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LEGAL ALERT

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Federal Court Finds That SEC Attorneys' Interview Notes and Memories Are Not Protected by the Work Product Doctrine

In a highly unusual decision that the Securities and Exchange Commission (SEC) says "ignores 65 years of precedent," a federal judge has held that the memories of SEC attorneys and information from their interview notes are discoverable.[1] The SEC lawyers appear to have interviewed three key witnesses during the investigation without taking their sworn testimony, thereby avoiding the creation of a verbatim transcript. In a February 4, 2013 Order, Magistrate Judge Nathanael Cousins of the Northern District of California rejected the SEC's argument that its attorneys' memories and notes about these interviews were protected by the work product doctrine and ordered full responses to interrogatories regarding the interviews.[2]

At the heart of this case, *SEC v. Christopher Sells*, is the allegation that the Defendants, former executives of Hansen Medical, Inc., violated the federal securities laws by participating in a fraudulent scheme to boost the company's sales of a surgical device. When making the allegations against one of the Defendants, Timothy Murawski, in the SEC's October 2011 complaint, the regulator relied on the statements of three immunized witnesses who were interviewed by SEC attorneys in 2010. These interviews were not recorded by a stenographer. Murawski submitted interrogatories to the SEC that asked the regulator to disclose the dates of these interviews and the information the witnesses provided. Murawski argued that this information was necessary to his case and could not be obtained by other means, even though he had chosen not to depose any of these witnesses. The SEC argued that the information in notes taken by its attorneys during these interviews was not discoverable under the work product doctrine. The court disagreed and ordered the SEC to "disclose the dates of its communications with the witnesses and to describe the information provided by the witnesses, including information provided during three specific meetings in 2010."[3]

The court and the parties largely focused on the U.S. Supreme Court's 1947 decision in *Hickman v. Taylor*. The SEC argued that "*Hickman* held that an interrogatory seeking a description of the substance of a witness statement obtained in anticipation of litigation calls for work product—even if the attorney learned facts about relevant events during the interviews . . .."[4] The SEC asserted that the Supreme Court had found that pre-filing interviews of this nature are the "most protected form of attorney work product" because they "reflect an attorney's mental impressions and opinions."[5] On the other hand, Murawski claimed that the information he sought constituted facts not protected by the work product doctrine, an argument the SEC said "ignores 65 years of precedent."[6] The court rejected the SEC's arguments and echoed the language from *Hickman* that "[w]here relevant and non-privileged facts remain hidden in an attorney's files and where production of those facts is essential to the preparation of one's case, discovery may properly be had."[7] This case was distinguishable from *Hickman*, in the court's opinion, because there the responding party had provided interrogatory responses that included relevant information from witness interviews. The court also noted that the party seeking discovery in *Hickman* "had not demonstrated the necessity of the production, or the

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[1] *SEC v. Christopher Sells,* Order Compelling Responses to Interrogatories 8-10, No. 11-cv-04941 CW (NC) (N.D. Cal. Feb. 4, 2013); *SEC v. Christopher Sells,* Joint Letter Brief, No. 11-cv-04941 CW (NC) (N.D. Cal. Jan. 29, 2013).
[2] *SEC v. Christopher Sells,* Order Compelling Responses to Interrogatories 8-10 at *2.
[3] *Id*.
[4] *SEC v. Christopher Sells,* Joint Letter Brief at *3.
[5] *Id.* at 3-4.
[6] *Id.* at 4.
[7] *SEC v. Christopher Sells,* Order Compelling Responses to Interrogatories 8-10 at *2 (quoting *Hickman v. Taylor*, 329 U.S. 495, 511 (1947)).

hardship or injustice caused by a denial of the discovery."[8] In *Sells*, the court held that the production of the requested information was justified because Murawski had demonstrated that the "information sought by the interrogatories is unavailable by other means and is substantially necessary to his case."[9] It was irrelevant to the court that Murawski could depose these witnesses because that would still not make their 2010 statements about what they had claimed at that time available to him.

Seemingly frustrated with the SEC's actions in discovery (the parties had a similar dispute about another witness), the court noted that the regulator "has asserted every possible objection," which were "misplaced" and "boilerplate," and that when "one party is repeatedly withholding relevant information, stronger medicine may be required."[10] In this case, that "stronger medicine" at a minimum is the compelled production of information gleaned from the three-year-old notes and memories of SEC attorneys. And the court darkly hinted that it might entertain a motion for sanctions against the SEC. Whether this ruling portends future difficulties for the SEC in keeping witness interviews confidential in other cases, or has any impact on the SEC's practice of conducting off-the-record interviews during investigations, remains to be seen.

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If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

Authors

Bruce M. Bettigole	202.383.0165	bruce.bettigole@sutherland.com
Andrew M. McCormick	202.383.0867	andrew.mccormick@sutherland.com

Related Attorneys

Peter J. Anderson	404.853.8414	peter.anderson@sutherland.com
Eric A. Arnold	202.383.0741	eric.arnold@sutherland.com
Keith J. Barnett	404.853.8384	keith.barnett@sutherland.com
Patricia A. Gorham	404.853.8298	patricia.gorham@sutherland.com
Olga Greenberg	404.853.8274	olga.greenberg@sutherland.com
Cheryl L. Haas	404.853.8521	cheryl.haas@sutherland.com
Deborah G. Heilizer	202.383.0858	deb.heilizer@sutherland.com
Clifford E. Kirsch	212.389.5052	clifford.kirsch@sutherland.com
Michael B. Koffler	212.389.5014	michael.koffler@sutherland.com
Susan S. Krawczyk	202.383.0197	susan.krawczyk@sutherland.com
Neil S. Lang	202.383.0277	neil.lang@sutherland.com
S. Lawrence Polk	404.853.8225	larry.polk@sutherland.com
Brian L. Rubin	202.383.0124	brian.rubin@sutherland.com
Amelia Toy Rudolph	404.853.8797	amelia.rudolph@sutherland.com
Holly H. Smith	202.383.0245	holly.smith@sutherland.com
W. Scott Sorrels	404.853.8087	scott.sorrels@sutherland.com
John H. Walsh	202.383.0818	john.walsh@sutherland.com
Bryan M. Ward	404.853.8249	bryan.ward@sutherland.com
Lewis S. Wiener	202.383.0140	lewis.wiener@sutherland.com

[8] *Id.* (citing *Hickman*, 329 U.S. at 509).
[9] *Id.* at *1.
[10] *Id.* at *2-3.