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Re: *BAE Systems Information and Electronic Systems Integration Inc. v. Lockheed Martin Corporation*
C.A. No. 3099-VCN
Date Submitted: May 23, 2011

Dear Counsel:

Plaintiff BAE Systems Information and Electronic Systems Integration Inc. ("BAE") has filed a motion seeking approval of its appointment of James Gallagher ("Gallagher") as its "Designated Consultant" pursuant to the Stipulation and Order for the Production and Exchange of Proprietary Information (the "Order") entered by the Court on February 22, 2010.[1] Defendant Lockheed Martin

[1] *See* Order at ¶ 12(f).

Corporation ("Lockheed") objects to Gallagher's designation, and the Court now addresses its objections.

I. BACKGROUND

A. *"Designated Consultants" under the Order*

Because the documents at issue in this case are, in many instances, of a technical and sensitive nature, the Order provides that each party may designate one "employee or agent" who is familiar with the technology involved to "assist [it] in the conduct of this Litigation (the 'Designated Consultants')."[2] A party seeking to designate such a consultant must provide the other party with the proposed Designated Consultant's identity and curriculum vitae before any Competition Sensitive information is disclosed to the proposed Designated Consultant.[3] A party may withhold its consent to the other party's choice of a

[2] *Id.* at 12(f). The Order provides that "Competition Sensitive" discovery materials may not be disclosed except to the parties' legal counsel; the Court and its employees; the authors, addressees, or copy recipients shown on particular Competition Sensitive documents; expert witnesses; and Designated Consultants. *Id.* at ¶¶ 12-13. These Paragraphs do not refer to fact witnesses, except that, in authorizing the authors, recipients, and copy recipients of Competition Sensitive documents, ¶ 12(c) requires that "such witness or deponent shall pledge to abide by the terms and conditions of [the Order]" by signing a confidentiality agreement.
[3] *Id.*

Designated Consultant "on the ground" that the proposed Designated Consultant is:

> involved in any capacity (other than advising with regard to this litigation) including but not limited to competitive decisionmaking, relating to the Automated Test Systems . . . opportunities covered or purported by either party to be covered by Memorandum of Agreement dated November 27, 2000 [the "New MOA"], with any Party or any other firm that could gain a competitive advantage from access to the Competition Sensitive Discovery Material, unless the proposed Designated Consultant agrees to cease any such involvement prior to receiving Competition Sensitive Discovery Material.[4]

Once approved as a Designated Consultant by the other party (or, in the case that party maintains an objection to the selection, by court order), the Designated Consultant must, before being permitted to review Competition Sensitive information, commit to complying with the terms of the Order for two years after the conclusion of this action and agree to notify the other party of any change in the Designated Consultant's employment if the change is related to Automated Test Systems ("ATS") work.[5]

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[4] *Id.* at ¶ 12(f)(i).

[5] *Id.* at ¶ 12(f)(ii). The party receiving such notification may then object to the Designated Consultant's new job responsibilities.

B. *Gallagher*

BAE notified Lockheed that that it had selected Gallagher as its Designated Consultant by letter dated May 10, 2010; included with the letter were Gallagher's curriculum vitae and an Agreement to be Bound by Protective Order signed by Gallagher.[6]

Gallagher was employed by, and performed ATS work on behalf of, Sanders Associates (from 1983 to 1986, when Sanders was purchased by Lockheed), Lockheed (from 1986 to 2000) and BAE (from 2000 to 2008).[7] BAE asserts that Gallagher, through his employment, became knowledgeable of the facts underlying its claims in this litigation; Lockheed describes Gallagher as a key fact witness.[8] After he retired, Gallagher became an employee of Hepco, Inc. and, in addition to consulting on other matters, provides consulting services to BAE and its counsel in connection with this litigation; he is paid $73.75 per hour, a rate that is

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[6] Pl.'s Mot. to Approve Designated Consultant ("Mot."), Ex. B.
[7] *Id.* at 2 (Gallagher CV).
[8] *Id.* ¶ 5; Def.'s Opp. to Pl.'s Mot. to Approve Designated Consultant ("AB") at 7; *Id.* Ex. 1, BAE Responses to Def.'s First Set of Interrogatories (listing Gallagher as a person with knowledge of the "[n]egotiation and performance of Original MOA and New MOA; [Lockheed]'s breach of the New MOA. Involved in presentations to BAE Systems regarding the extent and nature of work covered by the Original MOA.").

significantly lower than the effective hourly rate he was paid during his employment at BAE.[9] Gallagher indicated that serving as BAE's Designated Consultant would require a substantial time commitment and would prevent him from taking on other consulting projects, whether for BAE or others; it would additionally prevent him from accepting ATS-related consulting work for two years following the completion of this litigation.[10]

II. DISCUSSION

Lockheed objects to the choice of Gallagher as BAE's Designated Consultant on two grounds. It contends that, because Gallagher will be a fact witness in this action: (i) allowing him to serve as a Designated Consultant would violate the Order by exposing him to information that would unfairly inform his testimony and (ii) paying him to serve as a Designated Consultant would violate the Delaware Lawyers' Rules of Professional Ethics' prohibition on paying fact witnesses in order to influence their testimony.

