IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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FEDERAL TRADE COMMISSION,

Plaintiff,

vs.

STEPHEN BANNON,

Defendant.
- - - - - - - - - - - - - - - - - x

CA No: 1:20-mc-00111-CRC

Washington, D.C.
Tuesday, December 22, 2020
2:02 p.m.

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TRANSCRIPT OF SHOW CAUSE HEARING
HELD BEFORE THE HONORABLE CHRISTOPHER R. COOPER
UNITED STATES DISTRICT JUDGE

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APPEARANCES:

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Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription

P R O C E E D I N G S

THE COURTROOM DEPUTY: Your Honor, we're on the record for Miscellaneous Case 20-111, *Federal Trade Commission vs. Stephen K. Bannon*.

Counsel, please identify yourselves for the record.

MR. BERGGREN: Brian Berggren on behalf of the Federal Trade Commission.

MS. KOPP: Linda Kopp on behalf of the Federal Trade Commission.

MS. ARINGTON: Michele Arington on behalf of the Federal Trade Commission.

MS. McGUIRE: Allison McGuire from Quinn Emanuel on behalf of respondent, Stephen K. Bannon.

THE COURT: Okay. Good afternoon, everyone. Thanks for joining. Happy holidays.

Just to review the bidding here for the record. On November 9, 2020, the FTC filed a petition for an order enforcing a civil investigative demand that it issued back in September of 2019 to Mr. Stephen Bannon. On November 18th the Court issued a notice to show cause to Mr. Bannon why the petition should not be granted and set a December 8th hearing date.

On November 24th Mr. Burck, on Mr. Bannon's behalf, requested an extension of the December 8th hearing

date on the ground that Mr. Bannon needed additional time to retain substitute counsel. The Court granted that motion and set the hearing for today's date. Notwithstanding Mr. Burck's extension motion, I see that Quinn Emanuel is still appearing on Mr. Bannon's behalf, although Mr. Burck has indicated to the Court that for some unstated reason he is unavailable to argue against the petition.

So here we are. It's the commission's motion to enforce so whoever wants to speak on behalf of the commission, feel free. I've read your papers, but feel free to make any points that you would care to.

MR. BERGGREN: Good afternoon, Your Honor; Brian Berggren on behalf of the Federal Trade Commission, and with me today are my colleagues from the commission, Michele Arington and Linda Kopp.

And so as Your Honor is well aware, this matter involves the properly issued and authorized civil investigative demand that seeks oral testimony from Mr. Bannon. After counsel negotiated a mutually agreeable appearance date during a global pandemic, Mr. Bannon now refuses to appear and sit for the investigational hearing because of potential Fifth Amendment concerns. But as our opening memorandum laid out, that is not a basis to refuse to appear for an investigational hearing, nor could Mr. Bannon continue to ignore duly authorized agency

process, particularly when Mr. Bannon did not file a petition to quash before the commission, and Mr. Bannon did not otherwise object before the commission.

THE COURT: All right.

MR. BERGGREN: Accordingly, the Court should enforce the CID and order Mr. Bannon to appear for an investigational hearing for three reasons.

The first is that the CID is within the commission's authority and was properly issued according to all administrative prerequisites.

The second is that the CID seeks testimony from Mr. Bannon that is reasonably relevant to the commission's investigation.

And the third reason is that compliance with the CID is not unduly burdensome.

THE COURT: So, Counsel, I appreciate that it is common practice to force a subject of investigation or a witness to appear and assert the Fifth question by question, but certainly the commission has the authority to accept a blanket assertion and not force a witness to appear. Is that fair?

MR. BERGGREN: I believe the commission would have the authority to accept a blanket assertion, but in this particular case we believe that Mr. Bannon should have to make this assertion on a question-by-question basis.

THE COURT: Why?

MR. BERGGREN: The Office of -- well, two reasons, Your Honor. One, it's important that Mr. Bannon answer each and every question that the commission has and asserts the Fifth because there are potential adverse inferences that can be drawn from those assertions as well as there may be foundational questions that Mr. Bannon can answer without actually, you know, incriminating himself.

The second reason, it's a reason for both the commission and the district court record on this issue because there needs to be an assertion on a question-by-question basis in case the commission wants to contest Mr. Bannon's assertion to a particular question after the fact.

