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

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

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO COMPEL DEPOSITION OF SECURITIES AND EXCHANGE COMMISSION

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DEFENDANTS' REPLY IN SUPPORT OF MOTION TO COMPEL DEPOSITION OF SECURITIES AND EXCHANGE COMMISSION

Defendants file this Reply in Support of their Motion to Compel Deposition of the Securities and Exchange Commission ("Motion," Dkt. 73).

I. INTRODUCTION

Plaintiff alleges that the Breitling[1] fraud could have been avoided if only the SEC had brought an enforcement action sooner. Accordingly, Defendants have sought information from the source of information best able to shed light on whether that is true: the SEC. After serving the SEC with a properly issued deposition subpoena pursuant to the Federal Rules of Civil Procedure ("FRCP"), and after negotiating with the SEC for months and substantially reducing the scope of the subpoena to a single topic, Defendants have been met with the SEC's refusal to appear for deposition and comply with the subpoena. Although it cites to no Fifth Circuit authority to support its position, the SEC asserts that the Court has no authority to compel a representative to appear for deposition. Instead, the SEC invites Defendants to appeal its refusal to appear for deposition to the SEC itself for further consideration. Non-Party SEC's Response and Brief in Opposition to Defendants' Motion to Compel A Deposition Under FRCP 30(b)(6) ("Response," Dkt. 83) at 3-4.

The Court should follow the majority of courts in recent years and apply the FRCP, rather than the Administrative Procedure Act ("APA"), in resolving this dispute. And under the FRCP, there can be no reasonable doubt that the deposition should go forward. The requested testimony is plainly relevant both to Plaintiff's liability and damages theories. Given the limited scope of the deposition, it would not be unduly burdensome. Defendants are only seeking factual

[1] For simplicity's sake, Defendants will employ the same short-form abbreviations as in their Motion, *e.g.* Breitling Oil and Gas Corporation, Breitling Royalties Corporation, and Breitling Energy Corporation (together, "Breitling").

information surrounding the SEC's investigation, not information that would touch on any privilege, and the SEC may not rely on a blanket claim of privilege that would preclude the Defendants from asking a single deposition question. Accordingly, the Court should grant Defendants' motion and order the SEC to appear for deposition.

II. ARGUMENT

a. Defendants' Subpoena Is Controlled by the FRCP, Not the APA

The Court should decline to review Defendants' Motion under the APA and should instead apply the Federal Rules of Civil Procedure. The SEC acknowledges sovereign immunity has been waived and that there is no Fifth Circuit authority on point. Response at 4. The SEC goes on to urge this Court to look to the Fourth Circuit and ignore the Ninth Circuit, all the while ignoring the fact that the most recent District Court to address this issue surveyed the relevant authorities and concluded the SEC's position is contrary to the weight of authority. *See Beckett v. Serpas*, No. 12-910, 2013 WL 796067, at *7 (E.D. La. Mar. 4, 2013) (acknowledged in passing by the SEC for the proposition that "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," Response at 4). However, what the *Beckett* court said is actually far more illuminating than the SEC suggests (and contrary to the SEC's position in this case). The court in *Beckett* surveyed the law within the Fifth Circuit and nationally and concluded as follows:

> When a subpoena is issued to a nonparty federal employee by a federal court, the courts have generally held that sovereign immunity does not preclude the subpoena and that the party seeking to enforce the subpoena is not required to file a separate suit under the Administrative Procedures Act.

Id. at *4; *see also id.* at *8 (as between the APA and FRCP, electing to apply the standard of review more deferential to the losing party).

