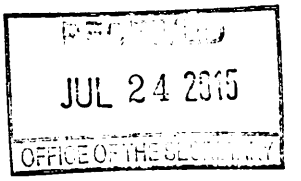
U.S. SECURITIES AND EXCHANGE COMMISSION



Matter of

EQUITY TRUST COMPANY,

Respondent.

A.P. File No. 3-16594

RESPONDENT'S MOTION FOR ADDITIONAL DISCLOSURE

Respondent Equity Trust Company ("ETC") moves for an order directing the Division of Enforcement to furnish the following information: **(1)** The substance of the many interviews conducted in lieu of depositions during the investigation of this matter. **(2)** The "examples" of ETC's conduct related to the fraudster Ephren Taylor alleged in ¶32 and ¶33 of the Order Instituting Proceedings ("OIP") that the Division will offer in evidence. **(3)** If any, the dates and locations of the fraudster Randy Poulson's events allegedly sponsored by ETC, and ETC events allegedly sponsored by Poulson, referred to in OIP ¶56 that the Division will offer in evidence. **(4)** If any, the SEC statements or guidance that the Division will offer to show that self-directed individual retirement account ("SDIRA") custodians were on notice of their purported duties under the securities laws. **(5)** If any, citations to other SEC enforcement actions or proceedings brought against SDIRA custodians. **(6)** The particular information that Rule 222(a) suggests is generally appropriate for disclosure in administrative proceedings.

MEMORANDUM OF SUPPORTING POINTS AND AUTHORITIES

The Division has been investigating this matter for at least four years. Its Rule 230 production included the transcript of an investigative deposition of Ephren Taylor's associate in June 2011, taken under a different file number. The Division has used subpoena power to take depositions and obtain production of thousands of documents and records. In contrast, ETC – not an entity regulated by the SEC – will now have about four months to analyze the Division's production and get ready for hearing. As a matter of fundamental fairness, ETC seeks the information requested in this motion alternatively under one or more of the following Rules of Practice, 17 C.F.R. Part 201:

(a) **Rule 220(d)**, which allows the Administrative Law Judge to direct the Division to provide "a more definite statement of specified matters of fact or law," and to "set

the periods for filing such a statement." *E.g. Matter of Bauer*, 1999 WL 4904 (Jan. 7, 1999) (ALJ Foelak) (mentions prior order under Rule 220(d) directing Division to provide a statement identifying "customers, accounts, and securities referred to" in particular OIP paragraphs).

(b) **Rule 222(a)**, which provides that the Administrative Law Judge "at the request of a party ... may order ... the interested division to furnish such information as deemed appropriate," including various categories of information. Rule 222(a)'s broad language allowing discovery of "information" that is deemed "appropriate" offers a means to partially ameliorate the limitations on discovery impacting non-regulated parties now that they are being charged in administrative proceedings following the Dodd-Frank amendments.

(c) **Rule 232(a)**, which provides that a respondent may request "subpoenas requiring the production of documentary or other tangible evidence returnable at any designated time or place." If allowed, ETC will present subpoenas for the information requested in this motion. *E.g. Matter of Raymond James Financial Services, Inc.*, 2005 WL 975346 (Feb. 10, 2005) (CALJ Murray) (order under Rule 232 requiring division directors to testify on SEC guidance provided to broker-dealer industry on email retention duties); *Matter of WHX Corp.*, 1999 WL 155907 (Mar. 9, 1999) (ALJ Foelak) (order allowing subpoenas to SEC for its guidance interpreting SEC "all holders" rule; materials sought "may be relevant to determining" existence of violations and to "weighing factors" relating to any remedy), *citing* Comment (a) to Rule 230, 60 Fed. Reg. 32738, 32762 (June 23, 1995) ("Production of documents prepared by the staff ... may be sought by subpoena pursuant to Rule 232).

In view of the expedited schedule imposed on administrative proceedings by Rule 360(a)(2), which will likely mean a hearing in about four months, ETC respectfully requests that this motion be determined at the initial prehearing conference set for July 27th. The types of information requested by this motion are appropriate for consideration at this time and include matters suggested by Rule 221(c) for discussion at the prehearing conference.

