**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

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| THOMAS L. TAYLOR, III, in his capacity as Court-appointed temporary receiver for Breitling Energy Corp. et al., Plaintiff | § | |
| v. | § | NO. 3:19-cv-01594-D |
| ROTHSTEIN KASS P.A. d/b/a ROTHSTEIN KASS & CO. P.C.; ROTHSTEIN KASS & COMPANY, PLLC and BRIAN MATLOCK, Defendants. | § | |

**NON-PARTY SEC'S RESPONSE AND BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL A DEPOSITION UNDER FRCP 30(b)(6)**

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The U.S. Securities and Exchange Commission ("SEC" or "Commission"), a nonparty, files this Response and Brief in Opposition to Defendants' Motion to Compel a Deposition from the SEC (Dkt. 73) under Fed. R. Civ. P. 30(b)(6). Defendants' motion should be denied because they have failed to exhaust their administrative remedies. In addition, even if Defendants' motion were not premature, Defendants have not provided any reason to believe a deposition would provide them with relevant non-privileged information while the SEC would be subject to a heavy burden if it needed to prepare for and appear at a deposition.

## INTRODUCTION

In 2013, the SEC's Fort Worth Regional Office began formally investigating potential violations of the federal securities laws involving Chris Faulkner, President, Chief Executive Officer, and Chairman of the Board of Directors of Breitling Energy Corporation ("BECC"); BECC; and related entities in the oil and gas industry in an investigation entitled, *In the Matter of Breitling Oil & Gas Corporation* (FW-3789) ("investigation"). That investigation ultimately led to the filing of an SEC enforcement action in this Court against Faulkner, Breitling Oil and Gas Corporation ("BOG"), BECC, and other individuals and entities.[1] The United States Attorney's Office also brought a criminal case against Faulkner.[2] As part of the SEC's civil case, this Court appointed Thomas L. Taylor III as temporary receiver over the assets of Defendants Faulkner, BOG, and BECC. Taylor brought this action against Breitling's auditors, Rothstein Kass P.A., Rothstein Kass & Co., PLLC, and Brian Matlock ("Defendants").[3] The SEC also instituted a

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1 *SEC v. Faulkner et al*., Case No. 3:16-CV-1735-D (N.D. Tex.).

2 *United States v. Faulkner*, Case No. 3:18-CR-500-B (N.D. Tex.).

3 The Receiver brought his action against Defendants for the damages sustained by the "Breitling Entities," which the Receiver has defined as including Breitling Oil & Gas Corporation, Breitling Royalties Corporation, Breitling Energy Corporation, and their alter egos Crude Energy, LLC, Crude Royalties, LLC, and Patriot Energy, Inc. *Thomas L. Taylor*

settled administrative proceeding against Defendant Matlock for his role in auditing the Breitling Entities. *See Brian Dee Matlock, CPA* (SEC Release Nos. 34-89552, AAER-4159; File No. 3-19914) August 13, 2020 (App'x at 0256-0257, Ex. F). Matlock had the same defense counsel as appear in this case. *Id.*

The SEC, which is not a party to this lawsuit, was served by Defendants with a deposition subpoena under Fed. R. Civ. P. 30(b)(6) dated June 30, 2020. (App'x at 0004 - 0044, Ex. A.)

**FACTUAL BACKGROUND**

Before serving the deposition subpoena at issue in June 2020, Defendants' counsel approached SEC counsel about deposing a specific SEC staff member in this action. (App'x at 0229-0231, Ex. E.) Then, on or about June 30, 2020, Defendants served the SEC with a deposition subpoena under Fed. R. Civ. P. 30(b)(6) that included a broad description of areas of testimony, but lacked a specific explanation of why it was needed for their case and was unavailable from other sources. (App'x at 0004-0044, Ex. A and its attach. 1.) Staff in the Commission's Office of the General Counsel ("OGC") advised Defendants that their deposition notice did not comply with the requirements of the SEC's *Touhy* regulations and that, in order to comply with those regulations, they should submit a request to OGC and include the specific factual information sought from the proposed SEC witnesses. (App'x at 0045 - 0047, Ex. B.) "Under the SEC's *Touhy* regulations, employees cannot provide testimony unless authorized to do so by the SEC's Office of General Counsel . . . . 17 C.F.R. 200.735-3(b)(2)(ii)." (App'x at 0046, Ex. B.)