THE COURT: When did your investigation begin?

MR. BERGGREN: The investigation or the CID that was --

THE COURT: I know when the CID was first issued, but when did the investigation begin? Did it begin pursuant to a commission order of some sort?

MR. BERGGREN: The CID was issued pursuant to an agency resolution, which is detailed in the commission's memorandum. It's an agency resolution that allows the commission to use compulsory process and to investigate unfair or deceptive trade practices with respect to consumer

privacy or data security issues.

THE COURT: And when was that resolution? In mid-2019 or before?

MR. BERGGREN: If you'll bear with me, Your Honor, I can get you the exact date.

So that was actually issued on March 14, 2019.

THE COURT: Okay.

MR. BERGGREN: And that's at ECF 1-2, Page 14.

THE COURT: Thank you.

MR. BERGGREN: And so, Your Honor, I'd like to address some of Mr. Bannon's arguments that were raised in the opposition and to put a finer point on some of these items, particularly as it relates to Mr. Bannon's supposedly undue burden.

So the first argument I'd like to address is Mr. Bannon's assertion that there is somehow a risk to his right to a fair trial in his criminal action by simply appearing at an investigational hearing. That's just simply not the case, Your Honor. Mr. Bannon does not dispute that the proper way to invoke the Fifth Amendment is on a question-by-question basis. He does not dispute that he must appear at an investigational hearing.

And at the end of the day, the commission is not actually contesting whether Mr. Bannon has the right or not to assert the Fifth Amendment. We're not trying to preclude

him here. Mr. Bannon is certainly able to assert the Fifth where he believes it's appropriate, and that mere assertion should protect his right to a fair trial in this criminal action.

There's nothing --

THE COURT: Well, his -- I'm sorry to interrupt, but the argument is, it seems to be, that if he asserts the Fifth here, that the prosecutors in the Southern District will attempt to introduce that assertion under 404(b) somehow; and, therefore, his fair trial right in New York will be jeopardized unnecessarily given that the commission can simply wait six months presuming optimistically, probably, that he will go to trial in May of 2021, and that in the balance his trial rights should outweigh the FTC's interest in proceeding within the next six months.

Not to put words in Ms. McGuire's mouth, but that's what I understand the core of the argument to be.

MR. BERGGREN: So, Your Honor, I'll take that in two parts.

The first is the -- that prosecutors are somehow allowed to use the assertion of the Fifth Amendment as -- under 404(b) as unindicted misconduct. I don't think that's the case. The cases that were cited in Bannon's opposition were talking about when you have an actual misconduct, a finding on the record either through a government action or

something else, that can be used by prosecutors if they file the particular requirements of 404(b). I am sure Mr. Bannon's criminal counsel will fight tooth and nail to prevent that from coming in, but I don't think the mere assertion of a Fifth Amendment can be used to draw an adverse inference in a criminal trial under 404(b).

The second argument, which has to do with this notion of a delay of six months in that it would somehow be in Mr. Bannon's interest and that it would protect his rights at trial and there's really no prejudice to the commission, that ignores two things that the commission set forth in its opening memorandum.

The first is that there is -- you know, the commission has a strong interest in timely enforcing its own laws and in completing this investigation. The commission can't complete this investigation without the testimony from Mr. Bannon. That's in the declaration of Ms. Kopp as well as the petition.

The second reason is that there's an interest in -- a public interest in seeing the enforcement of the FTC's law. But in the commission's opening memorandum, there were two decisions that were cited. It's the *Parade of Toys* decision and then the *American Tax Relief* decisions where it was dealing with this precise issue, this precise balancing test when you have a defendant that is raising a

potential Fifth Amendment concern and raising a stay. In that case the Court looked at it and determined that the FTC's interest in timely enforcing its own laws, that outweighed the defendant's interest in being able to assert his Fifth Amendment rights and cautioning against the stay.

But there's, you know, a practical point we want to keep in mind here, Your Honor, which is that the Southern District of New York is closed down currently for jury trials. It's been closed down since December 1st. It will be closed down until January 15th. There's no guarantee that Mr. Bannon's criminal trial occurs in May 2021, and there's no guarantee that Mr. Bannon can appear after that criminal trial because that may be an option that his criminal counsel determines that is inappropriate. And his own opposition brief concedes the sentencing judge can consider unindicted criminal conduct; so it can look at and use that same type of 404(b) evidence which they claim is prejudicial now at his sentencing. And then there's also no guarantee at the end of the day that Mr. Bannon actually answers the question and doesn't invoke the Fifth Amendment.

