

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,
Applicant,

-v.-

JAMES DAVID O'BRIEN,

Respondent.

19 Misc. 468 (KPF)

ORDER

KATHERINE POLK FAILLA, District Judge:

The Securities and Exchange Commission (the "Commission") brings this application for an order requiring Respondent James David O'Brien to comply with the Commission's testimony subpoena. The Commission argues that it has the statutory authority to compel O'Brien to testify under oath as a part of the Commission's investigation. O'Brien, for his part, contends that the Commission's subpoena was issued in bad faith and for an improper purpose. For the reasons set forth in the remainder of this Opinion, the Commission's application is granted.

BACKGROUND¹

A. Factual Background

¹ The facts set forth in this Opinion are drawn principally from the Memorandum of Law in Support of Securities and Exchange Commission's Application for an Order to Show Cause and for an Order Requiring Compliance with Subpoena ("Comm'n Br." (Dkt. #2)); the exhibits to the Declaration of Bennett Ellenbogen ("Ellenbogen Decl., Ex. []" (Dkt. #3)); and Respondent's Memorandum of Law in Opposition to the Securities and Exchange Commission's Application for an Order to Show Cause and an Order Requiring Compliance with Subpoena ("O'Brien Opp." (Dkt. #12)).

On May 8, 2018, the Commission issued an investigative subpoena to O'Brien for documents and testimony as part of its investigation into potential market manipulation of American River Bankshares securities. (Comm'n Br. 3). Following the issuance of the subpoena, and at least in part because of the existence of a parallel criminal investigation, the Commission entered into a proffer agreement with O'Brien and conducted a joint proffer session with federal prosecutors on August 21, 2018. (*Id.* at 3-5; O'Brien Opp. 1-2). The Commission's proffer agreement provided that its staff would not use any statements provided by O'Brien during the August 21 meeting except, *inter alia*, "[t]o obtain other evidence, which may be used against [O'Brien] and others." (Ellenbogen Decl., Ex. 3). The proffer agreement also stated that there were "no other promises or understandings applicable to the [August 21] Meeting." (*Id.*).

Following the proffer session, the Commission continued its investigation into American River Bankshares, including requesting further documentation from O'Brien. (Comm'n Br. 5; O'Brien Opp. 2). By May 2019, the Commission realized that it wished to question O'Brien once more, and issued a second subpoena to O'Brien for that purpose. (Comm'n Br. 5-6). After several anodyne communications regarding scheduling, O'Brien's counsel asked the Commission if O'Brien's testimony would be covered by the prior proffer agreement, and the Commission responded that the testimony would not be so covered. (*Id.* at 6-7). In response, O'Brien's counsel advised the Commission that his client would not appear for his scheduled testimony, arguing that the Commission had acted in bad faith by engaging in the August 21, 2018 proffer session but then refusing to allow O'Brien to testify in 2019 pursuant to the proffer agreement. (*Id.* at 7-8). On July 23, 2019, O'Brien failed to appear for his scheduled testimony with the Commission. (*Id.* at 9).

B. Procedural History

On October 18, 2019, the Commission filed an application for an order to show cause why O'Brien should not comply with the Commission's subpoena, as well as an application to enforce the subpoena. (Dkt. #1). The Commission also filed a supporting memorandum and declaration at that time. (Dkt. #2-3). On that same day, the Court issued an Order directing O'Brien to show cause why he should not be required to appear for testimony before the Commission and scheduled a hearing before the Court on the question. (Dkt. #5). On November 6, 2019, O'Brien filed briefing in opposition to the Commission's application, along with a supporting declaration (Dkt. #12-13), and on November 18, 2019, the Commission filed a reply (Dkt. #14).

The parties appeared before the Court on November 22, 2019, for a hearing on whether the subpoena should be enforced. (Minute Entry of November 22, 2019). After vigorous oral argument from both sides, the Court requested additional briefing from the Commission. (*Id.*). The Commission provided such supplemental briefing on December 6, 2019 (Dkt. #17), and O'Brien filed a response on December 9, 2019 (Dkt. #18).

DISCUSSION

A. The Court Will Enforce the Commission's Subpoena

1. The Relevant Standard

In order for the Commission to have this Court enforce its subpoena, it "must show [i] that the investigation will be conducted pursuant to a legitimate purpose, [ii] that the inquiry may be relevant to the purpose, [iii] that the information sought is not already within the Commission's

possession, and [iv] that the administrative steps required have been followed.” *SEC v. Finazzo*, 535 F. Supp. 2d 224, 226 (S.D.N.Y. 2008) (internal ellipses omitted) (quoting *RNR Enters., Inc. v. SEC*, 122 F.3d 93, 96 (2d Cir. 1997)). O’Brien does not contest any of the latter three prongs of the test; his only argument is that the investigation is being conducted in bad faith. In particular, O’Brien argues that the Commission is acting in bad faith — and indeed, seeks to violate its own proffer agreement — by seeking to compel O’Brien to testify about subject matter that he already discussed within the protective sphere of the August 21 proffer session and its corresponding agreement. (See O’Brien Opp. 7-10).

Therefore, the only question for the Court to answer is whether the Commission acts in bad faith by seeking to compel testimony about subject matter already discussed under the auspices of a proffer agreement.

2. The August 21 Proffer Agreement Only Grants O’Brien “Use” Immunity

A relevant initial question is whether the August 21 proffer agreement provided for “use” immunity or “derivative use” immunity, since that will determine the extent to which the Commission may rely on O’Brien’s statements from his 2018 proffer session. Use immunity precludes the Government from being able to use an interviewee’s statements directly against himself in a prosecution, but permits the Government to “use information derived from the statements.” See *United States v. Plummer*, 941 F.2d 799, 803 (9th Cir. 1991). Derivative use immunity, on the other hand, requires the Government “to have derived all the information on which the subsequent prosecution was based from a source wholly independent of the statements made in the interview.” See *id.* In interpreting proffer agreements

such as the one entered into between the Commission and O'Brien, the Court relies on principles of contract law. See *United States v. Liranzo*, 944 F.2d 73, 77 (2d Cir. 1991). "Where the language of a contract is unambiguous, the parties' intent is discerned from the four corners of the contract." *Id.* (citing *Nicholas Labs. Ltd. v. Almay, Inc.*, 900 F.2d 19, 21 (2d Cir. 1990) (per curiam)); see generally *United States v. Barrow*, 400 F.3d 109, 117 (2d Cir. 2005).

Here, the August 21 proffer agreement clearly provided only for use immunity. There is no ambiguity in the language — the agreement states that "any statements made by [O'Brien] during the Meeting" may be used "[t]o obtain other evidence, which may be used against [O'Brien] or others." (Ellenbogen Decl., Ex. 3). Given the clarity of the agreement's language, it is plain that the parties intended for the proffer agreement to provide use immunity, and nothing more. Indeed, O'Brien concedes as much in his briefing. (See O'Brien Opp. 15 (noting that the Commission could use the proffer session "as a source of leads to discover additional evidence")). Thus, while the plain language of the proffer agreement precludes the Commission from directly weaponizing O'Brien's prior statements against him, it does not prevent the Commission from either using those prior statements to develop new evidence or retreading the ground it explored in the August 21 proffer session.

3. There Is No Bad Faith in Repeating Questions from the Proffer Session

O'Brien's bad faith argument, at its core, is that the Commission is trying to have its cake and eat it too. According to O'Brien, the Commission has accepted the benefits of its proffer agreement — open testimony from O'Brien and the production of numerous documents — but

does not wish to accept the burden — “that the person offering the proffer has a legitimate expectation that they will not be prosecuted based on the information provided in the proffer session.” (See O’Brien Opp. 8-9). Put another way, O’Brien’s theory is that the Commission has used the proffer session as a fishing expedition, in which the Commission lures the unsuspecting interviewee into divulging incriminating information under a false promise of immunity, only to then compel him to repeat the incriminating information at a later date without the protection of any such immunity.

