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2009 SEP 14 AM 11:51

U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIF.
SANTA ANA

*Lodged
Order*

BY _____
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1 STEPTOE & JOHNSON LLP
2 Patrick M. Norton (*Pro Hac Vice*)
3 Email: pnorton@steptoe.com
4 Brian M. Heberlig (*Pro Hac Vice*)
5 Email: bheberlig@steptoe.com
6 1330 Connecticut Avenue, NW
7 Washington, DC 20036
8 T: (202) 429-3000
9 F: (202) 429-3902

10 Christian A. Jordan (235081)
11 Email: cjordan@steptoe.com
12 2121 Avenue of the Stars, Suite 2800
13 Los Angeles, CA 90067
14 T: (310) 734-3200
15 F: (310) 734-3300

16 *Counsel for IMI plc and Control Components, Inc.*

17 UNITED STATES DISTRICT COURT
18 CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

19 UNITED STATES OF AMERICA,

20 Plaintiff,

21 vs.

22 STUART CARSON, HONG
23 CARSON, a/k/a "Rose Carson,"
24 PAUL COSGROVE, DAVID
25 EDMONDS, FLAVIO RICOTTI, and
26 HAN YONG KIM,

27 Defendants.

Case No. SA CR 09-0077-JVS

NOTICE OF MOTION AND
MOTION TO INTERVENE BY IMI
plc AND CONTROL
COMPONENTS, INC.

Assigned to: Hon. James V. Selna

Date: October 5, 2009
Time: 9:00 a.m.
Place: Courtroom
411 West Fourth Street
Santa Ana, CA 92701-4516

ORIGINAL

1 PLEASE TAKE NOTICE that, on October 5, 2009, before the Honorable
2 James V. Selna, or as soon thereafter as this matter may be heard, IMI plc (“IMI”)
3 and its wholly-owned subsidiary, Control Components, Inc. (“CCI”) (collectively,
4 “the Companies”), will, and hereby do, move this Court to permit the Companies
5 to intervene in this action for the purpose of opposing Defendants’ Joint Motion to
6 Compel Discovery (Docket #101). In the Motion to Compel, Defendants seek to
7 obtain (1) documents in the government’s possession that IMI and CCI contend are
8 protected from disclosure by the attorney-client privilege and the attorney work
9 product doctrine, and (2) documents in IMI’s and CCI’s possession, which
10 Defendants claim are within the government’s constructive possession. IMI and
11 CCI have an interest in preventing disclosure of documents protected by the
12 attorney-client privilege and the work product doctrine, and avoiding being
13 compelled to produce an overwhelming amount of materials to the Defendants at
14 significant expense and burden to the Companies. The grounds in support of this
15 motion are set forth in the attached Memorandum of Points and Authorities.

16 The government does not oppose this motion. Defendants do not oppose
17 IMI and CCI intervening for purposes of asserting the attorney-client privilege and
18 work product doctrine over the documents in the government’s possession and on
19 the Companies’ privilege log. Defendants oppose intervention on any other issue.

20 Dated: September 11, 2009

Respectfully submitted,

21 STEPTOE & JOHNSON LLP

22
23 By: 

24 Brian M. Heberlig

25 *Counsel for IMI plc and Control*
26 *Components, Inc.*

MEMORANDUM

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Court should permit IMI plc (“IMI”) and its wholly-owned subsidiary Control Components, Inc. (“CCI”) (collectively “the Companies”) to intervene in this matter to oppose the Defendants’ Joint Motion to Compel Discovery (“Motion to Compel”). Defendants seek a limited number of charts prepared by the Companies’ outside counsel that the Companies contend are protected by the attorney-client privilege and the attorney work product doctrine. The Companies produced these documents to the government pursuant to a non-waiver and confidentiality agreement. Although the government has asserted the Companies’ privileges and has declined to produce the documents, the government is not the privilege holder and cannot adequately represent the Companies’ interests in preserving the confidentiality of their own privileged documents.

Defendants also seek broad categories of documents in the possession of IMI and CCI (or their outside counsel) based on Defendants’ claim that they are within the control or constructive possession of the government by virtue of the cooperation provision in CCI’s Plea Agreement. Among other things, Defendants seek (1) interview memoranda and other materials generated by IMI’s outside counsel, Steptoe & Johnson LLP (“Steptoe”), during a privileged investigation of these matters, and (2) the entire contents of a 5.5 million page electronic database compiled during the Steptoe investigation. The Steptoe investigation materials and a substantial number of documents in the database, however, are protected from disclosure by the attorney-client privilege and the attorney work product doctrine.