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*III v. Rothstein Kass, P.A., et al.*, No. 3:19-cv-01594-D (N.D. Tex.), First Amended Complaint, Dkt. 45, at 4 ¶1 (filed April 24, 2020).

By letter dated August 7, 2020, Defendants responded to the Commission regarding their request to depose SEC staff under Rule 30(b)(6). (App'x at 0048 - 0222, Ex. C.) During August to October, Defendants and SEC OGC discussed the deposition notice as well as the categories of documents Defendants had subpoenaed from the SEC in a subpoena dated June 10, 2020. (App'x at 0238-0255, Ex. E; App'x at 0275-0277, Ex. H.)

On October 9, 2020, OGC issued its decision under the SEC's *Touhy* regulations and denied Defendants' deposition request. (App'x at 0223-0227, Ex. D.) OGC advised Defendants that they could appeal that decision to the Commission under the procedures set forth in 17 C.F.R. 201.430(b) and cited to a case that required exhaustion of administrative remedies before the filing of a motion to compel against the SEC. (App'x at 0226, Ex. D (citing *In re Securities and Exchange Commission ex rel. Glotzer and Slansky*, 374 F.3d 184, 192 (2d Cir. 2004)).) Defendants had five days from that decision letter to file a written notice of intention to petition with the Commission and then five days after that to file a petition for review with the Commission. Defendants did not file an appeal with the Commission. Instead, on October 14, 2020, Defendants filed this Motion to Compel with this Court. (Dkt. 73.)

## ARGUMENT AND AUTHORITIES

### I. The Administrative Procedure Act applies here, and Defendants cannot prevail on a claim under that Act because they have not exhausted their administrative remedies.

#### A. The SEC's decision denying Defendants' request for a Rule 30(b)(6) deposition should be reviewed under the Administrative Procedure Act.

Because the federal government enjoys sovereign immunity, Congress must waive that immunity to allow any litigation against the federal government or one of its agencies. *U.S. Envtl. Protection Agency v. General Elec. Co.*, 197 F.3d 592, 597 (2d Cir. 1999) ("EPA v. GE I") (actions to compel the government to respond to a subpoena when it is a non-party are barred

by sovereign immunity in the absence of a waiver); *In re SEC ex rel. Glotze*r, 374 F.3d 184, 192 (2d Cir. 2004). Courts have recognized that when a person seeks to compel compliance with a federal court subpoena, the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, waives sovereign immunity. *EPA v. GE I*, 197 F.3d at 598 ("only identifiable waiver of sovereign immunity that would permit a court to require a response to a subpoena in an action in which the government is not a party is found in the APA."). Circuit courts, however, are split on the extent to which other provisions of the APA apply when a person moves to compel the government to respond to a subpoena. Some circuit courts have held that other provisions apply, including the requirement for final agency action and the deferential standard of review, 5 U.S.C. §§ 704, 706, while others have said courts may consider subpoenas issued to the federal government under Rule 45 without reference to the requirements of the APA. *Compare COMSAT Corp. v. Nat'l Sci. Found*., 190 F.3d 269, 277 (4th Cir. 1999) (using APA abuse of discretion standard to review federal agency action) *and Moore v. Armour Pharm. Co*., 927 F.2d 1194, 1195 (11th Cir. 1991) (same), *with Exxon Shipping Co. v. U.S. Dept. of Interior*, 34 F.3d 774, 780 (9th Cir. 1994) (applying Federal Rules of Civil Procedure) *and Linder v. Calero-Portocarrero*, 251 F.3d 178, 181 (D.C. Cir. 2001) (same). While the Fifth Circuit has not specifically ruled on the proper standard for review of a final agency decision to deny a subpoena served on a nonparty federal agency, *Beckett v. Serpas*, 2013 WL 796067, at *7 (E.D. La. March 4, 2013), some district courts in the Fifth Circuit have stated they are inclined to follow the Fourth and Eleventh Circuits and to apply the APA standard of review. *See Palmer v. Hawkins*, 2009 WL 3230750, at *3 (W.D. La. Oct. 2, 2009) ("persuaded that the courts that have applied the APA standard have the better argument"); *Phoenix Ins. Co. v. Phillips*, 2000 WL 680334, at *1 (E.D. La. May 24, 2000).

