

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 701/April 27, 2012

ADMINISTRATIVE PROCEEDINGS
File No. 3-14697

In the Matter of	:	
	:	ORDER ON APPLICATION TO QUASH
LISA B. PREMO	:	
	:	

On January 17, 2012, the Securities and Exchange Commission (Commission) issued an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) Pursuant to Sections 203(f) and 203(k) of the Investment Advisers Act of 1940, and Sections 9(b) and 9(f) of the Investment Company Act of 1940. The OIP alleges illegal conduct by Respondent in 2008, while she was employed by Evergreen Investment Management Company, LLC (Evergreen), and was the lead portfolio manager of the Evergreen Ultra Short Opportunities Fund (Ultra Fund).¹ The public hearing will begin on June 21, 2012.

Subpoena Duces Tecum

On March 23, 2012, at Respondent's request, I signed a Subpoena Duces Tecum to Wells Fargo & Company (Wells Fargo), which called for the production of twenty-two categories of subpoena requests (Subpoena Requests).

Application to Quash

On April 13, 2012, non-party Wells Fargo, which acquired Evergreen's parent company, Wachovia Corporation (Wachovia), in 2008, filed an Application to Quash Respondent's Subpoena Duces Tecum (Application to Quash) with a Declaration by Walter G. Ricciardi (Declaration) with Exhibits A through D. Wells Fargo describes the Subpoena Requests as covering e-mails and documents of named employees and Evergreen's policies and procedures. Wells Fargo conferred with Respondent, and informed her that she had many of the documents and it would endeavor to locate others. Application to Quash at 2.

¹ Evergreen was the investment adviser to the Ultra Fund. Evergreen Investment Services, Inc., is an affiliated broker-dealer.

The Application to Quash is detailed and specific. Its main points are that: (1) Evergreen has turned over vast amounts of information in cooperating with the Commission's investigation of these matters, which the Division of Enforcement (Division) provided to Respondent;² (2) most of the requests are overly broad in time frame and subject matter since the OIP's focus is on Respondent's "alleged non-disclosure to the [Evergreen Valuation Committee] of information related to a single bond (Novastar) held in the Ultra Short fund during March to June 2008 timeframe;" and (3) producing the e-mails requested would likely take weeks or months and cost hundreds of thousands of dollars and production of other documents would be unduly burdensome considering that these events occurred four years ago and the transition to Wells Fargo has resulted in changes in employees and information systems. Id. at 1-11; Declaration at 1-3.

Opposition to the Application to Quash

On April 20, 2012, Respondent filed its Opposition to the Application to Quash (Opposition), with the Declaration of Justin Deabler and Exhibits A and B. Respondent is willing to negotiate narrowing the scope of her Subpoena Requests. She is dismissive of Wells Fargo's position that it has produced a significant number of documents to the Division, and believes that certain of Wells Fargo's representations are inaccurate. Respondent claims that her communications with Wells Fargo raise "concerns about the completeness of Wells Fargo's production to the Staff and questions about the burden of locating responsive documents." Opposition at 3. For example, Respondent cites two Bates ranges responsive to five different Subpoena Requests that Wells Fargo did not produce to the Division, and notes that at least one document, which was not previously produced, has been located. Id. at 3. Respondent maintains that her Subpoena Requests are not unreasonable, oppressive, or unduly burdensome, and contends that any such concerns can be addressed through modification, not quashing. Id. at 3-4.

Respondent's need for the subpoenaed materials is that "what others at Evergreen knew about the NovaStar bond – and the duties and responsibilities of others at Evergreen with respect to Fund holdings – are central to the charges against Ms. Premo and to her defense." Id. at 5. She argues that the fact that the Division conducted five interviews after settling with Wells Fargo confirms that Wells Fargo's earlier production of documents cannot limit the universe of relevant evidence. Id. at 6. Respondent repeatedly stresses that it is significant to her defense to establish that she had a reasonable, good faith basis to believe that other Evergreen persons on the Evergreen Valuation Committee (EVC) "knew about the NovaStar bond's event of default, deferred cash flows, and missed interest payment." Id. at 7-10, 13, 15. For this proposition, Respondent cites Subpoena Requests Nos. 2, 3, 5, 7, 10, 11, 13.³

² The result was an Order Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order, Evergreen Investment Management Company, LLC, Securities Exchange Act of 1934 Release No. 60059 (June 8, 2009). Wells Fargo also provided additional materials to the Commonwealth of Massachusetts's Securities Division, which were shared with Respondent. (Application to Quash at 1; Declaration at 2).

³ Subpoena Request No. 2: "For the years 2007 and 2008, documents sufficient to show all of the duties and responsibilities of the Evergreen Risk Management group, including any changes to those duties and responsibilities at any time during those years."