THE COURT: Okay. Very well. Any other points?

MR. BERGGREN: The only other point I'd like to make, Your Honor, is, you know, to address Mr. Bannon's claims about that there is some improper purpose or nefarious motive with respect to the commission's

investigation. As Your Honor is well aware, there's not a single shred of evidence in the record that the commission's investigation is motivated by anything other than a lawful and proper purpose, nor does the investigation have to do with Mr. Bannon's supposed notoriety. It's, at the end of the day, about getting to the bottom of Cambridge Analytica's deceptive conduct. It's about learning where this data has been transferred, who it's been shared with, and whether it still exists.

Mr. Bannon, at the end of the day -- he's an officer of the company during the time in which this conduct took place. The commission is entitled to assess whether he can be held individually liable and whether he has any knowledge about Cambridge Analytica's data at the end of the day.

And that leads me to my final point, which is to address Mr. Bannon's argument that this oral testimony is somehow duplicative of the information that is sought by or provided by written discovery and in the document responses, but, you know, there's a couple of things to keep in mind.

The first is that Mr. Bannon waived this argument. It should have been raised in a petition to quash. It wasn't. He can't raise it now.

But even if Your Honor entertains it, it fails for a couple of reasons.

The first is, you know, courts have recognized that there's no general prohibition to seeking oral testimony on topics that concern information already received via other discovery devices. That's Your Honor's opinion in *Landis vs. Armstrong*.

The second is there's a sworn declaration from commission staff saying that additional information is needed; that it's relevant for Mr. Bannon, about his role at the company, his knowledge. Under, you know, Mr. Bannon's own authority in *Bisaro*, the commission's assertions are entitled to deference.

And the third thing at the end of the day is to, you know, look at the actual written discovery responses, which Mr. Bannon did not attach to his opposition; and it's clear why, because they're insufficient. They're larded up with four pages of general objections, some specific objections. They claim unspecified documents provide the answers to these interrogatories, and then the responses are frankly narrow. They're limited to personal knowledge during a very specific time period.

This is precisely why we need an investigational hearing. You need to test the foundation. You need to test the accuracy. You need to test the veracity. You need to, you know, test Mr. Bannon's recollection. These are all reasons why at the end of the day there's no undue burden on

Mr. Bannon and why the commission respectfully requests that Your Honor direct Mr. Bannon to appear for an investigational hearing.

THE COURT: Okay. Very well.

Ms. McGuire, it's a pleasure to meet you. Welcome.

MS. McGUIRE: Thank you, Your Honor.

THE COURT: Mr. Burck was not able to fit us into his busy schedule this afternoon?

MS. McGUIRE: Unfortunately he had a conflict, Your Honor.

THE COURT: Okay. All right. Please proceed.

MS. McGUIRE: Thank you.

Your Honor, your order asked us to show good cause for why we have not previously raised the arguments and objections that are at issue today, and it's really very simple. There has been a drastic change in circumstances that were completely unforeseeable.

We're living in a very different world than we were in November 2019 when Mr. Bannon was served with the CID. The global pandemic didn't exist when the FTC served Mr. Bannon, and separately and importantly, Mr. Bannon hadn't been arrested and indicted for alleged misrepresentations in November 2019. These two factors weren't in play at the time, and they're critically

important here.

And the FTC has accused us of trying to stall this proceeding, but that's not at all what's happening. We want the judge's involvement. We want Your Honor's neutral oversight of this matter, and as we've told the commission, if Your Honor decides that Mr. Bannon needs to appear at this moment and provide testimony, he certainly will comply with the Court's order.

But there is a reason why these administrative subpoenas aren't self-enforcing. There's a reason the laws make the commission go to the Court and seek an order getting compliance. We have built-in checks so that no arm of the government can exercise this unfettered investigative power.

And that's why we're here, Your Honor. We want the Court's involvement in this. We want the Court to evaluate the commission's purpose and see whether the Court shares our concerns that there may be political motives at play, and we also want the Court to evaluate the very real harm that Mr. Bannon faces to his right to a fair trial.