For the reasons stated by the Fourth Circuit in refusing to adopt the Ninth Circuit's decision to apply only Rule 45 standards, without any APA deference to the government, this Court should apply the procedural protections of the APA here:

> The Ninth Circuit's *Exxon* decision abrogates the doctrine of sovereign immunity to a significant degree. Although the decision acknowledges the APA as the source of the congressional waiver of sovereign immunity permitting review of a non-party agency's refusal to comply with a subpoena, *see* 34 F.3d at 779 n.9, *Exxon* overlooks an important limitation upon this waiver: courts may reverse an agency's decision not to comply only when the agency has acted unreasonably.

*COMSAT Corp.,* 190 F.3d at 277.

Thus, to prevail on a motion to compel, Defendants must show that they are challenging a final agency action, 5 U.S.C. § 704, and that the SEC's decision to deny Defendants' request for a Rule 30(b)(6) deposition was "arbitrary, capricious, an abuse of discretion, or otherwise not contrary to law." 5 U.S.C. § 706.

**B. Defendants' motion to compel is premature because Defendants failed to exhaust their administrative remedies.**

In *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 467-69 (1951), the Supreme Court concluded that government employees may not be compelled to respond to a subpoena when the relevant agency has a regulation that vests in the agency, and withdraws from the employee, the authority to respond to the subpoena. The SEC, like other federal agencies, has adopted regulations that establish a procedure litigants in actions to which the SEC is not a party must follow in seeking testimony from SEC employees. The SEC's *Touhy* regulations provide:

> [A]ny officer, employee or former officer or employee who is served with a subpoena requiring the disclosure of confidential or non-public information or documents shall, unless the Commission or the General Counsel, pursuant to delegated authority, authorizes the disclosure of such information or documents, respectfully decline to disclose the information or produce the documents called for, basing his or her refusal on this paragraph.

17 C.F.R. 200.735-3(b)(2)(ii). The SEC's regulations also state that the General Counsel has the authority to "[a]pprove nonexpert, non-privileged, factual testimony by present or former staff members, and the production of non-privileged documents, when validly subpoenaed." 17 C.F.R. 200.30-14(f).

The SEC's regulations further state that persons aggrieved by an action made pursuant to delegated authority may seek review from the Commission and that actions taken pursuant to delegated authority are not final for purposes of the APA, unless review is sought:

> (a) *Scope of rule.* Any person aggrieved by an action made by authority delegated in §§ 200.30-1 through 200.30-8 or §§ 200.30-11 through 200.30-18 of this chapter may seek review of the action pursuant to paragraph (b) of this section.
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> . . .
>
> (c) *Prerequisite to judicial review.* Pursuant to Section 704 of the Administrative Procedure Act, 5 U.S.C. 704, a petition to the Commission for review of an action made by authority delegated in §§ 200.30-1 through 200.30-18 of this chapter is a prerequisite to the seeking of judicial review of a final order entered pursuant to such an action....

17 C.F.R. 201.430. The SEC's regulations apply to all outside deposition requests of its staff members, regardless if it is under Fed. R. Civ. P. 30(b)(6) or if it is for a specifically identified staff member, because no employee can testify about their official Commission activities without approval of the Commission or the General Counsel. *See, e.g., Watts v. SEC*, 482 F.3d 501 (D.C. Cir. 2007) (describing use of the *Touhy* regulations for a Rule 30(b)(6) deposition); *Barnett v. Illinois State Bd. Elections, et al.*, 2002 WL 1560013 (N.D. Ill. July 2, 2002) (court relied on *Touhy*-type regulations to uphold agency's decision not to authorize testimony in response to a Rule 30(b)(6) subpoena).

The SEC's Office of the General Counsel issued a decision pursuant to delegated authority regarding Defendants' request for a Rule 30(b)(6) deposition, but Defendants did not petition the

Commission for review of that decision. Because they failed to take that step, they have not exhausted their administrative remedies, and they are not seeking review of a final agency action. As the Second Circuit has recognized in a case involving the SEC, such a claim cannot proceed:

> [W]e hold that a party seeking judicial review of an agency's non-compliance with a subpoena must first exhaust his or her administrative remedies pursuant to APA § 704. Judicial review under APA § 702 is expressly conditioned, under APA § 704, on the existence of a "final" agency action.

