

2024 WL 4754022

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United States District Court, S.D. New York.

CERCO BRIDGE LOANS 6 LLC, Plaintiff,

v.

Gregg SCHENKER, et al., Defendants.

23 Civ. 11093 (DEH)

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Signed July 9, 2024

Attorneys and Law Firms

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ORDER

DALE E. HO, United States District Judge:

*1 Defendants Gregg Schenker and Steven Hornstock's (collectively "Defendants") filed two letter-motions: (1) a letter-motion to compel with respect to three discovery disputes, ECF No. 77; (2) letter-motion to extend discovery, ECF No. 81. Cerco ("Plaintiff") filed its opposition to these letter-motions. *See* Pl.'s Opp'n, ECF No. 85. Furthermore, Plaintiff filed a letter-motion requesting leave to file a motion to quash Defendants' subpoenas to Plaintiff's transactional counsel, Matthew Lubart, and law firm Fox Rothschild LLP ("Fox"), and for a protective order. *See* Pl.'s Mot., ECF No. 83. Defendants filed a letter in opposition, arguing that counsel are material witnesses and Plaintiff waived its attorney-client privilege. *See* Defs.' Opp'n, ECF No. 88. Following Defendants' opposition, Plaintiff filed a reply. *See* ECF No. 90. The Court considers each request in turn.

Under Rule 26(b)(1) of the Federal Rules of Civil Procedure, a party may obtain discovery "that is relevant to any party's claim or defense" and that "[r]elevant information need not

be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Pursuant to Rule 45, a party may serve a subpoena on a non-party, although a non-party to whom a subpoena is addressed may object to the subpoena. *See Fed. R. Civ. P. 45(c)(2)*. Under Rule 45(c)(3), the Court "must quash or modify a subpoena that ... requires disclosure of privileged or other protected matter, if no exception or waiver applies; or ... subjects a person to undue burden." *Fed. R. Civ. P. 45(c)(3)*. "Motions to compel and motions to quash a subpoena are both entrusted to the sound discretion of the court." *Fitch, Inc. v. UBS Painewebber, Inc.*, 330 F.3d 104, 108 (2d Cir. 2003) (internal quotation marks omitted).

I. Subpoenas on Mr. Lubart and Fox

The motion to compel, ECF No. 77, and the motion to quash, ECF No. 83, both address whether Defendants are entitled to production of documents with Mr. Lubart and Fox and deposition of Mr. Lubart, ECF No. 83-2. In its motion to compel, Defendants argue they are entitled to Cerco's documents and communications with its counsel concerning the meaning of the Guaranty. ECF No. 77. Defendants argue Cerco's CEO, Peter Cervinka, voluntarily waived attorney-client privilege during his deposition. *Id.* Plaintiff argues Mr. Cervinka did not waive attorney-client privilege; he merely testified that he relied on Mr. Lubart's advice. Pl.'s Opp'n 3; *see also* ECF No. 85-5 at 137:14-137:15 ("So I got – yeah, that's what I understood from my legal advice.").¹ Defendants later argue, however, that "waiver is not a prerequisite to obtaining discovery from Fox and Lubart." Defs.' Opp'n 1.

*2 "[D]epositions of opposing counsel are disfavored" in this Circuit, although "the disfavor with which the practice of seeking discovery from adversary counsel is regarded is not a talisman for the resolution of all controversies of this nature." *In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 71 (2d Cir. 2003). The Second Circuit has explained that in making this determination, courts must look at "all of the relevant facts and circumstances" in order to "determine whether the proposed deposition would entail an inappropriate burden or hardship." *Friedman*, 350 F.3d at 72. Factors the courts can consider include:

[T]he need to depose the lawyer, the lawyer's role in connection with the matter on which discovery is

sought and in relation to the pending litigation, the risk of encountering privilege and work-product issues, and the extent of discovery already conducted.

Id. Courts have also applied the *Friedman* factors in non-deposition contexts, including in decisions resolving motions to compel lawyers to comply with document subpoenas. See *Chevron Corp. v. Donziger*, No. 11 Civ. 691, 2013 WL 1087236, at *23 (S.D.N.Y. Mar. 15, 2013); *Varbero v. Belesis*, No. 20 Civ. 2538, 2020 WL 7043503, at *2 (S.D.N.Y. Dec. 1, 2020). Here, the subpoenas issued seek both document production and the deposition of transactional counsel Mr. Fox; accordingly, the Court considers the *Friedman* factors.²

Need to Subpoena Mr. Lubart and Fox.

