ADMINISTRATIVE PROCEEDING
FILE NO. 3-12554

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
February 21, 2008

In the Matter of	:	
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MICHAEL SASSANO,	:	ORDER DECLINING TO SCHEDULE
DOGAN BARUH,	:	TELEPHONIC PREHEARING CONFER-
ROBERT OKIN, and	:	ENCE
R. SCOTT ABRY	:	

By January 29, 2008, the Division of Enforcement (Division) was required to make the non-privileged portions of its investigative file available to Respondents for inspection and copying (Orders of January 15, 2008, and June 8, 2007). See Rule 230 of the Rules of Practice of the Securities and Exchange Commission (Commission). On February 14, 2008, the Division provided Respondents with a supplemental privilege log, identifying the materials it is withholding from inspection and copying.

Respondent R. Scott Abry (Abry), on behalf of all Respondents, alleges that the Division's January 29, 2008, production materially fails to comply with the Orders of January 15, 2008, and June 8, 2007. In a letter dated February 7, 2008, Abry focuses on four "significant deficiencies" in the materials the Division made available. Abry states that Respondents are still reviewing the Division's production and reserve the right to raise additional deficiencies at a later time. Abry is vague about the specific relief he seeks. His February 7 letter asks only that I schedule a telephonic prehearing conference with the parties.

By letter dated February 12, 2008, the Division maintains that it has fully complied with its obligations under the January 15, 2008, and June 8, 2007, Orders. By letter dated February 15, 2008, Abry replied to the Division's response. In this last communication, Abry argues that the Division's failure to produce required documents in a timely manner "warrants an appropriate remedy for the prejudice it has caused Respondents."[1]

A telephonic prehearing conference is already scheduled for March 4, 2008. For the reasons set forth below, I find that Abry's February 7 letter does not demonstrate that an earlier prehearing conference is warranted. On that basis, Abry's request is denied.

[1] Abry does not identify the remedy he considers appropriate. In any event, it is improper to seek additional relief in a reply pleading.

I.

The Division has significantly narrowed the scope of its case: the evidence to be offered will relate to twenty-nine mutual fund families instead of eighty-three and four annuity fund families instead of eighteen.[2] In all, the Division intends to present evidence about forty-three entities. To comply with the Order of June 8, 2007, the Division made available for inspection and copying the following categories of non-privileged documents:

> (1) documents produced by the entities; (2) testimony transcripts of persons employed by the entities; (3) documents produced by third-parties under an investigation of any of the entities; and (4) Wells submissions, subpoenas, expert reports, and correspondence with third parties in an investigation of any of the entities.

Abry argues that the Division's search for responsive materials was too narrow and fails to comply with the Order of June 8, 2007 (Abry's February 7 letter at 2-4; Abry's February 15 letter at 1-3). The Division maintains that its search methodology offers "a principled and objective means to comply" with the Order of June 8, 2007 (Division's February 12 letter at 2-6). The issue arises because the parties were unable to reach a stipulation about the scope of a proper search.

I have carefully considered the parties' arguments. I find that the Division's search methodology complies with the letter and spirit of the Order of June 8, 2007. I reject Abry's arguments to the contrary.

II.

Abry also contends that the Division has improperly withheld documents not subject to any legitimate claim of privilege (Abry's February 7 letter at 2). The Division acknowledges that, as of February 12, 2008, it was still withholding approximately 37,000 pages of documents produced to it by Deutsche Bank AG and Deutsche Bank Securities, Inc. (collectively, Deutsche Bank), and a three-page document produced to it by Veras Investment Partners LLC (Veras) (January 29, 2008, Declaration of David Stoelting, New York Regional Office, ¶¶ 7-8; Division's February 12 letter at 9). I have already addressed this issue (Order of February 14, 2008, at 2 n.2). I presume that Respondents now have access to the Deutsche Bank and Veras documents. If this presumption is wrong, Respondents may file a motion to compel production.

If Respondents intend to argue that they have suffered irreparable prejudice because of the Division's untimely production, they must show when the Division made the Deutsche Bank and Veras materials available for inspection and copying; and they must identify the volume of materials made available after the January 29, 2008, deadline. After Respondents have completed their review of these materials, they must also identify the list entities to which the tardily-produced materials relate and they must show that such materials are important to their defense. Unless Respondents can demonstrate how late, how much, and how important these documents are, I will not entertain a vague claim of irreparable prejudice.

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[2] The Division also intends to present evidence relating to ten other entities: six hedge funds and four brokerage firms.

Now that the Division has filed its supplemental privilege log, Respondents may file a motion to compel production of any other withheld documents.

III.

Abry next argues that the Division destroyed "a significant volume" of non-privileged documents that should have been available for inspection and copying by January 29, 2008 (Abry's February 7 letter at 1-2). The Division acknowledges that, in three instances, files gathered under the formal order of investigation in NY-7220 were "inadvertently destroyed or appear to be missing" (Division's February 12 letter at 7-8).[3] The Division contends that the prejudice to Respondents is "minimal," because it has already made arrangements to have the producing entities copy certain documents for Respondents. The Division also states that, if Respondents request, it will contact the remaining producing entities to determine whether their productions can be recreated. As of February 12, 2008, however, Respondents had not requested the Division to obtain these documents.

