ALJ

ADMINISTRATIVE PROCEEDING
FILE NO. 3-11259

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
January 12, 2004

In the Matter of	:	
	:	
MICHAEL BATTERMAN and	:	ORDER
RANDALL B. BATTERMAN III	:	
	:	
	:	

After the Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings, the Division of Enforcement (Division) provided Respondents Michael Batterman and Randall B. Batterman III (collectively, the Battermans) with a timely opportunity to inspect and copy its investigative file.[1] See Rules 230(a)(1) and 230(d) of the Commission's Rules of Practice.

Pursuant to my instructions, the Division also prepared a list of the documents it withheld from inspection and copying on the grounds of privilege (Privilege Log). See Rule 230(c) of the Commission's Rules of Practice; Prehearing Conference of Oct. 29, 2003, at pages 23-25. Most of the items on the Privilege Log cited "work product 230(b)(1)(ii)" as the basis for the Division's determination to withhold production.[2] Four items on the Privilege Log cited a "law enforcement privilege" as the basis for the Division's determination to withhold production.

[1] The Division represented that many of the older documents in its original investigative file were lost as a result of the September 11, 2001, tragedy at the World Trade Center (Prehearing Conference of Nov. 20, 2003, at pages 13-16). On December 15, 2003, the Division submitted a letter describing the extent of the loss and the efforts it made to reconstruct the investigative file. On December 19, 2003, the Battermans asserted that the Division's explanation "strains credulity." I accept the Division's explanation. I find no merit to the Battermans' position.

[2] This was a shorthand reference to Rule 230(b)(1)(ii) of the Commission's Rules of Practice, which provides that the Division may withhold a document if it is "an internal memorandum, note or writing prepared by a Commission employee . . . , or is otherwise attorney work product and will not be offered in evidence."

The Parties' Pleadings

On December 12, 2003, the Battermans submitted a letter challenging the Division's claim of privilege with respect to eleven withheld documents. The Battermans also broadly objected to the Division's invocation of the work product and law enforcement privileges ("nomenclature which boggles one's mind in [its] indefinable obscurity"). The Battermans expressed particular concern about withheld documents relating to the "Upjohn insider trading case," a matter in which Michael Batterman previously testified. Finally, the Battermans stated that they were "confident" that the withheld documents contain exculpatory material that the Division is obliged to produce. In recognition of the Battermans' pro se status, I will treat their letter as a motion to compel the production of documents.

On December 19, 2003, the Division filed its opposition to the Battermans' motion.[3] The Division identified case law to support its reliance on both claimed privileges, but observed that it had not invoked the "law enforcement privilege" with respect to the eleven documents sought by the Battermans. The Division further stated that none of the eleven withheld documents relate to the "Upjohn insider trading case." The Division also represented that the eleven documents identified by the Battermans do not contain any exculpatory information within the scope of Rule 230(b)(2) of the Commission's Rules of Practice and Brady v. Maryland, 373 U.S. 83, 87 (1963).

The Work Product Doctrine

The qualified privilege for attorney work product was first articulated in Hickman v. Taylor, 329 U.S. 495, 509-12 (1947), and later codified in Federal Rule of Civil Procedure 26(b)(3). The primary purpose of the work product doctrine is to "prevent exploitation of a party's efforts in preparation for litigation." Admiral Ins. Co. v. U.S. District Court, 881 F.2d 1486, 1494 (9th Cir. 1989). "Protecting attorneys' work product promotes the adversary system by enabling attorneys to prepare cases without fear that their work product will be used against their clients." Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1428 (3d Cir. 1991).

"Fact" work product may be obtained upon a showing of substantial need and inability otherwise to obtain the documents without undue hardship. See Toledo Edison Co. v. G.A. Technologies, Inc., 847 F.2d 335, 339-40 (6th Cir. 1988). A party seeking "opinion" work product must make a showing beyond the substantial need/undue hardship test required for "fact" work product. Upjohn Co. v. United States, 449 U.S. 383, 401-02 (1981). Recent cases have afforded "opinion" work product near absolute protection from disclosure. See In re Cendant Corp. Sec. Litig., 343 F.3d 658, 663 (3d Cir. 2003) (requiring a showing of "rare and compelling circumstances"); In re Ford Motor Co., 110 F.3d 954, 962 n.7 (3d Cir. 1997).

