

ADMINISTRATIVE PROCEEDING
FILE NO. 3-11330

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
March 17, 2004

In the Matter of :
: RULING ON MOTION TO
RITA J. McCONVILLE, : QUASH SUBPOENA
and KEVIN M. HARRIS, C.P.A. :
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On November 12, 2003, the Securities and Exchange Commission ("Commission") instituted this proceeding pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(iii) of the Commission's Rules of Practice, 17 C.F.R. § 201.102(e)(1)(iii). The Order Instituting Proceeding ("OIP") charges that:

1. Respondent McConville violated Sections 10(b) and 13(b)(5) of the Exchange Act and Rules 10b-5, 13b2-1 and 13b2-2 thereunder, and caused Akorn, Inc., to violate Sections 13(a) and 13(b)(2) of the Exchange Act and Rules 12b-20 and 13a-1 thereunder; and
2. Respondent Harris willfully violated Rule 13b2-2 under the Exchange Act, and caused and willfully aided and abetted Akorn's violations of Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-13 thereunder.

The hearing is scheduled to begin in Chicago, Illinois, on Monday, March 22, 2004. On February 25, 2004, I signed a subpoena at the request of Respondent McConville that required the Secretary of the Commission to produce the following:

1. Any and all documents, including any internal communications, related to the restatement of Akorn's consolidated financial statements for the years ended December 31, 2000, and December 31, 2001;
2. Any and all documents, including any internal communications, related to the settlement between the Commission and Akorn, referenced in the September 25, 2003, Order Instituting Cease-And-Desist Proceedings,

Making Findings and Imposing a Cease-And-Desist Order (Administrative Proceeding File No. 3-11272); and

3. Any and all documents, including any internal communications, related to the settlement between the Commission and Thomas D. Costello, referenced in the December 11, 2003, Order Instituting Cease-And-Desist Proceedings, Making Findings and Imposing a Cease-And-Desist Order (Administrative Proceeding File No. 3-11353).

On March 11, 2004, the Commission's Office of General Counsel and the Division of Enforcement (collectively, "General Counsel") filed a joint Motion to Quash the subpoena to the extent the subpoena seeks internal Commission documents. According to the General Counsel, a reasonable search of the Commission's files located the following privileged documents: an internal Commission memorandum;¹ electronic mail messages containing internal staff communications; and handwritten staff notes; and certain non-privileged documents.² The General Counsel represents that the privileged materials do not contain materials covered by Brady v. Maryland, 373 U.S. 83, 87 (1963), or the Jencks Act, 18 U.S.C. § 3500.

On March 12, 2004, Respondent McConville filed a Motion to Strike the General Counsel's Motion to Quash and a memorandum in support.

Argument

The General Counsel contends that the Commission's Rules of Practice do not provide for "such discovery" from the Commission's divisions or offices or from the Division of Enforcement ("Division"). It cites the Comment to Rule 233 for the proposition that the Commission has no formal discovery and Rule 230 to support the argument that it is clear from the Rules of Practice that the Commission did not intend to allow Respondents broad access to the Commission's non-public files. The General Counsel notes that Rule 230(b) specifies that the Commission may withhold such materials as "internal memorandum[s], note[s] or writing[s] prepared by Commission employees," and documents that are protected under a privilege or work-product doctrine. It notes further that, except for final inspection reports, documents prepared by Commission staff are treated as attorney-work product and the Commission does not have to produce them citing Rule 230(b)(ii) of the Commission's Rules of Practice and Orlando Joseph Jett, 62 SEC Docket 503 (June 17, 1996).

The General Counsel's second argument is that the materials being withheld – internal Commission memorandum, electronic mail messages among staff members, and handwritten staff notes – are covered by the deliberative-process privilege and the work-product doctrine.

¹ The Division of Enforcement withheld the internal Commission memorandum pursuant to Rule 230 of the Commission's Rules of Practice, claiming privilege.

² By March 19, 2004, the General Counsel will produce "the handful of non-privileged documents responsive to the subpoena" to Respondent McConville.

