

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

ADMINISTRATIVE PROCEEDINGS RULINGS  
Release No. 1816/September 18, 2014

ADMINISTRATIVE PROCEEDING  
File No. 3-15918

In the Matter of  
  
DENNIS J. MALOUF

ORDER QUASHING IN PART AND  
MODIFYING SUBPOENA REQUEST TO  
FIDELITY BROKERAGE SERVICES, LLC

The Securities and Exchange Commission (Commission) commenced this proceeding on June 9, 2014, with an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) pursuant to Section 8A of the Securities Act of 1933 (Securities Act); Sections 15(b), 15C(c), and 21C of the Securities Exchange Act of 1934; Sections 203(f) and 203(k) of the Investment Advisers Act of 1940; and Section 9(b) of the Investment Company Act of 1940. The hearing is scheduled to commence on November 3, 2014.

On August 28, 2014, this Office received Respondent Dennis J. Malouf's (Malouf) Motion for Issuance of Subpoenas Duces Tecum Without Deposition (Motion for Issuance) pursuant to the Commission's Rules of Practice (Rule) 154 and 232. *See* 17 C.F.R. §§ 201.154, .232. The Motion for Issuance included a request for issuance of a subpoena to Fidelity Brokerage Services, LLC (FBS), and was not opposed by the Division of Enforcement. Motion for Issuance at Ex. B. On August 28, 2014, I granted the Motion for Issuance as to FBS and issued the requested subpoena (Subpoena). *Dennis J. Malouf*, Admin. Proc. Rulings No. 1740, 2014 SEC LEXIS 3087.

The Subpoena requests production of nine categories of documents. Subpoena at Ex. A. On September 8, 2014, FBS filed a Motion to Quash Respondent's Subpoena (FBS Motion). FBS represented that it had offered a compromise in lieu of a complete response to the Subpoena: to respond to the first and second requested categories in spreadsheet form, to the extent available, with personal identifying information redacted, and through 2011, when Respondent left UASNM, Inc. (UASNM). FBS Motion at 4-5.

On September 15, 2014, this Office received Malouf's Opposition to FBS's Motion to Quash Subpoena (FBS Opposition). Although Malouf disputes aspects of FBS' offered compromise, Malouf agreed to accept the proposed spreadsheet, which might satisfy four of his nine requested categories of documents, and agreed to postpone seeking production of two other categories of documents. FBS Opposition at 3 & n.5.

I applaud counsels' meet-and-confer efforts, even though they were ultimately unsuccessful. The proposed compromise as to the first, second, third, and seventh categories is eminently reasonable, and I will order it. The proposed spreadsheet would indeed seem to satisfy the first two categories of requested documents, and possibly the third and seventh. *See* FBS Opposition at 3 & n.5. Also, it is more efficient to postpone production of the fifth and sixth categories, which seek essentially all correspondence between FBS and various persons affiliated with UASNM, until after Malouf reviews the proposed spreadsheet.

The fifth and sixth categories of the Subpoena will therefore be quashed, and the first, second, third, and seventh categories will be modified as outlined above, without prejudice to renewal at a later date. This leaves the fourth, eighth, and ninth requests. Broadly speaking, the fourth request seeks FBS' policies and procedures pertaining to bond markups and markdowns, the eighth request seeks documentation of FBS' efforts to satisfy its best execution obligations for UASNM transactions, and the ninth request seeks FBS' procedures for placing and executing bond trades. Subpoena, Ex. A.

#### A. Legal Standard

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,” or excessive in scope. 17 C.F.R. § 201.232(b), (e)(2). Although the Commission sometimes looks to them for general guidance, the Federal Rules of Civil Procedure (FRCPs) do not apply in Commission administrative proceedings. *John Thomas Capital Mgmt. Grp. LLC*, Securities Act Release No. 9492, 2013 SEC LEXIS 3860, at \*26 (Dec. 6, 2013); *Clarke T. Blizzard*, 55 S.E.C. 754, 761 n.17 (2002); *Putnam Inv. Mgmt., LLC*, Admin. Proc. Rulings Release No. 614, 2004 SEC LEXIS 865, at \*3-4 (Apr. 7, 2004). FRCP 26 permits discovery as to any matter, not privileged, that is “reasonably calculated to lead to the discovery of admissible evidence.” FRCP 26(b)(1). No such standard appears in Rule 232. *See* 17 C.F.R. § 201.232. FRCP 45 establishes no standard for issuance of a subpoena, and although it permits quashing or modifying a subpoena on the basis of “undue burden,” it also permits quashing or modifying a subpoena on bases not found in the Rules. *Compare* FRCP 45(d)(3)(A)(iv) *with* 17 C.F.R. § 201.232(b), (e)(2). Indeed, Rule 232 does not even use the term “discovery.” *See* 17 C.F.R. § 201.232. In short, the central issue here – whether and how to modify or quash the Subpoena – is governed by a standard entirely unlike the standards in the FRCPs, and the FRCPs are generally not helpful in resolving it.

