

ADMINISTRATIVE PROCEEDING  
FILE NO. 3-12614

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION  
August 30, 2007

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In the Matter of :  
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PARK FINANCIAL GROUP, INC., and : ORDER  
GORDON C. CANTLEY :  
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The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on April 11, 2007. Respondent Gordon C. Cantley, (Cantley) filed his Answer on May 30, 2007. The hearing is scheduled to commence on October 22, 2007, in Orlando, Florida. At issue is Cantley's Motion to Compel Production of Investigative File Pursuant to Rule 230 (Motion) filed July 19, 2007, the Division of Enforcement's (Division) Response to Cantley's Motion (Response) filed August 3, 2007, and Cantley's Reply filed August 15, 2007.

In his Motion, Cantley contends that the Division is violating the production requirements of Rule 230 of the Commission's Rules of Practice because the Division is withholding "notes of interviews with various people taken by Commission attorneys or examiners" as work product. (Motion at 2.) Cantley agrees that witness statements and interview notes produced pursuant to Commission Rule of Practice 231 may be withheld by the Division until production has been ordered by the Administrative Law Judge, which will occur on September 25, 2007. (Motion at 3; Scheduling Order dated June 6, 2007.) However, he contends that interview notes and/or witness statements prepared prior to the institution of this proceeding are required to be produced pursuant to Rule 230 as part of the investigative file. Cantley further asserts that the documents were not prepared in anticipation of litigation and, therefore, are not work product. Cantley further contends, that if the interview notes and witness statements are work product, he is entitled to them pursuant to Rule 26(b)(3) of the Federal Rules of Civil Procedure because he has a substantial need for them in order to prepare his case and they cannot be obtained elsewhere without undue hardship. (Motion at 3.)

The Division's Response states, that after the OIP was filed, it made its entire non-privileged investigative file available to Cantley for inspection and copying as required by Rule 230. The file consisted of "more than 20 boxes and 50,000 papers consisting of documents obtained from third parties, correspondence, litigation pleadings, testimony and deposition exhibits, and 28 transcripts of sworn investigative and deposition testimony." In addition, the Division represents that it continued to produce documents to Cantley as it obtained them after instituting these proceedings and Cantley has all the Division's evidence in his possession. (Response at 2.) The Division asserts that the documents that Respondents seek are work

product and therefore may be withheld from production under Rule 230 of the Commission's Rules of Practice.


The Division represents that it has not rejected Cantley's request "out of hand." Rather, it is not required to produce interview notes at this stage of the proceeding and will comply with Rule 231 disclosure on September 25th. (Response at 2, 6 n.5.) I note that, in addition to the production it has already made, the Division has identified the individuals listed on its privilege log as well as three others whose names were inadvertently left off the log. (Response at 3.) Therefore, Cantley knows who the potential witnesses are and may, if he chooses, contact them. However, Cantley has not established that he has contacted, or attempted to contact, any of the potential witness. The Division represents that it has examined the notes at issue and none contain material required to be disclosed under Brady v. Maryland, 373 U.S. 83 (1963). (Response at 12-13; Exh. 4, Affidavit of Robert Levenson.)

Rule 230 of the Commission's Rules of Practice requires the Division to produce "documents obtained by the Division prior to the institution of proceedings, in connection with the investigation leading to the Division's recommendation to institute proceedings." The definition of "documents" in Rule 230 includes: writings, drawings, graphs, charts, photographs, recordings, and other data compilations, including data stored by computer, from which information can be obtained. Commission Rule of Practice 230(b)(1) states that documents may be withheld from production if they are (1) privileged; or (2) "an internal memorandum, note or writing prepared by a Commission employee . . . or is otherwise attorney work product that will not be offered into evidence."

Rule 231 of the Commission's Rules of Practice sets out the requirements for the production of witness statements. The Rule provides that a respondent may move the Division "to produce for inspection and copying any statement of any person called or to be called as a witness by the [Division] that pertains, or is expected to pertain, to his or her direct testimony and that would be required to be produced pursuant to the Jencks Act, 18 U.S.C. 3500." A comment to Rule 231 states: "Prior statements by witnesses memorialized in transcripts during the investigation that led to a proceeding fall within the scope of Rule 230 as well as Rule 231."

It is evident that the Division has made the investigative file available as well as provided a considerable amount of testimony taken during the investigation. Under Rule 230 of the Commission's Rules of Practice, the Commission may withhold from production documents that are attorney work product. The Division has until September 25, 2007, to decide what, if any, additional notes or statements are required to be produced to Cantley under Commission Rule of Practice 231. At this time it is premature to rule on this motion; instead I will wait until after the September 25 exchange of witness and exhibit lists, which is sufficient time prior to the hearing date, to determine if any production issues remain for resolution. If so, the parties shall arrange a conference call to discuss them.

SO ORDERED.

  
Robert G. Mahony  
Administrative Law Judge