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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. WILLIAM E. MAPP, III, WARREN K. PAXTON, JR., CALEB J. WHITE, and SERVERGY, INC., Defendants.	:	Civ. Action No. 4:16-cv-00246

DEFENDANT WARREN K. PAXTON, JR.'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND ANSWER TO INTERROGATORY FROM PLAINTIFF SECURITIES AND EXCHANGE COMMISSION

Pursuant to Federal Rule of Civil Procedure 37(a), Defendant Warren K. Paxton, Jr. hereby moves the Court to compel Plaintiff Securities and Exchange Commission ("SEC") to produce (1) notes of interviews the SEC conducted of "Investor 1" and "Investor 2," and (2) summaries of statements made to the SEC by "Investor 1" and "Investor 2."

As required by Local Rule CV-7(h), counsel for Mr. Paxton met and conferred with counsel telephonically for the SEC on October 21, 2016 and December 6, 2016, and were unable to obtain the SEC's concurrence in the relief sought in this motion.

Dated: December 14, 2016

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Respectfully submitted,

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT WARREN K. PAXTON, JR.'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND ANSWER TO INTERROGATORY FROM PLAINTIFF SECURITIES AND EXCHANGE COMMISSION

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STATEMENT OF THE ISSUES PRESENTED

1. Whether the SEC has waived any work product protection with regard to its interview notes and summaries for "Investor 1" and "Investor 2" by relying on those interviews in support of its Amended Complaint?

2. Whether Mr. Paxton has shown a substantial need for the interview notes and summaries for "Investor 1" or "Investor 2"?

INTRODUCTION

On October 7, 2016, this Court conditionally granted Mr. Paxton's Motion to Dismiss all four claims brought against him by the SEC, concluding that the original Complaint did not, among other things, allege facts sufficient to establish a fiduciary duty on the part of Mr. Paxton giving rise to a duty to disclose. The core of the SEC's fiduciary duty theory was that Mr. Paxton was a member of an "investment group" consisting of "Investor 1" and "Investor 2." The SEC now has filed an Amended Complaint alleging for the first time that the investment group had an "established purpose, policies, and practices." Amended Compl. ¶ 78 (Dkt. 40).

The many deficiencies in the SEC's Amended Complaint as a whole were addressed in Mr. Paxton's most recent Motion to Dismiss. For present purposes, it bears noting that the only possible basis for the new allegation concerning the so-called "established policies and practices" of the "investment group" is the SEC's non-privileged interviews of Investors 1 or 2, neither of which were conducted under oath or on the record. Recently, however, counsel for Investors 1 and 2 has represented in writing that "[t]here was no formal group," but rather "an ad hoc arrangement where, from time to time, good friends might invest in the same transaction" with the participants "differ[ing] from transaction to transaction." Obviously, this is a dramatically different story than the tale the SEC has spun about a decades-old investment group with established policies and practices. Mr. Paxton is seeking to discover the contents of the SEC's

non-privileged interviews of Investors 1 and 2, in part to discern where and how this divergence in stories occurred.

Counsel for the SEC has refused to provide the requested materials on work product protection grounds, stating that "showing the direction that we steered [the witness] with our questions would give away our strategy." One wonders why the SEC was steering the witnesses in any direction, rather than simply gathering the facts, but, in any event, the work product protection does not apply here. ***First***, the SEC has waived any work product protection by relying on the statements of those witnesses in leveling the allegations in the Amended Complaint. The law is clear that the SEC cannot for tactical advantage reveal those portions of an interview that it deems helpful to its case while simultaneously shielding the balance of the interview from discovery. ***Second***, in light of the differing stories about the supposed investment group on which the SEC places such great reliance, access to the statements made (or not made) by Investors 1 and 2 to the SEC during any of these non-privileged interviews will be critical to Mr. Paxton's ability to rebut the SEC's allegations and, if needed, to impeach the witnesses' credibility. And those two witnesses were the only Servergy investors allegedly solicited by Mr. Paxton whom the SEC interviewed prior to filing its Complaint. Mr. Paxton's substantial need for the statements of those key witnesses overcomes any work product protection that might otherwise apply.

