



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re: PETROBRAS SECURITIES
LITIGATION

:
: 14-cv-9662 (JSR)
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: MEMORANDUM ORDER

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JED S. RAKOFF, U.S.D.J.

Plaintiffs in the consolidated class action against Brazilian oil company Petr leo Brasileiro S.A. - Petrobras ("Petrobras") and related cases request that this Court approve their serving a testimonial subpoena on former Petrobras independent director, Mauro Gentile Rodrigues da Cunha. Plaintiffs make their request pursuant to Fed. R. Civ. P. 45(b)(3) and 28 U.S.C.   1783 (the "Walsh Act"), which authorizes courts to issue subpoenas of U.S. nationals located abroad. Specifically, the Walsh Act provides that a court may issue such a subpoena "if the court finds that particular testimony . . . is necessary in the interest of justice, and, . . . that it is not possible to obtain [the] testimony in admissible form without [the witness's] personal appearance." 28 U.S.C.   1783.

The Court received letter briefing from the parties on this issue, which will be docketed contemporaneously with this Order. Upon consideration of the parties' submissions, the Court

determines that the conditions of the Walsh Act have been met and that the subpoena may issue.

Under 8 U.S.C. § 1401, "a person born in the United States, and subject to the jurisdiction thereof" will be a "national[] and citizen[] of the United States at birth." Cunha is presumptively a national because he was born in Philadelphia. See Plaintiffs' Letter dated Feb. 29, 2016, Ex. A at 5. Moreover, "[w]henver the loss of United States nationality is put in issue in any action or proceeding . . . the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence." 8 U.S.C. § 1481(b). Defendants have not submitted evidence demonstrating that Cunha lost his U.S. nationality since his birth in Philadelphia. Accordingly, the Court considers Cunha a U.S. national for purposes of the present proceeding.

Cunha's testimony is necessary in the interest of justice. See Estate of Ungar v. Palestinian Auth., 412 F. Supp. 2d 328, 333-34 (S.D.N.Y. 2006) (discussing how courts consider the totality of the circumstances when deciding when subpoenas are necessary "to minimize surprise and unearth relevant information"). Plaintiffs allege that Petrobras was at the center of a multi-year, multi-billion dollar bribery and kickback scheme. Cunha was a member of Petrobras's Board of Directors from 2013 to 2015 and served on its Audit Committee.

There is little doubt that he has knowledge of facts relevant to this case.

There are no practical means of obtaining Cunha's testimony other than issuance of a subpoena. See S.E.C. v. Sandifur, No. C05-1631C, 2006 WL 3692611 at *4 (W.D. Wash. Dec. 11, 2006) ("Impracticality occurs . . . where resort to alternative methods is unlikely to produce the relevant evidence in time to meet impending discovery deadlines."). Defendants argue that Cunha's written testimony can be acquired through letters rogatory directed to Brazilian authorities. Plaintiffs object that similar letters rogatory submitted to the Brazilian authorities in November 2015 have not yet been processed and returned. See Plaintiffs' Letter dated March 2, 2016, at 3. It would be foolish for the Court to assume that a letter submitted now would be returned by April 29, 2016, the close of discovery in this case.

Plaintiffs also seek leave to serve Cunha with the subpoena through the Inter-American Convention on Letters Rogatory (the "I-A Convention") and, alternatively, through email, overnight mail, or personal service. Fed. R. Civ. P. 4(f)(3) provides that an individual may be served outside the United States by "means not prohibited by international agreement." The I-A Convention does not forbid other methods of service. See Kreimerman v. Casa Veerkamp, S.A. de C.V., 22 F.3d 634, 644 (5th Cir. 1994). Given

the approaching close of discovery, it would be impractical to require plaintiffs to attempt service through the I-A Convention before allowing alternative methods of service to be used. Accordingly, the Court directs plaintiffs to make best efforts to serve Cunha with the subpoena in person, and, if this cannot be accomplished by March 12, 2016, plaintiffs may effectuate service through email or overnight mail.

For the foregoing reasons, the Court concludes that issuance of a subpoena under the Walsh Act and alternative service thereof is appropriate. Plaintiffs are directed to present a proposed subpoena to the Court, for its inspection, by no later than March 8, 2016.

SO ORDERED.

Dated: New York, NY
March 4, 2016


JED S. RAKOFF S.S.D.J.