If this were an accurate representation of the Commission’s conduct, the Court might be inclined to agree with O’Brien that this is bad faith behavior. However, the Commission is not guilty of such malicious action. This is made clear by *Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983). Although the Supreme Court’s holding in *Pillsbury* focuses on whether a deponent’s civil deposition testimony, closely tracking or repeating verbatim prior immunized testimony, also qualifies as immunized testimony, *see* 459 U.S. at 263-64, the case is relevant because it makes clear that while the Commission can compel O’Brien to testify, it cannot compel him to answer any specific questions. Because the proffer agreement does not, by its language, apply to questions about previously discussed subject matter, O’Brien is free to assert his Fifth Amendment right against self-incrimination during his testimony before the Commission. *See id.* at 256-57 (finding that the deponent could not be compelled to answer deposition questions closely tracking prior immunized testimony where the deponent has asserted his Fifth Amendment right and there is no “duly authorized assurance of immunity at the time”). And O’Brien is just as protected by his ability to assert his Fifth Amendment right as he would be if he were still covered by the Commission’s offer of immunity. *Cf. Kastigar v. United States*, 406 U.S. 441, 462 (1972) (holding that “the immunity provided by 18 U.S.C. § 6002” — an

immunity comparable to that offered by the Commission — “leaves the witness ... in substantially the same position as if the witness had claimed the Fifth Amendment privilege”).

Indeed, were the Court to find otherwise, it would in fact be O’Brien who would unfairly receive all the benefits and none of the burdens of the proffer agreement. O’Brien’s interpretation of the law would mean that a prospective defendant, once questioned under a proffer agreement about a particular set of facts, could never be prosecuted or sued on those facts. *See Pillsbury*, 459 U.S. at 260 (noting that if a prior immunity order was interpreted to extend to subsequent testimony closely tracking immunized testimony, it would “in effect invest the deponent with transactional immunity on matters about which he testified at the immunized proceedings”). Such an interpretation would significantly devalue the utility of proffer agreements, as well as stretch the agreement far beyond what the parties originally intended when they contracted. The Court finds that the proffer agreement does not preclude, and thus that there is no bad faith in, the Commission asking O’Brien the same questions as he was previously asked on August 21, 2018, or asking O’Brien about the same subject matter. *Cf. Northern v. Stewart*, 32 F. App’x 800, 801- 02 (9th Cir. 2002) (unpublished decision) (finding, in a case where Northern sought to question his co-defendant about subject matter that the co- defendant had previously testified about with the benefit of use immunity, that Northern “was free to ask the same questions and cover the same material”).

Finally, insofar as O’Brien seeks relief on the grounds that the Commission engages in a widespread practice of issuing bad faith subpoenas subsequent to proffer sessions, O’Brien’s argument fails for the reasons already provided above. Assuming the Commission’s behavior in this case is representative of its behavior in general regarding proffer arguments, the Court cannot find

any fault in the Commission's practices. O'Brien has failed to show any way in which the Commission has acted in bad faith, and thus he must comply with the Commission's subpoena.

CONCLUSION

For the reasons set forth in this Opinion, the Commission's motion to compel O'Brien's testimony is GRANTED. O'Brien is ORDERED to appear for testimony at the Commission's offices in the New York Regional Office in response to the subpoena at a mutually convenient time on or before **January 31, 2020**. In the event that O'Brien does not appear for his testimony by the date specified above, the Commission will have established a *prima facie* case of civil contempt against O'Brien and O'Brien may be held in civil contempt for failure to comply with this Court's Order without further notice or hearing.

The Clerk of Court is directed to close this matter.

SO ORDERED.

Dated: December 27, 2019
New York, New York

KATHERINE POLK FAILLA
United States District Judge

*United States Securities and Exchange Commission v.
O'Brien*

**UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A

PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 11th day of January, two thousand twenty-one.

PRESENT: GUIDO CALABRESI, REENA RAGGI, DENNY CHIN,

Circuit Judges.

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UNITED STATES SECURITIES
AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

-v-

JAMES DAVID O'BRIEN,
Defendant-Appellant.

----- x
FOR PLAINTIFF-APPELLEE: ERIC A. REICHER, Special
Trial Counsel (Melinda Hardy, Assistant General Counsel,
on the brief), Securities and Exchange Commission,
Washington, D.C.

FOR DEFENDANT-APPELLANT: JOHN M.
HANAMIRIAN, Hanamirian Law Firm, P.C., Moorestown,
New Jersey.

Appeal from the United States District Court for the
Southern District of New York (Katherine Polk Failla, *J.*).

**UPON CONSIDERATION WHEREOF, IT IS HEREBY
ORDERED, ADJUDGED, AND DECREED that the
order of the district court is AFFIRMED.**

Defendant-appellant James David O'Brien appeals the
district court's order entered December 27, 2019, granting
the motion of plaintiff-appellee the Securities and Exchange
Commission (the "Commission") to enforce a 2019 subpoena.
O'Brien argues that he need not comply with the subpoena
because it was issued in breach of a proffer agreement
entered into between him and the Commission in August
2018. We assume the parties' familiarity with the
underlying facts, procedural history of the case, and issues
on appeal.

On May 8, 2018, the Commission issued a subpoena
to O'Brien requiring him to provide documents and
testimony regarding a market-manipulation investigation.

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On July 12, 2018, the Commission sent O'Brien a proffer agreement, which O'Brien signed on August 21, 2018 (the "Proffer Agreement"). The Proffer Agreement provided the following "terms of the August 21, 2018 meeting between [O'Brien] and the . . . Commission":

(2) This Agreement only covers statements provided by you during the Meeting. It does not cover statements provided, including statements made, at any other time, regardless of format (e.g., oral, written, or recorded).

A. The Commission's staff will not use any statements provided by you during the Meeting, except for the following purposes:

1. To obtain other evidence, which may be used against you and others;

. . . .

(6) You agree that there are no other promises or understandings applicable to the Meeting, and that none will be entered into unless in writing and signed by the parties to this Agreement.

J. App'x at 78-79.

On May 15, 2019, the Commission issued a second subpoena to O'Brien (the "2019 subpoena"). O'Brien did not appear to testify pursuant to the 2019 subpoena.

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On October 18, 2019, the Commission filed an application for an order to show cause and for an order compelling O'Brien to comply with the 2019 subpoena.

The district court issued an order to show cause that same day. After receiving two rounds of briefing and holding a hearing, the district court ordered O'Brien to comply with the subpoena. The district court concluded that the Proffer Agreement did not preclude the Commission from taking O'Brien's testimony pursuant to the 2019 subpoena, and it found that the Commission had not acted in bad faith. This appeal followed.

We review a district court's decision to enforce or quash a subpoena for abuse of discretion. *McLane Co. v. E.E.O.C.*, 137 S. Ct. 1159, 1167 (2017), *as revised* (Apr. 3, 2017); *E.E.O.C. v. United Parcel Serv., Inc.*, 587 F.3d 136, 140 (2d Cir. 2009) (Newman, J., concurring); *Ratliff v. Davis Polk & Wardwell*, 354 F.3d 165, 168 (2d Cir. 2003). "[O]ur review of the district court's determination that the government did not breach the Proffer Agreement is *de novo*." *United States v. Liranzo*, 944 F.2d 73, 77 (2d Cir. 1991).

We agree with the district court that the testimony the Commission sought in the 2019 subpoena was not precluded by the Proffer Agreement. "[P]roffer agreements[] are interpreted according to principles of contract law," and "[w]here the language of a contract is unambiguous," our review is based on "the four corners of the contract." *Id.* The Proffer Agreement provided, among other things, that (1) it "only cover[ed] statements provided by [O'Brien] during the Meeting" and "[did] not cover statements provided, including statements made, at any other time, regardless of format (e.g., oral, written, or recorded)," and (2) statements made during the proffer session could be used "[t]o obtain other evidence, which may be used against [O'Brien]." J. App'x at 78. Accordingly, the Proffer Agreement was unambiguous --

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it immunized O'Brien only for statements made at the proffer session, and there was nothing in it that prevented the Commission from subpoenaing O'Brien again to testify.

