UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of DELANEY EQUITY GROUP, LLC, DAVID C. DELANEY, AND IAN C. KASS, Respondents.	:	**ADMINISTRATIVE PROCEEDING File No. 3-17398**

OPPOSITION OF THE DIVISION OF CORPORATION FINANCE AND DIVISION OF ENFORCEMENT TO RESPONDENTS' MOTION FOR ISSUANCE OF SUBPOENA *DUCES TECUM* TO THE SECURITIES AND EXCHANGE COMMISSION

INTRODUCTION

The Division of Enforcement ("Division") and the Division of Corporation Finance ("CorpFin") oppose the motion of Respondents Delaney Equity Group LLC ("DEG") and David C. Delaney for issuance of a subpoena *duces tecum* to the Securities and Exchange Commission. The main purpose of the proposed subpoena is to seek documents that are either privileged or publicly available. The proposed subpoena also suffers from numerous other flaws. For example, because of the broad phrasing of the requests, the proposed subpoena seeks investigative documents that are privileged or already produced.

BACKGROUND

A. **The Subpoena**

The OIP alleges that, between September 2009 and October 2013, three undisclosed control persons (the "Control Persons") fraudulently created at least twelve undisclosed "blank check" companies ("Blank Check Companies") for sale by reverse merger. The fraud depended primarily on the misrepresentation of the Blank Check Companies as legitimate start-up companies managed and operated by a named sole officer and concealment of the fact that the Blank Check Companies had no business purpose other than to be sold as public vehicles by the Control Persons.

Delaney and Ian C. Kass played a critical role in the fraud, including the signing and filing of a Form 211 application with the Financial Industry Regulatory Authority, Inc. for each of the Blank Check Companies that contained these misrepresentations and omissions. DEG, based on the actions of its registered representatives Kass and Delaney, failed to conduct the analysis required by Rule 15c2-11 under the Exchange Act in connection with the Forms 211. Given the information that DEG possessed, it had no reasonable basis to conclude that the required information was accurate or came from a reliable source.

On September 30, 2016, DEG and Delaney filed a motion seeking issuance of a subpoena *duces tecum* to the Commission ("Motion"). The Motion states that DEG and Delaney are seeking documents "regarding the review and comment process surrounding each Form S-1" of thirty-four companies, including the twelve Blank Check Companies at issue in the OIP and twenty-two additional companies that are not part of this action (collectively, "Registered Companies").[1] However, the nine requests in the proposed subpoena appear to seek categories of documents that go well beyond the review and comment process. The proposed subpoena seeks:

[1] The Motion (at 1, n.1) states that the proposed subpoena seeks documents relating to 32 companies, but the list in the proposed subpoena names 34 companies.

(1) documents related to CorpFin's review of registration statements for thirty-four companies (request numbers 1, 2, 3, 4, 6, 7, 8, 9); (2) documents prepared by and exchanged between Commission staff regarding any investigation and litigation related to the Blank Check Companies (request numbers 3,4, 6); and (3) correspondence between the Commission and other governmental agencies relating to the Blank Check Companies (request number 5).

The Motion claim that documents regarding CorpFin's review processes are relevant because those documents "are likely to contain the best evidence that there were no material discrepancies in the public filings and it was unnecessary for Respondents to conduct any additional inquiry." Motion at 3. The Motion further claims that the Commission should not be able to require that the Respondents do more to fulfill their responsibilities than Commission staff did to conduct their review. The Motion does not provide any support for the claim that the Commission staff was charged with "more rigorous examination requirements" than Respondents were.

B. **The Relevant CorpFin Review Process**

CorpFin reviews Securities Act registration statements primarily to monitor compliance with the applicable regulatory requirements, not to verify the accuracy of statements in the filing. Declaration of Jay S. Mumford ¶ 3 (Attachment 1 hereto). No statutes or regulations dictate that the CorpFin registration statement reviews verify the registrant's statements in the filing. *Id.* Thus, the Commission's website specifically alerts the public to the fact that:

> The Division [of Corporation Finance] does not evaluate the merits of any transaction or determine whether an investment is appropriate for any investor. The Division's review process is not a guarantee that the disclosure is complete and accurate—responsibility for complete and accurate disclosure lies with the company and others involved in the preparation of a company's filings.

https://www.sec.gov/corpfin/Article/filing-review-process---corp-fin.html.

