

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

Administrative Proceedings Rulings
Release No. 6618 / July 1, 2019

Administrative Proceeding
File No. 3-17184

In the Matter of
Christopher M. Gibson

**Order Denying Respondent's
Motion to Quash**

Respondent Christopher M. Gibson moves to quash a subpoena directing him to produce certain documents.

Background

In late May 2019, the Division submitted a subpoena to my office for issuance. The subpoena directed Gibson to produce documents in the following four categories:

1. All documents, exhibits, and other information relating to Respondent's current financial condition, including but not limited to any personal financial documentation relating to Respondent's ability or inability to pay any disgorgement, penalty, or interest, in this proceeding.
2. All communications, including but not limited to emails and text messages, with any of the following individuals since March 29, 2016: Mason McKnight IV, Matthew McKnight, John Engler, John Gibson, James Hull, and any other individual invested in or associated in any way with the Geier International Strategies Fund, LLC ("GISF" or the "Fund").
3. All documents supporting or relating to any purported claim, defense, or argument by you that Division counsel provided inaccurate information or made misrepresentations to James M. Hull during

his investigative testimony on February 25, 2015, including but not limited to: (i) all documents relating to the Affidavit of James M. Hull dated February 13, 2018 (previously marked as Respondent's Exhibit 178), including all drafts and communications between you (or your attorneys) and Hull (or his attorneys); (ii) all documents relating to the allegations made by you in the civil injunctive action, *Gibson v. SEC, et al.*, Case No. 1:19-cv-01014-WMR (N.D. Ga.), in particular documents supporting your allegations in Paragraphs 61-70 of the Complaint; and (iii) all documents regarding any potential legal action by Hull against you or your father, John Gibson, at any time since March 29, 2016, including draft tolling agreements and all communications between you (or your attorneys) and Hull (or his attorneys) regarding such tolling agreements.

4. All documents relating to any financial or business dealings between you and Hull since March 29, 2016, including but not limited to documents relating to shared real estate or other investments and any contracts or other agreements between you and Hull.¹

Gibson moved to quash the subpoena, arguing that compliance with it would be unreasonable, oppressive, and unduly burdensome because it is incomplete and would require production of irrelevant documents.² Gibson's incompleteness argument relates to the subpoena's instructions, the third paragraph of which is the sentence fragment "this proceeding or the

¹ A fifth category is no longer at issue following the parties' entry of a joint stipulation.

² Mot. at 2. Gibson also argued that the subpoena was improperly issued because it was signed by the Chief Administrative Law Judge. *Id.* at 3; see *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018). On reviewing Gibson's motion I reissued the subpoena under my signature, thus rendering moot this aspect of Gibson's motion. *Christopher M. Gibson*, Admin. Proc. Rulings Release No. 6599, 2019 SEC LEXIS 1367, at *2 (ALJ June 12, 2019).

Division’s investigation of this matter, and/or any attorney who provided legal advice.”³

Gibson argues that category 3 seeks documents that the Division itself has argued are irrelevant in the context of its motion to prevent Gibson from calling Division counsel to testify.⁴ He says categories 2 and 4 are irrelevant because they seek documents created years after the last relevant event described in the order instituting proceedings (OIP).⁵ And category 1 is allegedly irrelevant because Gibson’s current financial condition does not bear on whether the OIP’s factual allegations are true.⁶

The Division opposes Gibson’s motion, asserting that its subpoena seeks relevant documents.⁷ It argues that Gibson fails to address category 1, which it argues is relevant to the extent Gibson intends to rely on the defense of inability to pay.⁸ And categories 2 through 4 relate to Gibson’s argument—raised in connection with his attempt to call Division counsel as witnesses in support of his due process claim—that Division counsel misrepresented facts to a witness.⁹

In his reply, Gibson faults the Division for applying one standard of relevance to him and another to itself.¹⁰ He also argues that the Division has failed to address categories 2 and 4 because its global defense of categories 2 through 4 only applies to category 3.¹¹ Gibson says that the Division is

³ Mot. at 3–4.

