

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS

Release No. 1256/February 24, 2014

ADMINISTRATIVE PROCEEDING

File No. 3-15574

In the Matter of

HARDING ADVISORY LLC AND
WING F. CHAU

ORDER GRANTING IN PART
RESPONDENTS' SUBPOENA
REQUEST

The Securities and Exchange Commission (Commission) issued an Order Instituting Administrative and Cease-and-Desist Proceedings on October 18, 2013, pursuant to Section 8A of the Securities Act of 1933, Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940 (Advisers Act), and Section 9(b) of the Investment Company Act of 1940. The hearing is scheduled to commence on March 31, 2014, in Washington, D.C.

On February 6, 2014, Respondents filed a Notice of Request for Issuance of Subpoena (Subpoena Request), which seeks three categories of documents from the Commission: (1) “[a]ll documents or information sufficient to determine what constitutes a collateral manager’s selection of collateral with reasonable care,” as specified in the pertinent collateral management agreement and offering circular; (2) “[a]ll documents or information relating to, or produced by” ACA Management LLC, ACA Capital Holdings, or affiliated entities (collectively, ACA), a collateral manager not connected with the present proceeding, in connection with its work as a collateral manager for CDO offerings; and (3) various marketing materials and disclosures for any CDO in which certain persons affiliated with Walkers SPV Ltd. (Walkers) (at least one of whom is a listed witness in the present proceeding) served as directors of the CDO issuers or co-issuers. Respondents also seek disclosure of Bates numbers “[t]o the extent documents have already been produced.” Subpoena Request. The Division of Enforcement (Division) filed a Motion to Quash Subpoena (Motion), and Respondents filed an Opposition (Opposition).

A party may request the issuance of subpoenas requiring the production of documentary or other tangible evidence. 17 C.F.R. § 201.232(a). However, a subpoena may be quashed or modified “[i]f compliance with the subpoena would be unreasonable, oppressive or unduly burdensome.” 17 C.F.R. § 201.232(e)(2). A respondent is not entitled to conduct a “fishing expedition” in an effort to discover something that might assist him in his defense. Scott Epstein, Securities Exchange Act of 1934 (Exchange Act) Release No. 59328 (Jan. 30, 2009), 95 SEC Docket 13833, 13860 n.54, quoted in China-Biotics, Inc., Exchange Act Release No. 70800, 2013 WL 5883342, at *18 n.131 (Nov. 4, 2013).

As to the first category, the Subpoena Request qualifies as a fishing expedition, and is therefore unreasonable. It is also very similar to a contention interrogatory, which is not permitted in Commission administrative proceedings. E.g., Woods v. DeAngelo Marine Exhaust, Inc., 692 F.3d 1272, 1280 (Fed. Cir. 2012) (describing contention interrogatory practice); 17 C.F.R. §§ 201.230-235. I agree with the Division that the universe of potentially responsive documents is unduly large, in part because it is unclear how to identify what information is “sufficient” to determine the standard of care. Motion at 4. The standard of reasonable care is best established by expert evidence. The actual practices or opinions of particular lay witnesses, and documentary evidence from other proceedings, might be relevant, but as drafted this category is plainly overbroad.

As to the second category, Respondents contend that the Division “advanced that ACA’s conduct – in the very same situation – comported with the relevant standard of care.” Opposition at 5. I have reviewed the pertinent materials Respondents previously submitted which, they argue, prove this contention, but I am not persuaded at this stage that ACA and Respondents are similarly situated, or that ACA’s circumstances are even relevant. Opposition at 4 (citing to Respondents’ reply brief to their motion for more definite statement). In an abundance of caution, however, and in view of Respondents’ specific request for documents pertaining to the three ACA-related CDO offerings at issue in SEC v. Tourre, No. 10-cv-3229 (S.D.N.Y), I will order that the Division make available for inspection and copying all documents produced by ACA in that case. Opposition at 5. The Division need only make these documents available for inspection and copying, and only to the extent they are not already part of the investigative file. This should not present an undue burden to the Division because ACA’s production in Tourre is presumably readily available.¹ Otherwise, the second category of requested documents is overbroad and unreasonable because it seeks non-Tourre related materials from CDO offerings in which ACA may not have been similarly situated to Respondents.²

I previously held that the Division need not provide a “roadmap” to the evidence. Harding Advisory LLC, Admin. Proc. Rulings Release No. 1195, 2014 SEC LEXIS 280, *6 (Jan. 24, 2014) (citing John Thomas Capital Mgmt. Grp. LLC, Advisers Act Release No. 3733, 2013 WL 6384275, at *6 (Dec. 6, 2013)). Providing a roadmap in an administrative proceeding includes providing Bates numbers for particular documents, and the Division thus need not provide them for responsive ACA-related documents already produced.

As to the third category, Respondents contend that the Subpoena Request is “narrowly targeted,” and that the materials “would establish the directors’ understanding and knowledge of the standard of care.” Opposition at 8. However, Respondents do not dispute the Division’s allegation that Walkers personnel “furnished directors for dozens if not hundreds of CDO special-purpose vehicles.” Motion at 5. This category of the Subpoena Request is therefore

¹ Should a protective order be needed, I encourage the parties to attempt to stipulate to its terms.

² The Division cited to Western Pacific Capital Management, LLC, File No. 3-14619 (Mar. 22, 2012) (unpublished), an unpublished order not available on the Commission’s website. Motion at 6; Opposition at 6 n.1. I have not relied on that order in deciding the Motion.

overbroad and unreasonable. Respondents might be better served seeking documents directly from Walkers, if possible.

It is HEREBY ORDERED that Respondents' Notice of Request for Issuance of Subpoena is GRANTED IN PART as outlined above, and that the Division is ORDERED to make available for inspection and copying, no later than February 28, 2014, all documents produced in SEC v. Toure, No. 10-cv-3229 (S.D.N.Y), by ACA Management LLC, ACA Capital Holdings, or affiliated entities, that have not already been made available.

Cameron Elliot
Administrative Law Judge