

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JEFFREY SAYE,	:	
	:	
Plaintiff,	:	
	:	
v.	:	No. 3:03CV1071 (DJS)
	:	
OLD HILL PARTNERS, INC.,	:	
	:	
Defendant.	:	
	:	

MEMORANDUM OF DECISION AND ORDER

Plaintiff, Jeffrey Saye, asserts five claims against defendant, Old Hill Partners, Inc. ("OHP"), seeking a declaration of his rights under certain contracts pertaining to his former employment with OHP and damages for OHP's alleged breach of these contracts. Several motions relating to discovery are pending in the above-captioned matter: (1) Saye's motion to compel discovery and for an order that certain matters are admitted under Rule 36 (dkt. # 35); (2) OHP's motion to quash the subpoena served upon UBS Securities seeking John C. Howe's personnel records (dkt. # 41); (3) OHP's motion to quash the subpoena served upon Nomura Securities seeking John C. Howe's personnel records (dkt. # 42); (4) OHP's motion to quash the second subpoena served upon Daniel Green, Esq. seeking production of all documents obtained from third parties (dkt. # 52); (5) Saye's cross-motion for sanctions (dkt. # 60); (6) Saye's motion to reopen the deposition of Luke Imperatore, for sanctions against defendant, and for an order

prohibiting defendant and defendant's counsel from employing intimidation and argumentative objections to prevent an effective deposition (dkt. # 59); and (7) OHP's motion to quash the subpoena served upon Bear Stearns & Co. seeking account statements for investment funds managed by OHP (dkt. # 63).

I. BACKGROUND

This lawsuit arises from the termination of Saye's employment relationship with OHP. Saye, a citizen of California, has been employed in "the investment and hedge fund industry, and was principally involved in analyzing and selecting bond positions for investment funds." (Compl., ¶ 7). OHP is a corporation organized in Delaware with its principal place of business in Darien, Connecticut. OHP "serves as an unregistered investment advisor, a hedge fund manager, and as the general partner of certain investment funds." (Id., ¶ 6). Saye commenced employment as a fund manager at OHP as of February 1, 2000.

At the time Saye began to work at OHP, the parties executed two contracts at issue in this case. First, Saye and the other shareholders of OHP, John C. Howe and Mark A. Samuel, executed the Old Hill Partners, Inc. Shareholder Agreement ("Shareholder Agreement"), which, for reasons not divulged in the record, is back-dated to December 15, 1998. The Shareholder Agreement provided that Saye would receive a 15% equity interest in OHP,

which would indefeasibly vest at 5% increments on December 1, 2000, October 1, 2001, and August 1, 2002 should Saye remain employed at OHP on those dates. Second, Saye and OHP executed a "Summary of Terms," which granted Saye an option to purchase an additional 5% equity interest in OHP at the price of \$250,000 if OHP's assets under management are valued at \$80,000,000 prior to the first anniversary of Saye's employment with OHP.

Saye's employment with OHP ended on March 31, 2002. According to Saye, this event triggered certain vested rights Saye held pursuant to the Shareholder Agreement and the Summary of Terms. Saye claims that, because he had been employed with OHP beyond October 1, 2001, OHP must pay him, within 180 days of the termination of his employment, a price per share as determined by an appraisal selected by OHP. Should Saye disagree with the original appraisal, the Shareholder Agreement provides that he may "engage, at [his] own expense, a qualified third party appraisal agreed to in advance by [OHP]." (Compl., Ex. A, ¶ 3.8(c)(iii), at 6). Saye asserts that OHP has not performed its obligation to compensate him for his ownership interest, and that OHP has impeded his efforts to obtain an alternate appraisal. Saye therefore claims that, because he remained employed with OHP through October 1, 2001 and after, he is entitled to receive compensation for the 10% equity interest that had vested pursuant to the Shareholder Agreement.

Saye also argues that the option provided for in the Summary of Terms has vested because the value of OHP's assets under management exceeded \$80,000,000 on February 1, 2001, which is the first anniversary of Saye's employment with OHP. Saye plans to exercise his option to purchase an additional 5% ownership interest in OHP for \$250,000 pursuant to the Summary of Terms and seek compensation for this 5% ownership interest in addition to the 10% ownership interest granted to him by the Shareholder Agreement, for a total of 15%.