In addition, if the Court were to grant Defendants’ motion, the Companies would be obligated to conduct extensive document searches and produce millions of pages of documents of questionable relevance. The Companies have already searched for and produced all relevant documents regarding improper payments to employees of state-owned and privately-owned customers of CCI. Other than the handful of privileged charts at issue, the government has produced all of these

1 documents to Defendants and has not challenged the sufficiency of the Companies'
2 production or requested the additional documents sought by Defendants. Thus,
3 granting Defendants' motion would result in an extremely burdensome process that
4 would cause the Companies to incur substantial attorneys' fees and expenses to
5 search for largely irrelevant or immaterial documents. The Companies
6 indisputably have a significant interest in the outcome of all aspects of the Motion
7 to Compel.

8 Moreover, Defendants' motion is an obvious end run around Rule 17(c) of
9 the Federal Rules of Criminal Procedure. Defendants are seeking to avoid issuing
10 a subpoena to the Companies for documents in their possession, which would give
11 the Companies standing to move to quash or modify any improper requests. Fed.
12 R. Crim. P. 17(c)(2). By manufacturing a "constructive possession" theory and
13 purporting to seek the materials from the government, Defendants are attempting
14 to avoid compliance with the strict standards associated with Rule 17(c)
15 subpoenas. Defendants would be unable to obtain the vast majority of the
16 documents requested through a Rule 17(c) subpoena, which requires the party
17 serving a subpoena to request specific, relevant, and admissible documents.

18 *United States v. Nixon*, 418 U.S. 683, 699-700. Such a subpoena cannot be used as
19 a "fishing expedition" or to obtain impeachment evidence. *Id.* at 700, 701.

20 Defendants' failure to follow the proper procedure to seek the documents at issue
21 is another reason to permit the Companies to intervene.

22 In sum, the Court should permit IMI and CCI to intervene in this matter to
23 oppose the Defendants' Motion to Compel. The Companies further respectfully
24 request that the Court set a schedule permitting them to respond to the motion in
25 approximately 30 days. The government does not oppose this motion. Defendants
26 do not oppose IMI and CCI intervening for purposes of asserting the attorney-
27 client privilege and work product doctrine over the documents in the government's
28 possession and on the Companies' privilege log. Defendants oppose intervention
on any other issue.

1 II. BACKGROUND

2 On April 8, 2009, the grand jury returned a sixteen-count indictment against
3 six former executives of CCI, including Stuart Carson, Hong “Rose” Carson, Paul
4 Cosgrove and David Edmonds (“Defendants”). The indictment charges a
5 conspiracy to violate the Foreign Corrupt Practices Act (“FCPA”) and the Travel
6 Act based on allegations that Defendants caused CCI to make approximately 236
7 payments totaling approximately \$6.85 million to employees of state-owned and
8 privately-owned customers of CCI for purposes of securing projects that resulted in
9 net profits to CCI of approximately \$46.5 million. Indictment ¶ 14. The
10 indictment also charges various defendants with nine substantive FCPA violations
11 and five substantive Travel Act violations, as well as one obstruction of justice
12 charge against Rose Carson.

13 On July 31, 2009, CCI pled guilty before this Court to an Information
14 charging a conspiracy to violate the FCPA and the Travel Act and two substantive
15 FCPA counts. *See United States v. Control Components, Inc.*, No. SA CR 09-
16 00162-JVS (C.D. Cal.). The Information and Statement of Facts to which CCI
17 agreed largely track the allegations in the indictment in this case. *Id.* (Docket # 7)
18 (attached as Ex. C to Declaration of Kenneth Miller). The Court imposed the
19 agreed-upon sentence in the Plea Agreement, including a criminal fine of \$18.2
20 million, which CCI has already paid. Pursuant to the Plea Agreement, CCI agreed
21 to continue to cooperate with the government’s investigation by, among other
22 things, producing to the Department of Justice (the “Department” or “DOJ”) upon
23 request “any non-privileged document . . . relating to such corrupt payments to
24 foreign public officials or to employees of private customers.” Plea Agreement ¶ 6
(Miller Decl., Ex. C).