PARTICULAR INFORMATION REQUESTED

(1) **The substance of interviews conducted in lieu of depositions during the investigation of this matter.** With just two exceptions – testimony of the criminal fraudster Taylor and his business associate – the Division took investigative depositions and produced transcripts only of ETC's own witnesses – current staff, a former employee and an expert declarant. For all other potential witnesses and others with knowledge of the facts here, the

Division chose not to take depositions, and instead conducted interviews and took notes on the substance of what each interviewed person said. This approach represents a departure from longstanding SEC practice where the Division would take testimony of all or most persons with substantive knowledge about a matter. And this new approach frustrates a basic underlying premise of the Rules of Practice, which deny depositions to respondents based on their receipt under Rule 230 of the transcripts of the depositions the Division has taken during the investigation.

So in the present matter, the Division now knows what each knowledgeable non-ETC person would say if called as a witness at the hearing. But ETC does not know what any of these persons would say and is left to speculate. ETC needs to know what the witnesses the Division chose to interview off-the-record can say if subpoenaed to testify at the hearing. Otherwise ETC will miss the opportunity to call exculpatory witnesses in support of its defense. And ETC will hear what the Division's witnesses may say for the first time on the witness stand, resulting in an inability to confront the witnesses with contrary evidence, to effectively cross-examine, and to prepare rebuttal proof.

Earlier today, the Division sent us its three-sentence *Brady* disclosure, which underscores the importance of getting disclosure of these non-deposed witnesses' information. Of the three substantive sentences in the *Brady* disclosure: One revealed that a Poulson investor named Keri DuPree was not swayed to invest by the presence of an ETC employee at a Poulson event. What else did she say during her interview? The second revealed that a Taylor employee named Kinetra Dixon did not believe ETC's representative acted as "an advocate" for Taylor. What else did she say? And the third revealed that Poulson himself (never deposed, only interviewed) said that ETC did not know he was repaying old investors with new money in Ponzi fashion. What else did he say? Clearly the Taylor personnel, Poulson personnel and many ETC customers that the Division has interviewed had more information than just these three sentences, important as they are. But ETC's only window into this information will be disclosure of the substance of what they said during their interviews.

ETC is not permitted to take its own depositions and must proceed quickly to hearing. In order to attempt to give ETC a fair chance to call knowledgeable witnesses, the Division should state the non-privileged content of what these individuals said during the interviews the Division chose to take in lieu of the usual testimony – either by producing existing notes or creating a memorandum for this purpose. *Cf. Matter of Jett*, 1998 WL 404648 (Jul. 21, 1998), in which ALJ Foelak observed that "the possibility of surprise" in witnesses' testimony "would have been minimal" because "Commission interview notes were available" to respondent "long in advance of the hearing."

(2) **The "examples" of the Taylor-related conduct alleged in OIP ¶32 and ¶33 that the Division will offer in evidence.** In ¶32 of the OIP the Division alleges that a particular ETC representative "vouched" for fraudster Ephren Taylor to customers, and that he told Taylor he would "close" deals with customers referred by Taylor. The Division then states in OIP ¶33 that a January 14, 2009 email string is merely an "example" of this conduct. In order to meet the Division's proof at the hearing, ETC needs in fairness to know if the Division will offer additional purported "examples" of such conduct and, if so, what they are. Only in this way can ETC prepare its own proof to rebut this charge of "vouching" and "closing" for Taylor. Realizing the need for such specificity in order that general allegations can be met with rebuttal proof at the hearing, ALJ Foelak in *Matter of Bauer*, 1999 WL 4904 (Jan. 7, 1999) directed the Division under Rule 220(d) to provide a statement identifying "customers, accounts, and securities referred to" in particular OIP paragraphs).

(3) **If any, the dates and locations of Poulson events sponsored by ETC, and ETC events sponsored by Poulson, that the Division will offer in evidence.** The Division alleges in OIP ¶56 that ETC "agreed" to sponsor the fraudster Randy Poulson's events and vice versa. But the Division does not indicate whether any such events were actually sponsored on either side. In order to meet the Division's proof at the hearing, ETC needs in fairness to know what actual events, if any, the Division will offer as examples of such sponsorship. Only in this way can ETC prepare its own proof to rebut this charge.