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[3] I advised the Division that, if it needed extra time to respond to the Battermans' motion to compel, it should ask (Prehearing Conference of Nov. 20, 2003, at page 25). The Division never requested additional time.

The eleven documents at issue, as described in the Privilege Log, meet the threshold test for qualification as work product. They are (a) documents sought by the Battermans that were (b) prepared in anticipation of litigation or for trial (c) by or for a representative of the Division. What is missing is an affidavit, describing the eleven documents in more detail than the Privilege Log, and demonstrating that senior counsel of record has personally reviewed the documents and has determined that they fall within the scope of the privilege. The Division will be required to file and serve that affidavit by January 20, 2004.

Relevance

Rule 230(b)(1)(iv) of the Commission's Rules of Practice provides that a hearing officer may grant the Division leave to withhold documents if the documents are not relevant to the subject matter of the proceeding. If the Battermans cannot show the relevance of the documents they seek, they cannot demonstrate a need to obtain them. Cf. Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1341 (D.C. Cir. 1984) ("one is presumed to have no need of matter not relevant to the subject matter involved in the pending action"). Although the Division has not asked me to deny access to any items on its Privilege Log on the basis of relevance, the Commission has found a lack of relevance for similar documents in a case akin to this one. See Joseph P. Galluzzi, 78 SEC Docket 1125, 1133 (Aug. 23, 2002).

The subject matter of this administrative proceeding is narrow: whether it is or is not in the public interest to bar the Battermans from associating with any investment adviser, based on the fact that a district court has enjoined them from future violations of the antifraud provisions of the federal securities laws.

Commission precedent makes it clear that a respondent in a proceeding such as this one may not collaterally attack the underlying injunctive action. See Ted Harold Westerfield, 69 SEC Docket 722, 729 n.22 (Mar. 1, 1999) (collecting cases). To the extent that the Battermans are seeking the production of privileged documents in an effort to find the "magic bullet" that may help them to vacate the underlying injunction, such material is not relevant to the subject matter of this administrative proceeding. Virtually all of the reasons the Battermans have advanced for requiring the Division to produce the withheld items relate to the underlying injunction, but not to this administrative proceeding.

The Battermans cannot satisfy the substantial need/undue hardship test needed to obtain the Division's "fact" work product documents if they cannot show relevance. The same is true as to the "rare and exceptional circumstances test" needed to obtain the Division's "opinion" work product documents. The Battermans will be required to make a showing of relevance by January 20, 2004.

The "Law Enforcement Privilege"

In support of its claim of a "law enforcement privilege," the Division cites three judicial opinions interpreting exemption 5 (deliberative process) and exemption 7(A) (law enforcement) of the Freedom of Information Act (FOIA), 5 U.S.C. §§ 552(b)(5), (b)(7)(A). The Division then states in conclusory fashion: "Clearly, the Battermans have shown no compelling need to

overcome the law enforcement privilege." The Division is wrong for three reasons: it has not yet properly claimed the privilege in question; its FOIA case law is not dispositive; and "compelling need" is not the standard for disclosure.

As recognized in Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1344 (D.C. Cir. 1984):

> If information in government documents is exempt from disclosure to the general public under FOIA, it does not automatically follow the information is privileged within the meaning of [Fed. R. Civ. Pro. 26(b)(1)] and thus not discoverable in civil litigation. . . . Though information available under the FOIA is likely to be available through discovery, information unavailable under the FOIA is not necessarily unavailable through discovery. . . .
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> In the FOIA context, the requesting party's need for the information is irrelevant; the most urgent need will not overcome an applicable FOIA exemption. In the discovery context, when qualified privilege is properly raised, the litigant's need is a key factor . . . . It is unsound to equate the FOIA exemptions and similar discovery privileges.

