

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 746 / February 5, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15124

In the Matter of	:	
	:	ORDER ON MOTION TO
DAVID F. BANDIMERE and	:	QUASH SUBPOENA
JOHN O. YOUNG	:	
	:	

The Securities and Exchange Commission (Commission) issued an Order Instituting Administrative and Cease-and-Desist Proceedings on December 6, 2012, pursuant to Section 8A of the Securities Act of 1933 (Securities Act), Sections 15(b) and 21C of the Securities Exchange Act of 1934 (Exchange Act), Section 9(b) of the Investment Company Act of 1940, and Sections 203(f) and (k) of the Investment Advisers Act of 1940.

On January 14, 2013, this Office received a letter from counsel for Respondent David F. Bandimere (Bandimere) requesting the issuance of a subpoena duces tecum directed to the Commission pursuant to Rule 232(a) of the Commission's Rules of Practice, attaching the subpoena and two exhibits. The Division of Enforcement (Division) filed a Motion to Quash Subpoena (Motion) on January 22, 2013, and this Office received Bandimere's Response in Opposition to Motion (Response) on January 29, 2013.¹

Bandimere requests the production of eight categories of documents, including documents withheld by the Division on the ground of attorney work-product privilege, documents relating to a prior investigation and enforcement action against Larry Michael Parrish (Parrish), operator of IV Capital, Ltd., one of the Ponzi schemes at issue in this matter, materials used to train Commission investigators on the identification of Ponzi schemes, documents obtained from other governmental agencies of the United States, and documents relevant to Bandimere's claim that he has been denied equal protection of law. The Division argues that the subpoena should be quashed because it is "unreasonable, oppressive and unduly burdensome." Motion, p. 1. Specifically, the Division points out that the subpoena would require the production of documents protected by the attorney work-product, attorney-client, law enforcement, and deliberative process privileges, as well as requests documents that are irrelevant and unrelated to this administrative proceeding. Id.

¹ The Division filed a Reply Brief in Support of Motion on February 1, 2013. Because a Reply Brief is neither contemplated by the procedures set forth in Rule 232(e), nor provided for in my January 15, 2013, Order setting forth a briefing schedule, I have not considered the Division's Reply in reaching a conclusion.

A party may request the issuance of subpoenas requiring the production of documentary or other tangible evidence. 17 C.F.R. § 201.232. However, a subpoena may be quashed “[i]f compliance with the subpoena would be unreasonable, oppressive or unduly burdensome.” 17 C.F.R. § 201.232(e)(2). For the reasons set forth below, the Division’s Motion will be granted and the subpoena will be quashed.² However, the Division will be required to submit for my review a withheld documents list in compliance with Rule 230(c) of the Commission’s Rules of Practice, and a declaration which describes its compliance with Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, and with 17 C.F.R. § 201.231.

Request 1

Bandimere seeks production of the “factual portion” of all documents relating to Bandimere, Parrish, Richard Dalton, Universal Consulting Resources, LLC, IV Capital Limited, Exito Capital, LLC (and any members thereof), Victoria Investors, LLC (and any members thereof), and Ministry Minded Investors, LLC (or any members thereof), which have been withheld, in whole or in part, on the grounds of attorney work product, “including by way of example and not limitation, interview notes (whether handwritten or otherwise) and memoranda and all non-identical drafts thereof.”

The Commission’s Rules of Practice, which govern in this case, provide for the withholding of internal memoranda, notes, or writings prepared by Commission employees, and for attorney work product, unless they constitute Brady material. 17 C.F.R. § 201.230(b). The Division represents, and Bandimere acknowledges, that it is currently conducting a review of withheld documents to determine whether they contain Brady material. Motion, p. 4; Response, p. 3. As previously noted, the Division will be ordered to submit a declaration describing its compliance with Brady, but that is all Bandimere is entitled to. All of the cases cited by Bandimere were decided under the Federal Rules of Civil Procedure (FRCP), which do not govern this proceeding. See John A. Carley, Exchange Act Release No. 50954 (Jan. 3, 2005), 84 SEC Docket 2317, 2318 n.6 (“[W]e have held repeatedly that our proceedings are not governed by the Federal Rules of Civil Procedure.”). Accordingly, Request 1 is quashed.

