

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDINGS RULINGS

Release No. 728 / October 10, 2012

ADMINISTRATIVE PROCEEDING

File No. 3-14856

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In the Matter of	:	
	:	ORDER REGARDING MOTION
EGAN-JONES RATINGS COMPANY and	:	FOR ISSUANCE OF SUBPOENAS
SEAN EGAN	:	TO SECURITIES AND
	:	EXCHANGE COMMISSION

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The Securities and Exchange Commission (Commission) issued an Order Instituting Administrative and Cease-and-Desist Proceedings on April 24, 2012, pursuant to Sections 15E(d) and 21C of the Securities Exchange Act of 1934.

On August 6, 2012, Respondents filed their Motion for Issuance of Subpoenas to the Securities and Exchange Commission (Motion). On September 21, 2012, the Division of Enforcement (Division) filed an Opposition, which included an Exhibit A (Exh. A), and the Commission's Office of the General Counsel filed a separate Opposition. Respondents filed a Reply (Reply) on October 1, 2012.

I. Discussion

Requests for subpoenas to the Commission may be construed as requests for specific information falling within the scope of Brady v. Maryland, 373 U.S. 83 (1963), and its progeny. The Division represents that it has searched for Brady material and has identified none. Exh. A, p. 7.

Actual production of documents under Brady is warranted only if Respondents make a "plausible showing" that the documents contain information that is both favorable and material to Respondents' defense. Orlando Joseph Jett, 52 S.E.C. 830, 830-31 (1996). I am mindful, however, of the fundamental difficulty the Division's discovery obligations present, particularly with respect to Brady: "some prosecutors have determined unilaterally that evidence will not be material and, often in good faith, have disclosed it neither to defense counsel nor to the court." U.S. v. Oxman, 740 F.2d 1298, 1310 (3rd Cir. 1984). Out of an abundance of caution, I will follow a procedure similar to the one outlined in City of Anaheim, Administrative Rulings Release No. 586 (Jul. 30, 1999), 70 SEC Docket 881, 887, where the administrative law judge held that "affidavits should be the primary tool for resolving Brady disputes." See also Jett, 52 S.E.C. at 831 (an affidavit regarding Brady "remove[d] any doubt about the matter").

Respondents argue that certain requested documents are potentially Brady material (more precisely, material falling within the scope of Giglio v. U.S., 405 U.S. 150, 154 (1972)) in that they may tend to demonstrate bias against Respondents on the part of certain Commission employee witnesses. Reply, pp. 6-8. I agree, based on concerns I have previously expressed during prehearing conferences, regarding alleged telephone calls by Commission staff to Respondents in response to certain credit downgrades. Accordingly, the Brady affidavit referenced above must state that a search has been made for documents or other information tending to show bias on the part of Commission employee witnesses. However, it would be pointless to require a search for documents tending to show bias before the Division has even identified its witnesses. The Brady affidavit will therefore be due on the same date as the Division's witness list, namely, October 29, 2012.

Respondents argue that the Division improperly filed two briefs opposing the present Motion, namely, one from the Division and one from the Office of the General Counsel. Reply, pp. 28-29. Inasmuch as Respondents move to strike either the Division's Opposition or the General Counsel's Opposition, or both, the motion is denied. The General Counsel's Opposition is in large part duplicative of the Division's, Respondents have shown no undue prejudice arising from the filing of two different Oppositions, and any potential prejudice was cured when I granted Respondents leave to file a Reply with no page limit and extended the time within which they could file it.

Respondents argue that the Division has waived any privileges pertaining to the requested documents because it improperly invoked such privileges. Reply, pp. 30-34. This contention lacks merit. Respondents did not previously formally request a withheld document list under 17 C.F.R. § 201.230(c). Nor is it practical for the Division to identify specific privileged documents, in the absence of a withheld document list, without knowing which documents Respondents seek, that is, without resolving the present Motion. Accordingly, although I will order production of a withheld document list no later than October 29, 2012, I will not treat the Division's claim of privilege as waived.

## II. Specific Requests

Because many of Respondents' arguments regarding specific subpoena requests recur throughout their Motion and Reply, I address them in general terms in the following comments and cite to them below as to each specific request.

- A. Respondents seek documents which are not public but which allegedly bear on legal interpretation. The law, and the sources used to interpret the law, are public. Any requested non-public documents are therefore irrelevant and their production would be unduly burdensome. That the Division's position might be inconsistent with a previous Division litigating position is similarly irrelevant, because it for me to interpret the statutes at the hearing level. See Warren Lammert, Securities Act Release No. 8833 (Aug. 9, 2007), 91 SEC Docket 856, 866 (one administrative proceeding, allegedly asserting a theory of liability inconsistent with a second administrative proceeding, did not obligate the Division to disclose documents from the first proceeding to the respondent in the second proceeding). Indeed, to even consider the non-public views of Commission staff on this issue arguably infringes on my decisional independence.