*In re Securities and Exchange Commission ex rel. Glotzer and Slansky*, 374 F.3d 184, 188-189 (2d Cir. 1994); *see also Darby v. Cisneros*, 509 U.S. 137, 146 (1993) ("When an aggrieved party has exhausted all administrative remedies expressly prescribed by statute or agency rule, the agency action is 'final' … and therefore 'subject to judicial review'….").

Since Defendants failed to exhaust their administrative remedies before the SEC, this motion is premature and must be denied.

### C. Even if Defendants had exhausted their administrative remedies, they have not shown that the SEC's decision was arbitrary or capricious.

Although it is not necessary to consider the merits of the SEC's decision to deny Defendants' request for a Rule 30(b)(6) deposition in light of their failure to exhaust administrative remedies, a review of the merits reveals that the SEC's decision should be affirmed under the APA. Under the APA, courts can overturn agency action only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706. The decision at issue easily satisfies that standard. As is evident from the discussion below, the SEC's Office of the General Counsel had good reason to find that allowing the deposition would impose an undue burden on the SEC. On one hand, Defendants have not shown that they could obtain any non-privileged testimony from the SEC that is relevant to their case and that is not already available to them through documents they have gathered. On the

other hand, preparing to have SEC staff testify regarding a complex investigation would impose a significant burden on the Commission.

## II. Even if this Court were to review the subpoena under Rule 45, Defendants' motion should be denied.

### A. Requiring the SEC to provide a Rule 30(b)(6) deposition would impose an undue burden on the SEC.

The Federal Rules of Civil Procedure prohibit parties from imposing an undue burden on persons subject to subpoenas. Initially, Rule 26(b)(1) requires a balancing of relevance, proportionality, and burden:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Rule 45(d)(1) also provides that "[a] party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." Rule 26(b)(2)(C)(i) further expressly states that a "court must limit the frequency or extent of discovery ... if it determines that (i) the discovery sought is unreasonably cumulative or duplicative or can be obtained from some other source that is more convenient, less burdensome, or less expensive."

Parties to litigation are required, in particular, to minimize the burden subpoenas impose on non-parties. *See Cusumano v. Microsoft Corp*., 162 F.2d 708, 717 (1st Cir. 1998) ("concern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs" in Rule 45 inquiry); *Precourt v. Fairbank Reconstr. Corp.,* 280 F.R.D. 462, 467 (D.S.D. 2011) ("If the party seeking the information can easily

obtain the same information without burdening the nonparty, the court will quash the subpoena."). Courts are especially loathe to enforce subpoenas on governmental bodies where the government is not a party to the underlying litigation. *See Watts v. SEC*, 482 F.3d 501, 509 (D.C. Cir. 2007) (courts "must properly accommodate the government's serious and legitimate concern that its employee resources not be commandeered into service by private litigants to the detriment of the smooth functioning of government operations") (*quoting Exxon Shipping Co*, 34 F.3d at 779); *COMSAT Corp.*, 190 F.3d at 277-278 ("As an agency official must, [non-party government agency's] counsel also considered whether the public interest and the agency's taxpayer-funded mission would be furthered by compliance."); *Moran v. Pfizer, Inc.*, 2000 WL 1099884, at *3 (S.D.N.Y. Aug. 4, 2000) ("Courts have regularly held that the public interest in insuring that the agency employees spend their time doing the agency's work is a valid reason to decline to comply with a subpoena."); *Alex v. Jasper Wyman & Son*, 115 F.R.D. 156, 158-59 (D. Me. 1986) (noting "important public policy favoring the conservation of government resources and the protection of orderly governmental operations" in explaining why undue burden analysis allowed court to prohibit taking of deposition altogether). Were courts to enforce subpoenas directed to the government where the records or information sought can be obtained from a party or other source, the cumulative effect would overwhelm governmental bodies, including the SEC. *See Anwar v. Fairfield Greenwich Ltd.,* 297 F.R.D. 223, 227-228 (2013) (subpoenas to depose employees of SEC charged with assessing regulatory compliance of publicly traded company would have caused undue burden and expense on SEC); *Moore v. Armour Pharm. Co.*, 927 F.2d 1194, 1198 (11th Cir. 1991) (expected "onslaught of subpoenas" directed to the Center for Disease Control in similar litigation raised substantial concern about "cumulative impact" of individual subpoena); *Davis Enters. v. EPA*, 877 F.2d 1181 (3rd Cir. 1989) (agency had

"legitimate concern with the potential cumulative effect" and "proliferation of testimony by its employees" that compliance with individual subpoena would entail).