First, the Court determines whether there is a need to subpoena Mr. Lubart and his firm. To make this determination, the Court considers whether the information “sought ... may be obtained from another source.” See *KOS Bldg. Grp., LLC v. R.S. Granoff Architects, P.C.*, No. 19 Civ. 2918, 2020 WL 1989487, at *4 (S.D.N.Y. Apr. 12, 2020). “Where the information sought from the attorney can be provided by non-attorney witnesses, that weighs against permitting the deposition of an attorney.” *Sec. & Exch. Comm’n v. Contrarian Press*, No. 16 Civ. 6964, 2020 WL 7079484, at *4 (S.D.N.Y. Dec. 2, 2020).

Plaintiffs argue that “the documents and testimony that Defendants seek are not relevant” because “the parties agree that the Guaranty is unambiguous, and parole evidence is not permitted.” ECF No. 83 at 3. “Although not unlimited, relevance, for purposes of discovery, is an extremely broad concept.” *Blagman v. Apple, Inc.*, No. 12 Civ. 5453, 2014 WL 1285496, at *4 (S.D.N.Y. Mar. 31, 2014). Plaintiff’s submission of Mr. Lubart’s declaration indicates his testimony is relevant. See ECF No. 57. Mr. Lubart was involved in negotiating the Guaranty, which is now disputed in this matter, so discovery from deal counsel is relevant. See *Bridgeport Music Inc. v. UMG Recordings, Inc.*, 2007 WL 4410405, at *3 (S.D.N.Y. Dec. 17, 2007) (granting a motion to compel for evidence from former transactional counsel that “are relevant to the construction of the [disputed] agreement”).

Defendants argue that “the discovery is needed because the parties’ deal counsel are material witnesses who were centrally involved in negotiating the Guaranty.” Defs.’ Opp’n 1. Defendants have attempted to receive information about the guaranty negotiations through Mr. Cervinka, however, he stated, “[i]f you want to know, go to Fox Rothschild, because ... all the communication goes from us to the lawyer.” See Peter Cervinka Dep. Tr., ECF No. 88-1 at 165:14-22.

***3** In *Friedman*, the Second Circuit counseled that the Court could consider whether “interrogatories should be used at least initially and sometimes in lieu of a deposition.” *Friedman*, 350 F.3d at 72. The Court determines that Defendants have established a need to seek document productions from Mr. Lubart via Fox, as the Guaranty negotiations are in dispute, so this factor weighs for allowing upholding the document subpoena, ECF No. 83-1, but not subpoena for a deposition, on Mr. Lubart. ECF No. 83-2.

Mr. Lubart’s Role.

Second, the Court considers the roles of Mr. Lubart and his firm, Fox, in this action. Plaintiff explains that “Mr. Lubart, at all relevant times, represents Cerco as its primary corporate counsel, represented Cerco at every step during the negotiation, drafting, and execution of the Loan Documents and Guaranty.” See ECF No. 83. Mr. Lubart is a corporate, not litigation, counsel for Plaintiff in this matter. The Court in *Friedman* noted that “the fact that the proposed deponent is a lawyer does not automatically insulate him or her from a deposition.” *Friedman*, 350 F.3d at 72. Courts in this District have considered the counsel’s role and the “extent to which the discovery would disrupt the litigation by injecting one of the lawyers charged with its conduct into the case as a witness or by making the advocate’s conduct or knowledge an issue in the proceeding.” *Chevron Corp. v. Donziger*, No. 11 Civ. 691, 2013 WL 1087236, at *30 (S.D.N.Y. Mar. 15, 2013) (internal citation omitted); see also *Varbero v. Belesis*, No. 20 Civ. 2538, 2020 WL 7043503, at *2 (S.D.N.Y. Dec. 1, 2020). Since Mr. Lubart was deal counsel, there is little risk that the subpoena would “reveal [Plaintiff’s] trial strategy, interfere with the relationship between [Plaintiff] and its litigation counsel, or otherwise have a disruptive effect on the litigation of the case.” *Rekor Sys., Inc. v. Loughlin*, No. 19 Civ. 7767, 2022 WL 671908, at *2 (S.D.N.Y. Mar. 7, 2022). Accordingly, the second factor weighs in favor of allowing the document subpoena.

Risk of Encountering Privilege & Work-Product Issues.

Third, is the risk that the requests would cause product privilege and work-product issues. The work product doctrine “provides qualified protection for materials prepared by or at the behest of counsel in anticipation of litigation or for trial.” *In re Grand Jury Subpoenas Dated March 19, 2002 & August 2, 2002*, 318 F.3d 379, 383 (2d Cir.2003). Since Mr. Lubart is “not a litigator and, at the moment the parties entered into the transaction, no litigation was anticipated between the parties, there should be no issue of work product.” *Rekor Sys., Inc.*, No. 19 Civ. 7767, 2022 WL 671908, at *2 (S.D.N.Y. Mar. 7, 2022).

