UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
--X
SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

THE NIR GROUP, LLC and COREY RIBOTSKY,

Defendants.
--X

MEMORANDUM AND ORDER
CV 11-4723 (JFB) (GRB)

BROWN, Magistrate Judge:

The instant motion (hereinafter "Motion"), by which the plaintiff Securities and Exchange Commission ("SEC" or "Commission") seeks to quash defendants' notices of deposition of the SEC's litigation counsel and a 30(b)(6) deponent, as well as requests for production of certain internal SEC documents, presents the novel question of whether the SEC must disclose information concerning its compliance with section 929U of the Dodd–Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 78d-5 ("section 929U"). That provision requires the SEC, within 180 days of notifying a target of the pendency of an investigation, to either file an action or, if the matter is "sufficiently complex," obtain an extension of time from a Commission director. Because the statute does not explicitly provide for dismissal of an enforcement action for failure to comply, and the absence of such a remedy does not, as defendants suggest, render the statutory provision superfluous, I find that no such remedy exists. Accordingly, the discovery sought is neither relevant to any claim or defense in this action nor reasonably calculated to lead to the discovery of admissible evidence. As such, the motion to quash is GRANTED.

BACKGROUND

The SEC brought this action against defendants NIR Group, LLC and Corey Ribotsky (collectively, "defendants") and another former NIR employee, Daryl Dworkin (since terminated from this action), for allegedly defrauding investors in connections with securities transactions. *See* Complaint, DE [1]. Most of the ensuing proceedings are not directly relevant here.

The instant dispute concerns a statutorily imposed deadline triggered by the SEC's issuance of a Wells Notice.[1] The statute provides that:

> Not later than 180 days after the date on which Commission staff provide a written Wells notification to any person, the Commission staff shall either file an action against such person or provide notice to the Director of the Division of Enforcement of its intent to not file an action.

15 U.S.C. § 78d-5(a)(1). The provision provides an exception:

> if the Director of the Division of Enforcement of the Commission or the Director's designee determines that a particular enforcement investigation is sufficiently complex such that a determination regarding the filing of an action against a person cannot be completed within the deadline specified in paragraph (1), the Director of the Division of Enforcement of the Commission or the Director's designee may, after providing notice to the Chairman of the Commission, extend such deadline as needed for one additional 180-day period. If after the additional 180-day period the Director of the Division of Enforcement of the Commission or the Director's designee determines that a particular enforcement investigation is sufficiently complex such that a determination regarding the filing of an action against a person cannot be completed within the additional 180-day period, the Director of the Division of Enforcement of the Commission or the Director's designee may, after providing notice to and receiving approval of the Commission, extend such deadline as needed for one or more additional successive 180-day periods.

15 U.S.C. § 78d-5(a)(2).

[1] "A Wells Notice notifies the recipient that the SEC's Enforcement Division is close to recommending to the full Commission an action against the recipient and provides the recipient the opportunity to set forth his version of the law or facts." *Office Depot, Inc. v. Nat'l Union Fire Ins. Co.*, 453 Fed. App'x 871, 874 n.4 (11th Cir. 2011) (quoting *SEC v. Internet Solutions for Bus., Inc.*, 509 F.3d 1161, 1163 n.1 (9th Cir. 2007)).

In response to a motion to dismiss based upon, *inter alia*, a claim by defendants that the failure to allege compliance with § 78d-5(a) should result in dismissal, the SEC provided a declaration of Kenneth Byrne ("Byrne"), the SEC's counsel of record in this action. The Byrne Declaration described the procedure followed to obtain extensions in this case:

> 15. The initial 180-day deadline was set to expire on February 14, 2011. However, on January 26, 2011, SEC staff received a 120-day extension of this deadline from the Direct of the Division of Enforcement ("Director") extending the February 14, 2011 deadline to June 14, 2011.
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> 16. Subsequently, on June 7, 2011, SEC staff received an additional 60-day extension from the Director further extending the deadline to August 12, 2011.
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> 17. Finally, on August 9, 2011, the Commission granted SEC staff one additional 180-day extension to February 8, 2012.
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> 18. Part of the reason for the extensions was that additional time was given to Defendants to submit their Wells submissions. Defendants were given an opportunity to file two Wells submissions and were given extensions of time to file both, and made large document productions with each submission, requiring further investigation. Nor did Ribotsky testify in the investigation until February 8 and 9, 2011.
>
> 19. Therefore, the Commission obtained timely extensions before filing its Complaint and long before the Dodd-Frank Act deadline expired.

Declaration of Kenneth Byrne ¶¶ 15-19, Apr. 20, 2012, DE [38] ("Byrne Declaration"). The motion to dismiss was terminated after the SEC was granted leave to file an amended complaint. Minute Order, May 17, 2012, DE [47]. The amended complaint does not set forth any allegations concerning compliance with § 78d-5(a), Am. Compl., Aug. 17, 2012, DE [66]; defendants filed an answer without renewing their motion to dismiss on this ground. The Defendants' Answer, Sept. 21, 2012, DE [67].