In the Fifth Circuit, courts consider several factors to determine whether a subpoena issued under Rule 45 imposes an undue burden:

> (1) relevance of the information requested; (2) the need of the party for the documents; (3) the breadth of the document request; (4) the time period covered by the request; (5) the particularity with which the party describes the requested documents; and (6) the burden imposed. Further, if the person to whom the document request is made is a non-party, the court may also consider the expense and inconvenience to the non-party. A court may find that a subpoena presents an undue burden when the subpoena is facially overbroad.

*Wiwa v. Royal Dutch Petro. Co*., 392 F.3d 812, 818 (5th Cir. 2004); *MCR Oil Tools, LLC v. SPEX Offshore, Ltd*., 2020 WL 5985499, at *1-2 (N.D. Tex. 2020); *Lead GHR Enters., Inc. v. Am. States Ins., Co.*, 2017 WL 6381744, at *5-7 (N.D. Tex. 2017); *see also Beckett,* 2013 WL 796067, at *6-7.

Under these factors, the deposition that Defendants seek would impose an undue burden on the SEC. Initially, Defendants have not identified any non-privileged information that they would obtain in a deposition that they do not already have. They state that they are seeking a deposition because Plaintiff's expert stated that "damages stopped accruing once the SEC had 'likely obtained sufficient (albeit disputed) evidence via subpoenas the SEC issued to Rothstein' to bring an enforcement action." (Dkt. 73 at 12.)[4] While this statement suggests that Defendants claim to need to learn what evidence they provided to the SEC and when they provided it, they presumably already know what they provided and when they provided it. In addition, if Defendants want to know what information the SEC received via subpoena, they should review

[4] References to page numbers in court filings are to the ECF page numbers.

the documents or testimony provided to the SEC in response to investigative subpoenas; doing so will provide more information than a Rule 30(b)(6) deposition about what the SEC received.

Defendants further state that "[t]estimony from the SEC will demonstrate the presence or absence of information in the Staff's possession before, during, and after the Rothstein Kass audits" and "[t]he SEC's communications with third-parties . . . will demonstrate the sources of information – other than Rothstein Kass – that the SEC had access to and the breadth of the SEC's knowledge of the Breitling Entities' activities." (Dkt. 73 at 13.) Defendants do not explain why they need this information, but even if it were relevant, it is information they could obtain from documents produced by the SEC to the Court-appointed Receiver regarding the Breitling Entities. It is apparent that Defendants have already received these documents directly from the Court-appointed Receiver, which the SEC told them the Receiver had. (App'x at 0235; 0243, Ex. E.) Indeed, Defendants' motion shows they know from whom, when, how much, and what the SEC received from third parties during the investigation. (Dkt. 73 at 6-9.)

Defendants also state that they have narrowed the deposition to a single topic—"the Rothstein Kass Audit's role in the SEC Investigation"—but they do not explain how this relates to the Plaintiff's expert report, how it "significantly" narrows the scope of the subpoena, or why it is an issue relevant to this litigation. (*Id.* at 11.) Defendants provide no information beyond their bare assertion that this topic "is permitted under the Federal Rules of Civil Procedure." (*Id.* at 13.)

In contrast to Defendants' failure to show they are seeking information that is relevant and for which they have a need, the SEC can show that providing a Rule 30(b)(6) deposition would impose a significant burden on the SEC. The SEC would need to designate a witness who has some familiarity with the SEC investigation. However, no one SEC staff member would

know everything about this investigation and the cases arising from it, and the vagueness of the deposition topic—"the Rothstein Kass Audit's role in the SEC Investigation"—does little to limit the scope of what a deponent would need to review to prepare for the Defendants' deposition. Although Rule 30(b)(6) requires the Defendants to provide the SEC with a description of "reasonable particularity" of all the matters for which they seek testimony from the SEC, they have not done so even after repeated requests from the SEC. (App'x at 0045-0047; 0096-0097; 00241; 0245-0248, 0277; Ex. B; Ex. E; Ex. H.) Defendants' deposition notice also defines the "relevant time period" as June 2012 through the present (despite the more focused time periods in Plaintiff's expert report) (App'x at 0063, Ex. A at its #28.) (*See* Dkt. 72 at its Ex. A).

