

ACT

ADMINISTRATIVE PROCEEDING  
FILE NO. 3-12626

SECURITIES & EXCHANGE COMMISSION  
MAILED FOR SERVICE

AUG 28 2007

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION  
August 27, 2007

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In the Matter of	:	
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THOMAS C. BRIDGE,	:	ORDER ON MOTION TO COMPEL
JAMES D. EDGE, and	:	PRODUCTION
JEFFREY K. ROBLES	:	
	:	
	:	

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The Securities and Exchange Commission (Commission) instituted this administrative and cease-and-desist proceeding on May 2, 2007, with an Order Instituting Proceedings (OIP). Respondents filed their Answers on May 25, 2007. The hearing is scheduled to begin on September 10, 2007.

**RESPONDENTS**

On August 13, 2007, Respondents filed a Motion to Compel Disclosure of Documents and Information and to Adjourn the Hearing Until After Production (Motion), and a Memorandum in Support (Memorandum), and Affidavit of Michael J. Duffy (Duffy Affidavit) with Exhibits A through F in support. In these materials and in a Reply to Division's Opposition (Reply in Opposition) filed August 23, 2007, Respondents argue that the Division of Enforcement (Division) should be ordered to supply them with:

- (1) the Division's complete file regarding Charles Sacco (Sacco);
- (2) notes and memoranda of witness statements; and

(3) all materials that any Division of the Commission obtained regarding all the mutual fund companies at issue in this proceeding. (Motion at 3-4.) More specifically, Respondents want all documents concerning correspondence between the Commission and the Commonwealth of Massachusetts's Securities Division, the State of Illinois's Securities Department, and the National Association of Securities Dealers. (Memorandum at 5.)

Respondents also complain that the Division has: (1) declined to supplement its List of Withheld Documents filed on June 18, 2007, a three-page document listing fifteen categories of withheld material; and (2) refused to produce materials required by Brady v. Maryland, 373 U.S. 83 (1963). (Memorandum at 2.) Respondents want the hearing postponed until a reasonable time after the Division has supplemented its disclosure or, alternatively, for an additional forty-five days. (Memorandum at 15.)

### **Division files regarding Sacco**

The OIP identified Sacco as an A.G. Edwards employee who was directly supervised by Jeffrey K. Robles (Robles) from June 2002 to October 2003. (OIP at 2.) Sacco agreed to a Commission order entered on May 2, 2007, finding that he willfully violated Section 17(a) of the Securities Act of 1933 (Securities Act), Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and Rule 10b-5 thereunder by using deceptive means to market time on behalf of his customers. Charles A. Sacco, Exchange Act Release No. 55693 (May 2, 2007).

Respondents claim, in part, that they need the materials they seek in connection with Sacco's credibility as a Division witness. (Memorandum at 7-8.) Respondents contend that the Division must provide it with "all of the documents it possesses relating to Sacco, including any statements and supporting materials that Sacco submitted in connection with his settlement of the Commission's administrative proceedings against him." (Memorandum at 7.) Respondents argue that redacted versions of Sacco materials are insufficient and they are entitled to everything the Division has concerning Sacco under the doctrine of Brady, incorporated in Commission Rule of Practice 230(b)(2). According to Respondents, the holding in Brady includes "not only those materials tending to exculpate the Respondents, but also materials relevant for impeachment purposes. See United States v. Bagley, 473 U.S. 667, 676 (1985)." (Memorandum at 7.) Respondents stress their need for these materials to impeach Sacco since as part of the settlement he agreed to cooperate with the Commission in this proceeding. (Memorandum at 7-8.) They argue that Sacco's financial submissions are relevant because if they can show Sacco is able to pay the substantial financial penalty that was waived, they can argue that the waiver was a quid pro quo for his testimony (presumably damaging testimony he will give against Robles). (Memorandum at 8.)

Respondents also claim the materials must be disclosed under Rule of Practice 231, which requires the Division to make available "any statement of any person called or to be called by the Division . . . that pertains, or is expected to pertain, to his or her direct testimony."