OHP asserts counterclaims against Saye. OHP claims that Saye violated the terms of a Confidentiality and Non-Compete Agreement between the parties by, prior to leaving his employment with OHP, using OHP's proprietary information, including information allegedly protected as trade secrets under the Connecticut Uniform Trade Secrets Protection Act, to arrange an investment and employment opportunity for a competitor of OHP for his own benefit. Further, OHP claims that Saye recorded the value of bonds he purchased as the fund manager at unrealistically high prices in order to artificially enhance his performance. OHP contends that Saye's actions breached his duty of loyalty and fiduciary responsibilities to OHP.

II. DISCUSSION

Rule 26 of the Federal Rules of Civil Procedure governs the scope of discovery. Specifically, "[p]arties may obtain

discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . .”

Fed. R. Civ. P. 26(b)(1). As a general proposition, the Federal Rules of Civil Procedure concerning discovery are to be construed broadly. See generally 6 Moore’s Federal Practice § 26.41(1) (Matthew Bender 3d ed. 1997) (citing Herbert v. Lando, 441 U.S. 153, 177 (1979)). A valid discovery request need only “encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.” Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978); see Hickman v. Taylor, 329 U.S. 495, 501 (1947); Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 756 F.2d 230, 236 (2d Cir. 1985).

“A court can limit discovery if it determines, among other things, that the discovery is: (1) unreasonably cumulative or duplicative; (2) obtainable from another source that is more convenient, less burdensome, or less expensive; or (3) the burden or expense of the proposed discovery outweighs its likely benefit.” Chavez v. DaimlerChrysler Corp., 206 F.R.D. 615, 619 (S.D. Ind. 2002) (citing Fed. R. Civ. P. 26(b)(2)). The party resisting discovery bears the burden of demonstrating that its objections should be sustained, and

pat, generic, non-specific objections, intoning the same boilerplate language, are inconsistent with both the letter and the spirit of the Federal Rules of Civil Procedure. An objection to a document request must

clearly set forth the specifics of the objection and how that objection relates to the documents being demanded.

Obiajulu v. City of Rochester, 166 F.R.D. 293, 295 (W.D.N.Y. 1996). The objecting party must do more than "simply intone [the] familiar litany that the interrogatories are burdensome, oppressive or overly broad." Compagnie Francaise D'Assurance Pour Le Commerce Exterieur v. Phillips Petroleum Co., 105 F.R.D. 16, 42 (S.D.N.Y. 1984). Instead, the objecting party must "show specifically how, despite the broad and liberal construction afforded the federal discovery rules, each [request] is not relevant or how each question is overly broad, burdensome or oppressive by submitting affidavits or offering evidence revealing the nature of the burden." Id. (internal citations and quotation marks omitted).

1. SAYE'S MOTION TO COMPEL (DKT. # 35)

Pursuant to Rule 37 of the Federal Rules of Civil Procedure, Saye seeks an order from this court compelling OHP to provide more complete responses to his First Request for Production of Documents. OHP asserts that it has "substantially complied with the requests by furnishing the Plaintiff with 1,227 pages of documents." (Dkt. # 45 at 1).

Saye correctly points out that OHP has yet to serve a supplemental response pursuant to Rule 34(b). Without this response, it is impossible for Saye, or the court, to determine

the sufficiency of OHP's response. Saye's motion is granted in part; OHP shall serve a supplemental response to Saye's First Request for Production of Documents on or before September 30, 2004.

2. SAYE'S MOTION FOR AN ORDER THAT CERTAIN MATTER IS ADMITTED
(DKT. # 35)

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, Saye asks the court to find that requests for admission numbered 2(a), 2(d), and 2(j) are admitted because OHP did not comply with the requirements of Rule 36. Rule 36 provides, in pertinent part, that an answer to a request for admission "shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission. . . ." Fed. R. Civ. P. 36(a). "When a request is denied, the court must consider: (1) whether the denial fairly meets the substance of the request; (2) whether good faith requires that the denial be qualified; and (3) whether any 'qualification' which has been supplied is a good faith qualification." Thalheim v. Eberheim, 124 F.R.D. 34, 35 (D. Conn. 1988). Rule 36 also provides that, with respect to objections to requests, "[a] party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request. . . ." Fed. R. Civ. P. 36(a).