Defendants noticed the deposition of Byrne of on January 17, 2013, seeking his testimony concerning the portion of the Byrne Declaration quoted above. Mot. Ex. A, Feb. 20,

2013, DE [76] (hereinafter "Byrne Deposition Notice").

The Byrne Deposition Notice also directs the deponent to produce, prior to the deposition, documents relating to the 180-day deadline and steps taken to extend it. *See generally* Byrne Depo. Notice Ex. A. The notice seeks, *inter alia*, documents related to Byrne's claims in the quoted portion of his Declaration, *id.* ¶ 1; documents related to the various requests for extensions of the deadline, *e.g.*, *id.* ¶¶ 3-12; documents that identify the SEC personnel that requested and granted the extensions, *id.* ¶¶ 3, 6, 9, 12; and, documents related to the determination by the Director of the SEC's Division of Enforcement "that the investigation that gave rise to this action was sufficiently complex so that an extension of the deadline … was warranted." *Id.* ¶ 2. The Byrne Deposition Notice also seeks documents supporting Byrne's claim that the extensions were sought in order to provide defendants time to make voluntary submissions to the SEC. *Id.* ¶ 13. In a separate notice, defendants seek the deposition of an SEC representative under Federal Rule of Civil Procedure 30(b)(6), seeking testimony on the same topics. *See generally* Mot. Ex. B.

The parties dispute, in their motion papers, the issue of relevance. The SEC contends that, because the statute "does not specify a consequence for noncompliance, [it is] not a limitations period and [does] not otherwise divest the agency of its authority to act." Mot. 2. Accordingly, the Commission argues, information concerning compliance with section 929U (do we want to use this, or§ 78d-5(a)?) "cannot be the basis for any right or claim by Defendants, [and] is utterly irrelevant to this action." *Id.*

Defendants, meanwhile, claim that the time limits act as a *de facto* statute of limitations on enforcement actions like this one. The defendants describe 929U as requiring the SEC to file a complaint within 180 days of the Wells notice, and as imposing "consequences" for failure to

do so: either informing the Director of the SEC's Division of Enforcement of the intention not to file an action, or obtaining an extension. Response in Opposition 2, Feb. 22, 2013, DE [77] (hereinafter "Opposition"). The defendants then construe *Bustamante v. Napolitano*, 582 F.3d 403 (2d Cir. 2009), to establish a general principle that, "[w]here a statute requires an agency to act within a certain time period and specifies a consequence for failure to comply with the provision, an agency is divested of jurisdiction if it fails to act within the prescribed time." *Id.* Defendants argue that the SEC's interpretation of the statute -- that the expiration of the 180-day deadline does not divest the Court of jurisdiction over an enforcement action -- "would render [the] language in the statute superfluous." *Id.*

The SEC also raised four privileges in relation to the documents sought: the attorney-client privilege, the attorney work-product privilege, the deliberative process privilege, and the law enforcement privilege. Mot. Ex. D. Defendants argue that the SEC has not met its burden of showing that the privileges protect the documents sought. Opp'n 3.

DISCUSSION

"Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26. "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* "The broad scope of discovery delimited by the Federal Rules of Civil Procedure is designed to achieve disclosure of all the evidence relevant to the merits of a controversy." *Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 882 F.2d 682, 687 (2d Cir. 1989).

Even the broad scope of civil discovery contemplated by the Federal Rules has its limits, however. "[R]ule 26, the general discovery rule, [does not] permit[] blanket discovery upon bare skeletal request when confronted with an objection…. Some degree of need must be shown. In

most cases, this need is demonstrated by simply showing the relevancy of the desired discovery to the cause of action." *Ehrlich v. Inc. Vill. of Sea Cliff*, No. 04-CV-4025, 2007 U.S. Dist. LEXIS 39824, at *19 (E.D.N.Y. May 31, 2007) (quoting *Belcher v. Bassett Furniture Industries, Inc.*, 588 F.2d 904, 908 (4th Cir. 1978)).

Here, "NIR seeks discovery about whether the SEC timely requested and received extensions of the 180-day deadline set forth in Section 929U." Opp'n 1. This is the sole focus of the testimony and documents sought. Whether the information sought is discoverable thus turns on whether it is relevant to a claim or defense in this action.

The question of whether a statutory deadline for agency action creates a jurisdictional defense is not a new one. In *Brock v. Pierce County*, 476 U.S. 253 (1986), the Supreme Court examined the statutory constraints on a program by which the Secretary of Labor could fund state and local governments' job training and employment programs. *Id.* at 255. The statute at issue authorized the Secretary to receive complaints about grant recipients' misuse of funds and to investigate such complaints, but stated that the Secretary "shall determine the truth of the allegation or belief involved, not later than 120 days after receiving the complaint." *Id.* at 255-56 (internal quotation marks omitted). The Secretary revoked two separate grants more than *two years* after the respective investigations had commenced. *Id.* at 256-57. The Supreme Court upheld the untimely revocations. *Id.* at 258. In so doing, the Court expressed

> reluctan[ce] to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act.

