United States v. Carson, Case No. 09-77 JVS

Tentative Minute Order re Motion to Suppress

Defendants Hong Carson ("Carson"), Paul Cosgrove ("Cosgrove"), and David Edmonds ("Edmonds") (collectively "Defendants") move to suppress statements which they made to attorneys from Steptoe & Johnson, LLP ("Steptoe") during the course of Steptoe's internal investigation of behalf of Control Components, Inc. ("CCI") and its parent IMI plc ("IMI"). The theory of the Motion is that the Steptoe attorneys were part of the Government's investigation, and therefore state actors. The record is clear that none of the movants was given a Miranda[1] warning.[2] The Defendants thus argue that their statements should be suppressed.

Because the Court rejects the state actor theory, the Court denies the Motion.

I. Background and Fact Finding.

By and large, there is no dispute what transpired between the Government and Steptoe because the record consists of e-mails and other correspondence. Where the parties differ is in the conclusions they draw. Accordingly, it is worthwhile to set out most of the communications before proceeding.

The initial contacts were between Patrick Norton, a Steptoe partner and former Deputy Chief of the United States Department of Justice Fraud Division Mark F. Mendelson on August 15, 2007. CCI's parent had directed that disclosure be made to the Department of Justice of potential violations of the Foreign Corrupt Practices Act. (Docket No. 104, Heberlig Decl., ¶ 2.) The following is the full text of an e-mail between Norton and Mendelson that same day:

[1]Miranda v. Arizona, 384 U.S. 436 (1966).

[2]E.g., Edmonds Decl., ¶ 9

Mark,

I've been discussing with IMI's general counsel the feasibility of holding off on their announcement to the London Exchange. He doesn't think it's doable. The Company's Board of Directors, on advice from UK counsel, decided at about 6 PM UK time to issue the release at 7:30 AM in London tomorrow. It's already 9:30 PM in the UK (about 8:30 - 9 when we spoke), and the wheels are in motion. It's simply not feasible to get UK counsel to opine on this and contact all the Board members in time to derail the announcement. There would also be a significant risk of a leak if they tried to do this at the last moment, and that would create other problems.

We fully recognize your and our interest in getting access to senior management who may have been involved in the payments in questions while may still be willing to cooperate. To that end, I am now planning to fly to LA this evening or first thing in the morning and to be present when the individuals are informed that they are being suspended pending the investigation. We intend to inform them that the suspension is temporary and we are not prejudging the outcome, but that the company expects them to cooperate with the investigation. Then I proceed to interview them.

This will give our associate in LA time to assemble many, if not all, of the relevant documents.

I would hope to be able to advise you by the end of the day tomorrow (probably COB PDT) whether the individuals are cooperating or not. If they are, you can then decide whether you wish to send someone from the DOJ or FBI to speak to them. I will also be on-site to help coordinate with the company. If they refuse to cooperate with us, they will presumably refuse to cooperate with you too. In either case, you should have a better idea of what course you wish to take.

If you want to discuss, I expect to be in the office until about 6:15 [telephone numbers deleted].

> Regards,
> Pat

(McCormick Decl., Exh. B, p. 2.)

On August 16, 2007, Cosgrove and Edmonds were instructed by CCI president Ian Whitten ("Whitten") meet with Steptoe lawyers that day. (Cosgrove Decl., ¶ 2; Edmonds Decl., ¶ 2.) Believing that their jobs were at risk, they met with Norton and another Steptoe lawyer on August 16 and 17. (Cosgrove Decl., ¶¶ 2-4; Edmonds Decl., ¶¶ 4-5, 7-8.) On August 17, 2007, Carson was instructed to meet with the Steptoe lawyers. (Carson, Decl., ¶¶ 2-3.) Feeling the same compulsion, she met with the Steptoe lawyers. (Id., ¶¶ 3,5, 7.)