25 These two cases arise out of a DOJ investigation following a voluntary
26 disclosure by IMI on August 15, 2007, in which it advised the Department of
27 potential FCPA violations committed by CCI and its employees. Declaration of
28 Brian M. Heberlig ¶ 2 (“Heberlig Decl.”). Shortly prior to the disclosure, IMI

1 retained Steptoe to conduct a privileged investigation of CCI's business practices
2 and potential violations of the FCPA in order to provide IMI with legal advice.
3 IMI also retained Steptoe to advise the company with regard to any interactions
4 with U.S. governmental authorities, including DOJ, and to handle any enforcement
5 action arising out of the events under investigation. In August 2007, IMI
6 established a Special Committee of its Board of Directors to coordinate the
7 investigation. *Id.* ¶ 3. Steptoe, in turn, retained forensic accountants at Ernst &
8 Young ("EY") to act as counsel's agents to assist with document collection and
9 analysis. *Id.* ¶ 4.

10 At Steptoe's direction, EY secured potentially relevant documents and
11 electronic records worldwide, including entire email servers and forensic images of
12 over 200 hard drives of company employees. Steptoe also conducted over 125
13 employee interviews in numerous countries. *Id.* ¶ 5.

14 Concurrent with the Steptoe investigation, the Department began its own
15 investigation of these practices at CCI. At the direction of IMI and the Special
16 Committee, Steptoe cooperated with the DOJ investigation. Early in the course of
17 the investigation, on October 18, 2007, IMI and DOJ entered into a Confidentiality
18 and Non-Waiver Agreement. *See Heberlig Decl.* ¶ 6 (Ex. A). The Agreement
19 provided that IMI intended to cooperate in the government's investigation by
20 producing oral summaries of witness interviews, document compilations and other
21 investigative findings that may be protected by the attorney-client privilege and/or
22 the attorney work product doctrine. By so doing, the agreement provided, IMI did
23 not intend to waive the attorney-client privilege or work product protection as to
24 any third party. The Department agreed not to assert that IMI's production of this
25 material constituted a waiver as to any third party, or as to any materials not
26 provided by IMI. DOJ further agreed to maintain the confidentiality of the
27 information and not disclose it to any third party, except to the extent that DOJ
28 determined that disclosure was required by law. *Id.*

1 Pursuant to this agreement, Steptoe provided oral summaries of witness
2 interviews and produced numerous documents, including binders of the key
3 documents that counsel used to interview witnesses. Heberlig Decl. ¶ 7. At the
4 Department's request, Steptoe also prepared a chart of the improper payments
5 identified during the investigation, as well as similar analyses of gifts, travel and
6 entertainment expenses provided to customers and certain improper "training trips"
7 provided by CCI to employees of state-owned enterprises. *Id.* IMI and CCI also
8 produced to the Department the supporting factual documentation upon which
9 these analyses were based. *Id.* In sum, IMI and the Special Committee directed
10 Steptoe to cooperate fully with the Department's investigation and to produce all
11 relevant, non-privileged documents reflecting potentially improper payments to
12 employees of state-owned and privately-owned CCI customers. Steptoe, in turn,
13 searched the EY electronic database for such records -- both in the context of
14 preparing for witness interviews and generating the payments chart requested by
15 the Department -- and produced them to the Department. *Id.* ¶ 8. It is our
16 understanding that, with the exception of the handful of privileged charts at issue,
17 the government has provided to Defendants in discovery all of the documents
18 produced by the Companies during the investigation.

19 In addition to conducting the privileged investigation on behalf of IMI and
20 the Special Committee, Steptoe represented both IMI and CCI in negotiations with
21 the Department about resolving the matters under investigation. Steptoe negotiated
22 CCI's Plea Agreement and represented the Company in the plea hearing and
23 sentencing before the Court. Heberlig Decl. ¶ 9. As undersigned counsel indicated
24 at the CCI plea hearing (in the excerpt attached as Exhibit L to the Miller
25 Declaration), Steptoe also negotiated with the Department on IMI's behalf and
26 secured a letter in which the Department agreed not to prosecute IMI based on the
27 conduct described in the Statement of Facts accompanying the CCI Plea
28 Agreement or any information disclosed by IMI or CCI to the Department. *Id.* ¶ 9
(Ex. B).