The volume of files that the designated SEC staff member may need to review is quite substantial. The SEC has approximately 700 gigabytes of data related to the SEC investigation and its related cases. (App'x at 0280, Ex. I.) It could take a designated SEC staff member hundreds of hours just to review those investigative and litigation files to prepare for a deposition. (App'x at 0277, Ex. H.) Other SEC investigative and litigation attorneys and OGC counsel would also need to devote considerable time to assist preparing the designated SEC deponent for the deposition. (App'x at 0277, Ex. H.) Thus, SEC staff would be drawn away from their important agency work duties to prepare for, assist with, and provide any deposition for Defendants. *Id.*

Because the heavy burden a deposition would impose on the SEC far outweighs Defendants' need for the testimony, Defendants' Motion to compel should be denied.

**B. Defendants seek SEC deposition testimony that would impermissibly disclose the SEC's attorney work product and deliberative process.**

Because of the vagueness of the proposed topic on which Defendants seek to depose an SEC staff member, it is difficult to determine to what extent they are seeking privileged

information. However, their assertion that they "are seeking the facts about how the audits of the Breitling Entities impacted the SEC's investigation" (Dkt. 73 at 15), combined with the fact that they have documents that provide all the information they need about what information the SEC received and when they received it, undermines their claims that they do not seek privileged information and, instead, suggests that they are primarily interested in information protected by the attorney work product doctrine and the deliberative process privilege.

**1. The attorney work product doctrine protects information about how SEC staff conducted an investigation.**

The "mental impressions, conclusions, opinions or legal theories," to the extent not set forth in their pleadings, are the work product of the Commission's attorneys and are protected under Fed R. Civ. P. 26(b)(3)(B). Thus, Defendants are not entitled to any information that is not already in the SEC's pleadings about how the audits of the Breitling Entities impacted the SEC's investigation. Courts in numerous actions have prevented Rule 30(b)(6) depositions of the SEC where the deposition sought information about SEC investigations. *See*, *e.g*., *SEC v. Nacchio*, 614 F. Supp. 2d 1164, 1177 (D. Co. 2009) (affirming magistrate's decision to quash Rule 30(b)(6) deposition and recognizing that "when inquiring as to how the SEC assembled the facts it had obtained in its investigation into the set of allegations set forth in the … Complaint, [the defendant] would almost certainly cross into territory protected by the work product privilege."); *SEC v. Jasper,* 2009 WL 1457755, at *2-3 (N.D. Cal. May 26, 2009) (quashing Rule 30(b)(6) deposition of SEC regarding the state of SEC's knowledge at time its complaint was filed as attorney work product); *SEC v. SBM Inv. Certs., Inc.,* 2009 WL 609888, at *23-24 (D. Md. Feb. 23, 2007) (finding 30(b)(6) notice demanding testimony on communications with third parties in anticipation of bringing enforcement proceedings invaded attorney work product); *SEC v. Buntrock*, 2004 WL 1470278 (N.D. Ill. June 29, 2004), *affirming SEC v. Buntrock*, 217 F.R.D.

441, 444-47 (N.D. Ill. 2003) (proposed Rule 30(b)(6) deposition quashed as seeking attorney work product regarding SEC investigation); *SEC v. Rosenfeld*, 1997 WL 576021, at *2-4 (S.D.N.Y. Sept. 16, 1997) (proposed deposition would disclose attorney mental impressions); *SEC v. Morelli*, 143 F.R.D. 42, 47 (S.D.N.Y. 1992) (proposed deposition is "an impermissible attempt by defendant to inquire into the mental processes and strategies of the SEC"; given SEC's production of its entire investigative file, "the Court is drawn inexorably to the conclusion that [the] Notice of Deposition is intended to ascertain how the SEC intends to marshal the facts, documents and testimony in its possession, and to discover the inferences that plaintiff believes properly can be drawn from the evidence it has accumulated"); *In re Bilzerian*, 258 B.R. 846, 848 (Bankr. M.D. Fla. 2001) (Rule 30(b)(6) deposition on the basis for SEC claims would impinge on the work product of counsel).[5]

