

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 731 / November 20, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-15015

In the Matter of	:	
	:	ORDER ON RESPONDENT
MICHAEL BRESNER,	:	KOUTSOUBOS'S REQUEST
RALPH CALABRO,	:	TO ISSUE FIVE SUBPOENAS
JASON KONNER, and	:	DUCES TECUM
DIMITRIOS KOUTSOUBOS	:	

The Securities and Exchange Commission (Commission) issued an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) on September 10, 2012, pursuant to Section 8A of the Securities Act of 1933, Sections 15(b) and 21C of the Securities Exchange Act of 1934, Section 203(f) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940.

On November 5, 2012, Respondent Dimitrios Koutsoubos (Koutsoubos) filed a request (Request) for issuance of subpoenas to the following: (1) Teddy Bryant (Bryant Subpoena), (2) Bruce W. Mills (Mills Subpoena), (3) Securities and Exchange Commission, Atlanta Regional Office (Commission Subpoena), (4) J.P. Turner and Company LLC (Turner Subpoena), and (5) National Financial Services LLC (National Financial Subpoena). On November 7, 2012, the Division of Enforcement (Division) filed an Opposition to Koutsoubos's requested subpoenas (Opposition), and Koutsoubos filed a Reply to Division's Opposition (Reply) on November 14, 2012.

A party may request the issuance of subpoenas requiring the production of documentary or other tangible evidence as well as the attendance and testimony of a witness at a designated time and place of hearing, unless the issuance of a subpoena is "unreasonable, oppressive, excessive in scope, or unduly burdensome." 17 C.F.R. § 201.232. For the reasons set forth in the discussion below, I GRANT IN PART AND DENY IN PART Koutsoubos's Request.

Discussion

Bryant Subpoena & Mills Subpoena

In its Opposition, the Division contends that virtually everything requested in the Bryant and Mills Subpoenas is already in the investigative file. Opposition, p. 4. This is almost certainly true. However, Koutsoubos has represented that there are various documents not in the investigative file which would be pertinent to this proceeding, i.e., that the investigative file is

incomplete. Reply, p. 2. The Division does not dispute this. Contrary to the Division's contention, the requested documents all appear to be those an individual investor might retain. Opposition, p. 4. Accordingly, the requests are generally reasonable and otherwise proper if they fill in gaps in the investigative file. I ORDER that Koutsoubos provide the investors with copies of any responsive documents already in the investigative file, an action Koutsoubos had generously agreed to already. Reply, pp. 2-3.

The Division also contends that the Bryant and Mills Subpoenas would have a harassing effect. Opposition, pp. 4-5. Except as indicated below, I am not persuaded. Any subpoena to a presumably hostile witness has the potential to be perceived as harassing, even if it is not. The possibility of harassment does not alone justify quashing a subpoena.

I do, however, find that requests five and six of the Bryant and Mills Subpoenas should not be enforced, although they would be proper if the language were changed. Requests five and six of the Bryant and Mills Subpoenas require the investors to "identify" their bank and brokerage accounts. It is not clear whether this requires simply a mental collection of information, followed by production of the requested documents, or the writing of an actual document listing the bank and brokerage accounts, or something else. Because a subpoena can only require production of a document already in existence, and the subpoena arguably requests that a new document be generated, requests five and six are unreasonable and unduly burdensome within the meaning of Rule 232 of the Commission's Rules of Practice. See 17 C.F.R. § 201.232(b).

I also find request nine in the Bryant Subpoena and requests seven and ten in the Mills Subpoena to be oppressive, unreasonable, and excessive in scope. These requests all documents concerning any civil action, criminal action, arbitration, or other proceeding, without time or subject matter limitations. Request seven of the Mills Subpoena requests all documents reflecting gambling debts incurred between 2005 and 2012. In general, prior securities arbitration might be relevant to this proceeding. However, a prior DUI conviction or a decades-old property dispute with a neighbor, for example, would not. Such requests are far too broad and have a strong potential for embarrassing the customer, and are oppressive, unreasonable, and excessive in scope within the meaning of Rule 232 of the Commission's Rules of Practice. See 17 C.F.R. § 201.232(b). However, I will consider a renewed subpoena request on these matters that is more narrowly tailored and which can be justified as leading to admissible evidence.

Based on the foregoing, I GRANT, subject to the modifications set forth above, Koutsoubos's request for issuance of the Bryant Subpoena and Mills Subpoena.

Commission Subpoena

As the Division correctly notes, the investigative file has already been produced, and any subpoena requesting it again would be unreasonable. The showing made by Koutsoubos – essentially, that a few documents one would expect to find in the file are not in the file – does not demonstrate that the Division failed to produce the whole investigative file. It may be that the file is just incomplete. Just as Koutsoubos does not have a copy of, for example, Mr. Bryant's J.P. Turner account documents, neither does the Division.

I note that Koutsoubos has withdrawn his request for Bates number identification of any responsive documents already produced. I also note that request nineteen is reasonably construed as a motion for Jencks Act material under Rule 231(a) of the Commission's Rules of Practice, and that the Division has a continuing duty under Rule 230 of the Commission's Rules of Practice to produce material exculpatory evidence. See 17 C.F.R. §§ 201.230(b)(2), .231(a).

I find the Commission Subpoena unreasonable and DENY Koutsoubos's Request for issuance of the Commission Subpoena.

Turner Subpoena & National Financial Subpoena

While the Division contends that virtually all of the documents requested by Koutsoubos in the Turner Subpoena and National Financial Subpoena have been produced as part of the investigative file, the Division "has limited objection to the issuance of these subpoenas – so long as Koutsoubos agrees to produce anything he receives from the subpoenas to the Division." Opposition, p. 5.

I GRANT Koutsoubos's request for issuance of the Turner Subpoena and National Financial Subpoena, and ORDER that Koutsoubos produce anything received in response to these subpoenas to the Division and other Respondents.

Order

It is ORDERED that Dimitrios Koutsoubos's Request for issuance of subpoenas is GRANTED IN PART AND DENIED IN PART, as set forth above; and

It is further ORDERED that Koutsoubos produce all documentary and tangible evidence received in response to the subpoenas issued to J.P. Turner and Company LLC, National Financial Services, LLC, Teddy Bryant, and Bruce W. Mills to the Division of Enforcement in a timely manner.

Cameron Elliot
Administrative Law Judge