When CorpFin reviews registration statements, the staff provides the company with comments to identify instances where it believes a company can improve its disclosure. Mumford Decl. at ¶ 3. CorpFin relies on publicly available information and responses from registrants to evaluate the disclosures. *Id* at ¶ 4. Generally, comments either request revisions to the disclosures or ask questions to help the staff better understand whether the disclosure should be improved. *Id.* The range of possible comments is broad and depends on the issues that arise in a particular filing review. *Id.*

During such reviews, CorpFin staff prepares examination reports that address apparent deficiencies and recommend possible comments. *Id.* at ¶ 5. A second-level reviewer in CorpFin evaluates the staff's examination report and make a determination about the comments to issue to the company. CorpFin staff also often discusses these issues internally through email and other forms of communication among staff. *Id.* CorpFin ultimately communicates its comments to companies in the form of a letter that reflects the final decision about apparent deficiencies and questions to pose to the company. *Id.* Companies typically provide a written response to each comment by a letter to CorpFin staff. *Id.*

When a company has resolved all CorpFin comments on a Securities Act registration statement, the company may request that the Commission declare the registration statement effective so that it can proceed with the transaction. *Id.*at ¶ 6. When taking that action, CorpFin, through authority delegated from the Commission, gives public notice on the Commission's EDGAR system that the registration statement is effective. *Id.* Even when CorpFin declares the registration statement effective, neither the Commission nor the staff has passed on the adequacy or accuracy of the prospectus. *See* Item 501(b)(7) of Regulation S-K (prospectus cover must

indicate that "neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of the securities or passed upon the accuracy or adequacy of the disclosures in the prospectus"); *see also* Mumford Decl. at ¶ 6.

To increase the transparency of the review process, when CorpFin completes a filing review, it makes its comment letters and company responses to those comment letters available to the public on the SEC's EDGAR system. Mumford Decl. at ¶ 7.

The proposed subpoena lists thirty-four companies. For all but two, registration statements and comment letters are available on EDGAR. Only those for Diamond Lane, Inc., and Sunchip Technology, Inc. are not available there. *Id.* at ¶ 8. Since the Commission issued a stop order for those companies's proposed transactions, their registration statements were never declared effective. *Id.* For four other companies, no comment letters exist because CorpFin did not review their registration statements. *Id.* Those companies are: Entertainment Art Inc.; Premier Nursing Products Corp; Pashminadepot.com, Inc.; and XtraSafe, Inc. *Id.*

ARGUMENT

Rule of Practice 232 permits a party to "request the issuance of . . . subpoenas requiring the production of documentary or other tangible evidence," 17 C.F.R. § 201.232(a). But to obtain such a subpoena, an Administrative Law Judge must exercise discretion to "require the person seeking the subpoena to show the general relevance and reasonable scope" of the evidence sought. 17 C.F.R. § 201.232(b). Moreover, where "compliance with the subpoena would be unreasonable, oppressive, or unduly burdensome," the judge "shall quash or modify" the subpoena. 17 C.F.R. § 201.232(e)(2).

DEG and Delaney do not and cannot satisfy these standards. First, the main purpose of the proposed subpoena is to seek documents that are either publicly available or privileged.

Registration statements and all but a handful of comment letters for the Registered Companies are publicly available. The remaining documents regarding the CorpFin review process are from CorpFin's internal review process, which the deliberative process privilege protects. DEG and Delaney cannot overcome that privilege because the documents are not relevant to this proceeding.

Second, DEG and Delaney have provided no justification for seeking documents that do not relate to CorpFin's review process—and no justification is evident—so no subpoena seeking documents about investigations or litigation related to the Registered Companies should issue. In any event, the Division has provided non-privileged documents from its investigative file to Respondents, and internal Commission documents regarding investigations or litigation are protected by the work-product doctrine and by the attorney-client, deliberative process, and law enforcement privileges.