BACKGROUND

In August 2013, Mr. Paxton announced his run for Texas Attorney General. Three weeks later, the SEC opened the investigation that led to the filing of this action. *See* Ex. 1 - Declaration of Matthew T. Martens (hereafter, "Martens Decl."), ¶ 2. On December 17, 2014, just weeks after Mr. Paxton's election as Texas Attorney General, the SEC took his testimony pursuant to subpoena and under oath. *Id.* ¶ 3.

During the course of its investigation, the SEC did not take sworn testimony from any potential investors in Servergy, Inc. *Id.* ¶ 4. On December 22, 2014, the SEC interviewed Byron C. Cook (who is believed to be Investor 1 in the SEC's Amended Complaint[1]) as part of the investigation. *See* Martens Decl., Ex. C, at 2.[2] Mr. Cook is a member of the Texas legislature and is reported to have supported Mr. Paxton's opponent in the Republican primary for the Attorney General nomination.[3] Unlike Mr. Paxton, Mr. Cook was not subpoenaed to testify before the SEC and was not placed under oath; he was interviewed by SEC investigators off the record.[4] Three months later, on March 12, 2015, Mr. Cook's friend, Joel Hochberg (who is believed to be Investor 2 in the Amended Complaint[5]), was interviewed by the SEC. *See id.* Mr. Hochberg also was not subpoenaed for testimony, was not placed under oath, and was interviewed off the record.[6] Accordingly, there is no transcript of the statements Messrs. Cook or Hochberg made to the SEC. The SEC did not interview any other Servergy investors supposedly solicited or recruited by Mr. Paxton prior to the filing of its initial complaint on April 11, 2016. *See id.*

[redacted]

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1 *See, e.g.*, Chuck Lindell, *Ken Paxton: Is his legal trouble motivated by politics?*, Austin American-Statesman (July 28, 2016), *available at* http://www.mystatesman.com/news/news/ken-paxton-is-his-legal-trouble-motivated-by-polit/nr6bt/.

2 Although the SEC's Supplemental Response to Mr. Paxton's First Interrogatory, dated August 25, 2016, lists its interview of Mr. Cook as taking place on January 6, 2015, the SEC has since informed counsel for Mr. Paxton that the date was actually December 22, 2014.

3 *See* Lindell, *supra* n.1.

4 Mr. Paxton requested copies of all transcripts of testimony by individuals in the investigation and received in response only the transcripts of Mr. Mapp's and Mr. Paxton's testimony. *See* Martens Decl., ¶ 4.

5 *See* Lindell, *supra* n.1.

6 *See supra* n.4.

[redacted]

On April 11, 2016, the SEC filed a complaint against Mr. Paxton ("Complaint"), among others, alleging that he had defrauded actual and potential investors in Servergy by failing to disclose a commission he supposedly had been offered by Servergy for soliciting potential investors. *See* Complaint (Dkt. 1). In particular, the Complaint alleged that Investors 1 and 2 (Messrs. Cook and Hochberg) were members of an "investment group" with Mr. Paxton and were defrauded by him. *See id.* ¶¶ 78, 80-83.

To discover the basis for the SEC's allegations in its initial Complaint, Mr. Paxton served a Request for the Production of Documents on the SEC on June 25, 2016, seeking any and all documents "concerning the Commission investigation known as *In the Matter of Servergy, Inc., FW-03828-A*, including, without limitation . . . interview notes." Martens Decl., Ex. A, at 4. The SEC produced some documents responsive to this request, but according to its privilege log, it withheld unspecified "investigative notes, internal memoranda, [and] legal research" on the basis of the work product protection, investigative privilege, or deliberative process privilege. Martens Decl., Ex. F.

