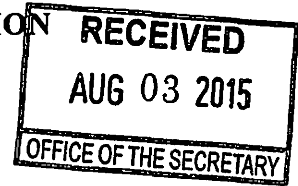
U.S. SECURITIES AND EXCHANGE COMMISSION



Matter of

EQUITY TRUST COMPANY, A.P. File No. 3-16594

Respondent.

RESPONDENT'S REPLY ON MOTION FOR ADDITIONAL DISCLOSURE

Respondent Equity Trust Company ("ETC") files this reply in further support of its motion for additional disclosure, pursuant to Rule 220(d), Rule 222(a) and Rule 232(a).

(1) Frustration of the Rule 230 Transcript Turnover Process. A cornerstone of the Rule 230 production process is the requirement that the Division produce "All transcripts and transcript exhibits." Rule 230(a)(1)(iv). Defense counsel receiving a Rule 230 production typically look first at the transcripts and transcript exhibits because they are the most important part of the production. The transcripts and exhibits give defense counsel an understanding of what they will have to respond to in just a few months at the hearing.

Indeed, the reason why the Rules of Practice do not allow discovery depositions is that the Division for decades routinely took on-the-record investigative deposition testimony from most witnesses with substantive knowledge of the facts – whether favorable or unfavorable – and then produced the transcripts of such testimony to defense counsel. Thus, during the consideration and drafting of the present Rules of Practice, the Task Force led by then-Commissioner Mary Schapiro stated that the new rules would not allow discovery depositions because the Division turned over to respondents "extensive" investigative transcripts of testimony relating to "whether or not" there had been securities violations:

> ... The continued adherence to this standard is appropriate given the fact that (1) Commission administrative hearings are typically preceded by an extensive fact finding investigation in which the staff accumulates evidence, including extensive investigative depositions, relevant to the question of whether or not there may have been securities law violations; [and] (2) under the proposed

> rule and existing practice, this evidence generally will be <u>turned over formally to the respondents</u> after commencement of a proceeding....

SEC Task Force on Administrative Proceedings, "Fair and Efficient Administrative Proceedings" (U.S. Govt. Printing Office, 1993), p. 47 (emphasis added).

What is different about the present case, however, is that the Division has chosen <u>not</u> to take such testimony during its four-year investigation. Instead, as described in our motion and not disputed in the Division's opposition, it has interviewed off-the-record virtually all of the non-ETC witnesses in this matter. This approach of interviewing virtually all non-party witnesses rather than taking their testimony is a sharp departure from decades of Division practice, under which staff took testimony of most witnesses with substantive knowledge of the facts. And it keeps defense counsel in the dark about what these witnesses will say – thus hiding helpful testimony from respondents, while surprising them with adverse testimony at the hearing and thus limiting cross-examination.

While there are no transcripts for all these interviewed witnesses, there are notes memorializing what they have to say. The Division's opposition does not dispute that such notes exist, and it is routine for enforcement attorneys to make a written record of interviews. Section 3.3.3.2 of the SEC Enforcement Manual, entitled "Documenting the Interview," confirms that it is routine to take "written notes" to memorialize an investigative interview:

> While conducting a voluntary telephone interview, the staff may take written notes of the interview. ... A minimum of two staff members are encouraged to be present to conduct a witness interview. ... [O]ne of the staff members may subsequently need to serve as a witness at trial. Staff also should consider having only one staff member take notes during the interview.

In order for ETC to be able to identify witnesses with testimony supporting its defense – and to prepare to effectively cross-examine the Division's witnesses – the Division in fairness should be directed to produce the notes of these witness interviews.

(2) <u>No Basis for the Division to Claim Work Product</u>. In opposition, the Division principally argues that the work product doctrine should excuse it from disclosing the facts revealed during its off-the-record witness interviews. In the first place, the Division's responsibility to provide fair and meaningful discovery under Rule 230 and other provisions of the Rules of Practice must take priority over any claim of work product. The Division's fundamental fairness obligation as an agent of the Commission requires no less.

But wholly apart from the Division's core discovery obligations, the Division cannot claim work product protection for the interview notes here. As the U.S. Court of Appeals for the District of Columbia Circuit reiterated several months ago, its consistent precedent makes clear that what a lawyer writes down during a witness interview will often be simply so-called "fact" work product that can be discoverable on a showing of substantial need and unavailability, as distinguished from so-called "opinion" work product that has greater protection. The Court of Appeals explained:

> In *Sealed Case* (1997), for example, we held that attorney notes of preliminary interviews with a witness were not necessarily opinion work product, as the mere fact that an attorney had chosen to write a fact down was not sufficient to convert that fact into opinion work product. ... Rather, there must be some indication that the lawyer "sharply focused or weeded the materials." ... As in *Sealed Case*, many of the documents at issue here contain only factual information requested or selected by counsel. Much of what the [petitioner] seeks is factual information ... that, while requested by ... attorneys, does not reveal any insight into counsel's legal impressions or their views of the case."