O'Brien argues that we should disregard the plain language of the Proffer Agreement because he understood it to cover all future testimony regarding the same set of facts, and that otherwise he never would have signed it. We reject this argument.

First, the Proffer Agreement has an integration clause, which provided that "there [we]re no other promises or understandings applicable to the Meeting, and that none will be entered into unless in writing and signed by the parties to this Agreement." J. App'x at 79. Second, O'Brien's allegation that the Commission breached his implicit understanding of the Proffer Agreement is insufficient to demonstrate that the Government breached the unambiguous contract. *See United States v. Altro (In re Altro)*, 180 F.3d 372, 376 (2d Cir. 1999) (in plea agreement context, "a defendant may not rely on a purported implicit understanding in order to demonstrate that the Government is in breach").

O'Brien also argues that the Commission acted in bad faith and thus breached the Proffer Agreement. Specifically, he states that he

does not dispute the authority of the Commission to issue a subpoena, but rather, asserts that the issuance of the May 2019 Subpoena in the context of the existence of the May 2018 Subpoena and the Proffer Agreement, stemming from the issuance of the May 2018

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Subpoena, was an act of bad faith breach of the Proffer Agreement.

Appellant's Reply Br. at 10-11. In other words, O'Brien is not disputing that the Commission had the authority to issue the 2019 subpoena, but instead he is asserting that the Commission's issuance of the 2019 subpoena breached the Proffer Agreement. But because the Proffer Agreement did not apply to the 2019 subpoena, this argument does not help O'Brien. Even assuming that by issuing the 2019 subpoena the Commission breached the Proffer Agreement, O'Brien has not argued that there is any basis to find that the proper remedy for that breach would be the quashing of the subsequent, undisputedly lawful 2019 subpoena. Accordingly, we are not persuaded that even if the Commission breached the Proffer Agreement by acting in bad faith, it would shield O'Brien from testifying pursuant to the 2019 subpoena.

We have considered O'Brien's remaining arguments and conclude they are without merit. Accordingly, we **AFFIRM** the order of the district court.

FOR THE COURT:

Catherine O'Hagan
Wolfe, Clerk

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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION NEW
YORK REGIONAL OFFICE 200 VESEY STREET,
SUITE 400
NEW YORK, NY 10281-1022

DIVISION OF ENFORCEMENT

Bennett Ellenbogen Senior Counsel
(212) 336-0062
ellenbogenB@sec.gov

DIVISION OF ENFORCEMENT

May 8, 2018

BY UPS & ELECTRONIC MAIL

Mr. James O'Brien
c/o John Hanamirian, Esq.
Hanamirian Law Firm
40 Main Street Moorestown, NJ 08057
Re: American River Bankshares (NY-09615)

Dear Mr. O'Brien :

The staff of the Securities and Exchange Commission is conducting an investigation in the matter identified above. The enclosed subpoena has been issued to Mr. James O'Brien as part of this investigation. The subpoena requires you to give us documents and provide sworn testimony. The staff further requests that you voluntarily complete the attached background questionnaire in advance of your testimony.

Please read the subpoena and this letter carefully. This letter answers some questions you may have about the

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subpoena. You should also read the enclosed SEC Form 1662. You must comply with the subpoena. You may be subject to a fine and/or imprisonment if you do not.

Producing Documents

What materials do I have to produce?

The subpoena requires you to give us the documents described in the attachment to the subpoena. You must provide these documents by May 22, 2018. The attachment to the subpoena defines some terms (such as "document") before listing what you must provide.

Please note that if copies of a document differ in any way, they are considered separate documents and you must send each one. For example, if you have two copies of the same letter, but only one of them has handwritten notes on it, you must send both the clean copy and the one with notes.

If you prefer, you may send us photocopies of the originals. The Commission cannot reimburse you for the copying costs. The copies must be identical to the originals, including even faint marks or print. If you choose to send copies, you must keep the originals in a safe place. The staff will accept the copies for now, but may require you to produce the originals later.

Subpoena issued to Mr. James O'Brien May 8, 2018

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If you do send us photocopies, please put an identifying notation on each page of each document to indicate that it was produced by you, and number the pages of all the documents submitted. (For example, if Jane Doe sends documents to the staff, she may number the pages JD- 1, JD-2, JD-3, etc., in a blank corner of the documents.) Please make sure the notation and number do not conceal any

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writing or marking on the document. If you send us originals, please do not add any identifying notations.

Copies of documents and information provided in electronic formats must comply with the technical requirements set out in the attached copy of the SEC's Data Delivery Standards. You should contact me prior to production in an electronic format other than those identified in the Data Delivery Standards.

Do I need to send anything else?

You should enclose a list briefly describing each item you send. The list should state which paragraph(s) in the subpoena attachment each item responds to. A copy of the subpoena should be included with the documents that are produced.

Passwords for documents, files, compressed archives, and encrypted media should be provided separately either via email addressed to ENF-CPU@sec.gov, or in a separate cover letter mailed separately from the data.

Please include a cover letter stating whether you believe you have met your obligations under the subpoena by searching carefully and thoroughly for everything called for by the subpoena, and sending it all to us.

What if I do not send everything described in the attachment to the subpoena?

The subpoena requires you to send all the materials described in it. If for any reason -- including a claim of attorney-client privilege -- you do not produce something called for by the subpoena, you should submit a list of what you are not producing. The list should describe each item separately, noting:

its author(s); its date; its subject matter; the name of the person who has the item now, or the last person known to have it; the names of everyone who ever had the item or a

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copy of it, and the names of everyone who was told the item's contents; and the reason you did not produce the item. If you withhold anything on the basis of a claim of attorney-client privilege or attorney work product protection, you should also identify the attorney and client involved.

Subpoena issued to Mr. James O'Brien May 8, 2018

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Where should I send the materials?

Please send the materials to:

ENF-CPU

United States Securities and Exchange Commission
100 F St., N.E., Mailstop 5973 Washington, DC 20549-5973
For smaller electronic productions that are less than 10 MB in size, the materials may be emailed to the following email address: ENF-CPU@sec.gov.

Testifying

Where and when do I testify?

The subpoena requires you to come to the Commission's offices at 200 Vesey Street, Suite 400, New York, NY 10281, on May 24, 2018 at 10:00 a.m., to testify under oath in the matter identified on the subpoena. Your testimony will be recorded by stenographic means.

Other Important Information

May I have a lawyer help me respond to the subpoena?

Yes. You have the right to consult with and be represented by your own lawyer in this matter. Your lawyer may also advise and accompany you when you testify. We cannot give you legal advice.

What will the Commission do with the materials I send and/or the testimony I provide?

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The enclosed SEC Form 1662 includes a List of Routine Uses of information provided to the Commission. This form has other important information for you. Please read it carefully.

Has the Commission determined that anyone has done anything wrong?

This investigation is a non-public, fact-finding inquiry. We are trying to determine whether there have been any violations of the federal securities laws. The investigation and the subpoena do not mean that we have concluded that you or anyone else has broken the law. Also, the investigation does not mean that we have a negative opinion of any person, entity or security.

Important Policy Concerning Settlements

Please note that, in any matter in which enforcement action is ultimately deemed to be warranted, the Division of Enforcement will not recommend any settlement to the Commission unless the party wishing to settle certifies, under penalty of perjury, that all documents responsive to Commission subpoenas and formal and informal document requests in this matter have been produced.

Subpoena issued to Mr. James O'Brien May 8, 2018

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I have read this letter, the subpoena, and the SEC Form 1662, but I still have questions. What should I do?

If you have any other questions, you may call me at (212) 336-1014. If you are represented by a lawyer; you should have your lawyer contact me.