Id. at 256-57.

The Supreme Court faced a similar issue in 2002. The Coal Industry Retiree Health

Benefit Act of 1992 provided for the Commissioner of Social Security to "assign" retired coal miners to a mining company (typically a previous employer), which assignee would then bear responsibility for funding the assigned retiree's benefits. *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 152 (2003). The Act stated that the Commissioner "shall" make such assignments "before October 1, 1993." *Id.* The coal companies argued that assignments after that date were invalid, and that the retirees "must be left unassigned for life." *Id.* at 156. The Court rejected that argument, upholding the assignments. *Id.* at 172. The Court found that "[i]t misses the point simply to argue that the October 1, 1993, date was 'mandatory,' 'imperative,' or a 'deadline.'" *Id.* at 157. Instead, the Court summarized the issue as follows: "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *Id.* at 159 (quoting *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993)).

The only district court to address the instant issue found that section 929U "imposes only an internal deadline on the SEC, not a private right to be free from agency action occurring beyond the internal deadline," relying on *Barnhart* and *James Daniel Good*. *SEC v. Levin*, No. 12-21917-CIV, 2013 U.S. Dist. LEXIS 20027, at *34-35 (S.D. Fla. Feb. 14, 2013).

Defendants muster no arguments that would even suggest a contrary finding. *Bustamante v. Napolitano*, 582 F.3d 403, concerned a statute that *explicitly vested* the district courts with jurisdiction to hear applications to be naturalized as a citizen where the United States Citizenship and Immigration Services had not decided the initial application after 120 days, *id.* at 403-404; the only issue was whether that grant of jurisdiction also deprived the USCIS of concurrent jurisdiction on a given application. *Id.* at 404. Here, in stark contrast, nothing in the statute would indicate that the deadline is jurisdictional.

Defendants also claim, unpersuasively, that to apply the reasoning of *Brock* and *Barnhart* to section 929U would render the statutory deadline "superfluous." The statute may not confer upon *defendants* the right to dismiss an enforcement action against them, but that does not mean that failure to comply with the deadline would necessarily be without consequence. In enacting the deadline, Congress obviously recognized the seriousness of a long-pending unresolved SEC investigation, a concern that would be exacerbated where the targets might include a public company or its officers and directors subject to disclosure requirements. The targets of an SEC probe that extended beyond the deadline may well be entitled to initiate administrative proceeding or file a declaratory judgment action to compel agency action.

Every relevant authority supports the conclusion that expiration of the 180-day deadline imposed by section 929U does not create a jurisdictional bar to SEC enforcement actions. Accordingly, evidence concerning compliance with the statutory deadline is not relevant to a claim or defense in this action, and is not discoverable.

The decision to deny the discovery sought is further buttressed by the nature of the disclosures sought by defendants. Even assuming that the SEC's analyses of the investigation and impending litigation, prepared in the course of seeking or granting an extension of the deadline, were relevant, such documents and determinations would be subject to protections under, *inter alia*, the attorney work-product privilege, *see, e.g.*, *SEC v. NIR Group, LLC*, 283 F.R.D. 127, 131 (E.D.N.Y. 2012) (privilege protects documents prepared because of expected litigation) (citing *United States v. Adlman*, 134 F.3d 1194, 1198 (2d Cir. 1998)), and the deliberative process privilege. *See Tigue v. U.S. Dep't of Justice*, 312 F.3d 70, 76 (2d Cir. 2002) (deliberative process privilege protects documents reflecting advisory opinions, recommendations and deliberations forming part of a process by which governmental decisions

and policies are formulated). Furthermore, authorizing the deposition of Byrne, the SEC's counsel of record in this litigation, requires a much higher showing than that presented here. *See, e.g.*, *SEC v. Morelli*, 143 F.R.D. 42, 47 (S.D.N.Y. 1992) ("Because deposition of a party's attorney is usually both burdensome and disruptive, the mere request to depose a party's attorney constitutes good cause for obtaining a Rule 26(c), Fed.R.Civ.P., protective order."). Defendants have already obtained substantial detail -- in the form of sworn statements from government counsel -- about the process used to obtain extensions in this case. The attempt to obtain further discovery on these issues constitutes an unnecessary burden and a waste of resources.

CONCLUSION

Whereas the subject of the depositions and document requests is irrelevant to any claim or defense in this action, and is not reasonably calculated to lead to the discovery of admissible evidence, the SEC's motion to quash is GRANTED in its entirety.

Dated: Central Islip, New York
March 24, 2013

SO ORDERED:

/s/ Gary R. Brown
GARY R. BROWN
United States Magistrate Judge