

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4252/October 13, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-17352

In the Matter of

SAVING2RETIRE, LLC, and
MARIAN P. YOUNG

ORDER ON SUBPOENA REQUEST

Respondents Saving2Retire, LLC, and Marian P. Young have asked that I issue a subpoena to the Securities and Exchange Commission concerning three categories of documents. The Division of Enforcement opposes this request. For the reasons discussed below, Respondents' request is denied in part.

Discussion

Respondents seek:

In .PDF format, all investigative files already submitted to Respondents.

Records of communication between the Securities Exchange Commission and Texas and California regulators regarding Saving2Retire, Marian P. Young, and any subject matter regarding this administrative proceeding.

A list of all investigative files retained by the Commission.

The Division objects to the first category, asserting that it has produced its investigative file "in the format in which it is received and kept in the Division's records." Opp'n at 2. Respondents do not dispute this assertion but argue that they cannot read some of the produced files because they lack "access to the appropriate software." Resp. at 2.

As to the second category, the Division avers that its "communications with any other agency about matters of common interest are subject to the law enforcement privilege." Opp'n at 2. It says that by statute and rule, information it shares with federal and state law enforcement authorities is "covered by . . . applicable privilege[s]," which are not waived by virtue of the fact

of that sharing. *Id.* (relying on 15 U.S.C. § 78x(c), (f)(1), and 17 C.F.R. §§ 203.2, 240.24c-1). Respondents respond that the Division has not validly invoked a law enforcement privilege and has not met its burden to show that the privilege applies. Resp. at 2-3.

The Division argues that the final category is, “[o]n its face, . . . unreasonable, oppressive, excessive in scope, and unduly burdensome.” Opp’n at 2-3. It also argues that the documents sought are irrelevant. *Id.* at 3. Respondents respond that they are entitled to documents the Commission relied on when deciding to initiate this proceeding. Resp. at 3.

1. The Division is required to “make available” to Respondents, “for inspection and copying[,] . . . documents obtained by the Division prior to the institution of proceedings, in connection with the investigation leading to the Division’s recommendation to institute proceedings.” 17 C.F.R. § 201.230(a). Unless the parties make different arrangements, the inspection and copying will occur “at the Commission office where [the documents in question] are ordinarily maintained.” 17 C.F.R. § 201.230(e). “The respondent shall be responsible for the cost of photocopying.” 17 C.F.R. § 201.230(f). If the Division withholds documents, it may be ordered to produce a withheld documents list. 17 C.F.R. § 201.230(c).

Because arguments of counsel do not constitute evidence,¹ disputed facts cannot be resolved by relying on those arguments. Although the Division presented no supporting declaration, Respondents do not dispute that the Division has provided an electronic version of its investigative file at no cost to Respondents or that it has produced that file in the manner in which it was maintained. Nothing more is required. *See* 17 C.F.R. § 201.230; *cf.* Fed. R. Civ. P. 34(b)(2)(E).² If Respondents wish to photocopy the Division’s file, they may make arrangements to do so. This aspect of Respondents’ request is quashed.

2. Exchange Act Section 24(f)(1) preserves the Commission’s claims of privilege with respect to documents given to other federal agencies and certain other regulators and law enforcement authorities. 15 U.S.C. § 78x(f)(1). Exchange Act Section 24(f)(3)(A) provides that “Federal agencies, State securities and law enforcement authorities, self-regulatory organizations, and the Public Company Accounting Oversight Board shall not be deemed to have waived any privilege applicable to any information by transferring that information to or permitting that information to be used by the Commission.” 15 U.S.C. § 78x(f)(3)(A). The result of these provisions is that if a privilege protects information law enforcement authorities have provided to the Commission, or vice versa, the provision of that information will not

¹ *Keith L. Mohn*, Securities Exchange Act of 1934 Release No. 42144, 1999 WL 1036827, at *4 n.16 (Nov. 16, 1999); *see Wood ex rel. United States v. Am. Inst. in Taiwan*, 286 F.3d 526, 534 (D.C. Cir. 2002); *Vivid Techs., Inc. v. Am. Sci. and Eng’g, Inc.*, 200 F.3d 795, 812 (Fed. Cir. 1999) (“The truth of a disputed material fact cannot be established on [an] attorney[’s] statement alone.”).

² Under Federal Rule of Civil Procedure 34(b)(2)(E), documents produced in civil litigation may either be produced in the manner in which they are kept or they may be produced in some other organized and labeled fashion. “A party need not produce the same electronically stored information in more than one form.” Fed. R. Civ. P. 34(b)(2)(E)(iii).

amount to a waiver of the privilege. Rule 24c-1 permits the Commission to provide nonpublic information to certain entities if those entities “provide[] such assurances of confidentiality as the Commission deems appropriate.” 17 C.F.R. § 240.24c-1(b).

Although the Division is correct that Section 24(f) operates to protect the privileged nature of information given to the Commission by regulators and law enforcement authorities, or vice versa, the Division has not established the predicate for application of subsection (f); it has not attempted to show that any underlying privilege exists that could be protected by subsection (f). *See In re City of New York*, 607 F.3d 923, 944 (2d Cir. 2010) (adopting the holding of *In re Sealed Case*, 856 F.2d 268, 271-72 (D.C. Cir. 1988), that “the party asserting the law enforcement privilege bears the burden of showing that the privilege applies to the documents in question”). Within ten days, the Division shall file a detailed privilege log describing the withheld communications, a thorough explanation of the applicability of any privilege it believes is relevant to the communications, and an appropriate declaration supporting its factual assertions. *See* 17 C.F.R. § 201.230(c); *see also In re Sealed Case*, 856 F.2d at 272 (discussing the privilege proponent’s burden); *Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000). Respondents may respond to the Division’s submission within seven days after it is filed.

3. It is not entirely clear what Respondents seek when they ask for “[a] list of all investigative files retained by the Commission.” Based on Respondents’ response to the Division’s opposition, it appears that they simply seek a withheld documents list. *See* Resp. at 3 (“The Division is attempting to deny Respondents access to the very documents that the Commission relied on when deciding to initiate its action against Respondents by falsely asserting its law enforcement privilege.”). My order with respect to Respondents’ second category of documents appears to resolve this aspect of Respondents request.

If Respondents are instead referring to a list of every investigation the Commission has ever conducted, their request is facially “unreasonable, oppressive, excessive in scope, [and] unduly burdensome,” 17 C.F.R. § 201.232(b), and is rejected as such.

James E. Grimes
Administrative Law Judge