Sincerely,

Counsel

Enclosures: Subpoena

Attachment to Subpoena SEC Form 1662

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SEC Data Delivery Standards Background
Questionnaire

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UNITED STATES OF AMERICA
SECURITIES AND EXCHANGE COMMISSION

In the Matter of American River Bankshares (NY-
09615)

To: Mr. James O'Brien
c/o John Hanamirian, Esq. Hanamirian Law Firm
40 Main Street Moorestown, NJ 08057

YOU MUST PRODUCE everything specified in the Attachment to this subpoena to officers of the Securities and Exchange Commission, at the place, date, and time specified below.

ENF-CPU, United States Securities and Exchange Commission, F St., N.E., Mailstop 5973, Washington, DC 20549-5973, or ENF-CPU@sec.gov, May 22, 2018, at 9:00 a.m.

YOU MUST TESTIFY before officers of the Securities and Exchange Commission, at the place, date, and time specified below.

200 Vesey Street, Suite 400, New York, NY 10281, May 24, 2018, at 10:00 a.m.

FEDERAL LAW REQUIRES YOU TO COMPLY WITH THIS SUBPOENA.

Failure to comply may subject you to a fine and/or imprisonment.

Date: May 8, 2018

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I am an officer of the Securities and Exchange Commission authorized to issue subpoenas in this matter. The Securities and Exchange Commission has issued a formal order authorizing this investigation under Section 20(a) of the Securities Act of 1933 and Section 21(a) of the Securities Exchange Act.

NOTICE TO WITNESS: If you claim a witness fee or mileage, submit this subpoena with the claim voucher.

ATTACHMENT TO SUBPOENA ISSUED TO
Mr. James O'Brien
IN THE MATTER OF (NY-09615)

May 8, 2018

A. DEFINITIONS

I. "You" or "O'Brien" means James O'Brien, as well as any entity over which O'Brien exercises control and/or in which he has an ownership interest.

"Document" includes any written, printed, or typed matter including, but not limited to agreements and amendments thereto, letters and correspondence, electronic mail, instant messages, text messages, interoffice communications, slips, tickets, records, worksheets, financial records, accounting documents, bookkeeping documents, memoranda, reports, manuals, telephone logs, telegrams, facsimiles, messages of any type, telephone messages, voice mails, tape recordings, notices, instructions, minutes, summaries, notes of meetings, purchase orders, information recorded by photographic process, including microfilm and

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microfiche, computer printouts, computer files, spreadsheets, websites, information posted on social networking sites, or other electronically stored information stored in any medium from which information can be retrieved, obtained, manipulated, or translated (including computer hard drives, servers, compact discs or other removable media, archives, and backup tapes).

"Communication" means and includes, without limitation, any and all written, oral, telephonic, electronic, or other utterances of any nature whatsoever, shared, shown, transferred between or among any two or more persons or entities, including, but not limited to, correspondence, memoranda, notes, e-mail, instant messages, chat, discussion forums, telephone conversations, and other conversations, conferences or meetings, statements, inquiries, discussions, dialogues, consultations, negotiations, agreements, understandings, meetings, letters, notations, telegrams, advertisements, or interviews.

"Agreement" means any actual or contemplated (a) written or oral covenant; (b) term or provision of such covenant; or (c) amendment of any nature or termination of such covenant. A request for any agreement among or between specified parties includes a request for all documents concerning (a) any actual or contemplated agreement among or between such parties, whether or not such agreement included any other person; (b) the drafting or negotiation of any such covenant; (c) any actual or contemplated demand, request or application for any such agreement, and any

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response thereto; and (d) any actual or contemplated objection or refusal to enter into any such agreement, and any response thereto.

"Payment" means an offer, transfer of anything of value, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any person, body, party, or entity.

"Brokerage Firms" means any of the following companies and any of their parents, subsidiaries, affiliates, predecessors, successors, officers, directors, employees, agents, partners, and independent contractors, as well as aliases, code names, trade names, or business names used by, or formerly used by, any of the foregoing:

Charles Schwab & Co., Inc.

E*Trade Securities LLC

Fidelity Brokerage Services, LLC

Lightspeed Trading, LLC

Bank of America Merrill Lynch (including Merrill Edge)

Scottrade, Inc.

TD Ameritrade, Inc

TradeKing Group, Inc. (including TradeKing Securities)

t. TradeStation Securities, Inc.

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Reference to a person shall also include that person's trusts, affiliates, employees, agents, partners, and independent contractors, as well as aliases, code names, trade names, or business names used by, or formerly used by, any of the foregoing.

Reference to an entity shall also include that entity's parents, subsidiaries, affiliates, predecessors, successors, officers, directors, employees, agents, partners, and independent contractors, as well as aliases, code names, trade names, or business names used by, or formerly used by, any of the foregoing.

Documents or communications "relating to," "relate to," "regarding," or "concerning" a given subject matter means any document or communication that constitutes, contains, embodies, comprises, reflects, identifies, states, alludes to, refers to, deals with, comments on, responds to, describes, analyzes, or is in any way pertinent to that subject, including, but not limited to, documents concerning the presentation of other documents.

To "identify" a person or entity means to provide that person's or entity's full legal name, nicknames, residential address(es), business address(es), nationality, telephone number(s), e-mail address(es), and state of incorporation, if applicable.

To the extent necessary to bring within the scope of this request any information or documents that might otherwise be construed to be outside its scope:

the word "or" means "and/or";

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the word "and" means "and/or";

the functional words "each," "every" "any" and "all" shall each be deemed to include each of the other functional words;

any gender pronouns used should be read expansively to include both male and female pronouns;

the singular includes the plural and the plural includes the singular;

the words "including" and "includes" mean "including, without limitation"; and

the past tense includes the present tense and vice versa.

"Relevant Period" means from January 1, 2014 to the present.

INSTRUCTIONS

You must produce all documents and communications sought in this subpoena that are in your possession or control, be it actual or constructive, including but not limited to your documents and communications that are in the possession of any third-party vendor.

Unless otherwise specified, this subpoena calls for production of the original documents and all copies and drafts of same. You may provide original documents or copies of original documents, at your expense, with the understanding that the staff has the right to compel

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production of the original documents at a later date. The Commission cannot reimburse you for the copying costs. If you are sending copies, the staff requests that you scan (rather than photocopy) hard copy documents. All electronic documents responsive to the document request, including all metadata, must also be secured and retained in their native software format and stored in a safe place. The staff may later request or require that you produce the native format. All electronic productions must comply with the Commission's Data Delivery Standards (attached).

Whether you scan or photocopy documents, the copies must be identical to the originals, including even faint marks or print. Also, please note that if copies of a document differ in any way, they are considered separate documents and you must send each one. For example, if you have two copies of the same letter, but only one of them has handwritten notes on it, you must send both the clean copy and the one with notes.

All documents must be produced in the manner in which they were maintained. For example, if documents are maintained loose in a file folder, the documents are to be produced in that same manner and not reorganized and/or put into a binder. On the other hand, if documents are maintained in a binder, the documents are to be produced in the same manner. Produce the entirety of each and every document described below, without alteration, deletion or obliteration of any information contained therein, even though such information is not specifically requested.

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If any of the documents called for are not produced, for whatever reason, submit a list of the documents not produced and state for each document:

the identity and position of the creator(s); the creation date; its present or last known custodian; a brief description, including the subject matter;

the identity and position of all persons or entities known to have been furnished the document or a copy of the document, or informed of its substance;

the reason the document is not being produced;

the specific request in Paragraph C to which the document relates;

in the case of a claim of attorney-client privilege, the attorney(s) and the client(s) involved; and

in the case of a claim of the work product doctrine, the litigation for which the document was prepared in anticipation and the first date that the subject litigation was anticipated.

Additionally, if the document is no longer in existence, please state the actual or approximate date it ceased to exist, the circumstances under which it ceased to exist, and the identity of all persons having knowledge of the circumstances under which it ceased to exist or having knowledge of the contents thereof.

All documents produced must be legible.

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Documents should be labeled with sequential numbering (*i.e.*, bates-stamped).

For business records, provide a certification from the custodian of records or other qualified person that the documents produced are records of regularly conducted business activities (see attached exemplars).

