is limited to only the witness interview memos.¹ Thus, with reference to the Privilege Log (Exhibit 6), this motion to compel seeks production of the following documents:

Privilege Log, Request 1:	Entries 7.1, 7.2, 7.3, 7.4, 7.5, 7.6
Privilege Log, Request 2:	Entries 1 through 44

IV. MEMORANDUM OF LAW

This Court is obviously very familiar with the doctrines of work-product and waiver, having published several opinions which set forth and analyze the applicable law. *See, e.g., Breslow v. Am. Sec. Ins. Co.*, No. 14-628340, 2016 WL 698124, *5-8 (S.D. Fla. Feb. 19, 2016); *Brown v. NCL (Bahamas), Ltd.*, 155 F. Supp. 3d 1335, 1338-41 (S.D. Fla. 2015). To summarize, work-product protection is waived when privileged materials are “disclosed in a manner which is either inconsistent with maintaining secrecy against opponents or substantially increases the opportunity for a potential adversary to obtain the protected information.” *Brown*, 155 F. Supp. 3d at 1339 (citation omitted) (collecting cases).

Defendants do not dispute that the interview memos were prepared by Morgan Lewis in anticipation of litigation. But, likewise, Morgan Lewis cannot seriously dispute that the

¹ In its Privilege Log, Morgan Lewis describes the interview notes as “Memorandum containing counsel’s mental impressions, conclusions, and opinions re: interview of [name of witness].”

SEC was the adversary of Morgan Lewis's client, GCC; the SEC was investigating GCC for misstatements in its financial reports and eventually imposed a \$6.5 million civil penalty against GCC. *See United States v. Bergonzi*, 216 F.R.D. 487, 497-99 (N.D. Cal. 2003) (company waived work-product protection by disclosure to SEC because SEC had issued a Wells letter to the company); *see also In re Initial Pub. Offering Litig.*, 249 F.R.D. 457 (S.D.N.Y. 2008) (company waived work-product protection by disclosure of memoranda to the SEC, which was investigating possibility of company's wrongdoing, to limit liability for that wrongdoing); *accord In re Qwest Commc'ns Int'l Inc.*, 450 F.3d 1179 (10th Cir. 2006).

Thus, Morgan Lewis waived the work-product privilege when it orally downloaded interview memos to the SEC. *See SEC v. Vitesse Semiconductor Corp.*, No. 10-9239 (JSR), 2011 WL 2899082 (S.D.N.Y. July 14, 2011) ("While it is undisputed that NuHo did not actually produce the notes themselves to the SEC, after reviewing the SEC's notes the Court found that NuHo effectively produced these notes to the SEC through its oral summaries."); *SEC v. Roberts*, 254 F.R.D. 371, 377 (N.D. Cal. 2008) ("to the extent that Howrey orally disclosed to the government factual information contained in any of the written material identified by Roberts, Howrey has waived the attorney-client and work product privileges with respect to that information."); *SEC v. Berry*, No. 07-04431, 2011 WL 825742, *5-6 (N.D.Ca. Mar. 7, 2011) (finding waiver of privilege in interview memoranda for five witnesses where attorneys orally disclosed to the SEC facts contained in interviews). The evidence shows that Morgan Lewis orally relayed the contents of at least twelve interview memos. See Privilege Log (Exh. 6), at p.1, Entry #7.

Likewise, Morgan Lewis waived the privilege in the interview memos by providing the SEC (and apparently the DOJ) with written memos which specifically referenced witness

statements, see Exh. 7, at p.4 (“We note that the presentations by Morgan Lewis to SEC and Department of Justice staff contain references to statements of certain interviewees.”), and also provided a detailed explanation of Morgan Lewis’s methodology and findings based at least in part on those interviews. See Exh. 3; *In re Weatherford Int’l Securities Litig.* No. 11-1646, 2013 WL 12185082, *7 (S.D.N.Y. Nov. 19, 2013) (“Therefore, Weatherford and its Audit Committee waived work product protection for the material that they provided to the SEC, as well as any underlying factual material explicitly referenced in it.”).