- B. Respondents seek documents which are public and are equally available to both parties. It would be unduly burdensome to require production of such documents by the Commission when they are equally accessible to Respondents.
- C. Respondents seek documents which have either been produced by Respondents or previously received by Respondents from the Commission. It is unduly burdensome for the Commission to produce documents which should already be in Respondents' possession.
- D. Respondents seek documents allegedly relevant to issues raised by stricken affirmative defenses. To the extent a document is relevant only to a stricken affirmative defense, its production would be unduly burdensome.
- E. Respondents seek documents allegedly relevant to any potential sanction, but which are pertinent only to the Commission's conduct in this proceeding or to the alleged high quality of Respondents' ratings. The factors to consider in evaluating any potential sanction are the Steadman public interest factors: the egregiousness of the respondents' actions, their isolated or recurrent nature, the degree of scienter involved, the sincerity of the assurances against future violations, the respondents' recognition of the wrongful nature of their conduct, and the likelihood of future violations. Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979) (quoting SEC v. Blatt, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)). Evaluating these factors requires neither a cost-benefit analysis nor consideration of the Commission's conduct. Documents pertaining to factors not relevant to the Steadman factors, including documents pertaining to the Commission's conduct and to the alleged benefits of Respondents' business activities, are not relevant and it would be unduly burdensome to produce them.
- F. Respondents seek documents pertaining to sanctions imposed on other nationally recognized statistical rating organizations (NRSROs). The Commission is not required to impose a sanction that is proportional to sanctions imposed against other respondents, so long as it is within the Commission's authority. Seghers v. SEC, 548 F.3d 129, 135 (D.C. Cir. 2008) (citing Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187 (1973) and Hiller v. SEC, 429 F.2d 856, 858-59 (2d Cir. 1970)). Any sanctions against other NRSROs are therefore irrelevant, and production of documents pertaining to them would be unduly burdensome.

My ruling as to each specific request is as follows. I follow the practice of the parties and address each request as part of a group of similar requests.

<u>Request</u>	<u>Ruling</u>
1-2	Denied. See Comments A, C, and E.
3-6	Denied except as to <u>Brady</u> material. See Comments C and E. It is irrelevant whether the Commission was aware that Respondents' registration applications

	contained false information, because materiality is evaluated based on an objective standard, not a subjective standard. See <u>SEC v. Morgan Keegan &amp; Co., Inc.</u> , 678 F.3d 1233, 1245 (11th Cir. 2012). However, to the extent requests 4-6 seek <u>Brady</u> material, they will be added to the list of specific <u>Brady</u> topics.
7-9	Denied except as to <u>Brady</u> material. See Comment B. To the extent request 9 seeks <u>Brady</u> material, it will be added to the list of specific Brady topics.
10-13	Denied except as to <u>Brady</u> material. See Comment E. These requests, collectively, ask for nothing more than the investigative file and <u>Brady</u> material. Documents falling within the scope of these requests but which are not part of the investigative file need not be produced, unless they constitute <u>Brady</u> material. 17 C.F.R. § 201.230(b).
14-15	Denied except as to <u>Brady</u> material. See Comment E. Examination-related documents need only be produced under the circumstances outlined in 17 C.F.R. § 201.230(a)(1)(vi). Investigation policies and protocols are irrelevant. To the extent request 14 seeks <u>Brady</u> material, it will be added to the list of specific <u>Brady</u> topics.
16-20	Denied. See Comments D and E. The requested documents are irrelevant.
21	Denied. See Comments D, E, and F. The requested documents are irrelevant.
22-25	Denied. See Comments D and F. The requested documents are irrelevant.
26-30	Denied. See Comments D and F. The requested documents are irrelevant.
31-33	Denied. See Comments E and F. The requested documents are irrelevant.
34-37	Denied. See Comments D and E. The requested documents are irrelevant.
38-41	Denied. See Comments D and E. The requested documents are irrelevant.
42-44	Denied. See Comments D, E, and F. The requested documents are irrelevant.
45-52	Denied. See Comment D. The requested documents pertain only to internal Commission procedures and are irrelevant.
53	Denied except as to <u>Brady</u> material. See Comment D. Out of an abundance of caution, I will assume the requested documents might contain <u>Brady</u> material.
Witnesses	Denied. See Comment D.

ORDER

It is ORDERED that Respondents' Motion for Issuance of Subpoenas to the Securities and Exchange Commission is GRANTED IN PART and DENIED IN PART as described above.

It is further ORDERED that the Division of Enforcement shall file, no later than October 29, 2012, a declaration as outlined above which describes its compliance with Brady v. Maryland and its progeny and with 17 C.F.R. § 201.231, and which specifically states that a search for Brady material has been made among all categories of documents listed in requests 4-6, 9-14, and 53 of Respondents' Motion, and that a search for Brady material has been made regarding evidence of bias on the part of any Commission employee listed on the Division's witness list.

It is further ORDERED that the Division of Enforcement shall file, no later than October 29, 2012, a withheld document list complying with 17 C.F.R. § 201.230(c).

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Cameron Elliot  
Administrative Law Judge