REQUIRED DOCUMENTS

Documents sufficient to identify any and all brokerage accounts (foreign and domestic) in the name of, for the benefit of, owned (in whole or in part) by or controlled by you during the Relevant Period. In the alternative, you may provide a list containing the information requested in this paragraph.

Documents sufficient to identify any and all bank accounts (foreign and domestic) in the name of, for the benefit of, owned (in whole or in part) by or controlled by you during the Relevant Period. In the alternative, you may provide a list containing the information requested in this paragraph.

All documents reflecting any communications-including, without limitation, emails, instant messages, and text messages, whether stored on a computer, mobile device, server or elsewhere-between you and any other person relating to the Brokerage Firms during the Relevant Period.

Documents sufficient to identify all email addresses you used during the Relevant Period. In the alternative, you

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may provide a list containing the information requested in this paragraph.

All account statement documents relating to any of your accounts at the Brokerage Firms.

All records reflecting your telephone calls or text messages, including, without limitation, telephone bills, records and invoices during the Relevant Period.

Documents sufficient to show any software, programs, algorithms or hot keys used in connection with trading with the Brokerage Firms during the Relevant Period.

U.S. Securities and Exchange Commission
Data Delivery Standards
Rev 10/2014

Appendix D-1

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
NEW YORK REGIONAL OFFICE
BROOKFIELD PROPERTIES, 200 VESEY ST., ROOM 400
NEW YORK, NEW YORK 10281

July 12, 2018

James O'Brien
c/o John Hanamirian, Esq.
Hanamirian Law Firm
40 Main Street
Moorestown, NJ 08057

Re: Proffer Agreement
American River Bankshares (TISO), File No. NY-9615

Dear Mr. O'Brien:

This Agreement contains the terms of the August 21, 2018 meeting between you and the staff of the Division of Enforcement of the United States Securities and Exchange Commission in the above-referenced matter ("Meeting"). These terms are as follows:

- A. This Meeting is voluntary, and you agree to provide complete and truthful statements during the Meeting.
- B. This Agreement only covers statements provided by you during the Meeting. It does not cover statements provided, including statements made, at any other time, regardless of format (e.g., oral, written, or recorded).
- C. The Commission's staff will not use any statements provided by you during the Meeting, except for the following purposes:

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1. To obtain other evidence, which may be used against you and others;
 2. In any action or proceeding brought or instituted by the Commission against you, to rebut your testimony, evidence offered, or arguments or assertions made by you or on your behalf (including in response to questions raised by a judge or jury);
 3. If you are a witness in any other action or proceeding brought or instituted by the Commission, to rebut your testimony; and
 4. In any referral to a criminal law enforcement agency or entity as evidence of false statements, perjury, or obstruction of justice, or as the basis for a criminal sentence adjustment for obstructing or impeding the administration of justice.
- D. You agree that any statements provided by you during the Meeting, or evidence obtained as a result, does not constitute a compromise offer, compromise negotiations, plea

James O'Brien

July 12, 2018

Page 2 of 2

discussions, or any related statements for purposes of Federal Rules of Evidence 408 or 410, and you agree not to assert that such rules apply to any statements provided by you during the Meeting, or evidence obtained as a result.

- * You and your counsel agree that you have fully discussed and understand all terms of this Agreement and their consequences.

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- * You agree that there are no other promises or understandings applicable to the Meeting, and that none will be entered into unless in writing and signed by the parties to this Agreement.
- * This Agreement does not bind anyone other than the Commission's staff. Except as provided in paragraph (3) or unless compelled by law, the Commission's staff will not disclose statements provided by you during the Meeting to any other regulator or law enforcement agency or entity not present at the Meeting without an agreement to abide by terms comparable to the terms of this Agreement as applicable to such other regulator or law enforcement agency or entity. Nothing in this Agreement limits the Commission staff's right to share within the Commission any statements provided by you during the Meeting.
- * This Agreement is not limited or affected by any agreement between you and any other regulator or law enforcement agency or entity, and vice versa.

Sincerely,

Assistant Director

James O'Brien

John Hanamirian
Counsel to James O'Brien

Appendix E-1

UNITED STATES SECURITIES AND EXCHANGE
COMMISSION NEW YORK REGIONAL OFFICE 200
VESEY STREET, SUITE 400 NEW YORK, NY 10281-1022
DIVISION OF ENFORCEMENT Bennett Ellenbogen Senior
Counsel (212) 336-0062 ellenbogenB@sec.gov

May 15, 2019

BY UPS & ELECTRONIC MAIL

Mr. James O'Brien
c/o John Hanamirian, Esq.
Hanamirian Law Firm
40 Main Street
Moorestown, NJ 08057

Re: American River Bankshares(NY-09615)

Dear Mr. O'Brien: The staff of the Securities and Exchange Commission is conducting an investigation in the matter identified above. The enclosed subpoena has been issued to Mr. James O'Brien as part of this investigation. The subpoena requires you to provide sworn testimony. The staff further requests that you voluntarily complete the attached background questionnaire in advance of your testimony.

Please read the subpoena and this letter carefully. This letter answers some questions you may have about the subpoena. You should also read the enclosed SEC Form 1662. You must comply with the subpoena. You may be subject to a fine and/or imprisonment if you do not.

Testifying Where and when do I testify? The subpoena requires you to come to the Commission's offices at 200 Vesey Street, Suite 400, New York, NY 10281, on June 19, 2019 at 10:00 a.m., to testify under oath in the matter identified on

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the subpoena. Your testimony will be recorded by stenographic means.

Other Important Information May I have a lawyer help me respond to the subpoena? Yes. You have the right to consult with and be represented by your own lawyer in this matter. Your lawyer may also advise and accompany you when you testify. We cannot give you legal advice.

Subpoena issued to Mr. James O'Brien May 15, 2019 Page 2
What will the Commission do with the materials I send and/or the testimony I provide? The enclosed SEC Form 1662 includes a List of Routine Uses of information provided to the Commission. This form has other important information for you. Please read it carefully.

Has the Commission determined that anyone has done anything wrong? This investigation is a non-public, fact-finding inquiry. We are trying to determine whether there have been any violations of the federal securities laws. The investigation and the subpoena do not mean that we have concluded that you or anyone else has broken the law. Also, the investigation does not mean that we have a negative opinion of any person, entity or security.

Important Policy Concerning Settlements Please note that, in any matter in which enforcement action is ultimately deemed to be warranted, the Division of Enforcement will not recommend any settlement to the Commission unless the party wishing to settle certifies, under penalty of perjury, that all documents responsive to Commission subpoenas and formal and informal document requests in this matter have been produced.

I have read this letter, the subpoena, and the SEC Form 1662, but I still have questions. What should I do? If you have any other questions, you may call me at (212) 336-0062. If you are

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represented by a lawyer, you should have your lawyer contact me.

Sincerely,

/S Bennett Ellenbogen

Counsel

Enclosures: Subpoena SEC Form 1662 Background
Questionnaire

**UNITED STATES OF
AMERICA
SECURITIES AND
EXCHANGE
COMMISSION**

**In the Matter of
American River
Bankshares (NY-09615)**

To: Mr. James O'Brien
c/o John Hanamirian, Esq. Hanamirian Law
Firm
40 Main Street
Moorestown, NJ 08057

A. **YOU MUST TESTIFY** before officers of the Securities and Exchange Commission, at the place, date, and time specified below.

**200 Vesey Street, Suite 400, New York, NY 10281,
June 19, at 10:00 a.m.**

**FEDERAL LAW REQUIRES YOU TO COMPLY
WITH THIS SUBPOENA.**

Failure to comply may
subject you to a fine and/or
imprisonment.

By: /S
Date: May 15, 2019
Bennett Ellenbogen
Senior Counsel

I am an officer of the Securities and Exchange Commission authorized to issue subpoenas in this matter. The Securities and Exchange Commission has issued a formal

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order authorizing this investigation under Section 20(a) of the Securities Act of 1933 and Section 21(a) of the Securities Exchange Act.