Respondent's proposed modifications of each Subpoena Request after a conference with Wells Fargo on April 9, 2012, are as follows:

Request No. 1: Withdrawn. Opposition at 8.

Request Nos. 2 and 3: Documents sufficient to show the duties and responsibilities of the Evergreen Fund Administration and Risk Management groups; documents from the Risk Management group limited to 2008; a binding stipulation from Wells Fargo and the Division. Opposition at 8-9.

Request No. 4: E-mails from the following Fund Administration personnel for the period February 1, 2008, through June 10, 2008: Jeremy DePalma, David Berardi, and Laura Young. Opposition at 9-10.

Request Nos. 5, 7, 8, 10, 12, and 13: A binding stipulation that Wells Fargo is confident there are no other policies and procedures beyond those produced to the Division and the one produced on April 13, 2012. Opposition at 10-12.

Subpoena Request No. 3: Same as No. 2 but for the Evergreen Fund Administration group.

Subpoena Request No. 5: "All documents reflecting or relating to Evergreen policies and procedures, whether formal or informal, in effect for the years 2007 and 2008, for the monitoring and tracking of payments due to Evergreen funds from any security held by the funds."

Subpoena Request No. 7: "For the years 2007 and 2008, documents reflecting or relating to the methods by which Evergreen communicated with and validated the custodial work of State Street and any other custodians receiving monies due to Evergreen funds."

Subpoena Request No. 10: "All documents reflecting or relating to Evergreen policies and procedures, whether formal or informal, in effect for the years 2007 and 2008, concerning the monitoring of rating agency actions, including but not limited to upgrades, downgrades, or credit watch alerts, as to securities held by Evergreen funds."

Subpoena Request No. 11: "For the period February 6, 2007 - June 18, 2008, all documents reflecting the monitoring by Evergreen of rating agency actions - *e.g.*, upgrades, downgrades, or credit watch alerts - for the NovaStar bond, including but not limited to emails or other electronic updates to Evergreen Risk Management or Fund Administration personnel, or materials generated by Evergreen Risk Management for the Structured Product Advisory Group or for any other purpose."

Subpoena Request No. 13: "All documents reflecting or relating to Evergreen policies and procedures, whether formal or informal, in effect for the years 2007 and 2008, concerning the monitoring of publicly-available information about securities held by Evergreen funds, or about the issuers of such securities."

Request No. 6: For the period February 1, 2008, through June 10, 2008, all documents reflecting or relating to communications between Evergreen and State Street concerning the NovaStar bond. Opposition at 12-13.

Request No. 9: For the period February 1, 2008, through June 10, 2008, all documents reflecting communications concerning valuation of the NovaStar bond between Evergreen and Peraza Capital & Investment, LLC. Opposition at 13-14.

Request No. 11: For the period February 1, 2008, through June 18, 2008, all documents reflecting the monitoring by Evergreen of rating agency actions - e.g., upgrades, downgrades, or credit watch alerts - for the NovaStar bond, including but not limited to e-mails or other electronic updates to Evergreen Risk Management or Fund Administration personnel, or materials generated by Evergreen Risk Management for the Structured Product Advisory Group or for any other purpose. Opposition at 14-15.

Request No. 14: For the period February 1, 2008, through June 10, 2008, all documents reflecting communications between Evergreen Risk Management personnel and the Evergreen MBS and Structured Products group concerning the NovaStar bond, including but not limited to the sharing of Index runs, cash flow tables, data, or other modeling on the NovaStar bond. Opposition at 15-16.

Request No. 15: Withdrawn. Opposition at 16.

Request No. 16: For the period January 1, 2008, through June 30, 2008, all documents concerning or relating to discussions about the Asset Management Fund's (AMF) invocation of the redemption-in-kind provision for AMF's Ultra Short Mortgage Fund. (This request is unmodified.) Opposition at 16.

Request No. 17: For the period January 1, 2008, through June 30, 2008, all documents concerning or relating to the Evergreen Stable Value Fund's exit from the Evergreen Ultra Short Fund or a binding stipulation among the parties and Wells Fargo that materials cannot be located. Opposition at 17.

Request No. 18: Audio recordings of each Evergreen Valuation Committee meeting held on May 28 and June 4, 2008, or a stipulation by the parties and Wells Fargo that these audio recordings not produced to the Division do not exist. Opposition at 17-18.

Request No. 19: Withdrawn. Opposition at 18.