On July 19, 2016, Mr. Paxton served his first interrogatory on the SEC, requesting that the SEC describe "in detail (including the date, SEC personnel to whom the statement was made, persons present, and content of) each and every statement made to the SEC by each of the individuals identified in Plaintiff's Initial Disclosures as someone solicited or recruited by Mr. Paxton to invest in Servergy, Inc." Martens Decl., Ex. B, at 3. After initially objecting on attorney work product grounds, the SEC eventually responded to the interrogatory in part by providing only the identities of witnesses it had interviewed who had allegedly been solicited by Mr. Paxton and when they were interviewed, confirming that it had interviewed only Messrs. Cook and Mr. Hochberg in late 2014 and early 2015, as described above. Martens Decl., Ex. C.

In the meantime, Mr. Paxton filed a Motion to Dismiss the SEC's Complaint, arguing that it failed to state a claim. By Order dated October 7, 2016, the Court conditionally granted Mr. Paxton's Motion to Dismiss. *See* Order (Dkt. 39). The Court held that the alleged omission by Mr. Paxton was not actionable absent a duty to disclose. *See id.* at 10. The SEC argued that Mr. Paxton had a duty to disclose as a result of a fiduciary duty to members of the supposed investment group, but the Court rejected this argument, noting that "[t]he Commission does not

allege that Paxton had any sort of control or dominance over his investment club members," as the case law requires. *Id.* at 12 (citing *United States v. Skelly*, 442 F.3d 94, 99 (2d Cir. 2006); *United States v. Chestman*, 947 F.2d 551, 568 (2d Cir. 1991)). Nor, the Court noted, had the complaint "allege[d] any *express policy* in Paxton's investment club regarding disclosing compensation when promoting stocks." *Id.* (emphasis added) (citing *SEC v. Kirch*, 263 F. Supp. 2d 1144, 1147 (N.D. Ill. 2003)). Accordingly, the Court conditionally granted the Motion to Dismiss, but afforded the SEC fourteen days to amend its Complaint. *Id.* at 29.

On October 21, 2016, the SEC filed an Amended Complaint, for the first time alleging that there was an "investment group" consisting of Investors 1, 2, 3, and 4; that the group had an "established purpose, policies, and practices" concerning participation in an investment; that Mr. Paxton "participate[d] in investments with the investment group"; and that Investor 1 (Mr. Cook) expressly informed Mr. Paxton of the investment group's "established policies." *See* Amended Compl. ¶¶ 77, 78.

Mr. Paxton thereafter served additional discovery on the SEC seeking to understand the basis for the SEC's new allegation that the "investment group" had "established policies and practices." In response to an interrogatory requesting the basis for this allegation, the SEC cited the interviews of Mr. Cook on December 22, 2014 and Mr. Hochberg on March 12, 2015 (as well as a few other pieces of evidence, such as [redacted] and Mr. Paxton's testimony to the Commission). Martens Decl., Ex. G. None of that other evidence suggests that there were established policies of the supposed "investment group." The only possible source for this supposed "established policy" (other than "anticipated testimony") is the non-privileged interviews of Messrs. Cook and Hochberg, which the SEC has shielded from discovery under the

guise of the work product protection.

In a further effort to obtain discovery regarding the supposed "investment group," Mr. Paxton served subpoenas *duces tecum* on Messrs. Cook and Hochberg. Martens Decl., ¶ 7. Thereafter, counsel for Messrs. Cook and Hochberg and Mr. Paxton's undersigned counsel conferred telephonically regarding the scope of the subpoenas, after which, by email dated December 2, 2016, counsel for Messrs. Cook and Hochberg confirmed that "[t]here was no formal group that existed." Martens Decl., Ex. H. "Instead," according to their counsel, "there was an ad hoc arrangement where, from time to time, good friends might invest in the same transaction—or were at least offered the opportunity to invest in the same transaction. The persons who invested differed from transaction to transaction, and the length of time they had invested all differed from person to person." *Id.*[7]

Counsel for Mr. Paxton have conferred with SEC counsel telephonically on several occasions concerning the Commission's refusal to produce its interview notes or summaries from any interviews of Investors 1 (Mr. Cook) and 2 (Mr. Hochberg). During the first teleconference on October 21, 2016, the SEC confirmed that Investor 1 was re-interviewed, again off the record, subsequent to the filing of the original Complaint. Martens Decl. ¶ 8. During a further teleconference on December 6, 2016, counsel for the SEC objected to the production of the requested materials on work product protection grounds, stating that "showing the direction that we steered [the witness] with our questions would give away our strategy." *Id.* ¶ 9. Counsel for Mr. Paxton made clear that they are not seeking to discover the SEC's opinion work product or the mental impressions of the SEC's attorneys, but rather only the statements made by Investors

[7] In addition, counsel for Messrs. Cook and Hochberg "confirmed that Mr. Cook and Mr. Hochberg did not consider Mr. Paxton to be their broker." Martens Decl., Ex. H.