### **Notes and Memorandum of witness statements**

Respondents cite numerous cases to support their claim that the Division has failed to come forward with sufficient facts to establish that the witness notes and memoranda being withheld are not discoverable under Rules of Practice 230 or 231 and are protected by the work-product and deliberative process privileges. (Memorandum at 9-13.) Respondents argue further that even if the privileges are applicable, they are overcome by Respondents' compelling need for the material and they cannot obtain it elsewhere. (Memorandum at 11-12.)

Respondents assume that the “withheld witness interview notes may reveal witnesses or material that is required to be disclosed under Brady” because the Division has refused to disclose the witnesses it has interviewed informally and a number of A.G. Edwards employees had specific knowledge of market timing practices. (Memorandum at 12.) Finally, Respondents reiterate their claim that they be given material covered by Rule of Practice 231.

### **Documents and information regarding the mutual funds at issue**

Respondents contend that the Division must make available any documents it has that “pertain to the individual mutual funds’ practices regarding market timing” because such information: (1) could undercut the Division’s position that market timing harmed the funds’ customers; (2) could show that the mutual fund companies knew about and decided to allow market timing; and (3) will allow Respondents to learn what evidence the Division has to support its charge that market timing caused harm to the mutual funds. (Memorandum at 14-15.)

### **Adjournment**

Respondents claim that it is necessary to continue the hearing until after the requested material is furnished to them, but in any event for forty-five days to allow them a full and fair opportunity to contest the allegations in the OIP. They note that much of the contents of the thirty-seven boxes of materials and 300 disks are irrelevant. They claim that the completion of production was delayed and that they have had a short time to review a large amount of material and prepare their defenses. (Memorandum at 15.)

## **DIVISION**

The Division filed a Brief in Opposition and a Declaration of Richard G. Stoltz in Support (Stoltz Declaration) on August 21, 2007. The Division believes Respondents are requesting: (1) countless boxes and CDs of irrelevant materials from files and offices throughout the Commission; (2) internal staff notes and memoranda; (3) financial information in connection with settlement of a related proceeding; and (4) a potentially open-ended adjournment of the hearing. (Brief in Opposition at 1.) The Division argues that Respondents’ request for information from mutual funds differs from what it first requested in a letter to the Division dated June 19, 2007. In any event, the volume of material sought would be enormous because Thomas C. Bridge (Bridge) and Sacco placed market timing trades in over 200 mutual funds during 2001 through 2003. (Brief in Opposition at 6.) The Division has given Respondents information from mutual fund companies in whose funds Bridge and Robles placed trades for their customers. The Division views Respondents requests as “red herrings,”<sup>1</sup> as the issues are whether Bridge committed fraud in his efforts to evade the mutual funds’ restrictions, and whether Robles and Edge failed reasonably to supervise, respectively, Sacco and Bridge. (Brief in Opposition at 7.)

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<sup>1</sup> A red herring is defined as “[s]omething that distracts attention from the real issue.” Merriam-Webster’s Collegiate Dictionary, (10th ed.) 977

The Division insists it has provided all Brady material to Respondents. (Brief in Opposition at 7.) It notes that mutual fund policies on market timing are contained in the funds' publicly available prospectuses.

The Division questions why Sacco's financial data that it received subject to a subpoena and voluntarily furnished to Respondents without personal identification information is insufficient. The Division's primary reason for refusing to disclose the 360 pages of financial information Sacco submitted in settlement of a separate, but related proceeding is that the information is not covered by Rule 230(a)(1) as material obtained "in connection with the investigation leading to the Division's recommendation to institute proceedings." (Brief in Opposition at 9.)

In response to Respondents' request for internal notes and memoranda, the Division describes (1) twelve non-verbatim, non-contemporaneous memoranda of witness interviews; (2) eleven sets of handwritten notes of investigative interviews; and (3) nine sets of notes from investigative interviews.<sup>2</sup> (Stoltz Declaration at 7-13.) According to the Division, all this material was prepared during the investigation leading up to this proceeding by Division attorneys or persons working under their direction, none of the material was reviewed by or adopted by any witness, and none of the material will be offered into evidence. (Brief in Opposition 11-12, Stoltz Declaration at 7-13.)