Norton sent Mendelsohn a second e-mail at 1:22 a.m. on Friday, August 17, 2007, which related first day of interviews:

> Mark,
>
> We interviewed five of the senior management at CCI today in very general terms. So far they are being cooperative. We intend to ask more difficult questions tomorrow based on specific documents.
>
> If you would like to discuss this, please suggest a time by email, and I[']ll try to break away.
>
> Best regards,
> Pat

((McCormick Decl., Exh. B, pp. 2-3.) Mendelsohn responded the same day: several hours later:

> Thanks, Pat. I will be out of the office on Friday [August 17, 2007]. I suggest we speak early next week, after you have gotten into specifics.

(Id., p. 3.)

As a matter of fact finding, there is no basis to conclude on the basis of events that transpired prior to the interviews or in the aftermath that the Steptoe lawyers were acting as agents of the Government. In a moment, the Court considers additional factors which bear on this conclusion.

Steptoe contacted the Department of Justice. Similar contacts were made with British regulatory authorities. (Motion, Ex. C.) There is no evidence that the Government had any input in the determination of which employees to interview or what they should be asked. Although Mendelsohn was advised of the first day of interviews via e-mail, he did not provide any guidance or input for the next day's interviews, and put off discussing the "specifics" of the interviews until the following week. (McCormick Decl., Ex. B, p. 3.)

The Court examines four factors which hold the potential to alter the Court's conclusion.

First, the Court notes Cosgrove's contention that FBI agents were at CCI while the interviews were conducted. (Cosgrove Decl., ¶ 4.) Apart from the fact that Cosgrove's statement is pure hearsay and has no evidentiary value, the Government has offered evidence from the FBI special agent on the case that no FBI agents were present, and that the FBI's investigation was not initiated until several months later. (Smith Decl., ¶¶ 2-4.)

Second, the Court notes that in an earlier declaration Steptoe counsel stated that "Steptoe informed the Department [of Justice] of these search terms and procedures [used in conducting interviews] during the course of the investigation." (Docket No. 121-2, Heberlig Decl., ¶ 13.) There is no indication that any such communications took place with regard to the interview of Carson, Cosgrove, or Edmonds, nor is there any indication that once having been informed of Steptoe's preparation, the Government provided input.

Third, the Court also notes a June 22, 2009 letter from A. Finocchiaro, President of IMI China explaining the Department of Justice's investigation of CCI to a Ms. Gao at CNOOC, an oil company owned by the People's Republic of China. The letter states in part:

> • In 2007 IMI found evidence that former CCI management were involved in paying bribes in many part of the world. IMI reported the matter to the DOJ which started its own investigation assisted by independent external US counsel appointed by IMI, Steptoe & Johnson.
>
> • CCI was required to provide to the DOJ all evidence that appeared to be relevant to the investigation. The entire investigation was carried out in co-operation between the DOJ and IMI's external counsel and was independent of IMI/CCI.

(Docket No. 551-1, Ex. A (emphasis supplied).) There are several problems with the letter, not the least of which is that it comes nearly two years after the limited communications between Steptoe and the Department of Justice. As the Court has previously noted, there is no indication that Finocchiaro, as a president of an IMI subsidiary, had a basis for the statements he made. The Court is more inclined to accept the testimony of those who dealt first hand with the Government and thus have knowledge of the activities of Steptoe.[3] (Docket No. 121-2.)

Fourth, the Government has publically available policies with regard to corporate wrongdoing. The so-called McNulty Memorandum, drafted by Deputy Attorney Paul J. McNulty, was in effect in 2007. The fact that the policy encouraged disclosure of wrongdoing and cooperation is no basis to conclude that every corporation doing so *ispo facto* converts the corporation and its lawyers into a government agent.

Having concluded as a matter of fact that the Steptoe lawyers were not agents of the Government at the time of the interviews, the Court turns to the applicable law.

II. Legal Discussion.

To succeed, the Defendants must establish that the Steptoe lawyers were state actors, and that the Defendants were compelled to give the interviews. Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 937 (1982); Fisher v. United

[3]Moreover, the language of the letter is not inconsistent with separate investigations.

States, 425 U.S. 391, 399-400 (1976).