FTC v. Boehringer Ingelheim Pharmaceuticals, Inc., 778 F. 3d 142, 152 (D.C. Cir. 2015). *See also U.S. ex rel. Landis v. Tailwind Sports Corp*, 303 F.R.D. 419, 425 (D.D.C. 2014) (witness interview notes "that have not been 'sharply focused or weeded' by an attorney [are held] to be 'fact' rather than 'opinion' work-product"); *U.S. v. Clemens*, 793 F. Supp 2d 236 (D.D.C. 2011) (attorney interview notes containing "fact" work product can be ordered produced). Any lawyer opinion or commentary can be redacted in a responsible manner that fairly discloses the facts that the witness has stated. Alternatively, the substantive portions of the notes can be copied-and-pasted into a separate memorandum.

The D.C. Circuit noted that such "fact" work product is discoverable on a showing "that the materials are relevant to the case, the materials have a unique value apart from those already in the movant's possession and 'special circumstances' excuse the movant's failure to obtain the requested materials itself." *FTC v. Boehringer*, 778 F.3d at 155.

In the present matter, it is unrealistic for the Division to respond that, in the four months available before the hearing, ETC can ascertain, locate and interview all of the witnesses the Division has interviewed over the last four years of its investigation. The Division's recent *Brady* disclosure is no roadmap as it identifies only three persons (one the fraudster Randy Poulson himself) and provides one short sentence as to what each might say. Nor in the short time available can ETC realistically find and interview all of its customers during the relevant period over five years ago, as the Division suggests. Given the passage of many years, witnesses are now harder to locate, and recollections not memorialized have often faded.

Moreover, the Division's witness interview notes are, as a result of the Division's conscious decision to examine virtually all non-ETC witnesses off-the-record, the only available substitute for the "extensive" investigative transcripts that the Rules of Practice Task Force contemplated would be produced under Rule 230 in lieu of discovery depositions. Realizing that reference to the limited discovery in criminal cases is inapt, as the Division has only the civil preponderance burden of proof, the drafters of the Rules of Practice mandated "fair" civil discovery, and specifically referred in Rule 230 to turnover of "all transcripts and transcript exhibits," never imagining that the Division would one day respond by simply not creating transcripts of its non-party interviews.

(3) Knowing What the Trial Will Be About. As set forth in our motion, the Division says in the OIP (¶32-33) that there are "examples" of how ETC supposedly helped the fraudster Ephren Taylor. Yet the OIP only identifies one such "example," an email string reflecting a communication between a former ETC employee, Robert Batt, and a single customer. If this is the only example the Division will offer at the hearing, ETC will be prepared to respond. However, if the Division plans to offer other "examples," it should be directed to tell ETC what these are. Otherwise ETC will arrive at the hearing prepared to respond to one event and be surprised and unprepared to respond to any other supposed examples the Division may offer.

Likewise, as to the charge that ETC supposedly helped the fraudster Randy Poulson, the Division says in the OIP (¶56) that Poulson and ETC agreed to contribute to sponsor each other's events. But the Division does not say – even in its opposition – whether it contends that there actually were any such sponsored events. The Division should be directed to identify by date and location any such supposed events so that ETC can be prepared to respond at the hearing.

Discovery rulings under various Rules of Practice demonstrate the basic principle that a respondent should not face "trial by ambush," but should instead have a fair opportunity to prepare for the hearing. *E.g. Matter of Bauer*, 1999 WL 4904 (Jan. 7, 1999) (ALJ Foelak) (Rule 220(d); directing Division to identify "customers, accounts, and securities referred to" in particular OIP paragraphs); *Matter of Raymond James Financial Services, Inc.*, 2005 WL 975346 (Feb. 10, 2005) (CALJ Murray) (Rule 232; Division to identify SEC guidance on email retention duties); *Matter of WHX Corp.*, 1999 WL 155907 (Mar. 9, 1999) (ALJ Foelak) (Rule 232; Division to identify prior interpretation "all holders" rule; "may be relevant to determining" existence of violations and to "weighing factors" relating to any remedy).

(4) The ALJ's Power to Allow Additional Disclosure. While the Rule 230 production is the core of discovery in an administrative proceeding, it is not a limitation on such discovery. Rule 230(a)(2) specifies that "nothing in [the rule's enumeration of materials to be produced] shall limit the right of a respondent to seek access to or production pursuant to subpoena of any

other document, or shall limit the authority of the hearing officer to order the production of any document pursuant to subpoena."

Consistent with Rule 230(a)(2), ETC presently seeks additional disclosure to enable it to prepare to present evidence at the hearing. As discussed in our motion, Administrative Law Judges have recognized that three separate provisions of the Rules of Practice are available as vehicles for such disclosure. Rule 220(d) allows the ALJ to direct the Division to provide "a more definite statement of specified matters of fact or law." Rule 222(a) allows the ALJ to direct the Division "to furnish such information as deemed appropriate" in the particular circumstances of a case. And Rule 232(a) allows the ALJ to issue a subpoena to the Division, which our motion requests, for "documentary or other tangible evidence."

CONCLUSION

The Division should be directed to furnish the categories of information requested in ETC's motion for additional disclosure within two weeks from the date of the order, or as soon as practicable in a rolling production.

Dated: July 28, 2015

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CERTIFICATE OF SERVICE AND FILING

Pursuant to Rule 150(c)(2), I certify that on July 28, 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 10281, and StoeltingD@sec.gov, FitzgeraldL@sec.gov, and DeanAn@sec.gov.

Stephen J. Cummins