### **Ruling**

As an initial matter, there is no evidence of bad faith by the Division with respect to disclosure. The Division made its investigative file available to Respondents beginning on May 9, 2007. 17 C.F.R. § 201.230. (Brief in Opposition at 2.) Respondents declined to review the entire file. (Brief in Opposition at 4.) At Respondents' request, the Division prepared a list or index of materials in the investigative file.<sup>3</sup> When Respondents requested copies of the entire investigative file, thirty-seven boxes of materials and 300 disks, the Division worked with Respondents to provide them with usable copies. At my request, the Division ascertained that only one other Division office had investigative materials related to the parties in this proceeding and provided that information to Respondents.<sup>4</sup> (Brief in Opposition at 3.)

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<sup>2</sup> The Division arrived at twenty-two rather than twenty sets of notes in its Brief in Opposition at 11.

<sup>3</sup> Respondents now fault the Division for not being "willing to make a detailed disclosure of the contents of its investigatory file, rather than merely stating numbers of boxes and disks in meaningless categories." (Reply in Opposition at 7 n.7.)

<sup>4</sup> The Division maintains that Rule of Practice 230 requires the Division to produce only materials obtained in the investigation that led to this proceeding, C-03817. (Brief in Opposition at 7.)

I DENY Respondents' Motion for the following reasons:

Privileges can be described generally as “an exception to a duty.” The attorney-client privilege is the “client’s right to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and the attorney.” The work-product privilege refers to “[t]angible material or its intangible equivalent – in unwritten or oral form – that was either prepared by or for a lawyer or prepared for litigation, either planned or in progress.” Work product is generally exempt from discovery or other compelling disclosure. The term is also used to describe the products of a “party’s investigation or communications concerning the subject matter of a lawsuit if made (1) to assist in the prosecution or defense of a pending suit, or (2) in reasonable anticipation of litigation.” The deliberative-process privilege permits “the government to withhold documents relating to policy formulation to encourage open and independent discussion among those who develop government policy.” Black’s Law Dictionary, (7th ed. 1999) 1215-16, 1600-01.

Page one and two of the Division’s List of Withheld Documents describe the categories of material withheld as all authored by attorneys or persons under their direction, and intended for Commissioners, attorneys at the Commission or in the Division, or attorneys at the Commonwealth of Massachusetts Securities Division, the State of Illinois Securities Department, or the Office of the U.S. Attorney – Eastern District of Missouri. Most of the materials are described as internal Commission documents. It appears from the information on the list that these materials were prepared for this litigation. The Division’s description of the material and the identity of the authors and recipients support the privilege(s): attorney-client, attorney work-product, deliberative-process, or law enforcement that the Division cites as the reason for withholding the material. In addition to the information that appears on the face of the List of Withheld Documents, the Stoltz Declaration with attached exhibits also supports the Division’s claims of privilege. (Stoltz Declaration Exhibits F and I.) Respondents’ Motion contains no persuasive arguments that indicate the privileges claims are unfounded.

Page three of the List of Withheld Documents shows four categories of documents that were not produced: (1) internal notes and memoranda; (2) non-redacted witness testimony; (3) financial information as to Sacco; and (4) final examination reports by the Office of Compliance Inspections and Examinations (OCIE) and the Division of Investment Management (IM).

Rule 231(a) of the Commission’s Rules of Practice provides that:

Any respondent in an enforcement . . . proceeding may move that the Division . . . produce for inspection and copying any statement of any person called or to be called as a witness by the Division . . . that pertains, or is expected to pertain, to his or her direct testimony and that would be required to be produced pursuant to the Jencks Act, 18 U.S.C. 3500. For purposes of this rule, *statement* shall have the meaning set forth in 18 U.S.C. 3500(e).

Respondents’ request for the Division’s internal notes and memoranda is outside the scope of Rule of Practice 231(a) as material covered by the Jencks Act, 18 U.S.C. § 3500. There is no indication that the materials are a written statement made by a witness and signed or otherwise

adopted or approved or a substantially verbatim recital of the witness's own words. (Stoltz Declaration Exhibit I.)

