UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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ADMINISTRATIVE PROCEEDING
File No. 3-16594

In the Matter of

EQUITY TRUST COMPANY,

Respondent.

OPPOSITION BRIEF OF DIVISION OF ENFORCEMENT TO RESPONDENT'S MOTION FOR ADDITIONAL DISCLOSURE

The Division of Enforcement respectfully submits this brief opposing Respondent's Motion for Additional Disclosure.

PRELIMINARY STATEMENT

Respondent Equity Trust Company ("ETC") seeks to compel the Division to produce additional evidence and information beyond what is required to be produced under the Rules of Practice. ETC claims to be in the dark about the nature of the allegations in the OIP and the underlying evidence. The evidence in this case, however, arises largely from ETC's own documents, ETC's own employees, and ETC's own customers. The Rules of Practice, moreover, provide for the pre-hearing disclosure of witnesses and exhibits, and ETC provides no compelling reason to deviate from that schedule. Its motion should be denied.

ARGUMENT

I. ETC's request for the "substance of interviews" should be denied

In its first request, Respondent seeks the "disclosure of the substance" of any interview of any "non-ETC" person that has been interviewed by the Division. Respondent appears to seek either interview notes or a separate memorandum summarizing each interview.

As is well established, attorney notes of oral investigative interviews inherently reflect attorneys' mental impressions, opinions, theories and conclusions, and are entitled to protection as work product. *See Upjohn v. United States*, 449 U.S. 383, 398-402 (1981) (circumstances justifying disclosure of attorney notes of oral witness statements range from "rare" to "never"); *Baker v. General Motors*, 209 F.3d 1051, 1054 (8th Cir.2000) ("Notes and memoranda of an attorney, or an attorney's agent, from a witness interview are opinion work product entitled to almost absolute immunity," because "when taking notes, an attorney often focuses on the facts he deems legally significant"); *SEC v. Strauss,* No. 09-CV-4150, 2009 WL 3459204, at *5 (S.D.N.Y. Oct. 28, 2009) ("[S]ummaries are not *verbatim* copies and necessarily involve some level of judgment in deciding what to note and what not to note"); *SEC v. Berry,* No. C-07-04431, 2011 WL 825742, at *3 (N.D. Cal. 2011) (interview notes were attorney work product).

Rule 203(b) permits the withholding of documents if the document is: "privileged, [or . . .] is an internal memorandum, note or writing prepared by a Commission employee . . . or is otherwise attorney work product and will not be offered in evidence." Rule 230(b)(i) and 230(b)(ii); *see also Matter of Piper Cap. Mgmt, Inc. et al.*, AP File No. 3-9657, 1999 SEC LEXIS 301, *15 (Jan. 15, 1999) (holding the Division appropriately relied on Rules 230(a) and (b) to deny respondents' motion to compel production of interview notes created by Commission employees).

Respondent also fails to cite to any authority that Rule 230 requires discovery beyond the investigative file to include opinion work-product. *See, e.g., Matter of Gregory Bartko*, AP File No. 3-14700, 2014 WL 896758, *18 (March 7, 2014) (Commission opinion) (denying respondents' request pursuant to Rule 230 to compel Division staff to search its records or make inquiries of other federal agencies); *Piper*, at *15 ("Rule 230(a) expressly is limited to documents obtained by the Division . . . from persons not employed by the Commission [] during the course of its investigation prior to the institution of proceedings[.]").

As Respondent's acknowledge, the Division has provided it with its *Brady* letter. Respondent is free to contact the persons identified in the Division's *Brady* letter and interview them. To the extent Respondent seeks to use *Brady* as means to obtain material to which it is not entitled, the argument is without merit. *See, e.g., Matter of Bandimere et al.,* AP File No. 3-15124, 2013 SEC Lexis 746, at *7-8 (March 12, 2013) ("Brady is not a discovery rule . . . and it does not authorize a wholesale fishing expedition into investigative material") (internal citations omitted).