1 On September 4, 2009, Defendants filed the Motion to Compel,¹ asking the
2 Court to order the government to produce various categories of materials pursuant
3 to Federal Rule of Criminal Procedure 16(a)(1)(E) and the government's
4 obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). Defendants seek the
5 eight documents identified on the IMI/CCI privilege log, consisting of the charts
6 summarizing the improper payments, gift and entertainment expenses, and
7 "training trips" that the Companies produced to the Department pursuant to the
8 Non-Waiver Agreement. Defendants contend that these analyses are not protected
9 by the attorney-client privilege because they were prepared at the government's
10 request. They do not contend, nor could they, that the documents are not attorney
11 work product. Defendants further contend that the Companies waived any
12 privilege or work product protection by producing these documents to the
13 Department, notwithstanding the parties' Non-Waiver Agreement.

14 The vast majority of Defendants' requests, however, are aimed at documents
15 that are *not in the possession of the government* but are in the possession of IMI or
16 CCI (or in some cases, their outside counsel, Steptoe). Indeed, with the exception
17 of the handful of privileged documents described above, it is our understanding
18 that the government has provided Defendants in discovery with all of the
19 documents produced by the Companies. Nonetheless, based on the ongoing
20 cooperation provision of CCI's Plea Agreement, Defendants maintain that all
21 documents in CCI's possession are within the control or constructive possession of
22 the government for purposes of Rule 16 and *Brady*. Based solely on this
23 constructive possession claim, the government seeks broad categories of
24 documents that the government has not requested from the Companies and CCI
25 and IMI have not produced, including (1) all interview memoranda and
26 investigation materials generated during the privileged Steptoe investigation

27 ¹ Defendants did not serve IMI or CCI with a copy of the motion.
28 Undersigned counsel did not learn about the motion until September 8, 2009, after
the holiday weekend.

1 conducted on behalf of IMI and the Special Committee, (2) all 5.5 million pages in
2 the electronic database that EY created to permit Steptoe to search among the
3 available materials for relevant documents (including numerous privileged
4 communications involving IMI's in-house and external counsel), and (3) a host of
5 other speculative or burdensome requests that amount to a fishing expedition for
6 potentially relevant material.

7 Although we do not brief the full merits here, IMI and CCI oppose
8 Defendants' Motion to Compel because (1) it seeks the production of materials
9 protected under the attorney-client privilege and work product doctrine;
10 (2) Defendants' constructive possession theory has no merit and, in any event, does
11 not apply to the many documents requested that are not subject to CCI's
12 cooperation agreement because they are either privileged, possessed by IMI, or
13 unrelated to corrupt payments; (3) it is an end run around Federal Rule of Criminal
14 Procedure 17(c), which limits third-party subpoena requests to specific, relevant
15 and *admissible* documents, and prevents criminal defendants from issuing the types
16 of "fishing exhibition" requests here seeking impeachment and other inadmissible
17 or irrelevant information²; and (4) it would require the Companies to commit
18 enormous effort and resources to search for documents responsive to Defendants'
19 demands and produce the more than 5.5 million pages of documents Defendants
20 seek. CCI intends to file a brief setting forth in detail its opposition to Defendants'
21 Motion to Compel, should this Court permit CCI to intervene.

21 **III. DISCUSSION**

22 "Third parties may intervene in a criminal trial to challenge the production
23 of subpoenaed documents on the ground of privilege." *United States v. Bergonzi*,

24
25 ² Rule 17(c) of the Federal Rules of Criminal Procedure does not entitle
26 defendants to pretrial production of impeachment materials. *United States v.*
27 *Nixon*, 418 U.S. 683, 701 (1974); *see also United States v. Fields*, 663 F.2d 880,
28 881 (9th Cir. 1981) (holding that it was an abuse of discretion for district court not
to quash a 17(c) subpoena seeking witness interview statements for impeachment).

1 216 F.R.D. 487, 492 (N.D. Cal. 2003) (citing *United States v. Cuthbertson*, 651
2 F.2d 189, 193 (3d Cir. 1981)). In *Bergonzi*, where individual defendants in a
3 criminal case had filed a motion to compel pursuant to Rule 16 and *Brady*, and the
4 company that had produced the responsive materials maintained they were
5 protected by the company's attorney-client privilege and work product protection,
6 the court permitted the company to intervene because the privilege asserted
7 belonged to the company. 216 F.R.D. 490, 492; *see also United States v.*
8 *Carmichael*, 342 F. Supp. 2d 1070, 1072 (M.D. Al. 2004) ("Intervention in
9 criminal cases is generally limited to those instances in which a third party's
10 constitutional or other federal rights are implicated by the resolution of a particular
11 motion, request, or other issue during the course of a criminal case," such as where
12 a third party "challenge[s] a request for the production of documents on the ground
13 of privilege").