⁴ *Id.* at 4–5.

⁵ *Id.* at 5.

⁶ *Id.*

⁷ Opp’n at 3–5. The Division also responds to Gibson’s incompleteness argument and explains that the omission about which Gibson complains is a “ministerial error.” *Id.* at 2–3. Because the Division is plainly correct, I reject this aspect of Gibson’s argument. Paragraph 3 of the definitions and instructions is the result of a scrivener’s error and should be read as a continuation of paragraph 2.

⁸ Opp’n at 4.

⁹ *Id.* at 3–4.

¹⁰ Reply at 2.

¹¹ *Id.* at 3.

mistaken that he failed to address category 1 (Gibson argued that his financial information is irrelevant to the factual allegations in the OIP), and because the Division failed to address his argument, the subpoena should be quashed.¹²

Discussion

Commission Rule of Practice 232(e)(2) provides that an administrative law judge must quash or modify a subpoena “[i]f compliance with” it “would be unreasonable, oppressive, unduly burdensome or would unduly delay the hearing.”¹³

In his motion, Gibson argues that compliance with the subpoena would be unreasonable, oppressive, and unduly burdensome because the subpoena seeks irrelevant evidence.¹⁴ Relevance is a factor courts consider in determining whether, under Federal Rule of Civil Procedure 45, ordering compliance with a subpoena would result in an undue burden.¹⁵ I thus consider Gibson’s relevance argument as going to that factor.

Category 1. Gibson has raised inability to pay as a defense.¹⁶ Evidence of his current financial condition is thus relevant.¹⁷ This aspect of the motion to quash is denied.

¹² *Id.* at 3–4.

¹³ 17 C.F.R. § 201.232(e)(2).

¹⁴ Mot. at 2.

¹⁵ *See Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 818 (5th Cir. 2004); *Wultz v. Bank of China Ltd.*, 298 F.R.D. 91, 98 (S.D.N.Y. 2014). Because Federal Rule of Civil Procedure 45 and Rule 232 of the Commission’s Rules of Practice both consider undue burden, I look to cases interpreting the federal rule for guidance. *See Robert M. Ryerson*, Exchange Act Release No. 57839, 2008 WL 2117161, at *5 (May 20, 2008) (“Under certain circumstances, the Federal Rules of Civil Procedure provide helpful guidance, such as when issues are not directly addressed by our Rules of Practice.”).

¹⁶ *See Answer* at 13.

¹⁷ *See* 17 C.F.R. § 201.630(a) (permitting a respondent to “present evidence of an inability to pay disgorgement, interest or a penalty”). Gibson asserts that because the Division failed to address his argument, the subpoena should be quashed. Reply at 4. I’m not sure what to make of this assertion. First, Gibson has the burden. *See* 5 U.S.C. § 556(d) (“[T]he proponent of a

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Categories 2 through 4. The Division argues that evidence in categories 2 through 4 “relate[s] to, *among other things*, purported misrepresentations made by Division counsel to a witness (James M. Hull) during his investigative testimony – a topic that is irrelevant to the Division’s claims in this case *but that Respondent has argued* are relevant to his purported ‘constitutional due process’ affirmative defense.”¹⁸ As to this point, Gibson seeks to raise a due-process based affirmative defense based on Division counsel’s communications with Hull and possibly other investors.¹⁹ Apparently relevant to this defense, Gibson listed Division counsel in his witness list for the hearing in this proceeding.²⁰ The Division moved to preclude Gibson from calling Division counsel and argued in part that evidence from its counsel would be irrelevant.²¹ Although I granted the Division’s motion to prevent Gibson from calling Division counsel as witnesses, I did not rule on the relevance of Gibson’s due process defense.

