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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16649

In the Matter of Ironridge Global Partners, LLC, Ironridge Global IV, Ltd. Respondents.	DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENTS' SECOND REQUEST FOR ISSUANCE OF A SUBPOENA DUCES TECUM TO THE COMMISSION

I. INTRODUCTION

The Division of Enforcement ("the Division") respectfully submits this memorandum[1] opposing the second request of Respondents Ironridge Global Partners, LLC and Ironridge Global IV, Ltd., ("Respondents") for the issuance of a document subpoena to the Securities and Exchange Commission ("Commission") (the "subpoena requests"). Respondents, for the second time, ask the Court to issue subpoenas containing requests that are not permitted under Rule 232(a).

Respondents' subpoena requests should be denied because: (1) Respondents seek protected attorney work product; (2) they seek information that is publicly available; (3) they seek materials as to which the Commission recently rejected a nearly identical request; and (4) the requests are otherwise "unreasonable, oppressive, excessive in scope, or unduly burdensome." 17 C.F.R. § 201.232(b).

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[1] In the event the Court issues a subpoena which includes any of Respondents' requests, the Division requests the opportunity to file a motion to quash.

The Division has complied with its Rule 230(a) obligations, including the timely provision of all transcripts of investigative testimony. In addition, shortly after providing the Rule 230(a) materials, the Division provided a privilege log to Respondents which put Respondents on notice that the Division has withheld attorney notes of interview created during the investigation, among other items.

II. ARGUMENT AND CITATION TO AUTHORITY

Rule 232(b) prohibits the issuance of subpoenas in administrative proceedings that are "unreasonable, oppressive, excessive in scope, or unduly burdensome." 17 C.F.R. § 201.232(b). As set forth below, each of Respondents' proposed document requests are unreasonable and unduly burdensome for the reasons set forth below.

Request No. 1:

> Produce all portions of notes and summaries from interviews of witness conducted during the investigation of Respondents to the extent those portions relate to the facts and circumstances of this case, the portions do not reflect attorney-opinion work product, and the notes or summaries are not about examinations for which the Division has produced transcripts.

Division's Response to Request No. 1:

Request No. 1 should be denied because it seeks only protected attorney work product for which Respondents cannot demonstrate an overriding necessity or justification. Under the case law regarding work product, codified for the federal courts in Fed. R. Civ. P. 26(b)(3), disclosure of notes and memoranda subject to the work product protection will not be ordered unless the party seeking them can demonstrate sufficient necessity or justification. *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). Even a showing of necessity or justification may not justify production of work product that will inevitably reveal the attorney's mental processes as he prepares for litigation. *See Hickman*, 329 U.S. at 513; *Upjohn Co. v. United States*, 449 U.S. 383, 401 (1981).

Notes of interview by Division attorneys prepared in anticipation of litigation have repeatedly been held to be protected work product by the courts. *See, e.g., SEC v. NIR Group, LLC*, 283 F.R.D. 127, 2012 WL 3553416 (E.D.N.Y. Aug. 17, 2012) (notes and memoranda of witness interviews conducted by a Division attorney as part of attorney-conducted witness interviews held to fall within the work product protection); *SEC v. Cavanagh*, 1998 WL 132842 (S.D.N.Y. Mar. 23, 1998) (notes taken by SEC attorneys during interviews held to be classic work product); *SEC v. Sentinel Mgmt. Group, Inc.*, 2010 WL 4977220 at *7 (N.D. Ill. Dec. 2, 2010) ("Materials prepared by SEC attorneys in anticipation of litigation that disclose what they learned during witness interviews undoubtedly constitute attorney work product."); *SEC v. Jasper*, 2010 WL 375137 at *2 (N.D. Cal. Jan. 25, 2010) (interview notes are work product).

The attorney notes that the Respondents seek constitute work product prepared in anticipation of litigation. They are not substantially verbatim statements of the witnesses and therefore would not qualify as *Jencks* material. The notes represent the interviewing attorney's attempt to capture what he thought was important given the legal theories that he was considering.

Respondents' attempt to make Request No. 1 palatable by limiting it to those portions of the attorney interview notes that "do not reflect attorney-opinion work product." But because notes reflect the attorney's thoughts on what facts might be important, the work product protection is not limited to only those portions of attorney notes that contain explicit expressions of the author's opinion. As the Court stated in *Upjohn*, elaborating upon its holding in *Hickman:*

> Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes, [*Hickman*], 329 U. S., at 513 ('what he saw fit to write down regarding witnesses' remarks'); *id.,* at 516-517 ('the statement would be his [the attorney's] language, permeated with his inferences') (Jackson, J., concurring).

449 U.S. at 399-400 (footnote omitted). *See also, e.g., SEC v. Roberts*, 254 F.R.D. 371, 382 (N.D. Cal. 2008) (rejecting request that Commission disclose factual portion of interview notes because "the facts contained within the notes are likely inextricably tied with the attorneys' mental thoughts and impressions").

The Respondents cannot demonstrate an overriding need or justification for the Division's attorney notes. The Respondents have been given a full production of all of the documents to which they are entitled under Rule 230(a), including all transcripts of witnesses who testified during the investigation and all non-privileged email and other communications. Respondents' principals are well positioned to assist in their defense, which is focused on Respondents' business model in providing financing to small publicly traded companies.

Request No. 2:

Documents sufficient to identify all enforcement actions (whether or not in an administrative proceeding) brought by the Commission, other than this proceeding, in which the Commission chose to bring a claim for a violation of Section 15(a) of the Securities Exchange Act of 1934 without also bringing a claim for either securities fraud or violation of Section 5(a) of the Securities Act.

Request No. 3:

Documents sufficient to identify all enforcement actions (whether or not in an administrative proceeding) brought by the Commission, other than this proceeding, in which the Commission has alleged that an entity or person violated Section 15(a) of the Securities Exchange Act of 1934 in connection with transactions in securities exempted from registration under Section 3(a)(10) of the Securities Act of 1933.

Division's Response to Request Nos. 2 and 3:

The Court should deny Request Nos. 2 and 3 because the information sought by the Respondents is publicly available and thus readily available to them. As such, the request is unreasonable and/or unduly burdensome.

Documents relating to the Division's enforcement actions are publicly available. Respondents are therefore free to find on their own whatever such documents that they wish. *See Egan-Jones Ratings Co., et al.*, Admin. File No. 3-14856, 2012 WL 8718379 at *2 (Oct. 10, 2012) (denying subpoena request and noting"[t]he law, and the sources used to interpret the law, are public."); *Monetta Financial Services, Inc., et al.*, Admin. File No. 3-9546, 1998 WL 211406 at *2-3 (Apr. 21, 1998). In an order denying a similar subpoena request, Chief Judge Murray explained "[a]ll of this material is available from public sources." *Raymond James Financial Services, Inc. et al.*, Admin. File No. 3-11692 (Nov. 30, 2004), p. 3; *see also Egan-Jones*, 2012 WL 8718379 at *2 (rejecting as unduly burdensome a subpoena that sought documents that were public and are equally available to both parties); *Kenneth Alderman, et al.*, Admin. Ruling No. 754 (Feb 28, 2013) (same).

Because the Division does not have all responsive information readily available, it would need to review public databases, such as the Commission website, LexisNexis and/or Westlaw to ensure that any response was accurate. Respondents can just as easily perform this task. Thus, the Court should not issue a subpoena for these requests.

Request No. 4:

> All documents and communications that support, or reflect or are related to the allegations made by Lillian McEwen, a former SEC administrative law judge, as reported by the Wall Street Journal on May 6, 2015, that chief administrative law judge Brenda Murray "questioned [her] loyalty to the SEC" as a result of finding too often in favor of defendants and that SEC administrative law judges are expected to work on the assumption that "the burden was on the people who were accused to show that they didn't do what the agency said they did."

Division's Response to Request No. 4

The Division opposes this request because the Commission recently rejected a nearly identical request for additional discovery based on an equally speculative suggestion that the Wall

Street Journal article cited by Respondents somehow supports a claim of bias on the part of the Commission's current ALJs. *In re Timbervest et al.*, Advisers Act Release No. 4197, slip op. 38-39 (Sept. 17, 2015). The Commission found that the article, along with Respondents' "unsupported speculation [and] inference . . . attempting to link the former ALJ's allegations to [the pending] proceeding" neither demonstrated actual bias by the presiding ALJ nor established a need for "further factual development as to Respondents' [bias] claims." *Id.*

Moreover, to the extent Respondents are concerned that this Court may be biased, the established procedure to resolve allegations of bias is a motion for recusal under Rule of Practice 111(f), 17 C.F.R. § 201.111 (f). *See, e.g., United States v. Torkington*, 874 F.2d 1441, 1446 (11th Cir. 1989) (the presiding "judge has the initial responsibility to recuse himself from a case"); *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 326-27 (9th Cir. 1995) (the recusal procedure "reflects an underlying policy that a decision-maker asked to recuse himself or herself should be presented with the basis for the request"). Respondents may avail themselves of that procedure should they so choose.

IV. CONCLUSION

For the reasons stated herein and any other reasons deemed appropriate by the Court, the Court should deny Respondents' subpoena request.

Dated: September 28, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel for the Division of Enforcement hereby certifies that he has served the foregoing via email and overnight delivery:

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