THE COURT: All right. So you've mentioned two things. You've mentioned the pandemic, and you've mentioned the criminal proceedings.

As to the pandemic, I assume that Mr. Bannon will have the option, if the Court enforces the CID, of appearing

remotely. Is that fair?

MS. McGUIRE: Yes, Your Honor; that's correct.

THE COURT: And if he were to choose to appear in person, certainly the FTC would accommodate him in any way in terms of safety and health protocols. The Court has permitted a number of in-person depositions in other civil litigation matters where we've managed to do that in a way that protects everyone, if Mr. Bannon were to choose that route.

Why don't we talk about the criminal case. You've mentioned the sort of -- FTC's failure to accept a blanket assertion, and you've mentioned this prospect of 404(b) evidence being introduced in New York. Why don't you talk about that.

MS. McGUIRE: Thank you, Your Honor, and you hit the nail on the head when you were speaking with Mr. Berggren earlier. This is sort of a twofold issue, and Mr. Bannon is being forced in a situation where no matter what he chooses he'll risk prejudice to his criminal trial.

On the one hand, he can choose to invoke his Fifth Amendment right to protect himself against the risk that DOJ could seek over his objection to introduce this evidence as 404(b).

THE COURT: And "this evidence" is what? His assertion, or the -- if the FTC were to issue an order prior

to the criminal trial finding him liable for a violation of the FTC Act, that that conduct could be introduced as 404(b), or the assertion itself? I was a little confused by the motion.

MS. McGUIRE: Your Honor, the conduct at issue here.

THE COURT: Okay.

MS. McGUIRE: And especially because there's a substantial similarity between the alleged misrepresentations. We're dealing with alleged misrepresentations on both sides.

And I think that the other part of this that's so critical is that, as Mr. Berggren already said, the FTC can admit adverse inferences again Mr. Bannon in this case.

There's prejudice on both sides of this. So if he does appear and does invoke, the FTC can use his invocations against him in this case to seek civil penalties or, worse, to draw false adverse inferences that Mr. Bannon has been dishonest, that he's lied, that he was complicit in the alleged misrepresentations here, which Mr. Bannon adamantly denies.

And the commission's brief tries to splice it and say, "Well, there are different time frames and different companies and different statements," but the core issue is the same. Forcing Mr. Bannon to appear pretrial and invoke

when the FTC says it has already determined that misrepresentations have occurred covers Mr. Bannon in this predetermined guilt, and the best we can hope for is that a jury will be able to parse out the commission's alleged misrepresentations and inferences about Mr. Bannon's invocation from the alleged misrepresentations at issue in the criminal case.

THE COURT: Well, Counsel, isn't what you're really seeking a stay of the civil proceedings?

MS. McGUIRE: Yes, Your Honor.

THE COURT: And I've had these cases before, and the standards for a stay are multifactored. And, you know, I think there are some considerations that have not been briefed here, and the chief consideration is the overlap of subject matter between the civil litigation and the criminal case. And here, while you're correct that, you know, ultimately the allegation is fraud or fraudulent misrepresentations, the subject matters are completely different, aren't they?

MS. McGUIRE: Yes, Your Honor; that's right. But the concern is still the same when the conduct at issue is substantially similar and, as Your Honor correctly stated, deals with alleged fraudulent misrepresentations.

THE COURT: Okay. Anything else?

MS. McGUIRE: No, Your Honor. We would simply

request that the Court allow Mr. Bannon to preserve his innocence; that he deserves a fair trial untainted by inferences of being forced to invoke his Fifth Amendment rights.

THE COURT: Okay. I'll give you the last word, Mr. Berggren.

MR. BERGGREN: Just a couple of points, Your Honor.

You know, the first is that, you know, I think counsel confirmed that the mere assertion of the Fifth Amendment is not 404(b) evidence. It's the conduct at the end of the day. Mr. Bannon's not going to be prejudiced by invoking the Fifth Amendment because there's going to be no issues with him admitting to certain conduct.

With respect to the issue of prejudice, look, this is the first time that Mr. Bannon's counsel is raising the issue of prejudice. They've never once said, "He'll be prejudiced by asserting his Fifth Amendment." That never came out in any meet-and-confer letters. It didn't even come out in the opposition. The first time it's coming out is in the hearing. And as Your Honor has recognized, when you're requesting a stay, something that they did not even, you know, request formally and address any of the factors, that, you know, the key issues overlap at the end of the day.