The court went on to observe, "the majority of the more recent decisions have held that an agency's denial of a *Touhy* request, as with any objection to a third party subpoena, is properly analyzed under Federal Rules of Civil Procedure 26 and 45." *Id.* at *8 (quoting *Solomon v. Nassau Cty.*, 274 F.R.D. 455, 458 (E.D.N.Y. 2011)); *see also In re Packaged Ice Antitrust Litig.*, No. 08-md-01952, 2011 WL 1790189, at *2 (E.D. Mich. May 10, 2011) ("This Court concludes that the Sixth Circuit would join the opinions of those courts, mostly in this century, that have concluded that Federal Rule of Civil Procedure 45 . . . provided sufficient limitations on discovery to adequately address legitimate governmental interests in objecting to a motion to compel . . . ."); *In re Micron Tech., Inc. Sec. Litig.*, 264 F.R.D. 7, 8 (D.D.C. 2010) (citing to *Watts v. Sec. Exchange Comm.*, 482 F.2d 501, 508 (D.C. Cir. 2007) (Kavanaugh, C.J.) and holding that Fed. R. Civ. P. 45 controls motions to compel even if the object of the subpoena is a federal agency).

Defendants are seeking to depose the SEC and not an individual employee of the SEC, and, as the SEC concedes, the APA waives sovereign immunity under these circumstances. Response at 4. As is the case in "the majority of the more recent decisions," such as in *Packaged Ice* and *Micron*, the Court here should apply the FRCP, which provide an adequate means of protecting the government's interests while simultaneously ensuring that the government's refusal to comply with subpoenas is subject to adequate review.

b. **Defendants Are Seeking Specific, Relevant Information That Does Not Impose an Undue Burden**

The SEC acknowledges that the Defendants limited their deposition topics to just one: "the Rothstein Kass Audit's role in the SEC Investigation." Response at 11. The SEC further concedes that Defendants have explained how the deposition relates to that topic: "[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." Response at 11.

However, despite the limited nature of the subject matter and its relevance to the claims and defenses of the case, the SEC surprisingly contends that it should not be deposed, and, instead, the Defendants should be limited to reviewing documents the SEC provided to the Plaintiff in order to obtain the information being sought. Response at 11. This is surprising because, at the same time the SEC suggests Defendants need only look at SEC documents to find the information Defendants seek, the SEC also steadfastly refuses to produce documents in response to the Defendants' document subpoena. *See* App. at 110, Ex. C (SEC declining to determine "how many emails exist that are between SEC staff (limited to those staff identified in the formal order) on the one hand and external recipients on the other hand that make reference to the formal order or MUI in the subject line"); and App. at 107, Ex. B (SEC acknowledging that they are "still working on [Defendants' document subpoena] project" and "will let you know when we will send our production"). Even if the SEC had produced all documents responsive to Defendants' document subpoena, which the SEC has not, those documents would not supplant the need for deposition testimony. But for the SEC to take the position that documents alone are sufficient for Defendants' purposes *while at the same time not producing or identifying documents*, demonstrates the disingenuity of the SEC's "rely-on-the-documents" posture.

For much the same reason, the SEC's claim that preparing a witness would be burdensome falls flat. *SEC. v. Brady*, 238 F.R.D. 429, 437 (N.D. Tex. 2006) (A party objecting because of undue burden must prove the undue burden, usually through an affidavit or other

evidentiary proof). The SEC claims that it *may* need to review up to 700 gigabytes of information "related to the SEC investigation and its related cases." Response at 12. But the SEC makes no attempt to ascertain what if any portion of the "700 gigabytes of information" would play absolutely no role in preparing a witness. It is clear from the SEC's response to Defendants' document subpoena that the SEC, which has spent years on the underlying investigation, has not taken even the most rudimentary steps to evaluate, for example, how many emails the SEC has between SEC staff and third parties. See App. at 110, Ex. C. It is ironic that the federal government agency that conducted the investigation resulting in the accumulation of "700 gigabytes of information" now essentially claims not to know what it has collected and claims that it would be too burdensome to find out. This is the same SEC that has brought numerous administrative and federal court actions based on that same information and is currently in active litigation in at least one of those actions, *SEC v. Faulkner,* Case No. 3:16-cv-01735-D (N.D. Tex.), the very case in which the Plaintiff was appointed receiver. Apparently, it is not too burdensome for the SEC to understand the "700 gigabytes of information" to prosecute those enforcement actions, but it is too burdensome to determine which of those documents might or might not be necessary to prepare for a deposition on a single topic.