The courts have recognized a qualified common-law privilege for law enforcement investigatory files. See United States v. Winner, 641 F.2d 825, 831 (10th Cir. 1981); Black v. Sheraton Corp. of Am., 564 F.2d 531, 541-42 (D.C. Cir. 1977). However, assertion of this privilege requires: (1) a formal claim of privilege by the "head of the department" having control over the requested information; (2) assertion of the privilege based on actual personal consideration by that official; and (3) a detailed specification of the information for which the privilege is claimed, with an explanation why it properly falls within the scope of the privilege. See Landry v. FDIC, 204 F.3d 1125, 1135 (D.C. Cir. 2000); Tuite v. Henry, 98 F.3d 1411, 1417 (D.C. Cir. 1996); In re Sealed Case, 856 F.2d 268, 271 (D.C. Cir. 1988); Friedman, 738 F.2d at 1342.

Once the government has properly asserted its claim of the qualified law enforcement investigatory privilege, and the demanding party has shown a need for disclosure, the public interest in nondisclosure must be balanced against the need of the requestor for access to the privileged information, using a ten-part test. See Sealed Case, 856 F.2d at 272 (citing Frankenhauser v. Rizzo, 59 F.R.D. 339, 344 (E.D. Pa. 1973)).

I assume that the Division intended to claim a qualified law enforcement investigatory privilege; however, it has not yet done so properly. See Friedman, 738 F.2d at 1342 ("Until the claim of privilege has been presented to a district court with appropriate deliberation and precision . . . the district court is not equipped to engage in the task of identifying and weighing the competing interests."). Because the party claiming a privilege has the burden to establish its existence, see Black, 564 F.2d at 547, the Division's assertion of a "law enforcement privilege" will be rejected if an appropriate affidavit is not filed and served by January 20, 2004. The affidavit must be filed by an official of appropriate rank, and not simply by counsel of record. See Landry, 204 F.3d at 1136 ("Under our cases, the head of the appropriate regional division of

the FDIC's supervisory personnel is of sufficient rank to achieve the necessary deliberateness in assertion of the deliberative process and law enforcement privileges.").

As discussed above, that is not the end of the matter. Even if the Division is unable to sustain its claim of a "law enforcement privilege," the Battermans must still show that the four documents as to which that privilege was asserted are relevant to the narrow issue in this proceeding. I grant the Battermans until January 20, 2004, to demonstrate the four documents at issue are relevant.

Brady Materials

Division counsel has represented that there are no Brady materials in the eleven documents identified in the Battermans' motion to compel. I do not believe that representation is broad enough to meet the Division's obligations under Rule 230(b)(2) of the Commission's Rules of Practice. The Division's lead counsel must review all of the documents on its Privilege Log for material exculpatory information, even if such documents are not specifically identified in the Battermans' motion to compel. The Division should undertake the necessary review now, if it has not already done so. By January 20, 2004, the Division should submit an affidavit by the attorney who conducts the review, stating the results of that review.[4]

Order

IT IS ORDERED THAT the motion to compel the production of documents, filed by Michael Batterman and Randall B. Batterman III, is held in abeyance, pending the receipt of the additional materials described below.

IT IS FURTHER ORDERED THAT, on or before January 20, 2004, the Division of Enforcement shall file and serve an affidavit by a responsible official who has personally reviewed the eleven documents for which work product privilege is claimed and the four documents for which a law enforcement privilege is claimed; and

IT IS FURTHER ORDERED THAT, on or before January 20, 2004, the Division of Enforcement shall complete a review of all materials on its Privilege Log and shall file and serve an affidavit by a responsible official who has personally reviewed the Privilege Log, stating whether any items on the Privilege Log contain material exculpatory information within the scope of Rule 230(b)(2) of the Commission's Rules of Practice and Brady v. Maryland, 373 U.S. 83, 87 (1963); and

[4] Lead counsel of record in this proceeding may sign the affidavit in support of the Brady review, as well as the affidavit in support of the claim of work product privilege. Under Landry, the only privilege requiring the involvement of a senior supervisor (as opposed to counsel of record) is the claim of the qualified law enforcement investigative privilege. If the Division finds the requirements of Landry too onerous, it may withdraw its claim of a "law enforcement privilege" and argue lack-of-relevance instead.

IT IS FURTHER ORDERED THAT, on or before January 20, 2004, Michael Batterman and Randall B. Batterman III shall submit a supplemental pleading, addressing the relevance of the documents sought in their December 12, 2003, letter to the issues in this proceeding.

James T. Kelly
Administrative Law Judge