1 and 2 in their non-privileged interviews and the dates those statements were made. The SEC refuses to provide either. This motion follows.

ARGUMENT

The work product doctrine does not shield from discovery either the SEC's notes or the content of its non-privileged interviews of Investors 1 or 2. ***First***, the SEC has waived its right to assert the work product doctrine by making the information it gained during its interview(s) the linchpin of its case against Mr. Paxton. Because the SEC has sought to use this "confidential information" as a sword against Mr. Paxton, it has "implicitly waive[d] its use protectively (the shield) under that privilege." *Willy v. Admin. Review Bd.*, 423 F.3d 483, 497 (5th Cir. 2005); see also *Mir v. L-3 Commcn's Integrated Sys., L.P.*, 315 F.R.D. 460, 470 (N.D. Tex. 2016). ***Second***, even assuming the SEC can assert the work product doctrine, that protection is overcome because Mr. Paxton has a substantial need for the notes from and summaries of the non-privileged interviews the SEC conducted of Investors 1 and 2. The SEC has admitted steering the witnesses in certain directions during its interviews, and, not surprisingly, there is reason to believe that Investors 1 and 2 gave statements during their SEC interviews that are inconsistent with earlier and subsequent statements. Those inconsistent statements would be invaluable impeachment evidence and there is no reliable alternative source for discovering those inconsistent statements other than questioning the very same persons who have made them.

I. The SEC Has Waived Its Right to Assert Work Product Protection By Putting the Facts in its Interview Notes at Issue in This Case

The SEC's original Complaint, and now its Amended Complaint, are based in large part on statements made by Investors 1 and 2 during non-privileged, unsworn, and unrecorded interviews by the SEC. Because the SEC affirmatively recited information from its interview(s) with Investors 1 and 2 in its Amended Complaint and made the information it discovered during

those interviews a central fact at issue in this litigation, the SEC has waived its right to assert the work product protection for its notes and summaries of those very same interviews. *See FDIC v. Wise*, 139 F.R.D. 168, 172 (D. Colo. 1991) ("Since the FDIC affirmatively placed this information at issue, allowing it to assert privileges to protect against disclosure of these documents would be manifestly unfair to defendants." (citing *Conkling v. Turner*, 883 F.2d 431, 434 (5th Cir. 1989))); *see also United States ex rel Westrick v. Second Chance Body Armor, Inc.*, 288 F.R.D. 222, 226 (D.D.C. 2012) ("A party who selectively and deliberately discloses work product to gain a tactical advantage during litigation waives the protection as to the entire subject matter of the disclosure."); *Granite Partners v. Bear, Stearns & Co., Inc.*, 184 F.R.D. 49, 55 (S.D.N.Y. 1999) ("A privilege may be impliedly waived where a party makes assertions in the litigation or 'asserts a claim that in fairness requires examination of protected communications.'" (quoting *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991))).

A party cannot "selectively disclose[] privileged information for its tactical benefit." *United States v. Citgo Petroleum Corp.*, No. C-06-563, 2007 WL 1125792, at *6 (S.D. Tex. Apr. 16, 2007) (citing *Nguyen v. Excel Corp.*, 197 F.3d 200, 208 (5th Cir. 1999)). Rather, implied waiver can be found where fairness mandates disclosure of work product because a party's claims inherently are based on the substance of work product information. See *Granite Partners*, 184 F.R.D. at 55 (ordering production of notes of witness interviews because those interviews were partially the basis for the lawsuit).