(4) **If any, the SEC statements or guidance that the Division will offer to show that SDIRA custodians were on notice of their duties under the securities laws.** The Division's press release announcing the institution of this proceeding linked to an SEC Investor Alert that makes clear that SDIRA custodians do "not evaluate the quality or legitimacy of an investment and its promoters," and that the custodians are "responsible only for holding and administering the assets." As this is inconsistent with the purported duties of an SDIRA custodian that the Division alleges in the OIP, the Division should furnish the SEC statements or guidance that it will offer in evidence or cite to at the hearing to attempt to establish its view of an SDIRA custodian's duties under the federal securities laws. Despite diligent research, we have not been able to locate any such SEC statements or guidance.

Such a request for SEC statements or guidance is appropriate as ALJ Foelak noted in *Matter of WHX Corp.*, 1999 WL 155907 (Mar. 9, 1999) in which she allowed subpoenas to the SEC for its guidance interpreting the SEC "all holders" rule, and noted that such materials "may be relevant to determining" the existence of violations and to "weighing factors" relating to any remedy. Chief ALJ Murray likewise allowed subpoenas for division directors to testify on SEC guidance provided to the broker-dealer industry on email retention duties in *Matter of Raymond James Financial Services, Inc.*, 2005 WL 975346 (Feb. 10, 2005).

(5) <u>If any, citations to any SEC enforcement actions or proceedings brought against SDIRA custodians</u>. If this matter is what the Division would term a "first ever" case, this is again relevant to whether ETC had fair notice of any purported duties imposed on SDIRA custodians under the federal securities laws. Despite diligent research, we have not been able to locate any prior SEC enforcement actions or administrative proceedings brought against an SDIRA custodian. Such a request is appropriate, as in a recent order in another matter, ALJ Grimes similarly ordered the Division to produce under a Rule 232 subpoena documents sufficient to identify any prior administrative proceedings charging insider trading violations of Securities Exchange Act §14(e) and Rule 14e-3. *Matter of Charles Hill*, A.P. No. 3-16383, A.P. Rul. Rel. 2706 (May 21, 2015).

(6) <u>The information that Rule 222(a) suggests is generally appropriate for disclosure in administrative proceedings</u>: Rule 222(a) suggests that the following information be furnished, among other "appropriate" information: **(a)** "an outline or narrative summary of [the Division's] case"; **(b)** "the legal theories upon which it will rely"; **(c)** "copies and a list of documents that it intends to introduce at the hearing"; and **(d)** "a list of witnesses who will testify on its behalf, including the witnesses' names, occupations, addresses and a brief summary of their expected testimony." While the Staff has already had four years or longer to prepare its case through investigative depositions, investigative document subpoenas and other official requests to numerous third parties, ETC will likely have to proceed to hearing in about four months under Rule 360(a)(2). For this reason, ETC needs this routine Rule 222(a) core disclosure information as soon as practicable in order to prepare an effective defense.

CONCLUSION

The Division should be directed to furnish the information requested in this motion within two weeks from the date of the order, or as soon as practicable in a rolling production.

Dated: July 17, 2015

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CERTIFICATE OF SERVICE AND FILING

Pursuant to Rule 150(c)(2), I certify that on July 17, 2015, I caused the foregoing to be sent: **(1)** By **US Mail (original and 3 copies)** directed to the Office of the Secretary, Securities and Exchange Commission, 100 F Street NE, Washington DC 20549-1090. **(2)** By **email and US Mail** directed to Honorable Carol Fox Foelak, Administrative Law Judge, Securities and Exchange Commission, 100 F Street NE, Washington DC 20549-2557, and alj@sec.gov, and to OALJ Attorney-Advisor William Miller at millerwi@sec.gov. **(3)** By **email and US Mail** directed to David Stoelting, Luke M. Fitzgerald, and Andrew Dean, New York Regional Office, Securities and Exchange Commission, 200 Vesey St., Suite 400, New York NY 20181, and StoeltingD@sec.gov, FitzgeraldL@sec.gov, and DeanAn@sec.gov.

Stephen J. Crimmins

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