Finally, Respondent's claim that it cannot adequately prepare a defense without the protected work-product is incorrect. Respondent has access to its own customers and to its employees and former employees, and is free to interview them. *See, e.g., Bandimere*, at *8-9 (citing *United States v. Rodriguez*, 496 F.3d 221, 226 (2d Cir. 2007) ("Brady information must be disclosed . . . in a manner that gives the defendant a reasonable opportunity either to use the evidence in the trial or to use the information to obtain evidence for use in the trial").

II. Requests 2 and 3, seeking the early disclosure of the Division's trial evidence, should be denied

In its second and third requests, Respondent seeks to compel the production of additional examples of an Equity Trust representative vouching for Ephren Taylor, and additional information about Poulson and Equity Trust sponsoring each other's events. This request amounts to an effort to obtain pre-trial evidence to which Respondent is not entitled.

The standard applicable to a motion for a more definite statement is well established: a pleading must only "sufficiently inform[] [a respondent] of the nature of the charges so that he or she may adequately prepare a defense; however, a respondent is not entitled to a disclosure of evidence in advance of the hearing." *Matter of Wolfson, et al.,* 103 S.E.C. Docket 1153, 2012 WL 8702983, at *1 (Mar. 28, 2012) (citation omitted); *see also Matter of optionsXpress, Inc., et al.*, 104 S.E.C. Docket 419, 2012 WL 8704501, at *2 (July 11, 2012) (denying motion because the Division met burden to inform "respondents of the charges against them so they can prepare a defense;" refusing to require Division to disclose evidence or theory of the case) (citations omitted); *Matter of Morris J. Reiter*, 39 S.E.C. 484, 1959 WL 59479, at *2 (Nov. 2, 1959) ("We have pointed out on prior occasions that appropriate notice of proceedings is given when the respondent is sufficiently informed of the nature of the charges against him so that he may adequately prepare his defense, and that he is not entitled to a disclosure of evidence."); *Matter of Western Pacific Capital,* 102 S.E.C. Docket 3633, 2012 WL 8700141, *2 (Feb. 7, 2012) ("[O]nce the factual basis of the allegation is sufficiently known by a respondent, any additional information is considered evidence to which a respondent is not entitled prior to hearing.").

The OIP more than sufficiently informs Respondent of the charges against it. With respect to Taylor, the OIP has alleged sufficient facts.[1] The OIP (¶ 32) describes how an Equity Trust salesperson vouched for Taylor either by email or telephone, and then those individuals invested with Taylor, and provided an example (¶ 33). Respondent is not entitled to more. Indeed, as a federal court explained in applying the more exacting pleading requirements imposed by Federal Rule of Civil Procedure 9(b), the SEC "need not allege specific details of every alleged fraud"; rather it "must provide some representative examples of the alleged misconduct." *SEC v. Morriss,* No. 4:12-CV-80 (CEJ), 2012 WL 6822346, at *4 (E.D. Mo. Sept. 21, 2012) (denying motion to dismiss or, in the alternative, for a more definite statement). In any event, to the extent the Division intends to rely on any additional written documents, such as emails, such documents would be identified in connection with its exhibit list or prehearing brief.

Respondent also asks whether ETC and Poulson "actually" sponsored each other's events. The documentary record, which largely consists of ETC's own documents, reflects evidence of the sponsorship, and the OIP also alleges that, in fact, "Equity Trust sponsored Poulson's dinner events with prospective investors." OIP ¶ 3. The OIP also states that "Equity Trust agreed to sponsor Poulson's monthly dinner events for a period of one year," beginning in summer 2009. OIP ¶ 56.

III. Request 4 should be denied as moot

Respondent asks that the Division provide any "SEC statements or guidance" that the Division will offer "to establish its view of an SDIRA custodian's duties under the federal securities laws." Apart from the "Investor Alert" referred to in Respondent's motion, however, the Division is not aware of any "SEC statements or guidance" specifically addressing a

[1] Equity Trust is, in effect, asking for the Division's privileged interview notes from its conversations with investors, which as explained above, is not subject to disclosure.

