

Project Cricket Acquisition, Inc. v Florida Capital Partners, Inc.

2020 NY Slip Op 30153(U)

January 17, 2020

Supreme Court, New York County

Docket Number: 652524/2015

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SALIANN SCARPULLA PART IAS MOTION 39EFM

Justice

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PROJECT CRICKET ACQUISITION, INC.,

Plaintiff,

- v -

FLORIDA CAPITAL PARTNERS, INC., FLORIDA CAPITAL PARTNERS II, INC., FCP INVESTORS VI, LP, FCP INVESTORS VI (PARALLEL FUND), LP, FCP PARTNERS VI, LLC, FELIX J. WONG, GREGORY JOHNSON, BARRY J. THIBODEAUX, THOMAS P. BAYHAM, THOMAS R. SUMNER, GEORGE T. MALVANEY, LARRY N. LEE, ROBERT WILLIAMS, RODNEY POWELL, ROBERT KEESEE, ERIC HOFFMAN, DAVID ZACHARY, CLAY COX, CRICKET STOCKHOLDER REP, LLC,

Defendant.

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INDEX NO. 652524/2015
MOTION DATE N/A
MOTION SEQ. NO. 012

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 012) 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 325, 326, 327, 328, 329, 330

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, it is

This case stems from the allegedly false and inaccurate representations made by Defendants to induce Plaintiff Project Cricket Acquisition, Inc.¹ (“Plaintiff”) to purchase USES Holding Corp. and its wholly owned subsidiaries (collectively, “USES” or the “Company”) under a Stock Purchase Agreement (the “SPA”) executed on March 31, 2014 (the “Closing”) for approximately \$100 million.

¹ Project Cricket Acquisition, Inc., is a Delaware corporation that is majority owned by The Halifax Group, LLC, through its partnership, Halifax Capital Partners III, L.P. (collectively “Halifax”).

Defendants FCP Investors VI, L.P. and FCP Investors VI (Parallel Fund), L.P. (together, “FCP Defendants”) move to compel production by non-party Halifax. Specifically, FCP Defendants seek: 1) the handwritten notes belonging to Scott Van Duinen (“Van Duinen”); and 2) an electronic document called a Quality of Earnings report (the “Earnings Report”) which was prepared by Ernst & Young LLP.

1. The Handwritten Notes

During a deposition on September 11, 2019, Van Duinen – USES’s former lead director, and Plaintiff’s former President, Secretary and Treasurer – was questioned about allegations in the First Amended Complaint (“FAC”) regarding USES’ relationship with its customer Chevron.² The testimony, in relevant part, stated:

Q. ...Did you take any notes, handwritten notes or send any communications of that firsthand interaction from senior management about this Chevron notice?

A. Yes, I would have taken notes.

Q. Did you keep your notepads?

A. No, I sent those to Arnold & Porter.

The FCP Defendants contend that they only became aware of the existence of Van Duinen’s handwritten notes (the “Notes”) based on this exchange and they made a

² Paragraph 126 in the FAC states that: “Plaintiff has also learned that before the Closing, Chevron communicated to USES that it was placing more of its work with larger, ‘national’ industrial cleaning companies such as Veolia, HydroChem, and PSC, and that USES’ business with Chevron would be materially reduced.”

demand for production of the Notes at the deposition.³ According to the FCP Defendants, the Notes should be produced because they are relevant “to the factual basis – or lack thereof – for [Plaintiff’s] assertions that USES breached the representations and warranties that it made in the SPA.”

In opposition to this motion to compel, Halifax avers that it has now “reviewed the remainder of Mr. Van Duinen’s handwritten notes and confirmed that there are no non-privileged, responsive notes that are subject to production.” At a Court conference, on January 15, 2020 (the “January 2020 Conference”), concerning the motion to compel, counsel for Halifax reiterated this representation and additionally represented that approximately 25 pages of the Notes were withheld on privilege grounds while the remainder of the Notes were non-responsive.