Here, the SEC has placed the interview statements of Investors 1 and 2 at issue by resting allegations in its Amended Complaint almost entirely on those statements, sometimes in their supposed verbatim form. Specifically, the Amended Complaint recites purported conversations between Investor 1 and Mr. Paxton, the only source for which can be the SEC's interview(s) of

Investor 1. *See* Amended Compl. ¶ 78 (alleging that Investor 1 "informed" and "expressly told" Mr. Paxton about supposed policies of the investment group). Similarly, the Amended Complaint purports to recite Investor 2's rendition of a telephone call with Mr. Paxton. *See id.* ¶ 96. The SEC cannot, for tactical benefit, selectively disclose and quote in its Amended Complaint those statements by Investors 1 and 2 that are favorable to the Commission and simultaneously shield from Mr. Paxton the remainder of those witnesses' statements to the SEC or the non-privileged context in which those statements were provided. *See Citgo Petroleum*, 2007 WL 1125792, at *6.

Fairness demands that Mr. Paxton be afforded access to the prior statements of Investor 1 in particular in order to test his credibility at trial. The SEC, in its Amended Complaint, has attempted to manufacture a fiduciary duty on the part of Mr. Paxton by alleging that Investor 1 advised Mr. Paxton of so-called established policies of the investment group. *See* Amended Compl. ¶ 78. As explained in Mr. Paxton's recent Motion to Dismiss, this allegation does nothing to rescue the SEC's defective fraud claims. But if this matter goes forward, the only evidence of this supposed conversation is Investor 1's account of it, which his own counsel, relying on his client's confirmation, has now contradicted. "Essential to testing a witness' account of events is the ability to compare that version with other versions the witness has earlier recounted." *Pennsylvania v. Ritchie*, 480 U.S. 39, 71 (1987). Given that the SEC's allegations concerning the supposed conversation between Investor 1 and Mr. Paxton did not emerge until the Amended Complaint and the SEC has admitted to steering the witness, Investor 1's failure to disclose this supposed conversation in earlier statements to the SEC, as well as the date on which Investor 1 first disclosed the alleged conversation to the SEC, would be critical pieces of evidence for impeachment purposes. *See* 1 McCormick on Evidence § 34 (7th ed. 2016) (prior

statement is "inconsistent" for impeachment purposes "if the prior statement omits a material fact presently testified to and it would have been natural to mention that fact in the prior statement"); *Jenkins v. Anderson*, 447 U.S. 231, 239 (1980) ("Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted."); *Jencks v. United States*, 353 U.S. 657, 667 (1957) ("The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony."). This is especially so where the claimed conversation is central to the SEC's effort to show the required fiduciary duty and the only evidence of any such conversation is the testimony of Investor 1. *See Giglio v. United States*, 405 U.S. 150, 154-55 (1972).[8] In short, basic fairness requires that Mr. Paxton have access to the prior witness statements to the SEC that form the basis of the SEC's case against him. *See* Fed. R. Evid. 613(b) (permitting extrinsic evidence of prior inconsistent statements for impeachment).

Since the SEC has waived its right to assert the work product doctrine by affirmatively recounting in its Amended Complaint information provided by Investors 1 and 2 during interviews with the SEC, the SEC cannot avail itself of the work product protection to shield the content of those interviews from discovery. The Court should compel the SEC to produce notes from its interview(s) of Investors 1 and 2, and to summarize the information provided (or not

[8] Mr. Paxton is aware that the *Ritchie*, *Jenkins*, *Jencks*, and *Giglio* decisions were constitutional decisions rendered in the criminal context. Mr. Paxton is not contending that there is, as in the criminal context, a constitutional right to the impeachment material in this civil enforcement action. Rather, Mr. Paxton cites these cases simply to demonstrate the importance of prior inconsistent statements for impeachment purposes. Courts have recognized a substantial need for similar impeachment evidence in the civil context as well. *See infra* Part II.

provided) by those witnesses in each of those interviews.

