IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

A. SCHULMAN, INC., *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No. 12459-VCL
	)	
CITADEL PLASTIC HOLDINGS, LLC, *et al.*,	)	
	)	
Defendants/Third-Party Plaintiffs,	)	
	)	
v.	)	
	)	
ROBERT J. BRINKMANN,	)	
	)	
Third-Party Defendant.	)	

ORDER GRANTING IN PART THE DEFENDANTS/THIRD-PARTY PLAINTIFFS' MOTION TO COMPEL REGARDING SCHULMAN'S COMMUNICATIONS WITH THE U.S. GOVERNMENT

1. The defendants moved to compel production of documents and responses to interrogatories related to communications between plaintiff A. Schulman, Inc. ("Schulman") and agencies of the United States government, including the Federal Bureau of Investigation.

2. In September 2016, the defendants served interrogatories on Schulman. Interrogatory 20 asked Schulman to "[i]dentify all Persons in the Government contacted Related to the alleged quality issues at Lucent, Including their names, roles, and time period." Schulman responded to the interrogatory by stating that "no Persons in the Government were contacted relating to the alleged quality issues at Lucent." Just over a year later, in an October 2017 filing with this

court, Schulman disclosed that it had been in contact with the FBI for approximately six months. Schulman had not supplemented its interrogatory response.

3. The discovery requests that the defendants served in September 2016 also included document requests. The defendants now claim that their requests called for all communications with the government, including with law enforcement agencies like the FBI or the United States Attorney's Office. In my view, when read fairly, the document requests did not call for communications with law enforcement agencies. They were focused on regulatory agencies that were involved in certifying and overseeing Schulman's products. This order does not give further consideration to the document requests.

4. In November 2017, after Schulman's disclosure of its interactions with the FBI, the defendants served new interrogatories and document requests that focused on communications with law enforcement agencies. The new interrogatories asked Schulman to describe its communications. The new document requests asked Schulman to produce the communications. Schulman objected that the information was irrelevant and privileged.

5. The defendants sent Schulman a deficiency letter, citing authority in support of their position that the materials should be produced. During a meet-and-confer session and in follow-up communications, Schulman did not cite any authority in support of its contrary positions. Schulman represented that it only had provided law enforcement agencies with (i) its own documents, (ii) deposition

transcripts, and (iii) documents reflecting Schulman's document retention and collection efforts. Schulman represented that it had not given the government any privileged material.

6. The defendants moved to compel. Schulman filed an opposition filled with legal authority that Schulman had not previously identified during the meet-and-confer sessions. In support of its opposition, Schulman submitted an affidavit containing factual information that Schulman should have provided in a supplemental response to the defendants' September 2016 interrogatory. In any event, Schulman should have provided the factual information in response to the additional interrogatories that the defendants served in November 2017.

7. The affidavit explains that, after being contacted initially by the FBI, Schulman's counsel met on July 31 and August 1, 2017, with representatives of the FBI, the U.S. Attorney's Office, and the Securities and Exchange Commission. Schulman's counsel gave a PowerPoint presentation to the law enforcement agencies, but did not give the government representatives a copy of the presentation slides. Schulman's counsel also referred to documents that have been produced in this litigation. Schulman later provided the government officials with copies of the documents that were referenced in the PowerPoint presentation. Schulman's counsel also provided the law enforcement agencies with copies of the amended complaint, this court's order addressing the defendants' motion to dismiss, and the transcript of the deposition of Schulman's Rule 30(b)(6) witness.

8. The affidavit states that Schulman's counsel later gave the U.S. Attorney three exhibits from the deposition of Schulman's Rule 30(b)(6) witness. After that, Schulman's counsel provided the U.S. Attorney with a full copy of Schulman's document production, a Collection Inventory Summary, a Former and Legacy Citadel and Lucent Personal Web-Based Email Address Summary, and a Litigation Hold Notice Summary. Schulman has subsequently provided the government with copies of deposition transcripts.

9. Schulman did not enter into a confidentiality agreement with the government. Schulman states that it has an understanding that the government will treat the information with the same degree of confidentiality afforded grand jury materials.

10. In opposing the motion to compel, Schulman engaged in sleight of hand by arguing that the defendants are not entitled to wholesale production of what a party provides to government officials. The case law is not so stark, nor is this line of authority relevant to the current motion. It is true that federal courts generally have resisted what have been called "clone production requests," in which a party in civil litigation seeks a copy of everything that has been produced to a regulator or government agency. A closer reading of the various authorities suggests that two significant factors are (i) the scope of the resulting production and (ii) the extent of overlap between the regulatory or enforcement proceeding and the civil litigation. When the government agency has received a vast amount of material as part of a wide-ranging investigation, courts have noted that (i) a

clone production could contain irrelevant material, (ii) the resulting production could be disproportionate and (iii) the production may include privileged material. *See, e.g.*, *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 2016 WL 6779901 (S.D.N.Y. Nov. 16, 2016); *Pensacola Firefighters' Relief Pension Fund Bd. of Tr. v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 265 F.R.D. 589 (N.D. Fla. 2010). When the production is limited and there is close overlap between what the government has been given and the subject matter of the civil litigation, courts have been more receptive to ordering production. *See, e.g.*, *Fort Worth Empls.' Ret. Fund v. J.P. Morgan Chase & Co.*, 297 F.R.D. 99 (S.D.N.Y. 2013); *In re Weatherford Int'l Sec. Litig.*, 2013 WL 5788687 (S.D.N.Y. Oct. 28, 2013). In one Delaware case, Chancellor Chandler adopted the latter approach and ordered an electronic production of the materials that an issuer had provided to the SEC as part of an investigation. *See Ryan v. Gifford*, 2007 WL 4259557, at *2 (Del. Ch. Nov. 30, 2007).

11. However intellectually stimulating my brisk dip into this case law might have been, the current motion does not call for analyzing the issue of clone production. The defendants are not seeking everything that Schulman produced as part of a government investigation. The defendants instead seek discovery into Schulman's communications with the government.

12. Two Delaware decisions provide guidance. *See Saito v. McKesson HBOC, Inc.*, 2002 WL 31657622 (Del. Ch. Oct. 25, 2002); *WT Equip. P'rs, L.P. v. Parrish*, 1999 WL 743498 (Del. Ch. 1999).

a. In *WT Equipment*, this court held that when a civil litigant communicates with a law enforcement agency about the subject matter of the litigation and provides information that has been produced in the litigation, the communicating party generally has no obligation to disclose the fact of the communication to its adversaries or to re-produce copies of the same material to reveal what has been provided to the government. 1999 WL 743498, at *1. The decision reasoned as follows:

> Under our Court Rules, the defendants in this action are entitled to discover into the factual and legal bases for the claims being asserted against them, and no argument is made that such discovery has been precluded. But, once those facts are disclosed as a matter of general discovery, it is unclear what, if any, utility is added by compelling the disclosure of essentially the same information in the form of what the plaintiff's counsel told the U.S. Attorney. Any relevance would appear to be at best marginal, and would be vastly outweighed by the prejudice occasioned by the likely chilling effect upon a litigant's counsel, from knowing that his or her communications with the Government, made in a good faith effort to report suspected criminal activity by a litigation adversary, would become discoverable by the adversary in the civil action.

Id. at *1.

b. In *Saito*, this court held that when a civil litigant communicates with a law enforcement agency about the subject matter of the litigation and provides information that has *not yet* been produced in the litigation, then that information is discoverable unless a recognized privilege applies.

i. The *Saito* case considered the production of books and records under Section 220 of the Delaware General Corporation Law, 8 *Del. C.* § 220. The SEC had been investigating whether McKesson had filed materially false

or misleading financial statements. McKesson's outside counsel conducted an internal investigation and prepared a report. McKesson's outside counsel offered to provide work product generated from its internal investigation to the SEC and the United States Attorney's Office if the materials were protected by a confidentiality agreement. The government agencies agreed.

ii. The stockholder plaintiff in *Saito* sought production of the information shared with the SEC. Unlike in *WT Equipment*, the information had not otherwise been provided to the plaintiff.

iii. The *Saito* decision accepted that absent a proper invocation of privilege, the material would be subject to production. The *Saito* decision held that the materials in question were work product. The decision further held that McKesson had not waived the protections afforded the materials by providing them to the government because McKesson had entered into a confidentiality agreement with the government and preserved its expectation of privacy. *Id.* at *6.

iv. By contrast, the *Saito* decision held that McKesson could not maintain work product protection for materials provided to the SEC before entering into the confidentiality agreement. McKesson had not preserved its expectation of privacy in these materials, which had to be produced.

