

Terry R. Miller
millerte@sec.gov
Stephen C. McKenna
mckennas@sec.gov
SECURITIES AND EXCHANGE COMMISSION
1961 Stout Street, 17th Floor
Denver, Colorado 80294
(303) 844-1000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

- against -

AMIR WALDMAN, et al.,

Defendants.

17-cv-02088-RMB-KNF

**MEMORANDUM OF LAW IN
SUPPORT OF MOTION TO
MODIFY SCHEDULING ORDER**

ECF CASE

Plaintiff Securities and Exchange Commission (the “Commission”), submits this memorandum of law in support of its motion pursuant to Federal Rule of Civil Procedure 16(b)(4) to modify the scheduling order to permit remaining discovery abroad that has been stayed by the Jerusalem District Court.

The Commission requests a limited exception to the discovery deadline to permit completion of evidence gathering in Israel previously authorized by the Court in a Letter of Request and Addendum (together, “Letter of Request”) pursuant to the Hague Convention on the Take of Evidence Abroad in Civil or Commercial Matters (“Hague Convention”). Doc. Nos. 57 & 103. The Commission obtained some of the evidence sought pursuant to the Letter of Request, but the Jerusalem District Court has stayed a portion of the discovery pending resolution of appeals filed by Defendant James Shaoul and two other witnesses who have opposed the evidence gathering process in Israel. The Commission requests that the exception have no impact

on the dispositive motion deadlines and proposes that the parties and the Court revisit the status of the discovery remaining in Israel (“Remaining Discovery”), as necessary, after resolution of dispositive motions.

Pursuant to Rule 1(E) of Individual Rules of Practice for Magistrate Judge Fox, (1) fact and expert discovery would otherwise end on May 30, 2018 (Doc. No. 111); (2) the parties have jointly requested one extension of the discovery cutoff: on March 23, 2018, the Parties submitted a joint request to extend the discovery cutoff to May 30 (Doc. No. 110); (3) the Court granted the parties previous request to extend the discovery cutoff (Doc. No. 111); and (4) Amir Waldman and Roger Shaoul oppose the relief requested, Lawrence Cluff does not oppose the relief requested, and James Shaoul has not responded to the Commission’s attempt to confer about this motion. The reasons given by Dr. Waldman for the opposition is that he views the discovery cutoff as a hard deadline and that the Commission has had enough time to conduct international discovery. Roger Shaoul adopted the same reasons. Finally, the requested exception to the discovery deadline will not affect any other scheduled deadlines. The Commission is confident it can successfully oppose defendants’ motions for summary judgment without the Remaining Discovery, and no trial date will be set until those motions are resolved.

ARGUMENT

“A schedule may be modified only for good cause and with the judge’s consent.” Fed. R. Civ. P. 16(b)(4). “[A] finding of ‘good cause’ depends on the diligence of the moving party.” *McDonald v. Escape the Room Experience, LLC*, No. 15CV7101 RA KNF, 2016 WL 6561408, at *1 (S.D.N.Y. Oct. 3, 2016) (quoting *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 340 (2d Cir. 2000)). Diligence “is not, however, the only consideration,” and courts may consider other relevant factors, including any prejudice. *Id.* (quoting *Kassner v. 2nd Avenue*

Delicatessen Inc., 496 F.3d 229, 244 (2d Cir. 2007)). Courts also consider “(1) the imminence of trial; (2) whether the request is opposed; (3) prejudice to the non-moving party; (4) whether the moving party foresaw the need for additional discovery, in light of the discovery deadline set by the court; and (5) whether further discovery is likely to lead to relevant evidence.” *Jeannite v. City of New York Dep’t of Bldgs.*, No. 09 CIV. 3464 DAB KNF, 2010 WL 2542050, at *2 (S.D.N.Y. June 21, 2010) (citations omitted).

