ADMINISTRATIVE PROCEEDING
FILE NO. 3-12554

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
February 14, 2008

In the Matter of	:	
	:	
MICHAEL SASSANO,	:	ORDER DENYING REQUESTS FOR
DOGAN BARUH,	:	CONFIDENTIAL TREATMENT OF
ROBERT OKIN, and	:	INVESTIGATIVE FILES AND FOR A
R. SCOTT ABRY	:	PROTECTIVE ORDER

The Division of Enforcement (Division) recently made the non-privileged portions of its investigative file available to Respondents for inspection and copying, as it is required to do under Rule 230 of the Rules of Practice of the Securities and Exchange Commission (Commission). The Division's supplemental privilege log is due shortly.

By letter dated January 29, 2008, the Division requested me to issue a "confidentiality order" stating that only Respondents, their lawyers, paralegals, experts, agents, witnesses, and consultants have access to the documents being made available in this proceeding, that the documents be used only for purposes of the present proceeding, and that disclosure of the documents to anyone else be prohibited. The Division's letter did not cite any particular Rule of Practice in support of its request. Nor did the Division's letter explain how the prohibition would be enforced. In fact, the Division stated that it "typically does not seek to impose restrictions on investigative files being made available in an administrative proceeding."

On February 8, 2008, Fidelity Investments (Fidelity), a non-party, filed an emergency motion for a protective order pursuant to Rule 322 of the Commission's Rules of Practice. On February 12 and 13, 2008, AllianceBernstein LP (AllianceBernstein) and Deutsche Bank AG (Deutsche Bank), also non-parties, submitted a letter and a motion, respectively, seeking the same relief as requested by Fidelity.[1]

Rule 322(a) provides in relevant part that, "[i]n any proceeding as defined in Rule 101(a), a party [or] any person who is the owner, subject or creator of a document subject to subpoena or which may be introduced as evidence . . . may file a motion requesting a protective order to limit from disclosure to . . . the public documents or testimony that contain confidential information."

[1] The Division knew of its duty to make the relevant materials available to Respondents as early as June 8, 2007. At the very latest, the Division knew of its duty on November 30, 2007, when the Office of the Secretary notified the Division by facsimile that the Commission had denied the Division's motion for interlocutory review. Nonetheless, the Division waited until shortly before January 29, 2008, to alert Fidelity, AllianceBernstein, and Deutsche Bank. The "emergency" underlying Fidelity's emergency motion is entirely a creation of the Division.

The letter requests, the emergency motion, and the motion are denied. First, the documents in question were not obtained pursuant to any subpoenas issued in this administrative proceeding. See Rule 232 of the Commission's Rules of Practice. Rather, the documents were obtained by the Division, either voluntarily or pursuant to investigative subpoenas, during the investigation leading to the Division's recommendation to institute the present proceeding. I decline to use the Rules of Practice to regulate investigatory subpoenas, or to police contractual arrangements the Division might have entered while it was conducting its investigation. See Rule 100(b)(1) of the Commission's Rules of Practice ("These rules do not apply to . . . investigations."). Any requests for confidential treatment that Fidelity, AllianceBernstein, and Deutsche Bank may have made under the Freedom of Information Act do not govern here. See 17 C.F.R. § 200.83(a). Any promises of confidentiality that the Division might have made to induce these entities to cooperate in its investigation bind only the Division.

Second, it is premature for non-parties Fidelity, AllianceBernstein, and Deutsche Bank to speculate that documents they provided to the Division may be introduced as evidence during the administrative hearing. Respondents must file their list of proposed hearing exhibits by March 31, 2008. If any documents of concern to Fidelity, AllianceBernstein, and Deutsche Bank are on the Respondents' lists of proposed hearing exhibits, these non-parties are free to renew their requests under Rule 322 at that time. Third, absent an explanation as to how the proposed order would be enforced, I am reluctant to engage in a meaningless exercise.[2] The parties and non-parties are encouraged to consult with each other to reach a mutually agreeable solution to this issue.

SO ORDERED.

James T. Kelly
Administrative Law Judge

[2] AllianceBernstein states that "to the extent that any materials protected by Alliance's attorney-client privilege or by the attorney work product privilege are made available to Respondents, Alliance and its attorneys continue to assert such privileges with respect to such materials." Deutsche Bank also purports to raise broad claims of privilege. These generalized assertions of privilege fail to address the governing case law. See, e.g., In re Qwest Comm. Int'l, Inc., 450 F.3d 1179, 1184-1202 (10th Cir. 2006) (collecting cases); Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc., 244 F.R.D. 412 (N.D. Ill. 2006); LaBelle v. Philip Morris, Inc., 2000 WL 33957169 (D.S.C. Oct. 23, 2000). As a result, the privilege claims are entitled to no weight here.

As a separate matter, I note that the Division's amended privilege log is due shortly. Unless the Division can distinguish the case law cited above, the Division may assert its own privileges, but not the privileges of non-parties who provided documents during its investigation. See Declaration of David Stoelting, dated Jan. 29, 2008, at ¶¶ 7-8; Letter to Administrative Law Judge from John H. Ray III, dated Feb. 7, 2008, at 2; Letter to Administrative Law Judge from David Stoelting, dated Feb. 12, 2008, at 9. Withheld documents that cannot meet this test should be made available for inspection and copying forthwith.