The Division provided Respondents with redacted copies of Sacco's tax return, W-2 forms, correspondence, and draft offers of settlement. (Stoltz Declaration Exhibits F and I.) The information stricken from the redacted version of the witnesses' statements consists of "[n]onpublic information related to witnesses' identities and finances, including social security numbers, brokerage account numbers, bank account numbers, addresses, and telephone numbers." (Duffy Affidavit, Exhibit B, List of Withheld Documents at 3.) I cannot find where Respondents address why they need unredacted versions of any witness statement other than of Sacco. Respondents' reasons for needing unredacted versions of Sacco materials and for copies of Sacco's sworn statement of financial condition are to show, possibly, that Sacco has financial means so he is not credible because the Commission's waiver of a financial penalty was payment for his testimony in this proceeding.

Respondents' reliance on Brady and Bagley for access to all the financial information the Division has to possibly attack Sacco's credibility is misplaced. The Brady doctrine arose in a criminal case where the United States Supreme Court held unequivocally that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith of the prosecution." Brady, 373 U.S. at 87. In Bagley, the government had represented that no deals, promises, or inducements had been made to its two witnesses in a criminal case. In fact, the government's two witnesses had entered contracts with a government agency to be paid for information, to work in an undercover capacity, to gather evidence, and to testify against the defendant. The Court found a significant likelihood that the government "misleadingly induced defense counsel to believe that [the two government witnesses] could not be impeached on the basis or interest arising from inducements offered by the Government." Bagley, 473 U.S. at 683. There is no evidence that the Division has withheld from or provided Respondents with untrue or misleading information.

The present situation also differs from Global Minerals & Metals Corp., No. 99-11, 2004 CFTC Lexis 3, which Respondents cite in their Reply in Opposition. In that situation the Commodity Futures Trading Commission found that "[i]n this proceeding, the record provides sufficient reason to believe that there may be potentially exculpatory documents . . . residing in other Commission offices." Global Minerals & Metals Corp., No. 99-11, 2004 CFTC Lexis 3, n.11. There is no indication that the Division has withheld exculpatory evidence or is aware of potentially exculpatory evidence in the material it has not turned over to Respondents. See also Warren Lammert, Securities Act Rel. No. 8833 (Aug. 9, 2007) at 11-12.

The Commission has recently affirmed that:

Brady does not 'authorize a wholesale 'fishing expedition' into investigative material. Moreover, 'the purpose of the Brady rule is not to provide a defendant with a complete disclosure of all evidence . . . which might conceivably assist him in preparing his defense.' (Citations omitted.)

Lammert, Securities Act Rel. No. 8833 at 11.

In addition, the financial information Sacco provided the Division in connection with the settlement of another proceeding is not covered by Rule of Practice 231 because it is not a statement by a person expected to be called as a witness that “pertains, or is expected to pertain, to his or her direct testimony and that would be required to be produced pursuant to the Jencks Act, 18 U.S.C. 3500.” The Division represent that if it does call Sacco as part of its direct case, it will not ask him about his financial situation in 2006, which is the contents of the information he provided in connection with the settlement. (Brief in Opposition at 10.)

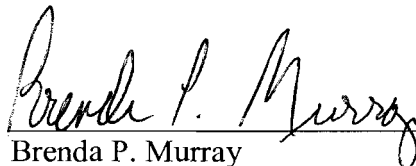
Rule of Practice 230(a)(1)(vi) includes as documents that the Commission shall make available for inspection and copying:

Any final examination or inspection reports prepared by [OCIE], the Division of Market Regulation, or [IM], if the Division . . . intends either to introduce any such report into evidence or to use any such report to refresh collect the recollection of any witness.

Rule of Practice 230(a)(1)(vi) does not cover the reports Respondents seek because the Division does not intend to introduce them into evidence or to refresh a witness’s recollection.

I reject Respondents request for “[a]ll materials obtained by any Division of the Commission regarding all of the mutual fund companies at issue in this case.” (Motion at 4.) Such a broad, open-ended request has no basis in the Commission’s Rules of Practice, in Brady, or in the Jencks Act. In addition, the volume of the material would be enormous and Respondents have already complained about the difficulty of examining the extensive materials they have received, much of which is not relevant. (Memorandum at 15.) Finally, Respondents should know the focus of the Division’s direct case from the list of witnesses and exhibits and expert witness testimony they received on August 13, 2007.

There is no need for an adjournment so the hearing will begin as scheduled on Monday, September 10, 2007, at 9:00 a.m. EDT. 17 C.F.R. §201.161.

  
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Brenda P. Murray  
Chief Administrative Law Judge