

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDINGS RULINGS

Release No. 695 / March 9, 2012

ADMINISTRATIVE PROCEEDING

File No. 3-14619

In the Matter of	:	
	:	ORDER DENYING DIVISION OF
WESTERN PACIFIC CAPITAL	:	ENFORCEMENT'S APPLICATION TO
MANAGEMENT, LLC and	:	MODIFY RESPONDENTS' PROPOSED
KEVIN JAMES O'ROURKE	:	SUBPOENAS

The Order Instituting Administrative and Cease-and-Desist Proceedings (OIP), issued on November 10, 2011, alleges that Respondents violated Section 17(a) of the Securities Act of 1933, Sections 10(b) and 15(a)(1) of the Securities Exchange Act of 1934 (Exchange Act) and Exchange Act Rule 10b-5, and Sections 206(1)-(4) of the Investment Advisers Act of 1940 (Advisers Act) and Advisers Act Rule 206(4)-8.

On February 22, 2012, Respondents filed a Request for the Issuance of Subpoenas Requiring the Attendance and Testimony of Witnesses at the Designated Time and Place of Hearing, and Requiring the Production of Documentary or Other Tangible Evidence (Request). The same day, the Division of Enforcement (Division) filed its Application to Modify Respondents' Proposed Subpoenas Requiring the Production of Documentary or Other Tangible Evidence (Motion). On February 27, 2012, this Office received Respondents' Opposition to the Division's Motion (Opposition). On February 29, 2012, the Division filed its Reply to Respondents' Opposition (Reply).

A party may request the issuance of subpoenas requiring the production of documentary or other tangible evidence. 17 C.F.R. § 201.232. However, a subpoena may be modified "[i]f compliance with the subpoena would be unreasonable, oppressive or unduly burdensome." 17 C.F.R. § 201.232(e)(2).

Respondents request the issuance of twenty-three subpoenas seeking the production of documentary and testimonial evidence.¹ The Division argues that it previously issued documentary subpoenas to all but one of these investors and has provided Respondents with all of the documents it received pursuant to these subpoenas. Motion at 2. Therefore, the Division requests that Respondents be ordered to modify the "INSTRUCTIONS AND DEFINITIONS" section of each Subpoena to clearly state that the recipient is not required to produce documents

¹ In its Request, Respondents seek the issuance of approximately twenty-three subpoenas, twenty-two of which the Division seeks to modify (Subpoenas).

that the recipient already produced to the Commission. Motion at 3. The Division argues that without the requested modifications, the Subpoenas are “unreasonable, oppressive and unduly burdensome” because they require the investors to produce the same documents twice. Motion at 1, 2.

Respondents respond that their Subpoenas specifically seek documents or categories of documents with clarity, stating that “the specificity in [their] request leaves little doubt in the investor witnesses’ mind what documents they must produce.” Opposition at 7. Respondents also assert that they have not received all documents or complete copies of documents responsive to the Commission’s subpoenas, either because the investors did not provide them to the Commission or because the Commission failed to provide them to the Respondents. Id. at 11-13. Specifically, one investor represented to Respondents that he has documents responsive to the Commission’s subpoenas that were not provided to Respondent and do not appear on the document log it received from the Commission. Id. at 12. Another investor stated to Respondents that there were a series of missteps by the Commission staff in handling responsive documents from him. Id. Respondents contend that these missteps raise the possibility that they may be highly prejudiced during trial. Id. For these reasons, among others, Respondents submit that the Division’s Motion should be denied.

Respondents’ Subpoenas are very similar in scope to the Division’s subpoenas. However, Respondents’ Subpoenas in many instances request numerous specific documents as well as documents falling into the usual broad, general categories. Such specific requests may make it easier to identify responsive documents. Additionally, in light of the representations of two investor witnesses, there is a reasonable likelihood that the investigative file does not contain everything responsive to the Division’s subpoenas. Respondents therefore may be unduly prejudiced at the hearing if they do not receive all or complete copies of documents and testimony that they request.

Ruling

It is hereby ORDERED that the Division’s Motion is DENIED. IT IS FURTHER ORDERED that Respondents make available to the Division, for inspection and copying, all documents received in response to the requested subpoenas within three business days of receipt.

SO ORDERED.

Cameron Elliot
Administrative Law Judge