OHP's objections to all three requests are overruled, with one exception. Specifically, request numbered 2(a) neither expressly defines "Old Hill's trading strategy" nor provides a sufficient description of this term such that the court may determine the sufficiency of the denial. Therefore, request numbered 2(a) is ambiguous. Saye may amend and re-serve the request.

The remainder of Saye's motion concerns the sufficiency of OHP's denials. Request numbered 2(d) asserts that "[t]he identity of the broker-dealer with which Old Hill has a 'prime brokerage relationship,' as such term is generally defined and understood in the securities industry, is not a trade secret." (Dkt. # 36, Ex. F). OHP responded by denying request numbered 2(d) on the grounds that "[t]he evidence at trial may support the conclusion that the identity of the broker used by Old Hill for a certain type of transaction, either alone, or in combination with other information does constitute a trade secret." (Id.). This response meets the substance of the request and is apparently set forth in good faith. Therefore, the response is sufficient.

Request numbered 2(j) asserts that "Old Hill's alleged 'trading strategy' of purchasing 'short duration paper,' as such term is known and understood in the securities industry, is not a trade secret." OHP responded by denying request numbered 2(j) because "[t]he evidence at trial may support the conclusion that

the 'trading strategy' of purchasing 'short duration paper,' as such term is known and understood in the securities industry, in combination with other components of Old Hill's trading and investment strategies, does constitute a trade secret." (Id.). The basis for OHP's denial appears to be that the purchase of short term paper, in combination with other components constituting OHP's "trading strategy" may be considered a trade secret. In other words, OHP's "trading strategy" may not be simply purchasing short term paper, and could arguably be proven to be worthy of trade secret protection. OHP's response is sufficient.

3. MOTION TO QUASH SUBPOENA ISSUED TO DANIEL GREEN, ESQ.
(DKT. # 52)

On May 17, 2004, Saye served a subpoena upon Daniel Green, Esq., counsel for OHP, seeking "[a]ny and all documents received by Jackson Lewis LLP in response to any subpoena served pursuant to this litigation, including without limitation, documents received from Bear Stearns & Co." (Dkt. # 61, Ex. 1, Sched. A). OHP and Green argue that the subpoena should be quashed because it is overbroad and because it seeks information immune from discovery pursuant to the work product doctrine.

The overbreadth objection to the subpoena is overruled. The subpoena specifically requests documents received by Green pursuant to a subpoena he or another person in his firm issued. The universe of documents responsive thereto is obvious.

OHP and Green's work product objection is also overruled. The documents sought have been produced to Green in response to subpoenas issued to various non-parties pursuant to Rule 45 of the Federal Rules of Civil Procedure. Rule 45 mandates that notice of a subpoena duces tecum be provided to all parties in the action, see Fed. R. Civ. P. 45(b)(1) ("Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b)"), and contemplates that all parties be able to "monitor the discovery process" and "to pursue access to any information that may or should be produced," id. Advisory Committee Notes, 1991 Amendment, Subdivision (b). A party's attorney's receipt of documents from a non-party does not confer work product immunity upon the documents received. Rather, the federal rules require the facile, cost-effective exchange of information throughout the course of discovery. When there is a breakdown of cooperation, or a miscommunication, between the parties with respect to the production of the documents responsive to the subpoena, a subpoena to the recipient party's attorney seeking documents received from third parties is a valid discovery tool.

Further, OHP and Green have not demonstrated that the requested production of documents would reveal counsel's thought process. Cf. Sprock v. Peil, 759 F.2d 312, 316 (3d. Cir. 1985)

(holding that the district court committed clear legal error in ordering production of a folder of documents selected by counsel to prepare a witness for a deposition because the production of the compilation of the documents, although the documents themselves were discoverable, would impermissibly reveal counsel's thought process). Here, Saye seeks exactly what was produced to OHP in response to OHP's subpoenas. OHP was required to notify Saye of the issuance of the subpoenas, and without question Saye has a right to obtain the same documents. Therefore, production of the responsive documents reveals absolutely no thought process beyond that which must already be disclosed under Rule 45.

