

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 692/February 21, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14676

In the Matter of	:	
	:	
ERIC DAVID WANGER and	:	ORDER ON PORTION OF MOTION
WANGER INVESTMENT MANAGEMENT, INC.	:	TO DISMISS AND MOTION TO
	:	ISSUE SUBPOENA
	:	

The Securities and Exchange Commission (Commission) initiated Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Section 21C of the Securities Exchange Act of 1934 (Exchange Act), Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940 (OIP) on December 23, 2011. Respondents filed their Answers and a Motion to Dismiss (Motion) on January 25 and 26, 2012, respectively.

At a prehearing conference on January 30, 2012, we set a schedule for a hearing to begin on April 23, 2012. I denied all but one argument in the Motion and ordered the Division of Enforcement (Division) to file its opposition to the pending portion of the Motion, which alleges that the OIP was issued in violation of Section 4E of the Exchange Act, by February 8, 2012, and Respondents to file a reply to the opposition by February 17, 2012.¹

Respondents did not mention their intent to request subpoenas at the prehearing conference; however, on February 1, 2012, Respondents filed a Motion to Issue Subpoena (Motion for Subpoena) to the Division. Respondents' Subpoena for the Production of Documents (Subpoena) requests of the Division, "All documents evidencing compliance with Section 929U of . . . the Dodd-Frank" including, but not limited to, five paragraphs of specific materials described in detail.

On February 7, 2012, the Division filed a Memorandum of Law in Opposition to Respondents' Motion to Dismiss and Respondents' Motion to Issue Subpoena with Exhibit A, the Declaration of Charles J. Kerstetter (Kerstetter Declaration) with two exhibits², and Exhibit B, a copy of an October 5, 2011, Order Following Prehearing Conference and a Rule 154(c)

¹ Section 4E of the Exchange Act contains Section 929U of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). 15 U.S.C. § 78d-5.

² Exhibit A has attached Exhibit 1, a December 12, 2011, letter from Respondents to the Division and Exhibit 2, a December 19, 2011, letter from the Division to the Respondents.

Certification (Division Response). On February 17, 2012, Respondents filed a Reply in Support of Their Motion to Dismiss (Reply).

Respondents argue that: (1) the Division issued the OIP 199 days after it provided Respondents with a Wells Notice when a 180-day statute of limitations existed for instituting these proceedings; and (2) the Division has not alleged that it has done what is necessary to come within the exception to the 180-day rule, because the Kerstetter Declaration is not admissible evidence, it violates the Best Evidence Rule, and it does not demonstrate a complexity determination. Motion 12-15, Motion for Subpoena at 1-2, Reply.

The Division maintains that Respondents are mistaken because: (1) the Division staff of the Chicago Regional Office requested an extension from the Division Director on November 2, 2011, and the Division Director, who could seek an extension if he determined the case was sufficiently complex, granted an extension to December 30, 2011, after notifying the Chairman of the Commission; and (2) Exchange Act Section 4E is not a statute of limitations for Commission actions (case citations omitted). Division Response at 1-2, 4-9, Exhibit A. The Division contends that all the documents requested are “either privileged, consist of internal memoranda, notes or writings prepared by Commission employees or both.” Division Response at 16. Rule 230(b) of the Commission’s Rules of practice authorizes withholding these materials from production. *Id.* 17 C.F.R. § 201.230(b).

Ruling

I DENY that portion of the Motion that I did not rule on at the prehearing conference because the Division has made a persuasive showing that it complied with the provisions of Section 4E of the Exchange Act. I accord weight to the sworn statement of the Assistant Regional Director based on his personal knowledge that the Division took the actions that it claims to have taken. Respondents do not suggest that the Division’s representations are inaccurate, but that they are insufficient. I disagree.

Rule 232 of the Commission’s Rules of Practice provides that a subpoena request may be denied if it is determined that the subpoena or its terms is “unreasonable, oppressive, excessive in scope, or unduly burdensome.” 17 C.F.R. § 201.232(b).

It is not clear whether Respondents are requesting all documents since Exchange Act Section 4E became effective or just those in this proceeding. In either event, my determination is the same. I DENY Respondents’ Motion for Subpoena because the Subpoena is unreasonable and excessive in scope.

Brenda P. Murray
Chief Administrative Law Judge