#### B. Relevance

FBS argues that the requested documents are irrelevant. FBS Motion at 6. The OIP alleges that Malouf failed to “seek best execution” on bond trades because he had a conflict of interest that gave him an incentive to execute trades through a particular broker-dealer, whom Malouf identifies as Raymond James Financial Services, Inc. (Raymond James), and that he actually did execute most trades through Raymond James. OIP at 2, 4-6; Motion for Issuance at 1. Malouf argues, as pertinent to the fourth, eighth, and ninth categories, that the requested documents would show that UASNM satisfied its best execution obligations and that UASNM

customers did not pay excessive markups or markdowns, specifically by comparison of trades through FBS with trades through Raymond James. FBS Opposition at 6-7.

Whether FBS satisfied its own best execution obligations might be relevant if Malouf avoided trading with FBS because it failed in its obligations. But that is not alleged in the OIP, nor does Malouf so contend. FBS' fulfillment of its own obligations is not at issue, and the eighth category of requested documents do not appear to be relevant. Similarly, FBS' firm-wide procedures for placing and executing bond trades – as opposed to what Malouf understood those procedures to be, and FBS' actual terms and charges for UASNM trades – are not at issue. Thus, the ninth category of documents seeks apparently irrelevant evidence, to the extent it seeks more than documentation of FBS' terms and charges for UASNM trades. The fourth category, because it seeks information pertaining to FBS' actual charges to customers, seemingly seeks relevant information. FBS contends, however, that it had no markup or markdown arrangement with UASNM. FBS Motion at 8. Malouf does not address this point in his Opposition. *See* FBS Opposition at 7. The OIP alleges a failure to seek best execution, but does not specifically allege that Raymond James had less favorable markups or markdowns than FBS. Moreover, the pertinent issue with respect to markups and markdowns is not FBS' markup/markdown policy, but what FBS actually charged UASNM on bond trades. If Malouf can show that FBS charged markups or markdowns, and that the evidence sought in the fourth category is not duplicative of the information sought in the first and second categories, he may renew his subpoena request for materials described in the ninth category of the Subpoena at a later date.

It is unreasonable to require production of irrelevant evidence. *See David F. Bandimere*, Admin. Proc. Rulings Release No. 746, 2013 SEC LEXIS 399, at \*12-13 (Feb. 5, 2013). The fourth, eighth, and ninth categories of the Subpoena will therefore be quashed.

### C. Scope, Timing, and Confidentiality

The proposed spreadsheet will be redacted of personal information, which should satisfy FBS' concerns about confidentiality. If not, FBS may move for an appropriate protective order. *See* 17 C.F.R. § 201.322. Trades predating January 2008 or postdating May 2011 are apparently not relevant in this proceeding, because the OIP alleges unlawful trades occurred only from January 2008 through May 2011. OIP at 3. The temporal scope of the Subpoena will be narrowed accordingly. In view of the imminence of the hearing, FBS shall have until September 26, 2014, to produce responsive documents. I have considered all other objections raised by FBS and do not find them meritorious; in particular, any production should not be unduly burdensome and Malouf will not be required to pay its costs. *See generally* FBS Motion.

### **Order**

It is ORDERED that Fidelity Brokerage Services, LLC's Motion to Quash Respondent's Subpoena is GRANTED IN PART as set forth above.

It is further ORDERED that Respondent's Subpoena Duces Tecum Without Deposition, issued to Fidelity Brokerage Services, LLC, is MODIFIED as follows and otherwise QUASHED: the information requested in the first and second categories of the subpoena may be

produced in spreadsheet form, with personal identifying information redacted, may be limited to the period January 1, 2008, to May 31, 2011, and shall be produced no later than close of business on September 26, 2014. Upon receipt, Respondent shall promptly make the produced documents available to the Division of Enforcement for inspection and copying.

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Cameron Elliot  
Administrative Law Judge