In light of the fact that Halifax has now reviewed the Notes and its representations about its review, the FCP Defendants’ request for production of the Notes is moot. However, Halifax must produce a privilege log to the FCP Defendants with respect to the aforementioned 25 pages of Notes. Further, FCP Defendants requested at the January 2020 Conference that if the Court were to order Halifax to submit a privilege log, that the log should list each item individually, rather than categorically. This request is denied due to the Commercial Division’s preference for categorical designations. See Rule 11-B

³ Halifax, on the other hand, believes that the FCP Defendants knew of the Notes prior to the deposition because the latter’s document request sought the production of “notes,” “handwritten notes,” and “notebooks.”

of the Uniform Rules for the Supreme and County Courts (Rules of Practice for the Commercial Division).

2. The Earnings Report

The second item sought by the FCP Defendants on this motion to compel is the Earnings Report, an electronic document that Van Duinen identified (at his deposition) as a factor in Halifax and Plaintiff's valuation of USES in connection with its acquisition.⁴ The FCP Defendants state that the document is relevant because it goes to damages. According to the FCP Defendants, this document is encompassed by a prior production order, issued at oral argument on February 20, 2019 (the "February 2019 Order"), and thus must be produced.

⁴ The relevant deposition testimony is as follows:

Q. Do you have any recollection as to whether or not Halifax used the Ernst & Young QofE to -- in connection with its valuation of the purchase price for the transaction?

A. Yes, we weighed their work product normalization analysis which you see here, EBIT, which isn't an analysis, but just looking at it with a different add-on, and all of these were weighed in determining valuation.

Q. So just to be clear, Halifax relied on the Ernst & Young QofE report to -- in part to arrive at its valuation and purchase price offer?

A. It was one of the things that we considered in concluding our diligence and executing the buyout.

Q. I'm not -- I'm setting aside diligence. At some point, Halifax made various bids for the USES companies, correct?

A. It did.

Q. And did the QofE impact -- the Ernst & Young QofE impact Halifax's valuation?

A. It did influence as the work that Ernst & Young was doing was going on prior to the LOI [letter of intent] and then post LOI.

Q. Did you use any of the Ernst & Young adjusted EBITDA when you were evaluating multiples?

A. I would rephrase that. We think about the investment as a -- what potential return it's going to yield and the risk associated with that return as well as the multiples that are displayed here on the page. So again, it's multiple factors and that is one of them.

In opposition, Halifax argues that the FCP Defendants' request for the Earnings Report is an attempt to re-litigate an issue that was resolved in the February 2019 Order and that the information sought actually falls within the ambit of information that Halifax does not have to produce.

At the February 20, 2019 oral argument, I stated to Halifax, "[if you have any documents that show due diligence with respect to whether or not there was compliance with GA[A]P, or GA[A]S... those documents must be produced. For whatever else you are looking at, whether this is a good investment... don't produce that." I then made a further clarification as to what documents must be produced:

...Whether USUS's [sic] financials comply with GA[A]P or GA[A]S. If there is an analysis as to that particular subject as opposed to whether or not it's a good investment, whether or not it is going to make us money, whether or not the transaction is good. Just specifically that issue, those documents must be produced by Halifax.

The February 2019 Order clearly pertained only to documents analyzing whether or not USES's financials were compliant with GAAP and GAAS. Despite, the FCP Defendants' unsupported argument that the Earnings Report "is by definition 'an analysis concerning GA[A]P,'" there is nothing to suggest that this is the case. Moreover, the FCP Defendants' position is belied by a letter by Ernst & Young LLP, addressed to counsel for the FCP Defendants, dated May 17, 2019 (the "EY Letter"). The EY Letter contained objections in response to a subpoena and stated that: "EY's due diligence work for Halifax explicitly was not for the purpose of determining whether the USES financial statements reviewed complied with GAAP or GAS. EY's due diligence work was not an

audit, review or examination of the USES financial statements in accordance with any generally accepted auditing standards, including those established by the AICPA.”

Therefore, based on the EY Letter, and in keeping with the February 2019 Order, I deny the FCP Defendants’ motion to compel production of the Earnings Report.


In accordance with the foregoing, it is

ORDERED that the FCP Defendants’ motion to compel production is denied; and it is further

ORDERED that Halifax must produce a categorical privilege log to the FCP Defendants, for the Notes withheld on the basis of privilege, by January 31, 2020.

This constitutes the decision and order of the Court.

1/17/2020
DATE


SALIANN SCARPULLA, J.S.C.

CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION

APPLICATION: GRANTED DENIED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE