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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

U.S. SECURITIES AND EXCHANGE COMMISSION,	:
	:
Plaintiff	:
	: 1:04-cv-02322 (GEL)
v.	:
	:
UNIVERSAL EXPRESS, INC., et al.,	:
	:
Defendants.	:

**PLAINTIFF’S MOTION IN LIMINE TO PRECLUDE DEFENDANTS’ REQUESTED
TESTIMONY FROM PLAINTIFF’S COUNSEL LESLIE J. HUGHES AND EXCLUDE
PROPOSED SETTLEMENT DOCUMENTS**

Plaintiff Securities and Exchange Commission (“Commission” or “SEC”) opposes the designation by defendants Tarun Mendiratta and George Sandhu of plaintiff’s trial counsel, Leslie J. Hughes, as a witness for cross examination at trial, and moves pursuant to Fed. R. Civ. P. 26 (c) for a protective order precluding the defendants from calling her as a witness at trial. Mr. Mendiratta also seeks to introduce at trial exhibits TM-1 and TM2, which are his consent

and a proposed judgment that he submitted to the Commission as part of settlement negotiations. The defendants seek impermissibly to introduce information through this witness and these exhibits about the parties' settlement discussions, presumably as a means to dispute the remedies that the Commission seeks against Mr. Mendiratta. Evidence of offers of compromise is not admissible under Fed. R. Evid. 408 and so the Commission's motion for a protective order should be granted.

I. Defendants Should Be Precluded From Calling The SEC's Attorney As A Trial Witness.

Defendant Mendiratta lists Leslie Hughes, one of the SEC's trial attorneys, as a witness for cross examination. See Mendiratta's designation of witnesses in Proposed Joint Pretrial Order at p. 8. Defendant Sandhu also lists Ms. Hughes as one of the affiants whom he intends to cross examine, although Ms. Hughes has not submitted an affidavit regarding any testimony that she might personally present at trial. See Sandhu's Designation of Affiants Whom He Intends to Cross Examine. Defendants should not be permitted to call the SEC's trial attorney to testify at trial. Under well-established case law, the testimony of opposing counsel is disfavored. *United States v. Yonkers Bd. Of Educ.*, 946 F. 2d 180, 185 (2d Cir. 1991); *Hickman v. Taylor*, 329 U.S. 495, 513-514 (1947) and *see id.* at 517 (Jackson, J., concurring) (forcing opposing counsel to be a witness at trial has long been discouraged).

The only knowledge Ms. Hughes has of the underlying facts was obtained in her capacity as the SEC's trial attorney. That knowledge as it relates to settlement discussions with Mr. Mendiratta's attorney is not admissible under Fed. R. Evid. 408. Any other conceivable line of questioning would invade relevant privileges. For example, allowing questions relating to the allegations in the Complaint would require the SEC's trial attorney to divulge information that she learned from serving as SEC trial attorney in the litigation and to give her assessment of

allegations against the defendants. Such information is protected by, among other things, the attorney work product doctrine, the deliberative process privilege, and the law enforcement privilege. Fed. R. Evid. 501. Any other information the defendants may seek to elicit from Ms. Hughes about the facts, documents, and testimonial evidence that the Commission's attorneys gathered in preparing for trial or the inferences that the Commission believes it can draw from that evidence is protected from discovery by attorney work product. See *SEC v. Rosenfeld*, 1997 U.S. Dist. Lexis 13996 *5-9 (S.D.N.Y. Sept. 16, 1997); see also *SEC v. Morelli*, 143 F.R.D. 42 *14 (S.D. N.Y. 1992). To obtain discovery of attorney work product, a party must show a substantial need of the materials and that the party is unable to obtain them without undue hardship by other means. Fed. R. Civ. P. 26(b) (3); *Hickman v. Taylor*, 329 U.S. 495, 511-512 (1947); *SEC v. Stanard*, 2007 U.S. Dist. Lexis 46432 *6-7 (S.D.N.Y. 2007); *SEC v. Thrasher*, 1995 U.S. Dist Lexis 1355, *8-9 (S.D.N.Y. 1995). Where the defendants seek to introduce the testimony of Ms. Hughes related to inadmissible settlement discussions, they have failed to make a showing of substantial need for her testimony. To the extent that settlement negotiation are admissible for some other purpose than to dispute the validity of the SEC's claims or the amount in remedies it seeks, Mr. Mendiratta or his counsel are able to testify to those issues without invading the work product of Ms. Hughes or the attorney-client privilege of the SEC.

In similar situations, courts have routinely denied requests to depose opposing counsel. *SEC v. Cavanagh*, 1998 US Dist. Lexis 3713 (S.D.N.Y. Mar. 23, 1998) (barring proposed depositions of SEC trial counsel, where SEC asserted questioning would violate work product, law enforcement, and deliberative process privileges); *SEC v. Rosenfeld*, 1997 U.S. Dist. Lexis 13996 *5-9 (S.D.N.Y. Sept. 16, 1997) (quashing defendant's notice to depose SEC attorney with knowledge of SEC action pending against defendant); *SEC v. Morelli*, 143 F.R.D. 42, 47

(S.D.N.Y. 1992) (quashing deposition of SEC attorney where deposition would impermissibly allow opposing counsel to inquire into SEC's litigation strategy). *See also Hickman*, 329 U.S. at 512-13 (disclosure of attorney's recollection of "oral statements made by witnesses" to him would tend to reveal the attorney's mental processes and may be compelled only in rare situations); *In re Grand Jury Subpoena*, 282 F. 3d 156, 161 (2d Cir. 2002) (on motion to compel attorney to testify regarding defendant's statements in interview with IRS, the court noted that "we see no reason why a work product objection would not properly lie" if an investigator were asked "What facts have you discovered in your investigation?").

No grounds exist for the defendants to call SEC trial counsel to testify at trial. The defendants in the Joint Pretrial Order fail to identify the subject area that the SEC counsel would be called to testify about. Prior to the submission the Joint Pretrial Order, the defendants had never indicated any intention to call Ms. Hughes as a trial witness; they did not list her on their Rule 26(a) initial disclosures and the never sought to depose Ms. Hughes during discovery. To the extent they wish to question her about settlement negotiations with Mr. Mendiratta that evidence is inadmissible to prove the invalidity of, or amount of a claim. Fed. R. Evid. 408.

II. Defendants Should be Precluded From Introducing Exhibits TM-1 and TM-2.

In the Joint Pretrial Order, Mendiratta lists exhibits TM-1 and TM2 as his consent and proposed judgment offered to the SEC in settlement of its claims against him in this case. These documents should be excluded because they are inadmissible under Fed. R. Evid. 408. On October 15, 2007, the Court denied a similar discovery request by Defendant Sandhu seeking to obtain from Mr. Mendiratta all documents related to the settlement negotiations between counsel for the Commission and Mr. Mendiratta. The Court held these documents are not admissible under Fed. R. Evid. 408, which prohibits using statements made in settlement negotiations to

prove liability for, or invalidity of, the claim or amount. See attached transcript of October 15, 2007 hearing at pp. 28:21 to 29:7, Attachment A. Clearly under the Court's October 15, 2007 ruling, Mendiratta's exhibits TM-1 and TM-2 must be excluded at trial.

III. Conclusion.

For the reasons discussed above, the Plaintiff respectfully requests that the Court enter a protective order pursuant to Rule 26(c) precluding the defendants from calling the SEC's trial counsel, Leslie Hughes, as a witness at trial and from introducing into evidence Mendiratta's exhibits TM-1 and TM-2.

Dated: November 16, 2007

Respectfully submitted,

s/ Leslie J. Hughes
Leslie J. Hughes
Attorney for the Plaintiff
Securities and Exchange Commission

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2007, I electronically filed the **PLAINTIFF'S MOTION IN LIMINE TO PRECLUDE DEFENDANTS' REQUESTED TESTIMONY FROM PLAINTIFF'S COUNSEL LESLIE J. HUGHES AND EXCLUDE PROPOSED SETTLEMENT DOCUMENTS** with the Clerk of the Court for filing and uploading to the CM/ECF system which will send notification to the following as indicated to the parties listed below.

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Dated: November 16, 2007

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