And, frankly, there's no overlap between this case and the criminal indictment. It's different defendants, kind of different victims at the end of the day. It's a different time period. The only locus, you know, similarity is that there was a misrepresentation, and even that misrepresentation is directed at two separate categories of individuals.

So under these circumstances, we would submit, Your Honor, that, you know, it's not an undue burden for Mr. Bannon to appear for an investigational hearing. It's not an undue burden for him to assert the Fifth on any questions; he's not going to be prejudiced in the criminal trial. And, therefore, we ask -- respectfully request Your Honor enter an order directing Mr. Bannon to comply with the CID and sit for an investigational hearing either remotely or in person, if he chooses.

THE COURT: Okay. So the -- you call it an investigational hearing. I'll call it a deposition. That's the only thing the commission's seeking at this point; is that correct?

MR. BERGGREN: That's correct, Your Honor.

THE COURT: Okay.

All right. Ms. McGuire, I want to make clear that no one is faulting Mr. Bannon for seeking the Court's intervention, which is obviously his right to do, but having

considered all of the arguments, the Court will enforce the CID to the extent that it seeks to compel Mr. Bannon's deposition testimony, which, as counsel has just confirmed, is all the commission is seeking at this point.

First, the issuance of the CID was within the FTC's statutory authority, and it was duly served on Mr. Bannon.

Second, Mr. Bannon has failed to demonstrate that delaying his testimony until after his criminal trial is warranted under the circumstances. As I indicated, I think what you're really seeking is a stay of the parallel civil proceedings, which is a fairly extraordinary remedy, particularly where there is no substantive overlap between the civil and criminal matters, as is the case here.

In any case, the FTC's investigation has been ongoing since, I believe Mr. Berggren indicated, March of 2019. Delaying that deposition, Mr. Bannon's testimony, indefinitely or even six months under the optimistic assumption that he will be tried in May will prevent the commission from completing its investigation, which is not in the public interest.

Third, the CID is not unduly burdensome.

As for the potential of self-incrimination, Mr. Bannon has the right to assert his Fifth Amendment in response to any question if he believes he has a good faith

basis for doing so, and, as Mr. Burck surely knows, requiring a deponent to assert the Fifth on a question-by-question basis is a common practice in government investigations. I'm also not convinced that there would be a basis to introduce his invocation of the Fifth under Rule 404(b), but I am fully confident that Judge Torres will see to it that Mr. Bannon receives a fair trial up in New York.

Finally, to the extent that the argument has not been waived, the CID is not necessarily duplicative of Mr. Bannon's interrogatory answers. And even if it was, that is not a basis to quash the CID. As Mr. Berggren mentioned, plaintiffs are entitled to obtain relevant evidence through multiple discovery mechanisms, and the plaintiff's entitled to test a deponent's interrogatory answers via cross-examination and follow-up questions.

So for those reasons, the Court will grant the commission's petition to enforce the CID.

Now, hopefully you folks won't need my help in coming up with a convenient date soon after the holidays to schedule this. I will leave it to you all to do that, but in the event that you need my help, you know where to find my. All right?

Is there anything else?

MR. BERGGREN: Thank you, Your Honor.

MS. McGUIRE: Thank you, Your Honor.

MS. KOPP: Thank you.

THE COURT: Okay. Well-argued, everyone. Happy holidays, and hopefully this will put a close to this matter before this Court, and good luck going forward, all right?

MS. KOPP: Thank you.

THE COURT: Thank you.

MR. BERGGREN: Thank you, Your Honor.

(Whereupon the hearing was concluded at 2:29 p.m.)

**CERTIFICATE OF OFFICIAL COURT REPORTER**

I, LISA A. MOREIRA, RDR, CRR, do hereby certify that the above and foregoing constitutes a true and accurate transcript of my stenographic notes and is a full, true and complete transcript of the proceedings to the best of my ability.

**NOTE:** This hearing was held during the COVID-19 pandemic stay-at-home restrictions and is subject to the technological limitations of court reporting remotely.

Dated this 21st day of January, 2021.

/s/Lisa A. Moreira, RDR, CRR
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