

ALS

ADMINISTRATIVE PROCEEDING
FILE NO. 3-10933

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
March 11, 2003

SECURITIES & EXCHANGE COMMISSION
MAILED FOR SERVICE

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In the Matter of	:	
	:	ORDER ON APPLICATION
	:	TO QUASH, SUBPOENA, AND
ERNST & YOUNG, LLP	:	MATERIAL FOR THE RECORD
	:	

On March 5, 2003, Respondent filed: (1) an Application to Quash; (2) an Application for a Subpoena; and (3) a copy of a February 10, 2003, letter regarding certain pretrial issues that it filed with the Office of the Secretary. On March 7, 2003, the Division of Enforcement and the Commission's Office of the Chief Accountant ("Division") filed an Opposition To E&Y's Motion To Quash Part 3 of the Division/OCA's Subpoena ("Opposition"), and a Motion To Deny Respondent's Application For A Subpoena For The Trial Testimony of Robert Burns.

Respondent's Application To Quash

Respondent moved to quash the following portion of a subpoena that I signed on February 20, 2003:

All performance evaluations, self-evaluations, promotion assessments, performance targets or goals, calculations or determinations of Compensation, and minutes of the Management Committee or similar committee concerning Compensation produced in 1994 through 2000 for the following partners: Richard Frick; Phillippe Paradis; Findlay Most; John Fridley; Lynn Anderson; Edmund Coulson; and Michael Bishko.

Respondent employed all these individuals during the relevant period. Mr. Frick and Mr. Paradis were the audit partners in charge of the audits of PeopleSoft Inc.'s financial statements. Mr. Coulson and Mr. Most were members of the national office. Mr. Fridley and Mr. Anderson were consulting partners, and Mr. Bishko was a partner in the tax group.

Respondent argues that I should quash the subpoenas because:

1. The Division seeks the materials to show that these individuals were motivated to decide independence issues in order to increase their compensation, but this showing is irrelevant since the receipt of fees does not by itself establish bad motives to auditors. See In re SmarTalk Teleservices Inc. Sec. Litig., 124 F. Supp. 2d 505, 518 (S.D. Ohio 2000); see also In re Complete Mgmt. Inc. Sec. Litig., 153 F.Supp. 2d 314, 335 (S.D.N.Y. 2001);

2. The request is inappropriate in view of the strong public policy against disclosure of personnel files. See In re One Bancorp Sec. Lit., 134 F.R.D. 4, 12 (D. Me. 1991); see also Closterman v. Liberty Mut. Ins. Co., 1995 WL 472105, at *1 (E.D. Pa. Aug. 9, 1995); and

3. The request is burdensome in view of the March 18, 2003, trial date, and is an attempt to obtain possible information on which to cross-examine Respondent's key witnesses.

Division¹

The Division claims that PeopleSoft, Inc. related business amounted to up to \$150 million annually for Respondent. The Division alleges that the information covered by the subpoena is relevant to its charge that certain of Respondent's employees were negligent or reckless because "the affect of increased compensation or improved performance evaluations resulting at least in part from attracting, retaining, or increasing, PeopleSoft-related business makes it more probable that certain individuals were negligent in maintaining E&Y's independence from PeopleSoft." (Opposition 3 note 2.) The Division claims further that it has no other way to show that these employees benefited from Respondent's continued relationship with PeopleSoft. The Division claims that discovery was disallowed in the cases cited by Respondent for failure to meet the standards for discovery, not because they were personnel records.

Ruling

Rule 232(e)(2) of the Securities and Exchange Commission's ("Commission") Rules of Practice provides that a subpoena should be quashed or modified if compliance with the subpoena would be unreasonable, oppressive or unduly burdensome. See 17 C.F.R. § 201.232(e)(2). In its five page Application To Quash, Respondent briefly argues that the request is unduly burdensome because the hearing begins on March 18, 2003.

I agree that counsel need to focus on the trial that will begin in about a week, however, others rather than counsel will be doing the file search called for by the subpoena. Also, the Application To Quash bears the names of five lawyers representing

¹ If the Division is correct that Respondent simply called and asked whether the Division was willing to withdraw its request, Respondent disregarded my instruction that the parties negotiate their differences before requesting a ruling.

Respondent so that it is reasonable to expect that one counsel would have time to oversee the effort. I DENY Respondent's Application to Quash because Respondent has not met the standard of Rule 232 and shown that the subpoena request is unreasonable, oppressive, or unduly burdensome.

Application For Subpoena ("Application")

Respondent requests a subpoena for the testimony at trial of Robert Burns, Chief Counsel, Office of the Chief Accountant ("OCA"). From the Application and from a discussion at the prehearing conference on March 4, 2003, I understand that Respondent wants to establish through Mr. Burns the fact that "in the past number of months representatives of [OCA] have consulted with Mr. Coulson concerning proposed rules and procedures pertaining to independence to be adopted by the SEC in light of Sarbanes-Oxley."

Division²

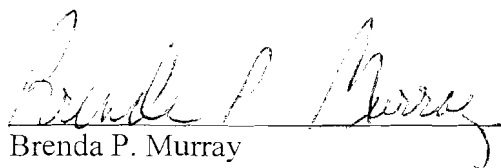
The Division objects to the subpoena because Mr. Burns was directly involved in the investigation that led to the Commission's decision to institute the proceeding. It claims that any testimony by Mr. Burns would raise complicated issues regarding application of attorney/client, work product, and deliberative process privileges. It argues further that Mr. Burns has no basis on which to testify as to Mr. Coulson's reputation, and that in this situation the Federal Rules of Evidence prohibit evidence from Mr. Burns as to Mr. Coulson's reputation.

Ruling

I will grant the Respondent's Application because it meets the criteria for a subpoena set out in Rule 232. When the witness is called to testify, I will deal with any privilege(s) or other objections that the Division might claim.

Respondent's Submission For Filing of Letter Regarding Certain Pretrial Issues

See Transcript of March 4, 2003, and Report Following Prehearing Conference issued March 5, 2003.


Brenda P. Murray
Chief Administrative Law Judge

² The Commission's Rules of Practice do not provide for objections to Applications for subpoenas. The scenario envisioned is a motion to quash after the subpoena is issued. See 17 C.F.R. § 201.232. Inasmuch as the hearing will begin soon, I will consider the Division's pleading as a motion to quash.