In moving to quash as to categories 2 through 4, Gibson does not argue that requiring compliance with the subpoena would be unreasonable or oppressive. He also does not argue that the subpoena is vague or overbroad. Instead, Gibson maintains that the subpoena seeks evidence that is

rule or order has the burden of proof.”); *cf. Wiwa*, 392 F.3d at 818 (holding that the party moving to quash carries the burden of proof). Second, Gibson argues in his motion that evidence of his current financial condition is not relevant, asserting that such evidence would not shed light on whether the OIP’s allegations “are true.” Mot. at 5. For its part, the Division argues that evidence of Gibson’s current financial condition *is* relevant because he might argue inability to pay. Opp’n at 4. So whether or not it realizes that he made it, the Division addressed Gibson’s argument directly.

¹⁸ Opp’n at 3 (first emphasis added, second emphasis in original). Gibson is mistaken that the Division’s argument only applies to category 3. Hull is mentioned by name in categories 2, 3, and 4.

¹⁹ See Opposition to Motion to Preclude Testimony of Current and Former Division Counsel at 11 (June 3, 2019) (“[T]he staff members which Respondent has included on his list of potential witnesses have first-hand knowledge of relevant matters, including their communications with Mr. Hull and one or more other investors and their testimony is relevant to Respondent’s affirmative defense of a denial of due process.”).

²⁰ See *id.*; Resp’t Witness List at 4.

²¹ Motion to Preclude Testimony of Current and Former Division Counsel at 4–7 (May 24, 2019).

irrelevant, an argument that goes to whether the subpoena is unduly burdensome.²²

Gibson's relevance argument is that the Division should not be permitted to argue that testimony from its counsel about communication with witnesses is irrelevant but that evidence from him about that matter is relevant.²³ This is a strange argument. Relevance has a fixed meaning—whether evidence will make a fact of consequence more or less likely²⁴—and in moving to quash based on the alleged irrelevance of the evidence at issue, Gibson's burden is to show that the evidence does not meet that standard. Showing that the Division is trying to have it both ways does little to help Gibson meet his burden. Even assuming Gibson is correct, the threshold relevance question remains.²⁵ Because Gibson has not met his burden, his motion must be denied.

Moreover, because I have not precluded Gibson from arguing and possibly procuring testimony related to his due process defense (just not from the Division counsel on his witness list), the Division should be entitled to evidence to attempt meet that defense.²⁶ Categories 2 through 4 relate to the Division's alleged misrepresentations to Hull and Gibson's communications and business dealings with Hull after the OIP was issued. These categories of documents are potentially relevant to Gibson's defense.²⁷

²² Mot. at 4–5; Reply at 2; *see Wultz*, 298 F.R.D. at 98.

²³ Mot. at 4–5; Reply at 2.

²⁴ Fed. R. Evid. 401; *see United States v. Latney*, 108 F.3d 1446, 1449 (D.C. Cir. 1997) (“So long as the evidence makes a fact of consequence more or less likely, it is relevant.”).

²⁵ In any event, the Division is not trying to have it both ways. It has preserved its argument that testimony from its counsel is—in its opinion—irrelevant, while recognizing that Gibson disagrees and intends to try to support his defense.

²⁶ For the sake of clarity, I reiterate that I have not yet had occasion to rule on the relevance of Gibson's due process defense. But other than broadly stating that his defense has something to do with Division counsel's communication with investor witnesses, Gibson has not thus far explained what his due process claim is.

²⁷ Since Gibson has introduced a declaration from Hull signed February 2018 in support of his due process defense, documents about Gibson's

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Conclusion

Gibson's motion to quash is DENIED. He shall forthwith comply with the subpoena to produce the requested documents.²⁸

James E. Grimes
Administrative Law Judge

business and other dealings with Hull after the OIP was issued in March 2016—which are sought in Categories 2 and 4—are at least potentially relevant. *See* Opposition to Motion to Preclude, Attach. D.

²⁸ If Gibson withholds documents on privilege grounds, he must file a supporting declaration and privilege log. *See Dorf & Stanton Commc'ns, Inc. v. Molson Breweries*, 100 F.3d 919, 923 (Fed. Cir. 1996); *Caudle v. Dist. of Columbia*, 263 F.R.D. 29, 35 (D.D.C. 2009).