There is some risk, however, that the document requests will involve attorney-client privilege issues, as Mr. Lubart “represents and oversees Cerco's current activities and provides legal advice.” ECF No. 83. The attorney-client privilege protects from disclosure “(1) a communication between client and counsel that (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice.” *In re Cty. of Erie*, 473 F.3d 413, 419 (2d Cir. 2007). “The privilege protects both the advice of the attorney to the client and the information communicated by the client that provides a basis for giving advice.” *Id.* Thus, this factor weighs against allowing a document subpoena.

Extent of Discovery.

*4 Finally, the Court considers the fourth factor, the extent of discovery. Here, Defendants have requested an extension of discovery, which the Court grants.³ “Courts are often less likely to grant discovery against opposing counsel where the parties have already engaged in significant discovery.” *Contrarian Press*, 2020 WL 7079484, at *5; see also *See KOS Bldg.*, 2020 WL 1989487, at *6 (determining that the “late stage of discovery” weighed against allowing counsel's deposition). Since discovery is still ongoing, this factor weighs in favor of upholding the document subpoena on Mr. Lubart.

Conclusion.

Considering all the *Friedman* factors, the Court **GRANTS in part** Defendants' motion to compel and **DENIES in part** Plaintiff's motion to quash. The Court denies Plaintiff's motion to quash with respect to the document subpoena on the law firm Fox Rothschild LLP. Taking “into consideration all of the relevant facts and circumstances[.]” the Court

concludes that Defendants should not be permitted to depose Mr. Lubart, *Friedman*, 350 F.3d at 72, but upholds the document subpoena on Fox Rothschild LLP.

II. Defendants' Motion to Compel

Defendants ask for a conference or alternatively, leave to file a motion to compel related to the two remaining discovery disputes: (1) whether Defendants are entitled to metadata of the CEO's “common mailbox”; (2) whether Plaintiff must produce copies of guaranties from other transactions. See ECF No. 77. Having reviewed the parties' letters and applicable law, the Defendants' motion to compel as to the metadata of the CEO's “common mailbox” is **GRANTED** but **DENIED** as to the copies of other guaranties.

III. Defendants' Discovery Extension Request

Defendants ask for a discovery extension because, among other things, Plaintiff has frustrated Defendants' efforts to obtain documents and depositions of Plaintiff's key executives and significant fact discovery remains outstanding. See ECF No. 81. Plaintiff's letter in opposition argues that there is no good cause warranting an extension of the discovery deadlines, arguing that Defendants have not done their due diligence to complete discovery within the time period allotted in the civil case management plan, given “Defendants' constant filing of vexatious motions over any conceivable issue.” Pl.'s Opp'n 5-6, ECF No. 85. Having carefully reviewed the parties' letters and finding good cause now, the Defendants' discovery extension request of forty-five days is **GRANTED**. The parties shall file an amended Civil Case Management Plan and Scheduling Order, see ECF No. 34, by **July 12, 2024**.

Finally, the parties have come before the Court with similar discovery disputes on multiple occasions. See, e.g., ECF Nos. 26, 42, 62, 75, 77-79, 81, 83. The parties are apprised that in light of the procedural history of this case, further extensions of time will not be granted absent a showing of compelling circumstances and diligence in taking discovery.

SO ORDERED.

All Citations

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Footnotes

- 1 The parties dispute whether Mr. Cervinka voluntarily waived attorney-client privilege during his deposition. See ECF Nos. 77, 83. The Court does not address this dispute because waiver is not required to obtain discovery from counsel in similar matters. See [In re Subpoena Issued to Dennis Friedman](#), 350 F.3d 65, 71 (2d Cir. 2003) (delineating the *Friedman* factors to consider subpoenas of a lawyer); accord [Ratliff v. Davis Polk & Wardwell](#), 354 F.3d 165, 170-71 (2d Cir. 2003) (“Documents obtain no special protection because they are housed in a law firm ...”). Furthermore, Plaintiff’s concerns regarding privilege are considered by the third *Friedman* factor, the risk of encountering privilege and work product issues.
- 2 Courts have at times drawn a distinction between subpoenas served on opposing counsel for depositions and subpoenas served on opposing counsel for documents. See, e.g., [Groppe v. David Ellis Real Estate, L.P.](#), No. 13 Civ. 2068, 2014 WL 904483, at *1-4 (S.D.N.Y. Mar. 4, 2014). Here, however, the Court will not engage in an analysis of these distinctions because both parties rely on *Friedman*. See ECF Nos. 83, 85.
- 3 See Section III.

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