Defendants cannot avoid the application of these principles by claiming they are seeking only "facts" about how SEC staff decided to conduct their investigation. A court considering a comparable Rule 30(b)(6) deposition notice of another federal agency explained:

> This request seeks to depose a Rule 30(b)(6) witness concerning materials that the EEOC asserts have already been provided in discovery. While the request is framed as one for "factual information" and "documents," the witness, in explaining why certain documents "support" or "rebut" the allegations, would necessarily be asked to interpret the facts and discuss how the EEOC decided to proceed in preparing the case. This topic is not appropriate for a Rule 30(b)(6) deposition.

*EEOC v. Texas Roadhouse, Inc.*, 2014 WL 4471521, at *3 (D. Mass. Sept. 9, 2014).

**2. The deliberative-process privilege protects SEC staff's deliberations about conducting an investigation and bringing an enforcement action.**

[5] Courts have also prevented Rule 30(b)(6) depositions in cases involving other federal agencies that bring enforcement actions. *See*, *e.g.*, *EEOC v. McCormick & Schmick's Seafood Rests., Inc.*, 2010 WL 2572809 (D. Md. June 22, 2010); *FTC v. U.S. Grant Resources, LLC*, 2004 WL 2238518 (E.D. La. June 25, 2004); *EEOC v. HBE Corp.*, 157 F.R.D. 465 (E.D. Mo. 1994).

Defendants also appear to be seeking information protected by the deliberative-process privilege. The deliberative-process privilege protects "the consultative functions of government by maintaining the confidentiality of advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1117 (9th Cir.1988) (citation and internal quotation marks omitted). The privilege "rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance 'the quality of agency decisions' by protecting open and frank discussion among those who make them within the Government." *Enviro Tech Int'l, Inc. v. EPA*, 371 F.3d 370, 374 (7th Cir. 2004) (citing *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001)).

To withhold information pursuant to the deliberative-process privilege, an agency must show that the information is deliberative and predecisional. *NLRB v. Sears,* 421 U.S. 132, 150-52 (1975); *Tax Analysts v. IRS,* 294 F.3d 71, 80 (D.C. Cir. 2002). Predecisional information reflects an agency's deliberations leading up to a final agency decision. *Id.* To the extent Defendants are seeking information about how the SEC staff came to recommend bringing an enforcement action at a particular time or based on certain facts, Defendants are seeking information about privileged predecisional deliberations.

Defendants note that the deliberative process privilege is not absolute and consequently does not apply if the need for the information outweighs the harm of providing it. (Dkt. 73 at 15.) Defendants, however, have not shown any legitimate need for the SEC's internal deliberations. In fact, Defendants are in possession of the very documents that reflect the information they now claim to seek from the SEC.

Defendants also claim there is little about the SEC's investigation that is still privileged because the SEC produced non-privileged documents it received from third parties during the underlying investigation and communicated extensively with the Breitling Entities. (Dkt. 73 at 16.) Defendants, however, do not and cannot explain why such activities waive protections for the SEC's privileged internal deliberations.

3. **Defendants' interest in privileged information supports a conclusion that Defendants have no valid reason for seeking a Rule 30(b)(6) deposition.**

The fact that Defendants appear to have no reason to take a deposition other than to seek privileged information from the SEC staff is further reason for denying their motion to compel. As they note, in some situations, privilege issues should be addressed only after questions that appear to seek privileged information are asked. (Dkt. 73 at 16.) Here, however, Defendants have provided no valid reason for seeking testimony from the SEC, and SEC staff should not be required to prepare for a burdensome deposition that seems to have no purpose other than trying to figure out internal SEC staff predecisional deliberations concerning how, when or whether to bring an enforcement action.

## CONCLUSION

For the reasons stated above, Defendants' motion to compel a deposition of the SEC (Dkt. 73) should be denied in its entirety.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 4, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States District Court, Northern District of Texas, using the CM/ECF system, which will send notification of the filing to all CM/ECF participants in this matter.

/s/ Juanita C. Hernandez
Juanita C. Hernandez