II. Mr. Paxton Has a Substantial Need for Notes from and Summaries of the SEC's Interview(s) of Investors 1 and 2, the SEC's Key Witnesses

As noted above, the SEC's newly-minted allegation—that Mr. Paxton was informed by Investor 1 of the investment group's established policies and practices—depends entirely on the testimony of Investor 1. Yet, this allegation appeared nowhere in the original Complaint, and [redacted] To the contrary, counsel for Investors 1 and 2 recently advised undersigned counsel in writing that "[t]here was no formal group," but rather an "an ad hoc arrangement where, from time to time, good friends" were offered the opportunity to invest in the same transaction. Martens. Decl., Ex. H. Given the continued evolution of the allegations concerning the supposed investment group and the SEC's admitted involvement in steering the witnesses, there is good reason to believe that the statements made (or not made) by Investors 1 and 2 to the SEC during their interviews will provide further impeachment material. Accordingly, Mr. Paxton has demonstrated substantial need for the interview notes and summaries of Investors 1 and 2's statements to the SEC and undue hardship if he is denied access thereto, as required to overcome any work product protection.

Federal Rule of Civil Procedure 26(b)(3)(A)(ii) provides that a party may discover documents that would otherwise be protected by the work product protection if the party "shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means."[9] Although disclosure of witness

[9] Mr. Paxton notes that "opinion" work product is more stringently protected than "fact" work product and obtaining it requires a showing of "necessity." *See, e.g., In re John Doe Corp.*, 675 F.2d 482, 492 (2d Cir. 1982); *see also* Fed. R. Civ. P. 26(b)(3). To the extent that notes constitute summaries of what a witness has stated, a number of courts consider this fact work

interview notes is disfavored, *see Upjohn Co. v. United States*, 449 U.S. 383, 398-99 (1981), courts nevertheless compel discovery of interview notes and summaries when the moving party demonstrates that those materials may be useful for impeachment of key witnesses, *see, e.g.*, *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) (observing that discovery of witness statements may be permitted where the statements "might be useful for purposes of impeachment or corroboration"); *John Doe Corp.*, 675 F.2d at 492; *Johnson v. Bryco Arms*, No. 03-CV-2582, 2005 WL 469612, at *5 (E.D.N.Y. Mar. 1, 2005) (requiring production of witness statements needed for impeachment); *Duck v. Warren*, 160 F.R.D. 80, 83 (E.D. Va. 1995) (compelling production of witness statements because "[t]he impeachment value at trial of inconsistencies in defendant's statements is unquestionably great"); Advisory Committee Notes, 1970 Amendment to Rule 26(b)(3) (noting that witness statements will be discoverable if the witness "may probably be deviating from his prior statement").

In *Duck v. Warren*, the court held that a "substantial need" for witnesses' statements sufficient to overcome work product protection "'can be established by showing the document is necessary for impeachment purposes.'" 160 F.R.D. at 83 (internal citation omitted). Because the plaintiff in *Duck* had identified inconsistencies in several of the defendant's statements, including those made to other witnesses, there was a "good indication that . . . statements [made] during the [] investigation . . . would reveal further inconsistencies." *Id.* Accordingly, the court concluded that "[t]he impeachment value at trial of inconsistencies in defendant's statements

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product to be evaluated under the substantial need test. *See, e.g.*, *Thomas v. General Motors Corp.*, 174 F.R.D. 386, 389 (E.D. Tex. 1997); *Xerox Corp. v. IBM Corp.*, 64 F.R.D. 367, 382 (S.D.N.Y. 1974). In any event, redactions of any opinions embedded therein should be sufficient to address any of the SEC's concerns. Mr. Paxton is not seeking any mental impressions that may be recorded in the interview notes. Nor is Mr. Paxton requesting that the SEC disclose its mental impressions when providing a recitation of the statements made by Investors 1 and 2 during their interviews.