In support of its claim that the deliberative-process privilege is applicable, the General Counsel cites the following cases: NLRB v. Sears, 421 U.S. 132, 151 (1975); McClelland v. Andrus, 606 F.2d 1278, 1287 (D.C. Cir. 1979); Coastal States Gas Corp. v. DOE, 617 F.2d 854, 866 (D.C. Cir. 1980); Landfair v. Dep't of the Army, 645 F. Supp. 325, 330 (D.D.C. 1986); Wolfe v. HHS, 839 F.2d 768 (D.C. Cir. 1988) (*en banc*); Assembly of the State of California v. Dep't of Commerce, 968 F.2d 916, 920 (9th Cir. 1992).

In support of its claim for protection under the work-product doctrine, the General Counsel cites Hickman v. Taylor, 329 U.S. 495, 510, 512-13 (1947); Coastal States, 617 F.2d at 864; Canadian Javelin, Ltd. v. SEC, 501 F. Supp. 898, 902 (D.C. Cir. 1980); Safecard Serv., Inc. v. SEC, 926 F.2d 1197, 1203 (D.C. Cir. 1991).

The General Counsel rejects Respondent McConville's argument that "to the extent the Division is relying on Akorn's restatement [of its 2000 financials], she is entitled to know about the Commission's deliberations related to the restatement." The General Counsel contends that it relies on the restatement not to justify the Commission's action, but to show that Akorn recognized that it had engaged in financial improprieties. Finally, the Commission claims that the internal memorandum is protected by the attorney-client privilege. See Upjohn Co. v. United States, 449 U.S. 383 (1981); In re Sealed Case, 737 F.2d 94, 98-99 (D.C. Cir. 1984); Tax Analysis v. IRS, 117 F.3d 607, 617 (D.C. Cir. 1997); Schlefer v. United States, 702 F.2d 233, 245 (D.C. Cir. 1983); Brinton v. Dep't of State, 636 F.2d 600, 605 (D.C. Cir. 1980) *cert. denied*, 452 U.S. 905 (1981).

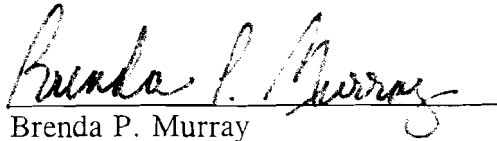
Respondent McConville moves to strike because the Motion to Quash was filed on March 11, 2004, and the Commission's Rules of Practice require that such a motion be filed no later than the time for compliance with the subpoena, which was March 6, 2004, 17 C.F.R. § 201.232(e)(1); and the materials sought are essential for effective cross-examination. The pleading cites Collins v. CFTC, 737 F. Supp. 1467, 1476 (N.D. Ill 1990) (dismissing untimely motions).

Ruling

Rule 232(e) of the Commission's Rules of Practice provides for motions to quash subpoenas "prior to the time specified therein for compliance, but in no event more than 15 days after service of the such subpoena." The Motion to Quash was filed on the fourth business day following the March 6, 2004, production date specified in the subpoena. I DENY the motion to strike because the delay was not undue considering that a number of different Commission offices were involved, Respondent was not damaged by the delay, and the Commission rarely rejects pleadings filed within a reasonable period of a deadline in administrative proceedings.

The General Counsel is correct that Respondent McConville seeks materials that are protected by the deliberative-process privilege, the work-product doctrine, and the attorney-client privilege. For this reason, I GRANT the Motion to Quash. At the hearing, I will have to deal with any Division assertions that Akorn's 2000 restatement demonstrates that "Akorn

recognized it had engaged in financial improprieties,” and Respondent McConville’s position that Akorn “ultimately acquiesced to the” Commission’s position that a restatement was required following negotiations with the Office of the Chief Accountant and the Division because of “exigent circumstances.” (Motion to Quash, Exhibit A.)

A handwritten signature in cursive script, reading "Brenda P. Murray", written over a horizontal line.

Brenda P. Murray
Chief Administrative Law Judge