Request 2

Bandimere seeks production of the investigative file associated with SEC v. Z-Par Holdings, Inc., No. 1:05-cv-01031 (JFM) (D. Md.) (Z-Par Action). The Division argues that the Commission’s prior investigation of, and litigation against, Parrish dealt with a scheme that ended in 2005 and none of the facts or allegations from the prior matter are relevant here. Motion, pp. 4-5. Bandimere argues that he first invested with Parrish in 2005 and that the fact that a preliminary injunction was entered against Parrish in May 2005 does not mean that he ended his scheme. Response, p. 9. Bandimere asserts that “documents relating to the entirety of Parrish’s scheme are

² The Motion to Quash Subpoena Request 7, which seeks “[a]ll documents received from other agencies or departments of the United States government which relate or refer to” certain enumerated parties, is denied as moot. The Division has produced documents it received from the Federal Bureau of Investigation, which it initially withheld as privileged, and that it asserts constitute the only documents received from any other agency related to this matter. Motion, p. 6. Bandimere has acknowledged the Division’s decision to produce those documents. Response, p. 4 n.3.

relevant on the issues of how the scheme was conducted, and how obvious it was to investors in the scheme that Parrish operated a Ponzi scheme.” Id.

Request 2 is quashed. That there are two different cases against Parrish, the second of which is not a contempt case for violating the injunction in the first case, strongly suggests that there are two different Ponzi schemes involving different participants. There is no reason to think, Bandimere’s allegation notwithstanding, that the two schemes have anything to do with one another, nor is there reason to think that Bandimere actually invested in the first (rather than the second) Ponzi scheme. It would be unreasonable to require production of the investigative file for the first Ponzi scheme.

Requests 3, 4, 5

Bandimere seeks production of all documents “received, reviewed or relating to” the Motion of Parrish for a Modification of the Temporary Restraining Order (Parrish Motion) filed in the Z-Par Action, including, but not limited to, Exhibits A and B attached to the Parrish Motion. He also seeks production of Exhibits A through C attached to the Declaration of Parrish Pursuant to Temporary Restraining Order and Asset Freeze (Parrish Declaration) filed in the Z-Par Action.³ He further requests production of “[a]ll documents which relate to or reflect any effort taken by the [Commission] to verify the information contained in” the Parrish Declaration.

Bandimere argues in a conclusory fashion that the requested documents pertain to Parrish’s financial condition and activities during the time when Bandimere invested with Parrish, and the information is therefore relevant to Parrish’s scheme and to how other people were taken in by it. Response, p. 10. Bandimere also claims the documents are relevant to his estoppel defense. Id. While the requested documents may reflect Parrish’s financial condition and his activities during 2005, the year that Parrish filed these documents in the Z-Par Action, it is not clear whether, or how, that information is relevant to any claim or defense in this proceeding. Bandimere’s alleged scheme between 2006 and 2010, including what he knew and what he told investors, is what is relevant to this case, not Parrish’s scheme that was enjoined in 2005. Furthermore, Bandimere’s claim that these documents are relevant to his estoppel defense is unsupported and wholly conclusory.

Moreover, some of the requested documents relating to Parrish’s Motion would appear to be publicly available on the Public Access to Court Electronic Records website. To the extent that any documents responsive to Request 4 have been sealed as confidential by the district court, I do not have the authority to order them un-sealed. Accordingly, Requests 3, 4, and 5 are quashed.

Request 6

Bandimere requests “[a]ll training materials used by the [Commission] relating to facts or circumstances which may evidence or indicate the existence of a Ponzi scheme.” Bandimere claims that the training materials “are likely to be relevant to whether [he] was reckless, or even negligent, in not identifying the facts which the Division claims he knew as being ‘red flags’ indicative of a fraudulent scheme.” Response, p. 11. Bandimere, however, has not demonstrated or even alleged that he ever saw the Commission’s training materials, and therefore they have no relevance to

³ The Parrish Motion and Declaration are attached to the subpoena as Exhibits A and B.

Bandimere’s state of mind. Determinations of recklessness, negligence, and other states of mind are left to my sound discretion, and the training that Commission examiners receive is completely irrelevant to that determination.

