

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 2405 / March 11, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16178

In the Matter of

GREGORY T. BOLAN, JR. AND
JOSEPH C. RUGGIERI

ORDER

On February 25, 2015, I issued a subpoena for the production of documents on non-party Wells Fargo Securities, LLC. On March 6, 2015, Well Fargo filed an application to modify the subpoena, by striking items (d)-(h). On March 9, the Division of Enforcement filed a response supporting Wells Fargo's application. The same day, Respondents opposed Wells Fargo's application.

The subpoena requests challenged by Wells Fargo target trading records or other data that Wells Fargo apparently used to create—and make adjustments to—a purported summary of Respondent Joseph C. Ruggieri's trading record. This information has been made relevant, in pertinent part, by the Division's production of the expert report of Edward S. O'Neal. The materials relied upon by Dr. O'Neal include "Mr. Ruggieri's trading activity from March 30, 2010 – March 31, 2011 (WF-002847663 through WF-002847678, WF-002848306)." O'Neal Report, Appendix 1, n.15. In particular, WF-002848306 is an Excel spreadsheet of adjustments to Mr. Ruggieri's trading record, which Wells Fargo made at the Division's request. There is no indication that Dr. O'Neal examined the underlying data or documents used by Wells Fargo to adduce Mr. Ruggieri's purported trading activity. Indeed, it does not appear that the Division ever requested the production of that underlying information. However, any disinterest by the Division and Dr. O'Neal in reviewing the underlying information on which Wells Fargo's summary of Mr. Ruggieri's trading activity is based does not render it irrelevant to the proceeding. Rather than just take Wells Fargo's word for it, and assume that all trading activity and adjustments were free of any error, Respondents would like the opportunity to examine the underlying data on which this document is based, and on which Dr. O'Neal's opinion is based.

Core issues of any expert opinion are the reliability of the data on which it is based, and what weight should be given to the expert opinion. *See Jay T. Comeaux*, Securities Act of 1933 Release No. 9633, 2014 SEC LEXIS 3001, at *14 (Aug. 21, 2014) (in the context of assessing an expert's analysis of financial records for purposes of determining disgorgement, "the Division must submit sufficient evidence for us to assess the reasonableness of that analysis," including

“the records on which [the expert] relies”); *Guy P. Riordan*, Securities Act Release No. 9085, 2009 SEC LEXIS 4166, at *54 n.63 (Dec. 11, 2009) (“While an expert’s testimony may properly be given substantial weight by the Commission, it has the duty to make its independent analyses and findings. . . . [W]e have appraised and given such weight to the expert testimony as we consider is indicated by the relevant facts in the record.” (internal citation, quotation marks, and alteration omitted)), *pet. denied*, 627 F.3d 1230 (D.C. Cir. 2010); *see also Elliott v. CFTC*, 202 F.3d 926, 934 (7th Cir. 2000) (the principle that “all expert testimony must be reliable . . . should apply with equal force to the weight a[n agency] factfinder accords expert testimony”); *Amorgianos v. Nat’l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002) (“In deciding whether a step in an expert’s analysis is unreliable, the district court should undertake a rigorous examination of the facts on which the expert relies.”); *Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 155 (3d Cir. 1999) (“the reliability analysis applies to all aspects of an expert’s testimony,” including “the facts underlying the expert’s opinion”). Here, I am persuaded by Respondents’ argument that Wells Fargo’s refusal to produce this information has “left Respondents without any ability to verify or test the accuracy of these adjustments by Wells Fargo” and “would deny Respondents the opportunity to test the veracity of the adjusted trading records – or determine if the originally-produced records were, in any instance, actually correct.” Opposition, p. 1.

Wells Fargo’s application contains a number of assertions by counsel regarding the nature of the trading records underlying subpoena items (d)-(h), and these suggest that the relationship of the underlying records to Ruggieri’s trading activity is minor, but the fact remains that these records are expressly implicated by Dr. O’Neal’s reliance on WF-002848306.

The burden of compliance is not excessive, and would appear to represent only a fraction of the longstanding, ongoing effort that Wells Fargo has willingly provided to the Division in this matter. It certainly seems plausible that if Wells Fargo had made the maker(s) of this document available for informal discussions with Respondents’ counsel, this is just the sort of issue that might have been narrowed or even avoided. But, since that opportunity was missed, and the hearing on the merits will start shortly, Wells Fargo is ORDERED to produce the information specified in the subpoena to the requester by no later than March 20, 2015.

Accordingly, Wells Fargo’s application to modify the subpoena is DENIED.

Jason S. Patil
Administrative Law Judge