Request No. 20: For the years 2003 to the present, all documents concerning Andrew Davidson & Company's (Andrew Davidson) assessment of the valuation procedures employed by the Evergreen MBS and Structured Products Group, including but not limited to any written conclusions reached by Andrew Davidson; documents reflecting the implementation at Evergreen of any aspect of Andrew Davidson's conclusions; and documents reflecting requests by Robert Rowe, Lisa Brown Premo, or other Evergreen personnel to review such conclusions. Respondent is willing to accept a stipulation that these materials cannot be located. Opposition at 18.

Request No. 21: Withdrawn. Opposition at 19.

Request No. 22: For the period November 2007 through June 2008, all documents concerning the Evergreen MBS and Structured Products Group's requests for technological support, or complaints or questions about the technological support being provided by Evergreen. Opposition at 19.

Division

On April 25, 2012, the Division filed a Response to Respondent's Opposition (Division's Response). The Division disputes Respondent's assertion that it conducted five additional interviews because Respondent's Wells submission defense was viable that other members of the EVC had independent knowledge of certain facts. Rather, the Division maintains that it took additional depositions because Respondent so vigorously blamed others, and the evidence adduced confirmed its position that what information others at Evergreen had about the Evergreen Ultra Fund is irrelevant to the allegations in the OIP. Division's Response at 2-3. The Division disfavors Respondent's suggestion that the Division enter stipulations in connection with Respondent's Subpoena Requests to a third party, and takes issue with Respondent's restatement of the OIP. *Id.* at 1, 3-4.

Other Filings

On April 25, 2012, I received Respondent's Motion for a Prompt Hearing on the Application for Non-Party Wells Fargo & Co. to Quash Respondent's Subpoena Duces Tecum.

On April 26, 2012, I received Non-Party Wells Fargo & Co.'s Opposition to Respondent's Motion for a Prompt Hearing and Cross-Motion for an In-Person Hearing.

Ruling

The Division has the burden of proving the allegations in the OIP by a preponderance of the evidence. It has provided Respondent with its investigative file, which contains materials that form the basis of the allegations in the OIP. 17 C.F.R. § 201.230(a). Because Respondent's Wells submission "vigorously pointed fingers at various members of the EVC," the Division interviewed five EVC members. Division's Response at 2-3. Respondent would have the material related to these interviews.

Commission Rule of Practice 232 states that a subpoena should be allowed where it is not unreasonable, oppressive, excessive in scope, or unduly burdensome.

Wells Fargo has made a persuasive showing that most of the Subpoena Requests are unreasonable, oppressive, excessive in scope, or unduly burdensome. The events at issue in the OIP occurred in the first half of 2008, the year in which Wells Fargo acquired Wachovia, which owned Evergreen. The first Subpoena Request covers all electronic communications over a six-month period for twenty-three people and Respondent. Nine Subpoena Requests cover a two-year period, eleven cover months of varying lengths, and two begin either in 2003 or on February 1, 2007, through to the present.

A change in business ownership and the passage of four years are significant events in terms of changing personnel and computer systems, especially the last four years in the financial industry. These circumstances, and the breadth and scope of the documents being sought by the Subpoena Requests, support Wells Fargo's representation that gathering the requested information would be unduly burdensome, unreasonable, costly, and take weeks or months.

I am uncertain at this stage how relevant the knowledge that others had of the salient facts is to the allegations in the OIP. However, Respondent should have an opportunity to pursue its theory of the case. For this reason, I will quash the subpoena, but I intend that Respondent be allowed to seek limited portions of the Subpoena Requests that go to what knowledge others had of the salient facts. I reject Respondent's position that this includes everything in Subpoena Requests Nos. 2, 3, 5, 7, 10, 11, and 13.

For the reasons stated, I find that the Subpoena Duces Tecum I signed is unreasonable, oppressive, excessive in scope, and unduly burdensome and GRANT Wells Fargo's Application to Quash Respondent's Subpoena Duces Tecum. Respondent should request from Wells Fargo the limited material she believes she needs to show that others had knowledge of the facts Respondent is charged with failing to disclose. If Respondent and Wells Fargo cannot reach an accommodation, Respondent may request issuance of a subpoena, which is vastly reduced in time and scope.

I would not require the Division to enter stipulations to resolve Respondent's efforts to acquire material from Wells Fargo.

I PARTIALLY DENY Respondent's Motion for a Prompt Hearing on the Application to Quash, and I DENY Non-Party Wells Fargo & Co.'s Opposition to Respondent's Motion for a Prompt Hearing and Cross-Motion for an In-Person Hearing.

I ORDER a telephonic prehearing conference at 10:30 a.m. EDT on Monday, May 14, 2012, if the matter is not resolved by that date.

Brenda P. Murray
Chief Administrative Law Judge