Third, the proposed subpoena is overbroad to the extent that it seeks documents about twenty-two companies that are not the subject of this this proceeding.

I. The Proposed Subpoena Seeks Privileged Documents

DEG and Delaney plainly state that they are seeking a subpoena "to obtain relevant documents and information regarding the review and comment process surrounding each Form S-1 of the Registered Companies, including correspondence, internal files, and policies and procedures." Motion at ¶ 5. Because registration statements and comment letters are almost all publicly available—and are all available for the twelve companies at issue in the OIP—a subpoena is not necessary to obtain those documents.[2] Thus, the focus of the proposed subpoena

[2] The proposed subpoena seeks comment letters between the Commission staff and the Registered Companies. But most of those comment letters—and all of the comment letters for

is internal documents that would reveal CorpFin's deliberations about the review that the deliberative process privilege clearly protects.

The deliberative process privilege is an "ancient [one] ... predicated on the recognition 'that the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl.'" *Dow Jones & Co. v. DOJ*, 917 F.2d 571, 573 (D.C. Cir. 1990); *see also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-51 (1975) (disclosure of intra-agency deliberations and advice is injurious to federal government's decision-making functions because it tends to inhibit frank and candid discussion necessary to effective government). The privilege protects materials that concern the internal deliberative processes of a government agency. *NLRB*, 421 U.S. at 151. Thus, the privilege protects information or documents reflecting deliberations and recommendations of agency personnel during their formulation of governmental decisions. *Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *McClelland v. Andrus*, 606 F.2d 1278, 1287 (D.C. Cir. 1979). The privilege covers documents that agency personnel prepare to assist the decision-maker in arriving at a decision or that reveal the agency's decision-making process. *Assembly of the State of California v. Dept. of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992). Thus, for example, the privilege "covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Coastal States Gas*, 617 F.2d at 866; *see also Landfair v. Dept. of the Army*, 645 F. Supp. 325, 330 (D.D.C. 1986) (document is protected by the deliberative process privilege when "it would

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the Blank Check Companies—are available on the public EDGAR system. Similarly, to the extent the proposed subpoena could be interpreted to seek registration statements, those documents are also available on EDGAR. The small group of comment letters that is not publicly available is not relevant to this proceeding for the reasons discussed below.

reveal the thought process of the agency prior to the adoption of a specific course of conduct"). In "some circumstances . . . the disclosure of even purely factual material may so expose the deliberative process within an agency" that it must be withheld as privileged. *Mead Data Central, Inc. v. Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977).

A court may override the deliberative process privilege only upon a showing that the evidentiary need for the privileged material outweighs the public interest in protecting the agency's deliberations and deliberative process. *See In re Sealed Case*, 121 F.3d 729, 737-38 (D.C. Cir. 1997); *Redland Soccer Club. Inc. v. Dept. of the Army*, 55 F.3d 827, 853-854 (3d Cir. 1995); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 328-29 (D.D.C. 1966) (to compel disclosure, the claimant must make "a showing of necessity sufficient to outweigh the adverse effects the production would engender").

The deliberative process privilege protects the internal CorpFin documents that the Respondents seek. Such internal Commission documents relating to review of a registration statement or a determination to grant effectiveness contain recommendations about what to include in comment letters or discuss legal issues identified by staff during a review. Since comment letters and the notices regarding effectiveness are public, they represent the final staff decisions.

Because DEG and Delaney seek privileged documents, they would bear the burden of overcoming the privilege. They cannot do so because the materials they seek are not relevant to this proceeding. DEG and Delaney provide no basis for their contention that the Commission "is charged with much more rigorous examination requirements" than broker-dealers or that the Commission's review bears any relevance to what they were required to do. As noted, no statute

or regulation imposes any requirements on a Commission review. To the contrary, the Securities Act specifies:

> Neither the fact that the registration statement for a security has been filed or is in effect nor the fact that a stop order is not in effect with respect thereto shall be deemed a finding by the Commission that the registration statement is true and accurate on its face or that it does not contain an untrue statement of fact or omit to state a material fact, or be held to mean that the Commission has in any way passed upon the merits of, or given approval to, such security.

