

ADMINISTRATIVE PROCEEDING  
FILE NO. 3-11259

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION  
January 28, 2004

SECURITIES & EXCHANGE COMMISSION  
MAILED FOR SERVICE

JAN 29 2004

FIRST CLASS

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In the Matter of :  
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MICHAEL BATTERMAN and : ORDER  
RANDALL B. BATTERMAN III :  
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After the Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings, the Division of Enforcement (Division) provided Respondents Michael Batterman and Randall B. Batterman III (collectively, the Battersmans) with a timely opportunity to inspect and copy its investigative file. See Rules 230(a)(1) and 230(d) of the Commission's Rules of Practice.

Pursuant to my instructions, the Division also prepared a list of the documents it withheld from inspection and copying on the grounds of privilege (Privilege Log). See Rule 230(c) of the Commission's Rules of Practice; Prehearing Conference of Oct. 29, 2003, at 23-25. The Division has twice supplemented its Privilege Log.

Before me is the Battersmans' motion to compel the production of documents and the Division's opposition to that motion. At issue are eleven documents the Division withheld from inspection and copying on the grounds of the "attorney work product" doctrine and four additional documents it withheld on the grounds of a "law enforcement privilege." By Order dated January 12, 2004, I requested the parties to provide additional materials and argument on the issues. Among other things, I specifically urged the parties to address the relevance of the documents sought in the motion to compel. See Rule 230(b)(1)(iv) of the Commission's Rules of Practice, as interpreted in Joseph P. Galluzzi, 78 SEC Docket 1125, 1133 (Aug. 23, 2002).

In support of the motion to compel, the Battersmans have submitted a five-page letter arguing that the materials they seek are relevant to the issues in this proceeding. I have carefully reviewed this letter. However, the Battersmans cannot collaterally attack the underlying injunctive action upon which the present proceeding is based. See Ted Harold Westerfield, 69 SEC Docket 722, 729 n.22 (Mar. 1, 1999) (collecting cases).

In opposition to the motion to compel, the Division has submitted an affidavit from Stephen E. Donahue, a branch chief in the Division's Northeast Regional Office,

with attachments (Donahue Affidavit). The Donahue Affidavit provides the additional information I requested from the Division in my Order of January 12, 2004. Mr. Donahue states that he has reviewed each of the eleven documents for which attorney work product privilege has been claimed, describes each of the eleven documents in more detail than contained in the Privilege Log and the addenda thereto, and affirms that each of the documents falls within the scope of the attorney work product doctrine. Mr. Donahue also states that he has conducted a review of all of the documents identified on the Privilege Log and represents that none of these documents contain material exculpatory information within the scope of Rule 230(b)(2) of the Commission's Rules of Practice and Brady v. Maryland, 373 U.S. 83, 87 (1963). Mr. Donahue also withdraws the Division's assertion of a "law enforcement privilege," and urges instead that production of those documents be denied on the grounds that the materials sought are not relevant to the subject matter of this proceeding. During the course of Mr. Donahue's review, he identified four non-privileged documents that were inadvertently included among the Division's privileged materials. The Division has now provided those documents to the Battermans.

I addressed the case law relevant to the privilege issues in my Order of January 12, 2004, and that discussion is incorporated by reference herein. With respect to the eleven documents for which the Division has invoked the attorney work product doctrine, I conclude that the Battermans have not satisfied the substantial need/undue hardship test necessary to obtain the Division's "fact" work product. Nor have the Battermans satisfied the "rare and exceptional circumstances" test necessary to obtain the Division's "opinion" work product documents. With respect to the four documents for which the Division initially invoked a law enforcement privilege, I conclude that the documents are not relevant to the narrow subject matter of this proceeding. Finally, with respect to Rule 230(b)(2) and Brady, the Battermans have not made a plausible showing that the documents in question contain information that is both favorable and material to their defense in this proceeding. I conclude that the Donahue Affidavit satisfies the Division's obligations under Rule 230(b)(2) and Brady, as interpreted by the Commission in Orlando Joseph Jett, 52 S.E.C. 830 (1996).

The Battermans' motion to compel the production of documents, filed December 12, 2003, is denied.

  
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James T. Kelly  
Administrative Law Judge