UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

MATHIAS FRANCISCO SANDOVAL HERRERA and MARIA D. CIDRE,

Defendants.

MORGAN LEWIS' MOTION FOR CLARIFICATION OR RECONSIDERATION OF THE ORDER ON DEFENDANTS' MOTION TO COMPEL PRODUCTION

Morgan, Lewis & Bockius LLP ("Morgan Lewis") moves for an Order clarifying the scope of the Order on Defendants' Motion to Compel Production From Non-Party Law Firm (the "December 5 Order", ECF 71), or, in the alternative, for reconsideration of the December 5 Order.

I. Introduction

On December 5, 2017, this Court entered an Order granting Defendant's motion to compel Morgan Lewis to produce to its work product with respect to twelve witness interviews that its attorneys disclosed to the Securities and Exchange Commission ("SEC") through oral discussions during the course of an SEC accounting investigation. The December 5 Order also requires Morgan Lewis to file under seal for *in camera* review copies of notes and memoranda reflecting other work-product information its attorneys provided to the SEC and/or the Department of Justice ("DOJ").

Morgan Lewis requests clarification of the scope of these requirements, as set forth below. In the alternative, Morgan Lewis requests that this Court reconsider the December 5 Order to the extent that it requires Morgan Lewis to produce work-product protected materials that were not disclosed to the SEC.

II. The Scope of What Morgan Lewis Must Produce to Defendants

On December 5, this Court entered an Order requiring Morgan Lewis to produce its work product relating to twelve witness interviews, finding that Morgan Lewis waived the attorney-work product protection as to those twelve interviews by orally summarizing them to the SEC during an October 29, 2013 meeting. (ECF 71 at 20; *see also* Defendants Motion to Compel the Law Firm of Morgan Lewis & Bockius, LLP, to Produce Documents ("Motion to Compel"), ECF 52-6 (Morgan Lewis privilege log describing the notes of the Oct. 29, 2013 SEC meeting)). Morgan Lewis provided those oral summaries to the SEC in response to its request for an "oral recitation of what each (relevant) witness stated during interviews[.]" ECF 52-4 (Sept. 23, 2013 SEC e-mail request). For purposes of this motion, Morgan Lewis accepts the Court's waiver finding, but seeks clarification concerning the Firm's compliance with the Order in light of the sensitive nature of the materials at issue.

The attorney notes of the October 29, 2013 meeting that Defendants proposed be reviewed *in camera* (Def. Br., ECF 52, at 9), reflect the substance of the oral communications conveyed to the SEC by Morgan Lewis concerning the twelve interviews at issue. They reflect substantial questioning by SEC attorneys about the interviews, and Morgan Lewis' responses thereto, including that a Morgan Lewis attorney read text from a single page of just one of the twelve interview memos.

While perhaps not clear from Morgan Lewis' November 10 response to Defendants' Motion to Compel, Morgan Lewis believes that those attorney notes, subject to appropriate

opinion work product redactions,[1] are the best evidence of what was orally described to the SEC. Defendants agree, at least according to their Motion to Compel, although they have advised Morgan Lewis that they intend to oppose this motion. *See* ECF 52 at 9 ("Both Morgan Lewis and the SEC took notes of their multiple meetings and conferences. ***Those notes are the primary written evidence of what information was provided to the SEC***.") (Emphasis added, internal citations omitted).

The Court's December 5 Order also directs Morgan Lewis to produce for *in camera* review a number of documents that include the October 29, 2013 notes, and simultaneous with the filing of this motion, Morgan Lewis is making that submission. Morgan Lewis respectfully requests that, after the Court reviews in camera the October 29, 2013 notes, the Court modify its Order to provide that, instead of the interview notes and memos for the twelve interviews at issue, only the October 29, 2013 notes (and the portion of the interview memo read to the SEC) be produced to Defendants. Such modification would be consistent with the Court's finding that Morgan Lewis' waived work product, but also with the principle that disclosure of work product-protected materials waives the privilege only as to the actual material disclosed, and not other materials.[2]

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[1] Morgan Lewis has highlighted a portion of the notes that reflect the authoring attorney's notes to himself, which were not shared with the SEC, and in any event, are best characterized as opinion, as opposed to fact work product. *See Guarantee Ins. Co. v. Heffernan Ins. Brokers, Inc.*, No. 13-23881-CIV, 2014 WL 5305581, at *2 (S.D. Fla. Oct. 15, 2014) ("Unlike factual work product, opinion work product enjoys almost absolute immunity from discovery.") (internal quotations omitted).

[2] *See, e.g.*, *Guarantee Ins. Co. v. Heffernan Ins. Brokers, Inc.*, 300 F.R.D. 590, 598–99 (S.D. Fla. 2014); *Securities and Exchange Comm. v. Berry*, No. 07-04431, 2011 WL 825742, *6 (N.D. Ca. Mar. 7, 2011) (use of written witness statements by attorneys to refresh their recollections when discussing the witnesses to the government effected a waiver of those written statements, not a broad subject matter waiver encompassing underlying attorney notes and draft interview memoranda).