Bandimere cites to SEC v. Kovzan, No. 11-2017-JWL, 2012 WL 4819011 (D. Kan. Oct. 12, 2012), to support his request. In Kovzan, the district court ordered the Commission to produce documents and SEC Interpretive Guidance concerning the interpretation of Item 402 of Regulation S-K, reasoning that “the standard of care in the industry” was relevant to the objective component of the Tenth Circuit’s definition of recklessness for purposes of scienter. Id., p. 2-3. Kovzan is clearly distinguishable. First, guidance or interpretation of a specific regulation is not the same as law enforcement techniques and procedures. The training materials at issue are used to instruct Commission employees tasked with catching Ponzi schemers who evade the law, while the purpose of interpretative guidance is to provide instruction and assist people in complying with the law. The Division represents, and I am inclined to agree, that disclosure of the training materials “would seriously impair the [Commission’s] ability to conduct future investigations because these training materials would provide a road map to Ponzi schemers . . . to evade detection.” Motion, p. 6.

Second, the district court in Kovzan took into account the fact that the defendant had narrowed his request and was not merely seeking internal Commission communications, but information regarding communications between the Commission and third parties. Kovzan, 2012 WL 4819011, p. 4-5. It is possible that Commission communications with third parties would be a relevant consideration in determining an industry standard. Here, however, Bandimere seeks purely internal Commission training materials, which could have had no effect on the “industry standard” or how a third party could go about identifying a Ponzi scheme, because the materials were never shared with any third party.

Third, the Kovzan court followed the FRCP, which, as explained above, are not applicable in Commission administrative proceedings. Under Rule 26(b)(1) of the FRCP, a subpoena may issue for documents if their production is “reasonably calculated to lead to the discovery of admissible evidence.” In Commission administrative proceedings, by contrast, discovery is “limited,” and the standard for a motion to quash is whether compliance with the subpoena would be unreasonable, oppressive, or unduly burdensome. Steven E. Muth, Securities Act Release No. 8622 (Oct. 3, 2005), 86 SEC Docket 1217; 17 C.F.R. § 201.232(e)(2). These standards are entirely distinct. Hector Gallardo, Administrative Proceedings Rulings Release No. 667 (Feb. 25, 2011), 100 SEC Docket 38676. That compliance with a subpoena for internal Commission training materials might reasonably lead to the discovery of admissible evidence does not mean that the subpoena satisfies Rule 232(e)(2). Requiring the Commission to produce the training materials would be unreasonable. Accordingly, Request 6 is quashed.

Request 8

Bandimere requests “[t]he factual portions of all documents which relate to or reflect the decision to initiate an administrative proceeding against . . . Bandimere, as opposed to a civil enforcement action in a United States District Court.” Bandimere’s attorney argues in his letter that these documents will support Bandimere’s claim that he has been denied equal protection of law because the proceeding against him was filed as an administrative proceeding rather than a civil enforcement proceeding, citing Gupta v. SEC, 796 F. Supp. 2d 503, 503 (S.D.N.Y. 2011).

Request 8 is quashed. Bandimere requests the “factual portions” of the documents relating to the Commission’s decision to bring an administrative proceeding against him, but this is not what is relevant to Bandimere’s equal protection defense. What is relevant to an equal protection defense are the non-factual portions, i.e., those dealing with motive, intent, etc., in other words, the explanation for the recommendation to bring the case administratively rather than civilly. See Gupta, 796 F. Supp. 2d at 515 (“Indeed, the selective prosecution/equal protection claim will turn entirely on whether the [Commission’s] decision to treat [respondent] differently . . . was irrational, arbitrary, and discriminatory.”). The “factual portions” would not contain such evidence and requiring their production would be unreasonable.

Order

It is ORDERED that the Division of Enforcement’s Motion to Quash Subpoena is GRANTED IN PART and DENIED AS MOOT IN PART as set forth above.

It is further ORDERED that the Division of Enforcement shall file, no later than February 19, 2013, a declaration as outlined above which describes its compliance with Brady v. Maryland and its progeny and with 17 C.F.R. § 201.231, and which specifically states that a search for Brady material has been made.

It is further ORDERED that the Division of Enforcement shall file, no later than February 19, 2013, a withheld document list complying with 17 C.F.R. § 201.230(c).

Cameron Elliot
Administrative Law Judge