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[9] Mot. ¶ 3; Pl.'s Reply in Further Supp. of its Mot. to Approve Designated Consultant, Ex. A, Aff. of James Gallagher ("Gallagher Aff.") ¶¶ 6-8.
[10] Gallagher Aff. ¶¶ 10-11.

A. *The Order*

As to Lockheed's first argument, the Order generally limits access to Competition Sensitive materials, but specifically provides that Designated Consultants may have access to such materials. The Order does not provide that Lockheed may object to Gallagher's designation on the basis that he is a fact witness, and neither does it provide that Lockheed may object on the basis that Gallagher is not the only person with the knowledge needed to assist BAE in connection with this litigation. Instead, the Order, which was negotiated and stipulated by the parties, provides that a party may object to another party's proposed Designated Consultant only on the basis that the proposed Designated Consultant is involved with a firm that would gain an advantage from exposure to Competition Sensitive information.

Gallagher currently has no such involvement, except in connection with advising BAE on this litigation (an exception expressly allowed under Paragraph 12(f)(i)).[11] Further, he has agreed to be bound by the terms of the Order

[11] Lockheed has not argued that Gallagher's potential role as a fact witness in this litigation falls within the definition of "involvement in any capacity" with BAE of the type that would provide a basis for Lockheed to object to his designation. *See* Order ¶ 12(f)(i) ("The Producing Party may

for two years following completion of this litigation. The Court understands Lockheed's concern that, if Gallagher serves as BAE's Designated Consultant, his recollection of the facts underlying BAE's claims may be affected. Although Lockheed may impeach Gallagher's credibility as a fact witness on that basis, Lockheed has no grounds, under the Order, to object to Gallagher's selection as BAE's Designated Consultant.

B. *The Ethics*

Lockheed's second objection is to BAE's compensation of Gallagher in his role as a Designated Consultant; Lockheed contends that such compensation is tantamount to paying Gallagher for his testimony as a fact witness. BAE argues that Gallagher is not being paid for the time he actually spends testifying, and that,

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withhold consent on the ground that a Designated Consultant is involved in any capacity, . . . , including but not limited to competitive decisionmaking, related to [ATS] opportunities . . . with any Party . . . .").

Although one heading in Lockheed's brief reads "Mr. Gallagher's Role as a Witness Precludes Him From serving as a Designated Consultant," the paragraphs under that heading do not argue that Gallagher's role as a witness amounts to "involvement" with BAE, but instead that the Order excludes witnesses and deponents from the category of persons who can review Competition Sensitive information, and that allowing Gallagher to serve as a Designated Consultant would "allow a provision intended to assist the education of counsel to be used as a means to educate a key fact witness[]." *See* AB ¶¶ 5-10.

even if he were being compensated for the time he would lose while testifying or preparing to testify, Rule 3.4(b) of the Delaware Lawyers' Rules of Professional Conduct does not prohibit reimbursement of expenses reasonably incurred by a witness and for the loss of time incurred in connection with preparing for testimony, attending proceedings, or testifying.

The prohibition against paying fact witnesses for their testimony protects the integrity of the adversary process: compensating a fact witness for her testimony creates the perception that, but for the compensation, the witness might not offer testimony consistent with the proponent's interest.[12] Nonetheless, although fact witnesses may not be paid for their testimony, the rules of ethics do not, in all

[12] *See* Del. Lawyers' Rules of Prof'l Conduct R. 3.4(b) (providing that lawyers may not "falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law."); *id.* at R. 3.4, cmt. 1 ("Fair competition in the adversary system is secured by the prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like"); *id.* at cmt. 3 ("[I]t is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying . . . ."); *Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n*, 865 F. Supp. 1516, 1525-26 (S.D. Fla. 1994), *aff'd in part*, 117 F.3d 1328 (11th Cir. 1997) ("'The payment of a sum of money to a witness to "tell the truth" is as clearly subversive of the proper administration of justice as to pay him to testify to what is not true.'") (applying Florida Rules of Prof'l Conduct R. 4–3.4(b), which, like Del. Lawyers' Rules of Prof'l Conduct R. 3.4(b), tracks the Model Rules of Prof'l Conduct R. 3.4(b)) (quoting *In re Robinson*, 151 A.D. 589, 600 (N.Y. App. Div. 1912), *aff'd*, 103 N.E. 160 (N.Y. 1913).

cases, prohibit individuals, who happen also to be fact witnesses, from receiving compensation from parties for services performed in other capacities. For example, as counsel for Lockheed observed:

> [C]ertainly employees of corporations can testify on behalf of corporations. Nobody doubts that, and they're going to be paid. And their credibility is going to be questioned, because they're giving testimony that presumably is consistent with their employer's interest. The ethical rules don't prohibit that.[13]

