

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 1676/August 7, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15790

In the Matter of :
: **ORDER ON SUBPOENAS**
MICHAEL A. HOROWITZ and :
MOSHE MARC COHEN :

On March 13, 2014, the Securities and Exchange Commission (Commission) issued an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) against Michael A. Horowitz (Horowitz) and Moshe Marc Cohen (Cohen). Horowitz entered an Offer of Settlement, which the Commission accepted on July 31, 2014. Michael A. Horowitz, Securities Act Release No. 9620, 2014 WL 3749703 (July 31, 2014).

Cohen filed an Answer on April 21, 2014. A hearing is scheduled to begin at 9:30 a.m. EDT on August 25, 2014, in Courtroom 238, Jacob Javits Federal Building, 26 Federal Plaza, New York, New York, 10278. I have either ruled on, or will rule on at the start of the hearing, several motions filed by Cohen: Motion for Summary Disposition filed July 1, 2014; Request for Oral Argument filed July 1, 2014; Motion to Transfer Venue, Motion to Clarify Stay, and Motion for Adjournment and Extension of Time filed July 2, 2014; and Motion to Exclude Exhibits filed July 16, 2014.

Pending Matters

On or about July 14, 2014, I signed twenty-four subpoenas requested by the Division of Enforcement (Division), pursuant to Commission Rule of Practice 232. On or about July 16, 2014, I signed thirty-six subpoenas requested by Cohen. On July 30, 2014, Cohen submitted a Second Motion for Issuance of Subpoenas requesting that I issue an additional eleven subpoenas.

On July 30, 2014, Baruch Weiss, Esq. (Weiss), filed a motion to quash the subpoena to testify (Weiss Motion) that I issued to him at the request of Cohen. See 17 C.F.R. §201.232(e). Weiss, a practicing attorney, has represented from August 2008 to the present several persons contacted by the Division in connection with its investigation of the variable annuity purchases at issue in this proceeding. Weiss Motion at 2. Weiss has accepted service of subpoenas on behalf of twelve clients who have been subpoenaed by the Division or Cohen to testify at the upcoming

hearing. Id. Weiss requests expedited action on the Weiss Motion as its existence prevents him from preparing his clients for the hearing. Id. at 1, 4-5.

Weiss argues that the subpoena to him should be quashed quickly because he has no first-hand knowledge of these matters; rather, his knowledge comes from representing clients after the Division's investigation began and the existence of the subpoena has and will imperil his ongoing attorney-client relationships and his representation of these clients at the hearing. Weiss Motion at 2-5.

On August 1, 2014, the Division filed a Motion to Quash and for a Protective Order Regarding Subpoenas to Division Counsel (Division Motion). The Division argues that three of the subpoenas Cohen requested, those directed to Peter Haggerty (Haggerty), Christopher Mathews (Mathews), and Marilyn B. Ampolsk (Ampolsk) to testify and provide "Staff notes," should be quashed because these three Division attorneys conducted the investigation of this proceeding and have no personal knowledge of the underlying facts; their notes would undoubtedly be covered by the work product privilege and the governmental deliberative process privilege; and testimony from Haggerty and Mathews, who are litigating the proceeding, and Ampolsk would be irrelevant because it could not establish Cohen's defense to the allegations in the OIP. Division Motion at 1-9. The Division requests a protective order barring Cohen from seeking testimony and notes from the named Division attorneys. Id. at 9.

On August 5, 2014, Cohen filed his Opposition to the Division's Motion with Exhibits A-M (Cohen Opposition). Cohen contends that the testimony of the Division attorneys will show that the Division manipulated witness statements and that the Division attorneys' testimony and notes are not privileged. Cohen Opposition at 2, 8-9. Cohen's claims are based on "Federal Procedures as well as Staff's Own 'Enforcement Manual,'" and certain cited cases. Cohen Opposition at 5. Cohen also seeks "clarification as to whether Respondent needs to file a separate Motion to Compel the Discovery of Witness Statements and Interviews or would this Motion be sufficient to compel the Staff to provide the Non-Privileged information for all witnesses the Staff has interviewed over the past 6.5 years?" Cohen Opposition at 13.

On August 6, 2014, the Division filed a Reply to Cohen's Opposition (Division Reply). The Division insists that it has fully complied with its file production obligations under Commission Rules of Practice 230 and 231, and that Cohen is attempting to divert attention from the allegations against him set out in the OIP. Division Reply at 3 n.1, Exhibit A.

Ruling

The standard governing an application to quash or modify a subpoena under Commission Rule of Practice 232(e) is whether compliance would be unreasonable, oppressive, or unduly burdensome. 17 C.F.R. § 201.232(e)(2).

The subpoenas at issue are oppressive because the four attorneys being subpoenaed could not possibly have any first-hand factual knowledge of the central issue in this proceeding, i.e., whether between January and February 2008, Cohen violated the antifraud provisions of the securities statutes and aided and abetted and caused a broker dealer to violate Section 17(a) of

the Securities Exchange Act of 1934 (Exchange Act) and Exchange Act Rule 17a-3(a)(6). OIP at 16-18. See also General Aeromation, Inc., 40 S.E.C. 21, 23-4 (1960); Harris Clare & Co., Inc., 43 S.E.C. 198, 201 (1966); Haight & Co., Inc., 44 S.E.C. 481, 510-11 (1971). The subpoenas at issue are unreasonable and unduly burdensome because the subpoenaed attorneys either represent clients who will likely be called to testify, are members of the litigation team prosecuting the allegations set out in the OIP, or assisted in preparing the Division's case. Cohen has not opposed the Weiss Motion, and Cohen's Opposition fails to successfully rebut the contention that the testimony of these attorneys is irrelevant, privileged, or both. In addition, the hearing begins in eleven business days and the subpoenas arrived amid a time of last minute preparation.

For the reasons stated, I GRANT the Application to Quash Subpoena Testificandum of Baruch Weiss, Esq., pursuant to Commission Rule of Practice 232(e);

I REFUSE to issue subpoenas to Peter Haggerty, Christopher Mathews, and Marilyn B. Ampolsk requested by Cohen, pursuant to Commission Rule of Practice 232(b). Given this ruling there is no need for a protective order;

I REFUSE to issue a subpoena to Eric Greenberg, Tashur 27A PO Box 2256, Zichron Yaakov, Israel 30900, because Cohen has not shown that the Commission has authority to issue a subpoena to someone outside the United States; and

I DENY Cohen's request that in addition to materials provided pursuant to Commission Rules of Practice 230 and 231, the Division provide Cohen with "Non-Privileged information for all witnesses the Staff has interviewed over the past 6.5 years."

Brenda P. Murray
Chief Administrative Law Judge