Defendants are not asking the SEC to review every piece of information it found during its investigation, but rather to simply testify on the impact Defendants' audit had on the SEC's investigation. Preparation of a witness for a deposition is not unduly burdensome, and the SEC's attempt to inflate its burden by claiming not to know what is contained in its own investigative files flies in the face of reason. If the SEC were able to avoid depositions simply by pointing to the mass of information it obtained during an investigation and claiming an undue burden in understanding what had been accumulated, the SEC would never be deposed in any case.

There does appear to be one factor in the undue burden analysis upon which the SEC and the Defendants agree: the relevance of the information sought. The SEC correctly observes that one factor in evaluating whether a third party deposition is unduly burdensome is the relevance of the information requested. Response at 10. However, the SEC then fails to seriously challenge in any way the relevance of the information sought here, which the SEC has the burden to demonstrate. *Merrill v. Waffle House, Inc.*, 227 F.R.D. 467, 470-1 (N.D. Tex. 2005) (if discovery seems relevant, objecting party bears the burden of establishing lack of relevance). As the SEC seems to implicitly recognize, the Plaintiff and his expert witness put the information sought—"the Rothstein Kass Audit's role in the SEC Investigation"—at the center of Plaintiff's case. Specifically, Plaintiff's expert, Saul Solomon, has built both his liability and damages theories around the claim that the alleged fraud at Breitling could have been prevented if the SEC had sufficient information to bring an enforcement action and shut down the Breitling entities. App. at 65-66, Ex. A at ¶ 108 (claiming that Defendants should have withdrawn and notified SEC of their findings, and that damages stopped accruing once the SEC had enough evidence from Defendants to bring an enforcement action). Under this theory, if the SEC had the necessary information to bring an enforcement action prior to or during Defendants' audits and did not bring such an action, then the Defendants did not cause the alleged damages. Similarly, if upon receiving information from Defendants the SEC was unable or unwilling to take immediate action based on that information, Defendants did not cause the alleged damages. Understanding the timing of the SEC's investigation, including the information it had before and during Defendants' audits, is therefore of paramount importance for Defendants' defense. The SEC does not suggest otherwise.

c. **Defendants Are Not Requesting Privileged Testimony, Which, in Any Event, May Be Addressed by Objection at the Deposition**

Defendants are not seeking privileged information from the SEC. Rather, Defendants are seeking factual information regarding the SEC's receipt and review of information during its investigation into Breitling, which does not implicate the work-product privilege or deliberative process privilege.[2] Defendants are not attempting to uncover the SEC's mental processes or decision making, but instead to understand the facts surrounding its investigation. What information the SEC reviewed and when they reviewed it does not enter into any privileged areas, and the SEC may not foreclose all inquiry into their investigation under the guise of privilege. *SEC v. Kramer*, 778 F. Supp. 2d 1320, 1328 (M.D. Fla. 2011) ("Permitting the Commission in this instance to assert a blanket claim of privilege in response to a Rule 30(b)(6) notice creates an unworkable circumstance" in which the defendant would lose a primary means of discovery without meaningful review of the privilege claims). Further, as noted previously, to the extent any questions do stray into privileged areas, the SEC retains the same right as all deponents to object at the deposition. *See SEC v. McCabe*, No. 2:13-CV-00161-TS-PMW, 2015 WL 2452937, at *4 (D. Utah May 22, 2015).

III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court order the SEC to appear for a deposition.

Date: November 18, 2020

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[2] Even if the deliberative process privilege were to apply, this privilege is not absolute and may be defeated by a showing of evidentiary need that outweighs the harm that disclosure of the information may cause. *Alaska v. United States*, 16 Cl. Ct. 5, 11 (1988). As stated previously, Defendants have a compelling need for the requested information—a point that the SEC does not appear to contest in any meaningful way.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been served to all counsel of record in accordance with the Federal Rules of Civil Procedure on November 18, 2020 via electronic mail.

/s/ Nicolas Morgan _____
NICOLAS MORGAN