I am less concerned about the documents missing from the investigative file in the Los Angeles Regional Office.[4] These materials were lost or destroyed in 2005—well before the present proceeding began. I am more concerned about the non-privileged documents that were "inadvertently destroyed" by the Chicago Regional Office in November 2007. Once the Division received the June 8, 2007, Order, it was obliged to suspend its routine document retention/document destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents. See Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003). Thereafter, Division counsel of record was obliged to take steps to oversee compliance with the litigation hold. Id. It is not yet clear that any of this took place.[5]

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[3] January 29, 2008, Declaration of Paul A. Montoya, Chicago Regional Office, ¶ 7; January 25, 2008, Declaration of Lorraine B. Echavarria, Los Angeles Regional Office, ¶¶ 7-9.

[4] Paragraph 9 of the Echavarria Declaration is somewhat unclear. It represents that the Los Angeles Regional Office obtained documents relating to Beacon Rock pursuant to a routine examination by the Commission's Office of Compliance Inspections and Examinations (OCIE). But see Rule 230(a)(1)(vi) of the Commission's Rules of Practice (providing that the Division is required to permit inspection and copying of OCIE final examination reports only in certain circumstances). In any event, the fact that the documents are missing from the Division's files in Los Angeles does not necessarily mean that the same materials are also unavailable from OCIE. Respondents previously subpoenaed materials from OCIE. If the issue is important to Respondents, they may wish to contact OCIE.

[5] See Toussie v. County of Suffolk, 2007 U.S. District LEXIS 93988, *23 (E.D.N.Y. Dec. 21, 2007) (Magistrate Judge) ("The law is very clear that the failure to implement a litigation hold at the outset of litigation amounts to gross negligence."). Counsel of record for the Division must provide evidence that, following the Order of June 8, 2007, he notified the Chicago Regional Office that it was necessary to place a litigation hold on the documents in question and to suspend the normal document destruction policies. He must also provide evidence that he oversaw compliance with the litigation hold. If Division counsel elected not to implement these routine procedures, he shall explain the circumstances. Division counsel shall file and serve an affidavit addressing these issues as soon as possible, and no later than February 29, 2008.

Nonetheless, I am satisfied that the Division is attempting to mitigate any harm by making reasonable arrangements for reconstructing the missing parts of the Chicago investigative file relating to Lincoln National Life Insurance Company (Lincoln National).

If Respondents intend to argue that they have suffered irreparable prejudice and/or that a spoliation sanction is warranted, they must show that they promptly took advantage of the Division's offer to obtain copies of the missing documents from the original sources in the Lincoln National investigation (Montoya Declaration, ¶ 7). Assuming that Respondents can satisfy this requirement, they must then address the questions set forth above (How much material was made available for inspection and copying after the January 29, 2008, deadline? When was it provided? How important is it to the defense?). Absent such showings, I will not entertain a vague claim of irreparable prejudice. See Residential Funding Corp. v. DeGeorge Financial Corp., 306 F.3d 99, 107 (2d Cir. 2002) (discussing the criteria for seeking adverse inferences or other sanctions for the destruction of evidence).

IV.

The Division has not searched the back-up storage tapes of e-mails from/to former staff members who worked on the NY-7220 investigation (January 29, 2008, letter from David Stoelting at 2). Abry claims that Respondents are entitled to inspect and copy such materials (Abry's February 7 letter at 4). The Division responds that the burden and expense of producing such materials would be considerable and would outweigh any benefit to Respondents because such materials would likely be irrelevant or privileged (Division's February 12 letter at 8).

In assessing the parties' positions, I have been guided by Federal Rule of Civil Procedure 26(b)(2)(B), which provides specific limitations on the discovery of electronically stored information. Under that Rule, a party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. The Rule further provides that, on motion to compel discovery or motion for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. While the Federal Rules of Civil Procedure do not govern the Commission's administrative proceedings, they are often helpful in resolving issues not addressed by the Commission's Rules of Practice.

I will treat Abry's February 7 letter as the equivalent of a motion to compel production of the back-up storage tapes, and the Division's February 12 letter as the equivalent of a motion for a protective order.[6] I will rule on these "motions" once the record is fully developed.

The Division shall clarify whether it discussed the production of this electronically stored information with Respondents during December 2007 and January 2008, or whether it unilaterally announced its position for the first time on January 29, 2008. Cf. Advisory Committee Note to Fed. R. Civ. Pro. 26(f)(3) (noting that the Rule amendment directs the parties to discuss discovery of electronically stored information during their discovery-planning

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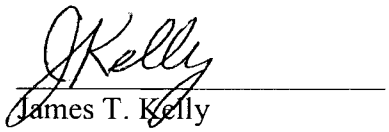
[6] I take this action to expedite the resolution of the controversy. In the future, the parties must file motions, not letters, if they seek specific relief. See Rule 154(a) of the Commission's Rules of Practice.

conference). The Division shall also provide evidence, in the form of affidavits, to support its claim of undue burden and cost. If possible, the Division shall quantify the anticipated burdens and costs (in hours and dollars). It would be helpful if the Division can identify the number of former employees at issue and the regional offices that employed them. The Division shall also provide information from an individual knowledgeable about the Commission's back-up computer file system, stating whether the agency uses back-up tapes solely for disaster recovery purposes or whether it actively uses them for information retrieval. The Division shall show whether the agency has a retention policy for such back-up e-mails, whether the agency saved the e-mails of the relevant employees, and whether any of the relevant back-up materials were purged before the preservation period expired. The Division may also present argument of counsel. The Division shall file and serve this information as soon as possible, but no later than February 29, 2008. After receiving the Division's submission, Respondents may reply within five days.

SO ORDERED.



James T. Kelly
Administrative Law Judge