NOTICE TO WITNESS: If you claim a witness fee or mileage, submit this subpoena with the claim voucher.

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BACKGROUND QUESTIONNAIRE

Please respond to the following questions in the space provided. If you need additional space for any response, you may attach additional pieces of paper.

Today's date:

1. What is your full name?
2. Have you ever been known by any other name? Yes No
If yes, list each such name and the period(s) in which you were known by that name.
3. Date and Place of Birth?
4. Country of Citizenship?
5. Marital Status? Married Divorced Single
If you have ever been married, state for each marriage: (i) the date(s) of the marriage;
(ii) the name of your spouse; (iii) your spouse's birth name, if different; (iv) your spouse's age; and (v) your spouse's occupation.
6. List the names, ages and occupations of your children, if any.
7. List all residences you occupied at any time during the last [three] years, including vacation homes, beginning with your current residence. For each residence, state the address, dates of residence, and all telephone numbers (including facsimile numbers) listed at that address.

Background Questionnaire Page 2

8. List all telephone numbers and telecommunication services that were in your name or that you regularly used at any time during the last [three] years. Include all residential, business, cellular, credit card, and VOIP telephone numbers, including those listed in your response to question 7, and services such as GoogleVoice, Skype, video conference services. For each telephone number, state the name(s) of the corresponding carrier(s) (e.g., AT&T, Verizon, Vonage, Skype, etc.).
9. List the universal resource locator (URL) for all websites or blogs that you established or for which you had the authority to

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control content, at any time during the last [three] years. For each website, state the name(s) of the domain name registrar (e.g. GoDaddy) through which the URL was obtained, the name(s) of all individuals or entities who provided web site hosting or design services, whether the website contained primarily business or personal information, and the time period in which it was active.

10. List all electronic mail addresses and social networking accounts (e.g. Facebook, LinkedIn, Twitter, Instagram, Flickr, and Google+) that were in your name or that you regularly used at any time during the last [three] years. Include all personal, business and shared electronic mail addresses and social networking accounts. For each electronic mail address and social networking account, state the name(s) of the corresponding internet service provider(s) (e.g., Google, Yahoo, AOL, or your employer), whether the address was used primarily for business or personal correspondence, and the time period in which it was active.

11. List all usernames for instant messaging and similar electronic communication services (including, but not limited to, Bloomberg, Skype, whatsapp), other than those listed in your response to questions 8 through 10, that were in your name or that you regularly used at any time during the last [three] years. Include all personal, business and shared addresses. For each username, state the name(s) of the communication service provider (e.g., Google, AOL, etc.), whether the address was used primarily for business or personal correspondence, the time period in which it was active, and the name of the software application(s) (e.g., GTalk, ICQ, MSN Messenger) you used to access it.

12. List all internet message boards or discussion forums (including, but not limited to, Money Maker Group, PNQI Message Board, Investors Hub Daily) of which you were a member or on which you posted any messages at any time during the last [three] years. For each message board or discussion

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forum, state the service provider and your member name or identification information.

PUBLICLY-HELD COMPANIES

13. Are you now, or have you ever been, an officer or director of any publicly-held company? Yes No

If yes, identify each such company, its CUSIP, and any exchange on which it is or was listed, and state your positions (including membership on any Board or management committees) and the dates you held each position.

14. Are you now, or have you ever been, a beneficial owner, directly or indirectly, of five per cent or more of any class of equity securities of any publicly held company? Yes No

If yes, identify each such company, its CUSIP, and any exchange on which it is or was listed, and state the amount, percentage, and dates of your ownership.

Background Questionnaire Page 4

PRIVATELY-HELD COMPANIES

15. Are you now, or have you ever been, a beneficial owner, directly or indirectly, of any privately-held company (*i.e.*, corporation, partnership, limited liability company or other corporate form)? Yes No

If yes, identify each such company, including address and other contact information, and state your positions and the dates you held each position.

16. Are you now, or have you ever been, a manager or a member of any privately-held company (*i.e.*, corporation, partnership, limited liability company or other corporate form)?
Yes No

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If yes, identify each such company, including address and other contact information, and state your positions and the dates you held each position.

SECURITIES ACCOUNTS

17. List all securities or brokerage accounts that you have held in your name, individually or jointly, at any time during the last [three] years. Include all foreign accounts. For each such account, identify: (i) the brokerage firm; (ii) the location of the branch where your account is or was held; (iii) your broker; (iv) the type of account (*i.e.*, cash, margin or IRA); (v) the account number; and (vi) whether any person has ever held discretionary authority or power of attorney over the account; if so, name such person(s).

Background Questionnaire Page 5

18. List all securities or brokerage accounts (including foreign accounts), other than those listed in your answer to question 17, in which you had any direct or indirect beneficial interest at any time during the last [three] years. For each such account, provide the information requested by question 17.

19. List all securities or brokerage accounts (including foreign accounts), other than those listed in your answer to question 17 or 18, over which you had any control at any time during the last [three] years. For each such account, provide the information requested by question 17.

BANK ACCOUNTS

20. List all accounts you have held in your name at any financial institution (*i.e.*, bank, thrift, or credit union) at any time during the last [three] years. Include all foreign accounts. For each such account, identify: (i) the financial institution; (ii) the address of the branch at which your account is or was held; (iii) the type of account (*i.e.*, checking, savings, money market or IRA); (iv) the account number; and (v) whether any person has ever had discretionary authority or power of attorney over the account; if so, name such person(s).

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21. List all accounts at financial institutions (including foreign accounts), other than those listed in your answer to question 20, in which you had any direct or indirect beneficial interest at any time during the last [three] years. For each such account, provide the information requested by question 20.

Background Questionnaire Page 6

22. List all accounts at financial institutions (including foreign accounts), other than those listed in your answer to question 20 or 21, over which you had any control at any time during the last [three] years. For each such account, provide the information requested by question 20.

23. List any other accounts (including foreign accounts), other than those listed in your answers to questions 20 through 22, that were held in your name, in which you had any direct or indirect beneficial interest, or over which you had any control, that you have used to transfer funds in the last [three] years, including, but not limited to, PayPal accounts. For each such account, provide the information requested by question 20.

PRIOR PROCEEDINGS

24. Have you ever testified in any proceeding conducted by the staff of the Securities and Exchange Commission, a U.S. or foreign federal or state agency, a U.S. or foreign federal or state court, a stock exchange, the Financial Industry Regulatory Authority (“FINRA”) or any other self-regulatory organization (“SRO”), or in any arbitration proceeding related to securities transactions? Yes No

If yes, for each such proceeding, identify: (i) the title of the proceeding; (ii) the organization or agency; and (iii) the date(s) on which you testified.

Background Questionnaire Page 7

25. Have you ever been deposed in connection with any court proceeding? Yes No

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If yes, for each such proceeding, identify: (i) the title of the proceeding, and (ii) the date(s) on which you were deposed.

26. Have you ever been named as a defendant or respondent in any action or proceeding brought by the SEC, any other U.S. or foreign federal agency, a state securities agency, FINRA, an SRO, or any exchange? Yes No

If yes, for each such proceeding, identify: (i) the title of the proceeding; (ii) the agency or tribunal; (iii) the substance of the allegations; (iv) the outcome of the proceeding; and

(v) the date of the outcome.

27. Have you ever been a defendant in any action (other than those listed in response to question 26) alleging violations of the federal securities laws? Yes No

If yes, for each such proceeding, identify: (i) the title of the proceeding; (ii) the court or tribunal; (iii) the outcome of the proceeding; and (iv) the date of the outcome.

28. Have you ever been a defendant in any criminal proceeding other than one involving a minor traffic offense? Yes No

If yes, for each such proceeding, identify: (i) the title of the proceeding; (ii) the court or tribunal; (iii) the outcome of the proceeding; and (iv) the date of the outcome.

Background Questionnaire Page 8

EDUCATIONAL HISTORY

29. Provide the requested information about each educational institution that you have attended, beginning with the most recent and working backward to the date that you completed high school.