III. **The Scope of What Morgan Lewis Must Produce for the Court's In Camera Review**

At page 20 of its December 5 Order, the Court ordered Morgan Lewis, within seven days, to

> file under seal (with a courtesy copy to chambers) for *in camera* review copies of the notes and memoranda reflecting any other work-product information its attorneys provided to the SEC and the DOJ about the employee interviews.

December 5 Order, at 20; *see also id.* 15 (requiring Morgan Lewis to file under seal "a copy of all attorney notes discussing or reflecting what information was disclosed to the SEC or the Department of Justice during meetings (or otherwise)").

Morgan Lewis wishes to point out that the Court's language could be read literally to require it to turn over work product information that goes well beyond Defendants' subpoena and Defendants' motion to compel and the confines of the underlying litigation involving the SEC and Defendants, which Morgan Lewis does not believe the Court intended, and which Morgan Lewis cannot do and remain faithful to its professional obligations to its client, General Cable Corporation.

Morgan Lewis is not a party to this litigation, and is only before this Court because of Defendants' August 30, 2017 subpoena. (*See* ECF 52-1). That subpoena originally consisted of four document requests. Request 2, which sought interview materials shared with Deloitte & Touche, is no longer operative as a result of the December 5 Order. Requests 3 and 4, which sought documents shared with Deloitte other than interview materials, were explicitly removed by Defendants from their Motion to Compel (*see* ECF 52 at 7). This leaves Request 1, which called for

> 1. The "detailed presentations on the key findings of the investigation," "chronologies," "interview downloads" and "forensic accounting analyses" referenced in paragraph 31 of the Order Instituting Proceedings against General Cable Corporation

> dated December 29, 2016 [SEC Release No. 79702] (attached as Exhibit A), including any memoranda, notes, talking points, PowerPoint slides or other materials on which the Firm relied to make any related download or oral presentation(s) to the SEC.

Request 1 contains two important limitations:

The first limitation relates to subject matter. Request 1 invokes and attaches the SEC Order entered against General Cable on December 29, 2016 [SEC Release No. 79702] with respect to accounting matters (ECF 52-2), and *not* the SEC Order entered against General Cable on December 29, 2016 [SEC Release No. 79703] with respect to Foreign Corrupt Practices Act ("FCPA") matters. Morgan Lewis' interactions with the SEC Staff (and the DOJ) in connection with the FCPA matter do not bear any relation to the accounting-related case that the SEC filed against Defendants, and are not covered by Defendants' Subpoena. Morgan Lewis accordingly seeks clarification that the December 5 Order does not extend to interactions (and Morgan Lewis' underlying notes describing them) with the DOJ and SEC concerning the FCPA matter.

The second limitation relates to time. Request 1 requests the presentations, chronologies, downloads, and analyses referenced in paragraph 31 of the SEC's accounting order, Release No. 79702, dated December 29, 2016 – in other words, those that occurred on or before December 29, 2016. Morgan Lewis does not understand Defendants' Subpoena to refer to any of its interactions with the SEC Staff *after* December 29, 2016, both because the language used in Defendants' subpoena excludes those interactions and because the concept behind Defendants' subpoena (as well as Defendants' Motion to Compel and the December 5 Order) – namely, that Morgan Lewis waived the work product protection by sharing work product with General Cable's then-adversary, the SEC, during the SEC's investigation – has no application to the period after the SEC issued its Order resolving that investigation. In fact, Paragraph 34 of the SEC's December 29, 2016 Order obliges General Cable, going forward, to "cooperate fully with

the Commission in any and all investigations, litigation, or other proceedings relating to or arising from the matters described in this Order" (ECF 52-2 at 8), which is the antithesis of an adversary relationship for purposes of a work product waiver analysis. Morgan Lewis accordingly seeks clarification that the December 5 Order directing an *in camera* review does not extend to communications with the SEC Staff ***after*** December 29, 2016.

Putting aside the written factual presentations that Morgan Lewis physically provided to the SEC Staff during the investigation, all of which Defendants have confirmed having received from the SEC,[3] Morgan Lewis understands the December 5 Order to concern the documents listed on Morgan Lewis' privilege log for Request 1 (ECF 52-6 at 1). Of these, Entries 7.1 through 7.6[4] are the interview notes and memoranda as to which Morgan Lewis seeks clarification in Part II above. Focusing on the remainder – Entries 1-6, 7, and 8-11 – Morgan Lewis notes that Defendants excluded *all* of those documents from their Motion to Compel, choosing instead to seek production of Entries 7.1 through 7.6 (ECF 52 at 7). Because Defendants abandoned their effort to compel these documents at the outset of the Motion to Compel, Morgan Lewis never briefed whether those documents should themselves be produced to Defendants.[5]

Although Defendants do not seek production of Entries 1-6, 7, or 8-11 themselves, those documents do represent the results of a good-faith search by Morgan Lewis for notes that reflect

[3] Defendants appended only one of those presentations to their Motion to Compel (ECF 52-3). If Defendants had thought that others of those presentations supported their waiver argument, presumably they would have appended those other presentations as well.

[4] Entry 7.6 is a composite entry that incorporates by reference the interview notes and memoranda referenced in Entry 7 that appear individually elsewhere on Morgan Lewis' privilege log.