15 U.S.C. § 77w; *see also* 15 U.S.C. 78z ("No action or failure to act by the Commission . . . shall be construed to mean that the particular authority has in any way passed upon the merits of, or given approval to, any security or any transaction or transactions therein"). Similarly, as noted above, Commission regulations require that the cover of a prospectus indicate that "neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of the securities or passed upon the accuracy or adequacy of the disclosures in the prospectus." Item 501(b)(7) of Regulation S-K.

DEG and Delaney's argument is also meritless because they do not and cannot establish that they and the Commission have similar responsibilities. CorpFin staff review disclosure documents to "monitor compliance with the applicable disclosure and accounting requirements." Mumford Decl. at ¶ 3. The obligation on Respondents was separate and distinct from any CorpFin review. Rule 15c2-11 requires broker-dealers to obtain Forms S-1 and periodic reports filed with the Commission and "any other material information (including adverse information) regarding the issuer" in its possession. After reviewing this information, the broker-dealer must have a reasonable basis for stating that the information in the registration statement is accurate. 17 C.F.R. § 240.15c2-11(a); *see also* OIP ¶ 11.

The requirements of Rule 15c2-11 do not apply to CorpFin's review of a registration statement and therefore DEG and Delaney have no basis to compare CorpFin's responsibility with their own. *See* Rule 15c2-11(a). *Cf. Anwar v. Fairfield Greenwich Ltd.*, 297 F.R.D. 223, 226-27 (S.D.N.Y. 2013) (denying motion to compel testimony from SEC staff where party seeking testimony claimed SEC's failure to find fraud could help show that party was not negligent in not identifying fraud because the SEC was not similarly situated).

The public interest in protecting CorpFin's internal deliberations, to encourage and not inhibit frank and candid internal agency discussions, outweighs any possible relevance that such documents might possess. Because the only reason DEG and Delaney have provided for issuing a subpoena is to obtain these documents and documents that they already possess or are publicly available, no portion of their subpoena should be issued.

II. The Proposed Subpoena Is Facially Overbroad

Although no further consideration is necessary, the additional documents that the subpoena seeks are also not a proper focus of any subpoena.

First, several of the requests are phrased broadly and seek *all* Commission documents related to the thirty-four companies listed in the proposed subpoena. For example, the third request seeks,

> All documents or correspondence relating to the Registered Companies, including but not limited to any internal files, notes (whether handwritten or electronic), memoranda, and internal correspondence within or between any divisions of the U.S. Securities and Exchange Commission.

DEG and Delaney have provided no justification for a subpoena that seeks all documents relating to investigations and litigation relating to the Registered Companies. The Division have already provided the non-privileged documents it is required to provide, and the proposed subpoena seeks facially privileged documents. Rule of Practice 230(b) explicitly authorizes the

withholding of any "internal memorandum, note or writing prepared by a Commission employee" or any document that "is otherwise attorney work product" 17 C.F.R. § 201.230(b)(ii). The Commission has recognized that, irrespective of whether those notes reflect mental impressions or facts, they are generally protected from production. *See In the Matter of John Thomas Capital Mgmt. Group LLC*, Rel. No. IA-3733, 2013 WL 6384275, at *4 (S.E.C. Dec. 6, 2013) (rejecting respondents' request for interview notes).

Second, DEG and Delaney state that their request is not limited to the twelve companies identified in the OIP because the Control Persons allegedly created additional companies. Motion at 1 n.1. DEG and Delaney, however, never explain how information about the review of companies that are not discussed in the OIP and for which they did not file Form 211 applications, would bear on the issue of whether they conducted the required analysis for the twelve companies at issue. Even if CorpFin and the Respondents were similarly situated, a review of what CorpFin considered in connection with one company would have no probative value on how the Respondents should have handled their responsibilities as to different companies.