Name of School

City

State

Country

Zip Code

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Dates of Attendance: Month/Year to Month/Year
Degree/Major Month/Year of Degree

Name of School

City State
Country Zip Code

Dates of Attendance: Month/Year to Month/Year
Degree/Major Month/Year of Degree

Name of School

City State
Country Zip Code

Dates of Attendance: Month/Year to Month/Year
Degree/Major Month/Year of Degree

Name of School

City State
Country Zip Code

Dates of Attendance: Month/Year to Month/Year
Degree/Major Month/Year of Degree

30. Other than courses taken in connection with institutions listed in response to question 29, list any securities, accounting or business related courses taken since high school. For each such course, identify the date that the course was completed and the name of the institution or organization that offered the course.

Background Questionnaire Page 9

PROFESSIONAL LICENSES/CLUBS

31. Do you hold, or have you ever held, any professional license?
Yes No

If yes, for each such license, identify: (i) the license number or attorney bar number;

Appendix E-13

(ii) the licensing organization; (iii) the date the license was awarded; (iv) the date such license terminated, if applicable; (v) the date(s) of any disciplinary proceeding(s) against you; and (vi) the outcome of any such disciplinary proceeding (e.g., reprimand, suspension, revocation).

32. Are you, or have you ever been, a member of any professional or business club or organization? Yes No

If yes, list for each: (i) the name of the club or organization; (ii) its address; (iii) the date(s) of your membership; and (iv) service in any governance roles (e.g., board member, committee member, etc.) including title and dates of service.

33. Are you, or have you been in the last [three] years, a member of any social clubs,

charities or nonprofit organizations? Yes

No

If yes, list for each: (i) the name of the social club, charity or nonprofit organization;

(ii) its address; (iii) the date(s) of your membership; and (iv) service in any governance roles (e.g., board member, committee member, etc.) including title and dates of service..

EMPLOYMENT HISTORY

34. Are you, or have you ever been, an employee of a broker, dealer, investment adviser, investment company, municipal securities dealer, municipal advisor, transfer agent, or

Background Questionnaire Page 10

nationally recognized statistical rating organization? Yes

No

If yes, list for each: (i) the jurisdiction of the entity; (ii) your CRD number; (iii) the entity's CRD number; (iv) the entity's SEC File

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number; (v) the entity's CUSIP number; and (vi) any foreign registration information similar to the foregoing.

35. State your employment activities, beginning with the present and working backward to the date that you completed high school and attach a recent copy of your resume or curriculum vitae.

Employer's Name/Self-
Employment

Title
Dates of Employment
Supervisor

Title
Dates of Employment
Supervisor

Title
Dates of Employment
Supervisor

Title
Dates of Employment
Supervisor

Employer's Name/Self-
Employment

Employer's Street Address
Telephone Number

Title
Dates of Employment
Supervisor

Appendix F-1

UNITED STATES DISTRICT COURT SOUTHERN
DISTRICT OF NEW YORK

-----X
SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

JAMES DAVID O'BRIEN,
Defendant.

-----X

19MC468 (KPF)

November 22, 2019

10:00 a.m.

Before: HON. KATHERINE POLK FAILLA,

District Judge

APPEARANCES

SECURITIES AND EXCHANGE COMMISSION BY:
PAUL G. GIZZI
BY: BENNETT ELLENBOGEN

HANAMIRIAN LAW FIRM

Attorneys for Defendant BY: JOHN M. HANAMIRIAN

(Case called)

THE DEPUTY CLERK: Please state your name for the record,
beginning with plaintiff.

MR. GIZZI: Paul Gizzi for Securities and Exchange
Commission and with me is Bennett Ellenbogen.

THE COURT: Gentlemen, of the two of you, to whom
should I be directing my questions?

MR. GIZZI: You can direct them to me, your Honor.

THE COURT: Thanks for letting me know.

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MR. HANAMIRIAN: John Hanamirian, Hanamirian Law Firm on behalf of respondent, your Honor.

THE COURT: Sir, good morning to you as well. Thank you so much.

I have the parties' submissions in connection with the SEC's order to show cause and I have questions for both sides. Since you are not familiar with me I want to make clear at the outset, sometimes my questions are in the vein of tire kicking so, please, do not ascribe all too much importance to them

because what gets a little bit frustrating is when people begin by answering, *As your Honor recognized...* I recognize a lot of things but I haven't decided anything just yet.

So, what I would like to know at the outset,

And perhaps I can have agreement between both sides on this, there are legal standards that both sides have presented to me and you seem to be in agreement that the issue on which this whole application pivots is that of improper purpose or bad faith.

So, Mr. Gizzi, is there anything else on which I should be focusing with respect to the legal standards here?

It does sound like you are in agreement as to what they are.

MR. GIZZI: I think that's correct, your Honor. We believe that the sole challenge that respondent has made here is his contention that the SEC is acting in bad faith by issuing a testimony subpoena after having participated in a proffer with Mr. O'Brien.

THE COURT: Sir, as well in the defendant's opposition, there is a timeline that is proffered to me regarding events of interest in the course of the case. Do you dispute the timeline that was written out for me?

MR. GIZZI: We don't dispute the timeline, although it would be worth noting that Mr. O'Brien has contended or has argued that it was well over a year -- well, actually the

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proffer was in August, the second testimony subpoena was in May so it was approximately eight-plus months, not well over a year. But, otherwise, the time we -- there is nothing else in the timeline that is incorrect.

THE COURT: Let me just confirm with Mr. Hanamirian. Sir, I think we are in agreement as to what the applicable law is and our purpose in meeting today is to address the issue of whether the Commission's request for your client's testimony amounts to either improper purpose or bad faith.

Do you agree?

MR. HANAMIRIAN: Kind of. THE COURT: Okay.

MR. HANAMIRIAN: And I say that obviously respectfully, but I think that the initial argument on our part is that there is a proffer agreement in existence and that this conduct, the issuance of a subpoena is a breach of the purpose of the proffer agreement. So, the reason I say kind of is that I think, subsumed within the analysis of bad faith, is whether you have breached an agreement. And so -- right? I mean, if that's the case, then yes. If the breach of contract analysis is subsumed within the analysis of bad faith? Yes.

THE COURT: Why I am asking is at some point I am going to have to give a decision and it would be better for the parties if I gave the decision today orally, and if I can, I will. I was going to refrain from having a lengthy disposition of the applicable law because I think we are in agreement as to what it is and the real issue is whether the facts of this case suggest that it is somehow inappropriate for the Commission to issue its subpoena.

May we limit the inquiry to that?

MR. HANAMIRIAN: Yes.

THE COURT: Okay. Great. Thank you. Let me talk to the folks at the front table and then I will turn to you.

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Mr. Gizzi, I want to understand a couple of things and so first I want to understand your reliance on the *Knopfler* case, and I will ask you when you are speaking with me, please, if you can grab the microphone slightly to your left and bring it closer to center, and Mr. Ellenbogen has a microphone on himself if he needs it. Sir, as I was reading the case, the language that is in there is the language you have quoted to me but it is a *per curiam* decision of about a page length where the focus seems to be, or the issue before the district court seems to be whether or not there needed to be a complete evidentiary hearing or whether it was enough for the district court to have made decisions on a summary basis without having a hearing.

So, I guess my question to you is, are you reading, extrapolating what it should really stand for, even though the language is in there, is there any reason why I should find

that that language is somehow limited, by context, to the question of how much of an evidentiary hearing is needed?