SDIRA's duties under the federal securities laws "that [the Division] will offer as evidence or cite to at the hearing." As a result, this request is moot.

IV. **Request 5, seeking citations to similar actions, should be denied**

Respondent asks that the Division identify any SEC enforcement proceedings brought against self-directed IRA custodians, noting that "[d]espite diligent research" it has not found such cases.

Respondent, which is represented by two law firms, has access to the same legal research services and resources as the Division (*e.g.,* Lexis, Westlaw, the SEC's website) to conduct this research, and it would be unreasonable to have the Division double-check Respondent's legal research. Moreover, the single case cited by Respondent in support of its request to compel the Division to provide the legal citation, *Matter of Charles Hill*, A.P. No. 3-16383, A.P. Rul. Rel. 2706 (May 21, 2015), is inapposite. In *Hill*, respondent's request was granted where the SEC argued only that the identity of the public administrative proceedings records were privileged, and not, as is the case here, that ETC could obtain the records as easily as the Division, or that requiring the Division to perform Respondent's legal research is "'unreasonable, oppressive[,] or unduly burdensome.' See 17 C.F.R. § 201.232(e)(2)." *Id.*

V. **Request 6, for early Rule 222(a) disclosure, should be denied**

Respondent also requests that the parties exchange the information provided for under Rule 222(a) "as soon as practicable." The Rules provide for the exchange of such information at a reasonable time prior to the hearing, and there is no need for expedited disclosures in this proceeding.

CONCLUSION

Based on the foregoing, the Division respectfully requests that Respondent's Motion for Additional Disclosure be denied.

Dated: New York, NY
July 24, 2015

Respectfully submitted,

DIVISION OF ENFORCEMENT

David Stoelting /ABD

David Stoelting
Andrew Dean
Luke Fitzgerald
SECURITIES AND EXCHANGE COMMISSION
200 Vesey Street, Suite 400
New York, NY 10281
(212) 336-0164 (Stoelting)

CERTIFICATE OF SERVICE

I hereby certify that I served true copies by overnight courier and electronic mail of the foregoing Opposition Brief of the Division of Enforcement to Respondent's Motion for Additional Disclosures on the following on the 24th day of July, 2015:

Brent J. Fields, Secretary
Office of the Secretary
Securities and Exchange Commission
100 F Street N.E., Mail Stop 3628
Washington, DC 20549
Facsimile: (202) 772-9324

The Honorable Carol Fox Foelak
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F Street, NE
Mail Stop 1090
Washington, DC 20549
alj@sec.gov

Stephen J. Crimmins, Esq.
Murphy & McGonigle PC
555 13th Street NW
Washington DC 20004
(Counsel for Respondent)
(By email to Stephen.Crimmins@mmlawus.com)

Howard Groedel, Esq.
Ulmer & Berne LLP
Skylight Office Tower
1660 West 2nd Street, Suite 1100
Cleveland, OH 44113
(Counsel for Respondent)
(By email to hgroedel@ulmer.com)

Dated: July 24, 2015

Andrew Dean

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
NEW YORK REGIONAL OFFICE
200 VESEY STREET, SUITE 400
NEW YORK, NEW YORK 10281-1022

ANDREW DEAN
(212) 336-1314
DeanAn@sec.gov

July 24, 2015

VIA UPS

Brent J. Fields, Secretary
Office of the Secretary
Securities and Exchange Commission
100 F Street N.E., Mail Stop 3628
Washington, DC 20549

Re: Matter of Equity Trust Company, AP File No. 3-16594

Dear Mr. Fields:

Enclosed please find the original and three copies of the Opposition Brief of the Division of Enforcement to Respondent's Motion for Additional Disclosures. A copy of this filing has been served today by email on Respondent's counsel, and to the Court by email and UPS.

Respectfully submitted,

Andrew Dean
Division of Enforcement

cc: The Honorable Carol Fox Foelak (by email to ALJ@sec.gov and UPS)
Counsel for Respondent Equity Trust Company (by email)