[5] Morgan Lewis agreed to in camera review by the Court of one of those documents, Entry 7, which is the only one of them that appears to fall within the SEC's term "interview download." *See supra* Part II herein.

"detailed presentations on the key findings of the investigation," "chronologies," "interview downloads" and "forensic accounting analyses" referenced in paragraph 31 of the Order Instituting Proceedings against General Cable Corporation dated December 29, 2016. Thus, they appear to be the documents that the Court seeks to review *in camera* in order to determine whether additional witness interview notes and memoranda (or, the notes of Morgan Lewis' meetings with the SEC about the substance of those interviews) -- should be turned over to the Defendants. With that understanding, today we are filing copies of the documents listed in Morgan Lewis's Request 1 privilege log (other than Entries 7.1-7.6) under seal for the Court's *in camera* review.

III. In the Alternative, this Court Should Reconsider the December 5 Order, to the Extent that it Requires Morgan Lewis to Produce Work-Product Protected Materials

A motion for reconsideration of a non-final order may be brought to "correct clear errors of law or fact." *See Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 806 n.5 (11th Cir. 1993). Courts have delineated three major grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice. *See Carnival Corp. v. Rolls-Royce PLC*, No. 08-23318-CIV, 2010 WL 1854099, *1 (S.D. Fla. May 3, 2010). As written, the December 5 Order requires Morgan Lewis to produce work product-protected interview memoranda, which would result in a manifest injustice. *Cf. Steel Works Rebar Fabricators, LLC v. Alterra America Ins. Co.*, No. 11-24032 CIV, 2012 WL 1414142, *2 (S.D. Fla. April 20, 2012) (finding that a discovery order would not be reconsidered, as it "will not result in the waiver of any privilege or cause any significant burden" and therefore does not result in manifest injustice).[6]

[6] Other federal courts have found that compelling the production of privileged materials results in a manifest injustice. *See e.g., Pengate Handling Sys. inc. v. Westchester Surplus Lines Ins,*

As explained in the December 5 Order, "[t]here is no dispute here that the notes and memoranda prepared by ML attorneys [as part of an internal investigation of General Cable Corporation] are in fact work product material." (ECF 71 at 7-8). Further, according to the Order, Morgan Lewis waived the privilege only for "the interview notes and memoranda ***that were orally downloaded*** [by Morgan Lewis to the SEC]." (*Id.* at 2) (emphasis added). The "oral downloads" were provided "[o]n October 29, 2013, [when] ML attorneys met with SEC staff…" (*Id.* at 6). Thus, Morgan Lewis' interview notes and memoranda that were ***not*** orally downloaded to the SEC at the October 29, 2013 meeting are attorney work product for which there has been no finding of waiver.

The Morgan Lewis attorney notes are the best evidence of what was orally described to the SEC at the October 2013 meeting, as argued by Defendants in the Motion to Compel. *See* ECF 52 at 9. To avoid the manifest injustice of requiring Morgan Lewis to produce protected work-product material, Morgan Lewis respectfully requests that this Court review the October 29, 2013 Morgan Lewis attorney notes to determine which materials were orally downloaded to the SEC, and accordingly modify its Order to require production of only those materials for which the work product privilege was waived.

Co., CIV 1:06-CV-0993, 2007 WL 1176021, *3 (M.D. Pa. April 20, 2007) ("Because the attorney-client privilege and the protections it affords are of the utmost importance, if the court were to compel production of privileged material, manifest injustice would occur.") (internal citation omitted); *Carbajal v. Lincoln Ben. Life Co.*, CIV-A-06-cv-00884-EWN-KLM, 2007 WL 3407345, *6 (D. Colo. Nov. 13, 2007) ("Considering that grounds for a motion to reconsider include 'the need to correct clear error or prevent manifest injustice,' this Court finds that it would constitute manifest injustice to hold that Defendant waived its attorney-client, work product and joint defense privileges due to an inadequate original privilege log")(internal citation omitted).

IV. Conclusion

For the foregoing reasons, Morgan Lewis' Motion for Clarification should be granted, or, in the alternative, the Court should reconsider the December 5 Order.

Certificate of Compliance with Local Rule 7.1(a)(3)

Pursuant to S.D. Fla. L.R. 7.1(a)(3), Morgan Lewis contacted Defendants' counsel regarding the relief requested in this motion. Defendants, through their counsel Scott Skrebnick, have advised that they do not agree to the relief requested.

Pursuant to S.D. Fla. L.R. 7.1(a)(3), Morgan Lewis contacted Plaintiff's counsel, Kevin Lombardi, regarding the relief requested in this motion, and Mr. Lombardi advised that Plaintiff does not oppose this Motion.

Date: December 12, 2017

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I hereby certify that on December 12, 2017, I electronically filed the foregoing Morgan, Lewis & Bockius LLP's Motion for Clarification, or, in the Alternative, for Reconsideration along with the Certificate of Compliance with S.D. Fla. L.R. 7.1(a)(3), on all counsel of record via the CM/ECF system.

s/Alison Tanchyk
Alison Tanchyk