[was] unquestionably great." *Id.* The court further held that merely deposing the witnesses was not an adequate alternative to production of the witnesses' statements because the plaintiff was not "merely on a mission to discover the facts underlying the work product documents," but rather was seeking to obtain "invaluable impeachment information." *Id.* The court therefore compelled production of the witness statements. *Id.*

Similarly, in *Johnson v. Bryco Arms*, the plaintiff sought to compel the defendants to produce a witness statement made to a defense investigator in anticipation of litigation. 2005 WL 469612, at *1. In evaluating whether the plaintiff had "substantial need" for the witness statement sufficient to overcome work product protection, the court observed that "[i]mpeachment material can, in some circumstances, support a claim of substantial need sufficient to pierce a claim of work-product protection." *Id.* at *5. The court concluded that the plaintiff had made the substantial need showing, observing that "[a] prior statement by a witness—in this case, a central witness to the case—will provide plaintiffs with a critical piece of impeachment material." *Id.* at *5. The court further observed that "[t]he fact that plaintiffs' counsel were able to depose the witness does not obviate the need for the statement," as "[a]ny prior statement provides a clue to what may be a developing narrative with significant contradictions, that may bear on credibility." *Id.*

Here, the notes from the SEC's interview(s) of Investors 1 and 2—the SEC's key (and, perhaps, only) witnesses against Mr. Paxton—are likely to contain inconsistencies and are necessary to impeach their statements, which are the basis for the SEC's new allegations. As detailed above, there is no indication that, at any point in the SEC's multi-year investigation, Investor 1 or 2 ever made any statements about "established policies" of the supposed investment group. There was no allegation of those policies in the original Complaint, and the SEC did not

refer to any such policies during the lengthy oral argument on Mr. Paxton's original Motion to Dismiss. [redacted], and, more recently, their counsel has denied that there even was a formal group, as opposed to an ad hoc arrangement where friends were offered opportunities to invest from time to time. As in *Duck* and *Johnson*, these demonstrated inconsistencies are reason to believe that further inconsistencies would be uncovered in the witnesses' statements to the SEC.

At the same time, there is no ready alternative to develop a record of Investors 1 and 2's prior statements to the SEC in order to highlight inconsistencies and contradictions with the SEC's latest rendition of events. The SEC chose not to conduct the interviews of Investors 1 and 2 on the record, perhaps to conceal their now-admitted efforts to steer the direction of those witnesses' statements. In any event, the only reliable source for the contents of those interviews are the SEC's interview notes or their summaries of those interviews. As courts have recognized, a deposition of Investors 1 and 2 is not an adequate alternative means to uncover inconsistencies absent access to notes or summaries of what was said previously. *See, e.g.*, *Duck*, 160 F.R.D. at 82 (holding that a deposition is not a substitute for "invaluable impeachment information"); *Johnson*, 2005 WL 469612, at *5 (holding that the opportunity to depose the witness "does not obviate the need for the statement" that bears on credibility). Indeed, the whole point of impeachment material is to challenge the witness's deposition testimony and demonstrate that the current testimony is inconsistent with prior versions of events told by the witnesses. The only reliable way for Mr. Paxton to discover when Investor 1 first told the SEC about the newly alleged established policy, in what circumstances those statements were made to the SEC, and what additional context may have been provided to the SEC is to review the interview notes and have access to summaries of the statements of those witnesses.

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CONCLUSION

For the foregoing reasons, Mr. Paxton respectfully requests that this Court compel the SEC to produce notes from and summaries of interviews conducted by the SEC of Investors 1 and 2.

Dated: December 14, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2016, I electronically filed the foregoing with the Clerk of the Court through the CM/ECF system, which will send notices of electronic filing to all counsel of record.

/s/ Matthew T. Martens
Attorney

REDACTED

CERTIFICATE OF CONFERENCE

We hereby certify that on December 6, 2016, we complied with the meet and confer requirement in Local Rule CV-7(h) and determined that this motion will be opposed. Mr. Gulde and counsel for Mr. Paxton conducted the personal conferences required by this rule via telephone on October 21, 2016 and December 6, 2016 and determined that no agreement could be reached because the SEC claims privilege over this set of documents and information. The discussions have conclusively ended in an impasse, leaving an open issue for the court to resolve.

/s/ Matthew T. Martens
Lead Attorney

/s/ Bill Mateja
Local Counsel