13. Under *WT Equipment* and *Saito*, Schulman does not have to produce documents that Schulman has already produced in this litigation. Nor does Schulman need to produce deposition transcripts from this litigation that the

defendants already possess or can readily obtain. Schulman does have to produce the four documents it provided to the government that it has not yet produced in this litigation: the PowerPoint slides, the Collection Inventory Summary, the Former and Legacy Citadel and Lucent Personal Web-Based Email Address Summary, and the Litigation Hold Notice Summary.

a. Schulman did not enter into a confidentiality agreement with the law enforcement agencies before providing the four documents. Consequently, under *Saito*, Schulman had no continuing expectation of privacy in the materials. Moreover, in my view, the Collection Inventory Summary and Litigation Hold Notice Summary are types of documents that warrant production to promote transparency in the discovery process.

b. Schulman has stressed that it showed the government the PowerPoint presentation but did not give the government a copy. This is a distinction without a difference. *Cf. U.S. v. Reyes*, 239 F.R.D. 591, 604 (N.D. Cal. 2006) (rejecting as "specious" the argument that discovery rules should apply differently to a document that was shown to the government just because a copy was not left with the government).

14. The four documents are subject to production for an additional reason: Schulman failed to update its prior interrogatory responses in timely fashion.

a. Under Court of Chancery Rule 26(e)(2),

> [a] party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which . . . (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

Ct. Ch. R. 26(e)(2). Schulman's failure to amend its interrogatory response regarding communications with the government meets this standard. Once Schulman began communicating with the FBI and other government agencies, Schulman's interrogatory response was no longer correct. Schulman could have disclosed voluntarily the facts surrounding its communications with the government, or it could have amended its response, raised a specific objection, and cited pertinent authority. Schulman did neither. It ignored its duty to update.

b. By failing to provide a timely updated response, Schulman waived any right to object to providing the information. *See, e.g.*, *Gower v. Beldock*, 1998 WL 200267, at *2-3 (Del. Ch. Apr. 21, 1998); *Fingold v. Comput. Entry Sys. Corp.*, 1990 WL 11633, at *1 (Del. Ch. Mar. 14, 1990). Schulman's waiver provides an additional basis for producing the PowerPoint slides, the Collection Inventory Summary, the Former and Legacy Citadel and Lucent Personal Web-Based Email Address Summary, and the Litigation Hold Notice Summary.

15. Schulman resists further production, stating that "all substantive" discussions with the government were conducted through telephone calls, in-person meetings, or web conferences. This statement leaves open the possibility of non-substantive communications with the government that were conducted in

writing or via email. These communications likely involve logistical matters concerning the meetings with the government. As part of the sanction for failing to update its interrogatory response, Schulman shall produce these communications.

16. As long as the foregoing materials are produced, Schulman need not update its interrogatory responses to describe its communications with the government in greater detail. A blow-by-blow of what was said to the government or what the government asked might be useful for the defendants in the criminal proceedings that they face. The information has far less significance for this civil case. The burden involved in attempting to reconstruct those communications outweighs their probative value.

17. Schulman has asserted work product protection for any attorney notes or memoranda that relate to Schulman's communications with the government. The defendants have proposed that Schulman log those materials. This order adopts the defendants' proposed remedy on this point.

18. So far, this order has looked backwards to address Schulman's past communications with law enforcement agencies. Going forward, Schulman shall comply with *WT Equipment* and *Saito*. As long as Schulman only provides the government with documents that Schulman already has produced to the defendants or with deposition transcripts that the defendants possess or can easily obtain, then Schulman need not advise the defendants, formally or informally, about what Schulman provides to law enforcement agencies or when. As to these materials, *WT Equipment* controls. To the extent that Schulman provides the government

with information or materials that have not otherwise been provided to the defendants, then *Saito* controls. Unless the materials are subject to work product protection *and* the recipient agency has entered into a confidentiality agreement with Schulman that preserves Schulman's expectation of privacy, then Schulman must produce copies of the materials to the defendants. Schulman also shall update its interrogatory responses to state the date on which the materials were provided and to identify the agency that received it. Schulman need not provide any greater detail in its interrogatory responses.

Vice Chancellor J. Travis Laster
Dated: February 7, 2017