CONCLUSION

For the foregoing reasons, the Division and CorpFin respectfully request that the Court quash The Respondents' subpoena of CorpFin's documents.

Respectfully submitted,

U.S. Securities and Exchange Commission

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Dated: October 7, 2016

CERTIFICATE OF SERVICE

I certify that I served Respondents, Delaney Equity Group LLC and David C. Delaney this the 7th day of October 2016, by sending a copy of the foregoing to their attorneys by United Parcel Service, at the following addresses and by e-mail, as follows:

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Issued by:

U.S. Securities and Exchange Commission

By: J. Marc Wheat

/s/

J. Marc Wheat

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of DELANEY EQUITY GROUP, LLC, DAVID C. DELANEY, AND IAN C. KASS, Respondents.	:	**ADMINISTRATIVE PROCEEDING File No. 3-17398**

DECLARATION OF Jay S. Mumford

I, Jay S. Mumford, declare as follows:

1. I am currently an Attorney-Advisor in the Office of Enforcement Liaison in the Division of Corporation Finance at the Commission, and I have served in this position since October of 2015. From March 2004 through September 2015, I served as an attorney in the operations section of the Division of Corporation Finance (CorpFin). In my previous position, I reviewed corporate filings to offer securities and periodic reports for compliance with federal securities laws. And I advised companies on their compliance obligations by issuing comment letters seeking information about their disclosures and asking for them to revise such disclosure statements as appropriate. In the Office of Enforcement Liaison, I act as a liaison between CorpFin and the other divisions within the Commission regarding enforcement issues involving the U.S. securities laws.

2. In making this declaration, I have relied on my personal knowledge, or where my personal knowledge was lacking or incomplete, I have relied on my review of records that CorpFin routinely maintains in the ordinary course of its business.

3. Among other responsibilities, CorpFin reviews Securities Act registration statements to monitor compliance with the applicable disclosure and accounting requirements. No statutes or regulations dictate standards for registration statement reviews.

4. When CorpFin reviews registration statements, the staff typically provides the company with comments if it identifies instances where it believes a company can improve its disclosure. In the normal course, CorpFin relies on publicly available information and responses from registrants to evaluate these disclosures. Generally, comments either request revisions to the disclosure or ask questions to help the staff better understand whether the disclosure should be improved. The range of possible comments is broad and depends on the issues that arise in a particular filing review.

5. In the course of their filing reviews, CorpFin staff typically prepares documents they refer to as examination reports that discuss what deficiencies may exist and that recommend possible comments. A second-level reviewer in CorpFin will evaluate the original staff examination report and decide on the comments to issue to the company. CorpFin staff also often discusses these issues internally through email and other forms of communication. CorpFin ultimately communicates its comments to companies in a letter that reflects the final decision about apparent deficiencies or questions about the company's filings. Companies typically provide a written response to each comment in the form of a letter to CorpFin staff.

6. When a company has resolved all CorpFin comments on a Securities Act registration statement, the company may request that the Commission declare the registration statement effective so that it can proceed with the transaction. When taking that action, CorpFin, through authority delegated from the Commission, gives public notice on the Commission's EDGAR system that the registration statement is effective. Even when CorpFin declares the

registration statement effective, neither the Commission nor the staff has passed on the adequacy or accuracy of the registration statement or other filing.

7. To increase the transparency of the review process, when CorpFin completes a filing review it gives the public access to its comment letters and a company's responses to those letters through the SEC's EDGAR system.

8. Of the thirty-four companies listed in the subpoena, registration statements and comment letters are available on EDGAR for twenty-eight of the companies. For two companies, Diamond Lane, Inc., and Sunchip Technology, Inc., the Commission issued a stop order. Thus the registration statements filed by those companies were never effective. For four other companies, no comment letters exist because CorpFin did not review their registration statements. Those companies are: Entertainment Art Inc.; Premier Nursing Products Corp; Pashminadepot.com, Inc.; and XtraSafe, Inc.

I declare under penalty of perjury that the foregoing is accurate and correct.

Washington, D.C.

October 7, 2016

Respectfully submitted,