

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

ADMINISTRATIVE PROCEEDINGS RULINGS

Release No. 1744/August 29, 2014

ADMINISTRATIVE PROCEEDING

File No. 3-15913

In the Matter of

WEDBUSH SECURITIES INC.,
JEFFREY BELL, and
CHRISTINA FILLHART

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ORDER DENYING MOTION TO
WITHHOLD DOCUMENTS

The Securities and Exchange Commission (Commission) instituted this proceeding with an Order Instituting Proceedings, pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 (Exchange Act) and Section 203(e) of the Investment Advisers Act of 1940, on June 6, 2014, and the hearing is scheduled to commence the week of October 6, 2014.

The Division of Enforcement (Division) filed a Motion for Leave to Withhold Certain Categories of Documents Not Relevant to the Subject Matter of the Proceedings (Motion) on August 13, 2014, attaching the Declaration of Steven D. Bucholz. The Division, citing Commission Rule of Practice (Rule) 230(b)(1)(iv), argues that certain documents gathered in the course of its investigation regarding Wedbush Securities Inc. (Wedbush) and two other parties should be withheld because they are not relevant to the instant proceeding. Mot. at 2-3. The Division further claims that production of the documents would infringe upon the Commission's interest in protecting the confidential nature of its investigations into other parties in the investigation, and that production would be burdensome to all parties, due to the volume of the documents, estimated at 200,000 pages. Mot. at 2-4.

Respondents Wedbush and Christina Fillhart filed an Opposition to the Motion on August 20, 2014, with the Declaration of Joseph E. Floren (Floren Decl.), which was joined by Respondent Jeffrey Bell. Respondents argue that the Division's argument that the documents are irrelevant is unsupported, and that the documents at issue are relevant to this proceeding, because they provide germane information on industry practices and standards relating to market access programs. Opp. at 3-7. Additionally, Respondents argue that the production imposes no burden on Respondents, any burden on the Division is negligible, and any potential confidentiality issues could be addressed with a protective order. Opp. at 7-8.

In its Reply, which attaches a declaration of Steven D. Bucholz (Bucholz Reply Decl.) in support, the Division argues that evidence of industry practice, if relevant, would be more reasonably shown by expert testimony, and that the Respondents' ability to form a defense based on industry practice would be incomplete due to the fact that the formal order of investigation names

only two other firms beside Wedbush. Reply at 1-3. The Division also emphasizes that there is a lack of factual overlap between the present case and the materials sought to be withheld and that production of the documents would “significantly burden the Division and this Court.” Reply at 4-5.

Rule 230(a) requires that the Division:

make available for inspection and copying . . . documents obtained by the Division prior to the institution of proceedings, in connection with the investigation leading to the Division’s recommendation to institute proceedings . . . includ[ing] [e]ach subpoena issued; [e]very other written request to persons not employed by the Commission to provide documents or to be interviewed; [t]he documents turned over in response to any such subpoenas or written requests; [and] [a]ll transcripts and transcript exhibits.

17 C.F.R. § 201.230(a) (formatting altered). Rule 230(b)(1)(iv) permits, by order, the withholding of documents from the investigative file if they are not relevant to the subject matter of the proceeding, or for good cause shown. 17 C.F.R. § 201.230(b)(1)(iv).

To withhold documents based on irrelevancy, the Division must show that the investigation concerns

a discrete segment or segments that are related only indirectly, or not at all, to the recommendations ultimately made to the Commission with respect to the particular respondents in a specific proceeding. . . . For example, a single investigation may encompass inquiry into an issuer’s allegedly false accounting disclosure and an unrelated manipulation of the issuer’s securities by a third party. If the recommendation to the Commission and resulting administrative proceeding involve only the accounting disclosures, the Division could seek leave to withhold trading records, transcripts and other documents related to the manipulation investigation.

60 Fed. Reg. 32738, 32762 (June 9, 1995) (formatting altered).

The Division’s justifications for withholding based on irrelevancy are that the documents in question concern other firms and that this proceeding concerns only Respondents’ specific failures to develop, implement, and document adequate risk management controls and supervisory procedures to ensure compliance with all regulations when providing market access to Wedbush’s customers. Mot. at 3-4. The formal order of investigation underlying this proceeding identifies two firms other than Wedbush, yet concerns the same potential subject-matter violations by all three parties, including violations of Exchange Act Sections 15(c)(3) and 17(a) and Rule 17a-8. *See* Floren Decl., Exhibit A (the formal order of investigation). The Division’s argument for relevancy, thus, falls outside the standard for Rule 230(b)(1)(iv).¹

¹ The Division relies on *China-Biotics, Inc.*, which concerned alleged violations of Section 12(j) of the Exchange Act and the single legal issue of whether the respondent failed to file required periodic reports. Exchange Act Release No. 70800, 2013 SEC LEXIS 3451, at *14 (Nov. 4, 2013); *see* Mot. at 3; Reply at 3-4. There, certain documents that “were obtained from third parties as part

The Division also has not otherwise demonstrated good cause to withhold the documents. *See* 17 C.F.R. § 201.230(b)(1)(iv). First, the undersigned is not convinced that production of the documents would be burdensome to the Court or the Division. Any concerns by the Division that the production will create “significant risk of two irrelevant mini-trials” or a “side show” during the hearing will be handled according to Rule 320, which requires exclusion of evidence that is “irrelevant, immaterial or unduly repetitious.” 17 C.F.R. § 201.320; *see* Reply at 2, 5. Furthermore, the 200,000 documents were collected from sophisticated brokerage and clearing firms that would presumably have produced them in an organized and easily reproducible manner. Second, Respondents have made clear that they do not believe the production would burden them. *See* Opp. at 7-8. Third, any concerns for confidentiality can be addressed with a protective order. *See* 17 C.F.R. § 201.322.

The Division’s Motion is DENIED. The Division shall make available the documents it seeks withheld to Respondents promptly, pursuant to Rule 230(a), 17 C.F.R. § 201.230(a).

IT IS SO ORDERED.

Carol Fox Foelak
Administrative Law Judge

of an ongoing investigation concerning conduct and potential securities law violations distinct from that addressed by the OIP” were excluded from the broader investigative file, after the Division had represented that “[n]one of the custodians had any ability to affect the company’s noncompliance with its periodic filing obligations, nor [did] the custodians have any ability to remedy [r]espondent’s delinquent filings and assure its future compliance.” *Id.* at *13-14. Comparing the Division’s circumstances here with those in *China-Biotics*, the Division notes the two other parties in the formal order of investigation underlying this proceeding never “have, or had at any time relevant to these proceedings, the ability to affect Wedbush’s compliance, or lack thereof, with various securities laws and regulations.” Bucholz Reply Decl. Unlike in *China-Biotics*, which concerned the narrow issue of ability to file past-due and future periodic reports, the undersigned is unconvinced by the Division’s conclusory representations that the documents sought to be withheld have no possible bearing on Wedbush’s ability to comply with the securities laws charged in the OIP.