Both Morgan Lewis and the SEC took notes of their multiple meetings and conferences. Compare Exh. 6, p.1, Entry #7 with Exh. 7, at p.4. Those notes are the primary written evidence of what information was provided to the SEC. At a minimum, the Court should direct Morgan Lewis and the SEC to produce to the Court, for *in camera* review, their notes/memos of all meetings and conference calls between them so that Court may determine the scope of the information that was actually communicated by Morgan Lewis to the SEC.

The defendants have a substantial need for the interview memos. The witnesses, many of whom are in Brazil, were interviewed 4-5 years ago. Thus, even assuming the Defendants can secure their testimony by deposition or letters rogatory, “these depositions ‘cannot reveal the same detail’ as interviews conducted ‘when the witnesses’ memories were fresh.” *SEC v. Vitesse Semiconductor Corp.*, 771 F.Supp.2d 310, 314 (S.D.N.Y. 2011) (citation omitted). Disclosure to the Defendants is necessary to “level the playing field.” *Id.*

It appears that Morgan Lewis’s disclosure to Deloitte was even broader than its disclosure to the SEC; the Deloitte IAP team was given the opportunity to have all interview memos read to them by Morgan Lewis attorneys. See Exh. 11, at p.9. However, the question of whether Deloitte was an adversary or a “conduit to a potential adversary,” see *Merrill Lynch*

& Co., Inc. v. Allegheny Energy, Inc., 229 F.R.D. 441, 446 (S.D.N.Y. 2004), is not as straightforward as with the SEC. The “courts are split in their treatment of disclosures to a corporation’s accountants or auditors,” *id.*, with the majority of courts holding that an independent or outside auditor typically shares a common interest with the corporation for purpose of the work-product and waiver doctrines. *See generally Westernbank Puerto Rico v. Kachkar*, No. 07-1606, 2009 WL 530131, *7-8 (D.P.R. Feb. 9, 2009) (collecting cases). *Compare Medinol, Ltd. v. Boston Scientific Corp.*, 214 F.R.D. 113 (S.D.N.Y. 2002) (finding waiver where material was shared with company’s outside auditor).

This case, however, is different from those cases which have found a common interest between the corporation and its independent auditor. Deloitte itself was on the SEC’s radar and entered into a tolling agreement with the SEC regarding its own conduct. See Exh. 8. Deloitte was a potential adversary to GCC because Deloitte was motivated to claim that GCC personnel had misled Deloitte regarding the accounting practices at GCC. Moreover, Deloitte was a potential conduit of information to the SEC in an effort to avoid or minimize its own liability. Thus, Morgan Lewis’s disclosure of its interview memos to Deloitte waived the work product privilege as to those memos; there is no need to determine the *extent* of the waiver because Deloitte was given the opportunity to have all of the interview memos read to it.

V. CONCLUSION

For the foregoing reasons, this Court should compel production of the witness interview notes and memoranda. Should the Court need additional information to determine the *extent* of the waiver, or should the Court need any additional information to determine the nature of the relationship among Morgan Lewis, the SEC, and Deloitte, Defendants respectfully request an evidentiary hearing on this motion.

Respectfully Submitted,

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COMPLIANCE WITH LOCAL RULE 7.1(a)(3)

Defense counsel hereby certify that they previously conferred with counsel for the non-party Morgan Lewis, who asserts a privilege and opposes this motion. Defense counsel also contacted Kevin Lombardi, counsel for the SEC, who advises that the SEC takes no position on this motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have electronically filed the foregoing with the Clerk of the Court using the CM/ECF on October 31, 2017, and that the foregoing is served via transmission of Notice of Electronic Filing generated by CM/ECF to all counsel of record. I further certify that the foregoing is being served by e-mail on Christian J. Mixter, counsel for the third-party, Morgan Lewis, at cmixter@morganlewis.com, and by mail to 1111 Pennsylvania Avenue, N.W., Washington, D.C. 20004-2541.

/s/Scott A. Srebnick
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