4. SAYE'S CROSS-MOTION FOR SANCTIONS (DKT. # 60)

Saye moves for sanctions against OHP and Green under Rule 45(e) and 28 U.S.C. § 1927. Saye alleges that OHP and Green have engaged in vexatious and obstructive actions in not responding to the May 17, 2004 subpoena issued to Green and in moving to quash the subpoena without a colorable basis. This motion is denied; Saye has not met his burden of demonstrating that sanctions are warranted.

5. OHP'S MOTIONS TO QUASH SUBPOENAS SERVED UPON UBS SECURITIES AND NOMURA SECURITIES (DKT. #S 41 & 42)

On April 5, 2004, Saye served subpoenas on UBS Securities and Nomura Securities seeking John Howe's personnel file maintained at each company. OHP now moves to quash these

subpoenas on the grounds that the subpoena requests documents that are not relevant to this litigation. Saye argues that the purpose of the subpoenas is to unearth information pertaining to Howe's employment at the respondent companies for the purpose of impeaching Howe's past and future testimony.

OHP's motions are granted. The subpoenas require the production of far more material than is necessary to discover what Saye seeks. Further, much of the material in Howe's personnel file could be personal information with no relation to this lawsuit.

6. OHP'S MOTION TO QUASH THE SUBPOENA SERVED UPON BEAR STEARNS & CO., INC. (DKT. # 63)

On June 17, 2004, Saye served a subpoena upon Bear Stearns & Co., Inc. seeking "[a]ll monthly or periodic account statements for accounts maintained with Bear Stearns & Co., Inc. by Footbridge Limited Trust, FLT Opportunity Fund, or any other common investment or hedge fund managed by Old Hill Partners, Inc. from inception of the account to the present," and "[a]ll monthly or periodic account statements for accounts maintained with Bear Stearns & Co., Inc. by Old Hill Partners, Inc. from inception of the account to the present." (Dkt. # 63, Ex. A, Sched. A). OHP moves to quash this subpoena, and argues that it is overbroad with respect to both the time period and the subject matter.

OHP's motion is granted. The subpoena should be limited in

both time and subject matter to request information pertaining to funds Saye participated in managing for the time Saye was a shareholder and employee of OHP. Saye argues that the full panoply of account statements is relevant because the statements show the trading strategies employed by OHP, which OHP claims were misappropriated by Saye. In order for these trading strategies to have any relevance to this litigation, however, Saye would have to be aware of them. The only way to prove, through this medium, that Saye was aware of the strategies would be to see if Saye actually employed them while at OHP. Therefore, the subpoena is quashed, and Saye may re-serve a new subpoena seeking only documents pertaining to funds he managed during the time he was an employee at OHP.

7. SAYE'S MOTION TO REOPEN THE DEPOSITION OF LUKE IMPERATORE, FOR SANCTIONS AGAINST DEFENDANT, AND FOR AN ORDER PROHIBITING DEFENDANT AND DEFENDANT'S COUNSEL FROM EMPLOYING INTIMIDATION AND ARGUMENTATIVE OBJECTIONS TO PREVENT AN EFFECTIVE DEPOSITION
(DKT. # 62)

On March 11, 2004, Luke Imperatore provided testimony at a deposition pursuant to a subpoena issued by Saye. Imperatore worked for OHP from December of 2000 through July of 2003, and was responsible for soliciting investors for the funds OHP was managing. Imperatore is a witness to certain events that occurred at OHP during the time Saye worked there and some time thereafter. Saye moves to reopen Imperatore's deposition, with an instruction to OHP's counsel to refrain from disrupting the

deposition, and for an order sanctioning OHP's counsel for disrupting the first deposition.

Saye advances two grounds in support of his motion: (1) that OHP improperly prevented Imperatore from testifying fully by not providing him with representation and threatening to sue Imperatore for violating a non-compete agreement with OHP; and (2) that OHP's counsel was disruptive in objecting to questions posed to Imperatore. With respect to the first ground, Imperatore communicated with OHP's general counsel, Travis Pauley, to discuss whether OHP would provide Imperatore counsel for the March 11, 2004 deposition. Imperatore requested that OHP do so pursuant to the terms of his severance agreement with OHP, which required Imperatore to "provide reasonable cooperation and assistance to Old Hill" with respect to any litigation arising during his tenure or concerning events during his tenure and provided that OHP would "indemnify [Imperatore] for reasonable damages, losses, costs or liabilities (including reasonable legal fees) based upon, arising out of, or relating to any formal and filed claim, demand, action, suit or proceeding . . . initiated by a third party against [Imperatore] as a result of the aforementioned cooperation and assistance . . . provided to Old Hill. . . ." (Dkt. # 62, Ex. 2). OHP declined to provide counsel, but left open the possibility that it would do so in the future should it become appropriate under the terms of the

severance agreement. With respect to the second ground, OHP's counsel objected to several questions on the basis that the questions were duplicative of questions asked of Imperatore in a previous deposition in other litigation. In many instances, counsel did not simply state the objection and the ground, but rather argued with Saye's counsel.