In this civil insider trading case, the Commission alleges that James Shaoul, who resides in Israel, tipped his brother Roger Shaoul and his friend Dr. Waldman with material nonpublic information about a tender offer for the purchase of Mobileye. Roger Shaoul tipped his friend, Lawrence Cluff, and all defendants purchased Mobileye securities based on the material nonpublic information. The Commission sought the deposition testimony for use at trial of James Shaoul and four other witnesses in Israel pursuant to the Hague Convention. The Commission scheduled the depositions of all five witnesses and obtained the deposition of two of these witnesses in Israel prior to the close of discovery. However, the Jerusalem District Court has stayed discovery as to James Shaoul, Ziv Sheleg (a financial adviser to Amir Waldman and James Shaoul), and Yossi Azarzar (a mutual friend of James Shaoul and Mobileye insiders, who made trades similar to Amir Waldman and Roger Shaoul)—specifically, the Remaining Discovery includes requests for documents and depositions from the three witnesses.

As described below, the Commission acted diligently in pursuing the Remaining Discovery, and the other relevant factors weigh in favor of an exception to the discovery deadline for the Remaining Discovery.

I. THE COMMISSION PURSUED DISCOVERY IN ISRAEL WITH DILIGENCE.

The Commission initiated the Hague Convention process with diligence by filing the Letter of Request shortly after Amir Waldman's deposition, which he had delayed until November 8, 2017. The Commission then diligently worked with the Israeli authorities, and even hired an attorney in Israel to facilitate the evidence gathering process. The Remaining Discovery is not yet complete due to reasons outside of the Commission's control, which is evidenced primarily by the fact that the Commission was able to obtain documents and testimony located in Israel prior to the discovery deadline from two of the five witnesses from whom such discovery was sought.

A. The Commission diligently filed the Letter of Request.

The Commission aggressively sought discovery since the dates these consolidated cases were filed. The case against Amir Waldman was filed on March 23, 2017, the same day that the Court granted the Commission's request for expedited discovery. Doc. Nos. 1 & 5. The Commission served written discovery requests on Dr. Waldman on March 23, and his responses were due on March 28. The Commission also requested Dr. Waldman's deposition in New York prior to April 5, 2017, which was the date scheduled for a show cause hearing. Doc. No. 5 at 3. Dr. Waldman requested, and the Commission agreed, to (1) extend the show cause hearing many months (it occurred in April 2018); (2) extend the deadline to respond to written discovery until June 30, 2017; and (3) schedule Dr. Waldman's deposition after he responded to written discovery (it occurred many months later in Toronto, Canada). Declaration of Terry R. Miller ¶ 2, attached hereto as Exhibit A ("Miller Decl.").

Dr. Waldman first responded to written discovery requests and made his initial disclosures on June 30, 2017. In the written disclosures and documents produced on June 30, the

Commission learned the identity and relevance of Ziv Sheleg and Moshe Ruach for the first time. It also learned for the first time from these materials that James Shaoul communicated with Dr. Waldman about Mobileye during the relevant trading period. Miller Decl. ¶ 3.

The Commission began seeking evidence in Israel as early as July 19, 2017, by conferring with counsel of record. On July 19, the Commission asked the parties to set aside the week of October 9, 2017, for depositions in Israel. Email dated July 19, 2017, attached hereto as Exhibit B. On August 4, the Commission circulated a draft letter of request to Dr. Waldman's counsel, which requested depositions in Israel of four witnesses: Dr. Waldman, James Shaoul, Ziv Sheleg, and Moshe Ruach. Email dated August 4, 2017, attached hereto as Exhibit C. On August 14, counsel for the Commission conferred with the parties again, noting that it hoped to submit the letter of request "today or tomorrow. We need to file as soon as possible to give the Israeli Authority sufficient time to process the request by October." Email dated August 14, 2017, attached hereto as Exhibit D. Dr. Waldman responded that he did not want to be listed on the letter of request because he did not want to draw the attention of the Israeli authorities, and did not want to appear in the United States for a deposition because he feared arrest. Miller Decl. ¶ 4. The Commission's purpose has never been to use this action for other purposes and, on August 31, 2017, the Commission agreed to meet in Toronto for Dr. Waldman's deposition on November 8 to accommodate Dr. Waldman's concerns. Email dated August 31, 2017, attached hereto as Exhibit E.

On September 8, just eight days after the Commission agreed to remove Dr. Waldman from the Letter of Request, the Commission circulated a proposed case management plan in advance of a Court conference where the Commission proposed an extension of the fact discovery cutoff to allow for discovery taken pursuant to the Hague Convention, and explained

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.