Here, the Court is satisfied that the compensation BAE proposes to pay to Gallagher relates to his work as a Designated Consultant, and not to his willingness to testify as to the facts underlying BAE's claims. Gallagher has been paid at a fixed hourly rate for consulting for BAE, and others, since 2008.[14] Lockheed concedes that, had Gallagher been BAE's employee during that time, continuing to pay him as an employee now would not present a problem under the ethics rules. Paying Gallagher what is, in effect, his standard consulting fee does not seem functionally different. So long as he is paid for his time in connection with his

[13] May 23, 2011 Hr'g on Pl.'s Mot. to Approve Designated Consultant, Cross Motions to Compel, Def.'s Mot. to Bifurcate, Tr. at 96.
[14] Gallagher Aff. ¶ 10.

work as a Designated Consultant, and not for his time as a fact witness,[15] Gallagher is not precluded by the rules of ethics from attempting to wear two hats.[16] Again, Lockheed, if it believes that Gallagher's fact testimony has been affected by his exposure to Competition Sensitive material while acting as BAE's Designated Consultant, is free to attempt to impeach his credibility on that basis.[17]

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[15] *See id.* at ¶ 12 ("I understand that any compensation I receive in connection with this case is for the time I spend acting as a litigation consultant, and that I will not be compensated for the time I spend testifying at a deposition or at trial in this case.").

[16] *See, e.g.*, *Barrett Indus. Trucks, Inc. v. Old Republic Ins. Co.*, 129 F.R.D. 515 (N.D. Ill. 1990); *In re Gulf Oil/Cities Serv. Tender Offer Litig.,* 1990 WL 108352 (S.D.N.Y. 1990) (each allowing a party to hire, as a litigation consultant, a former employee who was also a fact witness); *but see State of N.Y. v. Solvent Chem. Co., Inc.*, 166 F.R.D. 284, 290-91 (W.D.N.Y. 1996) (holding that the work of a fact witness as a litigation consultant was not protected under the work product doctrine where (1) the witness had previously been viewed as a hostile witness by the hiring party, and (2) the hiring party attempted to use the employment agreement with the witness to avoid production of otherwise discoverable material). Indeed, *Solvent Chemical Company* demonstrates that the question as to whether one person may function both as a fact witness and as a litigation consultant may be answered differently in view of the particular circumstances of the case.

[17] The parties both contend that an opinion of the Delaware State Bar Association's Committee on Professional Ethics (Del. Ethics Op. 2003-3 ("Op. 2003-3")) supports their respective positions on Gallagher's compensation. With regard to that matter, the Committee on Professional Ethics considered whether a client should have been allowed to compensate two fact witnesses ("Witnesses A and B"), both retirees, for their expenses and lost time. The Committee considered that Witness A was presently unemployed, but that Witness B had started an independent consulting business. *Id.* at 1. The client proposed to compensate Witness A for his lost time at the same rate as he had been paid as the client's employee immediately before his retirement more than three years before; Witness B would be compensated for his lost time at the same rate as he then received when consulting for others. *Id.* at 2. The Committee concluded that:

III. CONCLUSION

Because the terms of the Order do not prevent the selection of a likely fact witness as a Designated Consultant—and the Order does not otherwise prevent Gallagher's designation—and because compensating Gallagher as a Designated Consultant (and not as a fact witness) would not violate the Delaware Lawyers'

> (1) Witness B may be reimbursed for his out of pocket expenses, and for the reasonable value of his lost time; and (2) Witness A may be reimbursed for his out of pocket expenses. However, insufficient facts have been presented to the Committee to conclude that Witness A may be compensated for the loss of his time or to determine what rate of compensation would be appropriate under the circumstances.

Id. The distinction drawn by the Committee between the two witnesses was that, in the case of Witness B, participation as a fact witness would "result in a substantial lost economic opportunity, and, moreover, that loss can be reasonably measured," (*Id.* at 9) while, in the case of Witness A, the Committee had "no facts to suggest that Witness A will lose an economic opportunity in spending time preparing for his testimony and testifying at the Delaware Trial." *Id.* at 10.

Because BAE proposes to compensate Gallagher as a Designated Consultant and not in his capacity as a fact witness, Op. 2003-3 is not precisely on point here. If the Court were to consider a portion of Gallagher's time as preparation for giving fact testimony, then the reasoning expressed in Op. 2003-3 would tend to support BAE's position, because Gallagher's situation is more closely analogous to Witness B's situation than it is to Witness A's. Gallagher appears to have worked as a consultant for the past three years (for which he is paid by Hepco at a fixed hourly rate), and he has agreed to act as BAE's Designated Consultant in lieu of seeking other consulting work with BAE or other clients. Thus, like Witness B, Gallagher, unless compensated, will suffer a substantial, and measurable, financial loss if he has to testify for the party proposing to compensate him. Compensating Gallagher for his lost time under such circumstances would be consistent with the reasoning expressed in Op. 2003-3.

Rules of Professional Conduct, BAE's Motion to Approve Designated Consultant is granted.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K