The conduct of depositions at issue here is governed by Rule 30 of the Federal Rules of Civil Procedure. Rule 30 provides that "[u]nless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours. The court must allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination." Fed. R. Civ. P. 30(d)(2). Further, "[i]f the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof." Fed. R. Civ. P. 30(d)(3). With respect to objections, Rule 30 states that "[a]ny objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner." Fed. R. Civ. P. 30(d)(1).

Saye's motion is denied. Imperatore testified at length

regarding events pertinent to this lawsuit and did not refuse to answer questions about these events, or other background information. Although Imperatore was reticent to testify regarding subjects implicating his non-compete agreement with OHP, he did provide testimony on these subjects. Further, the record does not indicate that the source of his reticence was improper pressure exerted by OHP. Rather, the record indicates that Imperatore felt the tension ordinarily associated with determining the proper course of conduct pursuant to his contractual obligations to OHP, and that he was unsure of how to proceed. Although, when read in isolation, some excerpts of Imperatore's testimony suggest that OHP conditioned its decision on whether to provide counsel for Imperatore on whether Imperatore was a "friendly" witness, the balance of Imperatore's testimony on this subject reveals that the term "friendly" refers to whether Imperatore would become akin to a party aligned with either OHP or Saye in the litigation before this court for the purpose of applying the terms of the severance agreement. Therefore, any pressure Imperatore felt was not improperly placed upon him by OHP. Because the record does not indicate that Imperatore refused to provide testimony, and that OHP did not improperly influence his testimony, there is no need to reopen his deposition.

OHP's counsel's improper objections do not warrant reopening

Imperatore's deposition. The exchange at issue regarding allegedly duplicative testimony did not cause an interruption or delay that would require reopening the deposition. Also, although counsel's objections were not proper, they were not of such an egregious nature that sanctions would be appropriate.

III. CONCLUSION

Pursuant to the foregoing, the court orders the following:

1. Saye's motion to compel discovery and for an order that certain matter is admitted under Rule 36 (dkt. # 35, all subparts) is **GRANTED in part** and **DENIED in part**. OHP shall serve a supplemental response to Saye's First Request for Production of Documents on or before **September 30, 2004**.

2. OHP's motion to quash the subpoena served upon UBS Securities seeking John C. Howe's personnel records (dkt. # 41) is **GRANTED**.

3. OHP's motion to quash the subpoena served upon Nomura Securities seeking John C. Howe's personnel records (dkt. # 42) **GRANTED**.

4. OHP's motion to quash the second subpoena served upon Daniel Green, Esq. seeking production of all documents obtained from third parties (dkt. # 52) is **DENIED**. Green shall respond to the subpoena on or before **September 30, 2004**.

5. Saye's cross-motion for sanctions (dkt. # 60) is **DENIED**.

6. Saye's motion to reopen the deposition of Luke Imperatore, for sanctions against defendant, and for an order prohibiting defendant and defendant's counsel from employing intimidation and argumentative objections to prevent an effective deposition (dkt. # 59, all subparts) is **DENIED**.

7. OHP's motion to quash the subpoena served upon Bear Stearns & Co. seeking account statements for investment funds managed by OHP (dkt. # 63) is **GRANTED**.

8. OHP's motion to quash (dkt. # 46) is **DENIED as moot**.

9. OHP's motion to withdraw (dkt. # 73) is **GRANTED**. The Clerk of the Court shall terminate OHP's motion to seal (dkt. # 64).

10. The remaining deadlines for this case shall be extended pursuant to an order issued herewith.

So ordered this 31st day of August, 2004.

/s/DJS

DOMINIC J. SQUATRITO
UNITED STATES DISTRICT JUDGE