A. State Actors.

One test for determining whether a private person is a state actor is to determine "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974). The requisite nexus is established "only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (italics in original).

Cooperation with the Government does not convert the party cooperating into a state actor. United States v. Ferguson , 2007 WL 4240782 at *5 (D. Conn. Nov. 30, 2007).

Another test is whether the Government has "knowingly acquiesce[d] in and encourage[d] directly or indirectly a private citizen to engage in activity which it is prohibited." United States v. Walther, 652 F.2d 788, 793 (9th Cir. 1981).

The facts here do not establish more than a unilateral determination on the part of CCI and its parent to cooperate with the Government. Surely, it was in CCI's interest and a legitimate activity to investigate potential criminal conduct in its business operations. The Government had no involvement with the Defendants' interviews, and it cannot be said that Steptoe's action were so intertwined with the Government that those interviews may be "fairly treated" as the conduct of the Government. Jackson, 419 U.S. at 351. Indeed, Norton's e-mail recognize two separate sets of interests at work, and there is a clear expression that Steptoe expected the Government to determine "what course you wish to take" with regard to employee interviews. (McCormick Decl., Ex. B, p. 2.)

The record is clear that CCI through its parent IMI had made a decision to conduct an internal investigation before Steptoe contacted the Government.

The Stein decisions–United States v. Stein, 435 F. Supp. 2d 330 (S.D. N.Y. 2006) ("Stein I"), and United States v. Stein, 440 F. Supp. 2d 315 (S.D.N.Y. 2006) ("Stein II")–do not advance the Defendants' position here. In Stein I, the Government had coerced the accounting firm KPMG to withdraw defense expenses for the employees. That fact is not present here, and indeed that investigation had played out while the Thompson Memorandum was in effect. This potential for coercion was eliminated in the McNulty Memorandum. Moreover, the coerced employee statements were made directly to the Government, a factor that certainly enhanced the Stein II's court finding of coercion. Stein II, 440 F. Supp. 2d at 326. Nothing here establishes that the Government "deliberately precipitated" the supposed coercion employed by CCI in causing the interviews to go forward. (Id. at 334.)

B. Coercion.

There are really two issues here: Were Carson, Cosgrove, and Edmonds in fact coerced to give their statements, and apart from that, did the Government bring about the coercion?

The proof of coercion rests mainly of the subjective statements of Carson, Cosgrove, and Edmonds. None say in their declarations that Whitman or anyone else at CCI in fact threatened termination. Contrast Garrity v. State of New Jersey, 385 U.S. 493, 494 (1967). The letters which Whitman sent to each following his face-to-face discussions contain no threats. (McCormick Decl., Exs. C1-C3.) Whitman did instruct them to cooperate:

> As someone involved in the Severe Service business, the Company expects you to cooperate fully in this process. Arrangements have been made for you to meet with the investigators. When you do so, please answer all their questions and furnish all information they request.

(E.g., id., Ex. C1, p. 1.) But even if Whitman went farther, it would not amount to coercion. In Ferguson, the employer Ge Re went beyond directing cooperation and advised that "(1) Gen Re would consider disciplining employees who failed to cooperate, and (2) Gen Re would reexamine its obligations, under its by-laws, to pay non-cooperating employees' legal fees." (2007 WL 420782 at *7.) Even such

encouragement did not amount to coercion.

Here, there is no evidence, either direct or indirect, that the Government precipitated or encouraged any threats of sanctions for failing to cooperate. It is evident from Norton's lengthy e-mail to Mendelsohn that CCI had already determined that Carson, Cosgrove, and Edmonds would be suspended (McCormick Decl., Ex. B, p. 2.) And Whitman's letters to the Defendants prior to the interviews advised of suspension.

The Court concludes that even if there were both a subjective and reasonably objective belief of job loss, that would still be insufficient to establish the requisite coercion.

III. Conclusion.

The Court finds that the Defendants' Fifth Amendment right were not violated during the conduct of the Steptoe interviews. The Motion is denied.