14 Courts have reached similar conclusions in the grand jury context, where
15 "[i]t is well-established that a litigant may have sufficiently important, legally-
16 cognizable interests in the materials or testimony sought by a grand jury subpoena
17 issued to another person to give the litigant standing to challenge the validity of
18 that subpoena." *In re Grand Jury*, 111 F.3d 1066, 1073-74 (3d Cir. 1997)
(collecting cases).

19 Precedent under Rule 24(a) of the Federal Rules of Civil Procedure,
20 governing intervention, is also instructive. Under Rule 24(a), intervenors must
21 satisfy a four-part test:

22 (1) the application for intervention must be timely; (2) the applicant
23 must have a "significantly protectable" interest relating to the property
24 or transaction that is the subject of the action; (3) the applicant must
25 be so situated that the disposition of the action may, as a practical
26 matter, impair or impede the applicant's ability to protect that interest;
27 and (4) the applicant's interest must not be adequately represented by
28 the existing parties in the lawsuit.

1 *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001).
2 (quotation omitted). IMI and CCI easily satisfy all four prongs of this test.

3 First, the Companies' motion to intervene is timely. The Defendants filed
4 the Motion to Compel Discovery one week ago. Because the motion was not
5 served on IMI or CCI, counsel did not learn about it until Tuesday, September 8,
6 2009, and promptly filed this motion to intervene three days later. None of the
7 parties will be prejudiced by the Companies' intervention at this stage of the
8 matter.

9 Second, CCI has "significantly protectable" interests relating to the
10 documents that are the object of Defendants' motion. The Companies' interest in
11 preserving the confidentiality of privileged and work product documents is a
12 legally protected interest. *Bergonzi*, 216 F.R.D. at 492; *see also In re Grand Jury*
13 *Proceedings*, 469 F.3d 24, 26 (1st Cir. 2006) ("[C]olorable claims of attorney-
14 client privilege qualify as sufficient interests to ground intervention as of right").
15 In addition, because the motion seeks the production of documents in the
16 Companies' possession, the Companies have standing in this matter and a strong
17 interest in not being compelled to expend the substantial resources that would be
18 required to locate and produce the documents sought by Defendants.

19 Third, granting Defendants' motion would impede the Companies' ability to
20 protect their interests by requiring the Companies to conduct extensive document
21 searches and potentially produce the entire database of documents collected in the
22 Steptoe investigation, including privileged documents, attorney work product, and
23 irrelevant or immaterial documents, at significant expense to IMI/CCI.

24 Finally, the Companies' interests are not adequately represented by the
25 existing parties. The burden on proposed intervenors to show inadequate
26 representation is "minimal." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir.
27 2003). Here, the government is not the privilege holder and does not have an
28 interest in protecting disclosure of the documents. Moreover, CCI, not the
government, would suffer the burden of having to search for and produce the

1 documents if the Court grants the Motion to Compel, giving the Companies greater
2 incentive to contest the motion. Only the Companies possess sufficient
3 information to explain the circumstances behind the Steptoe investigation, the
4 creation of the privileged documents at issue, the contents of the electronic
5 database, and the processes by which the Companies produced documents to the
6 government (to rebut the Defendants' unfounded and implausible claims that
7 Steptoe selectively disclosed documents to scapegoat the Defendants). *See* Motion
8 to Compel at 3. The government is simply not in a position to make the same
9 arguments as the Companies, even if it were inclined to do so.

10 **IV. CONCLUSION**

11 For the foregoing reasons, IMI and CCI respectfully request that the Court
12 grant this Motion to Intervene and permit the Companies to submit a brief in
13 opposition to the Defendants' Motion to Compel in approximately 30 days.

14
15 Dated: September 11, 2009

Respectfully submitted,

16 STEPTOE & JOHNSON LLP

17
18 By: 

19 Brian M. Heberlig

20 *Counsel for IMI plc and Control*
21 *Components, Inc.*