MR. GIZZI: Well, I think *Knopfler* does say that in order for there to be an evidentiary hearing, respondent would need to present a very strong case, a strong factual case for bad faith on the part of the SEC, technically on the part of the SEC itself but certainly even as to the staff it would have to be a very strong case for there to be an evidentiary hearing. I don't believe we are anywhere near that. All we have is simply a contention that because the Commission participated in the August 2018 proffer, issuing the 2019 subpoena was in bad faith and that there is no case that holds that or says that so we are certainly not in bad faith, it is merely a contention on the part of respondent but there is no case law that supports it. The Commission, obviously, has acted properly in issuing the subpoena throughout. We participated in the August 2018 proffer, we obtained an initial understanding of the facts. Now we would like to have a more detailed, more precise understanding of the facts which is why we issued a subpoena and the

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Commission is entitled to issue multiple subpoenas as Judge Carter ordered in the Stillwell case where the Commission staff had already taken testimony from the witness and issued a Wells notice. So, the record there was even further developed than the record we have here and so we are clearly within -- the Commission is clearly within its rights to issue a second subpoena.

THE COURT: Sir, don't sit down just yet. Thank you. I will be more precise with my questions but I really only want you to answer the question that I am asking. I promise I will give you time to give me your arguments. I know where you are going but really my question was you are asking me to put a lot of stock in *Knopfler* for the proposition that the bad faith showing that needs to be made is one that is Commission-wide rather than investigator-specific or team-specific.

Is that not correct?

MR. GIZZI: That's correct.

THE COURT: And so, I appreciate that what you want to tell me is that there is no bad faith anywhere but assuming -- assuming -- I were to find it on the part of anyone, it is your view, sir, that I must find it on the part of the Commission as a whole before I can find bad faith sufficient to invalidate the subpoena?

MR. GIZZI: Well, I believe that is what *Knopfler* says, and it cites to the *LaSalle* Supreme Court decision which says that even if an IRS agent is acting in bad faith in that instance simply to develop evidence for criminal referral when they already decided they were going to make a criminal referral, it would still not matter to be whether or not the subpoena could be enforced because it would have to be the bad faith of the IRS because, otherwise, it would frustrate the enforcement of the tax law. Same thing here. If the Commission issued its order, its formal order in bad faith, that would be one thing but even if the staff acted in bad faith in issuing the subpoena, it still wouldn't frustrate our ability to enforce the subpoena

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because otherwise it would frustrate our ability to investigate whether or not there have been violations of the securities laws.

THE COURT: Well, I want to understand where we go from there because it's interesting, it would seem to me, that there wouldn't be much in the way of punishment to the Commission if they were allowed to have individual investigators act in bad faith as long as the Commission as a whole didn't act in bad faith. So, I guess I'm trying to understand, and I realize you don't necessarily want to answer this question, what would constitute bad faith on the part of the entire Commission?

Here is something I came up with that I am not sure would qualify but imagine, if you will, that the Commission has a practice of affirmatively misrepresenting to people the significance or not of the proffer agreement. Let's imagine that here and everywhere they told every proffering interviewee we will never, ever seek your testimony again, this is it, it is only pursuant to the proffer agreement -- and then they consistently try to and then issue subpoenas for testimony. That would be a Commission-wide example of bad faith, correct?

MR. GIZZI: I think that's correct, your Honor.

THE COURT: Okay. Let's try this. Let's say the policy and practice of the Commission was to limit its investigation to a proffer conducted pursuant to a proffer agreement, then no further investigation, and then the next day a subpoena for testimony. Would that also be bad faith or at least -- at least am I getting warmer?

MR. GIZZI: Well, okay. So, these are hypothetical questions.

THE COURT: Of course they are. Yes.

MR. GIZZI: I think that that's troublesome conduct if that were to be the case.

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THE COURT: What is the practice of the Commission with respect to the use of proffer agreements? And I will ask both sides, I come from the criminal side of the house where proffer agreements are a coin of the realm, they're always being used and so it is the rare case, except with perhaps a witness who has no criminal exposure where I wasn't using a proffer agreement. Is it the policy of the Commission to consistently use proffer agreements whenever interviewing someone or is it something that is done when there is an interview conducted concurrently with a criminal investigating agency?

MR. GIZZI: Well, proffer agreements can be used in both situations and other situations as well. In our papers we cited to the enforcement manual.

THE COURT: Yes.

MR. GIZZI: And in there, for instance, it explains or it describes how, as if somebody is interested in cooperating with the Commission it's often an initial step to have a proffer with the person to determine whether or not they can provide valuable cooperation. When the Commission does participate with an interview with the criminal authorities, whether it's U.S. Attorney's office or state criminal authorities, the witnesses often enter into a proffer agreement with the criminal authorities and most of the time I would say, also would like a proffer agreement with the SEC but they don't always want the proffer agreement with the SEC. And then there may be instances where it's clear that the criminal investigation seems to have trailed off but a witness will still rather take, rather have a proffer agreements because if they are put on the record they'll take the fifth. And so, in order to find out what the witness knows, what the witness' story is, sometimes the staff will get an attorney proffer which doesn't require a proffer agreement, other times staff will get a proffer from the witness, but that doesn't stop the staff from then later putting the witness, getting

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investigative testimony of the witness so that there is a clear record of what the witness' story is.

THE COURT: Is it in fact the case that the two subpoenas required identical information or were largely identical other than the date?

MR. GIZZI: Well, they required his testimony.

THE COURT: Yes.

MR. GIZZI: Obviously, the state of the investigation was further along when the second subpoena was issued so technically they're not requiring the same identical information, although they both require, just simply require that he testify.

THE COURT: Is it you or Mr. Ellenbogen who has more firsthand knowledge of the circumstances of this proffer?

MR. GIZZI: I was not involved in the August 2018 proffer.

THE COURT: May I inquire of Mr. Ellenbogen for a bit?

MR. GIZZI: Certainly.

THE COURT: Mr. Ellenbogen, may inquire of you for a moment?

MR. ELLENBOGEN: Of course.

THE COURT: Thank you.

Sir, do I understand correctly that it is your

position that you issued a subpoena and then found out about the proffer and did you find out about the proffer through Mr. O'Brien's counsel?

MR. ELLENBOGEN: We found out about the proffer through the U.S. Attorney's office, and then it was at that time that we were, we had decided that we wanted to participate, if possible, we agreed to surface in our investigation at that point. Right around that time Mr. O'Brien and counsel were not aware that we had this investigation and it was at the time that he began discussing proffer with the U.S. Attorney's office that we wanted – we decided we also wanted to participate.

THE COURT: Which is interesting because, again, in my experience, it is sometimes the rolls are reversed where someone has come in and given testimony to the

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Commission and then they are called in for a proffer and they did not appreciate that the U.S. Attorney's office was thinking about it, some might say, waiting in the wings. So, I have seen plenty of cases on that front, this would be like the Cordell and the Fiori line of cases but not -- this is the opposite of what I have usually seen.

Sir, are you the author of the letter of June 7th of last year?

MR. ELLENBOGEN: I believe so. Yes.

THE COURT: Okay, so this is, as I am understanding it, in relevant part, this letter indicated that if the proffer were going forward the Commission would be willing to push off the date of testimony. I presume that's the testimony sought by the subpoena, yes?

MR. ELLENBOGEN: Yes. That's correct.

THE COURT: But would like to revisit once we have confirmed the proffer.

Now, that is in fact the language of your letter, in substance, yes, sir?

MR. ELLENBOGEN: Yes. That's right.

THE COURT: You have cited this to me as sort of a forewarning to Mr. Hanamirian that you weren't giving up your right in the future to seek testimony.

Am I correct?

MR. ELLENBOGEN: That's correct.

THE COURT: What is interesting is it's the use of the word "confirmed the proffer." It's confirmed as distinguished from once we have conducted the proffer, once we've thought about how the proffer was. And so, I guess what I am asking is, was this issue revisited at any point before the issuance of the second subpoena?

MR. ELLENBOGEN: Was the issue revisited of having Mr. O'Brien come in for testimony pursuant to subpoena?

THE COURT: I will ask a more precise question.

MR. ELLENBOGEN: I'm sorry.

THE COURT: No. My doing, sir.

This particular submission suggests that upon confirmation of the proffer there would be a revisiting of

the issue and so I don't -- so, once we have confirmed the proffer,

that's the relevant language --

MR. ELLENBOGEN: I see, yes.

THE COURT: I don't know if that means immediately after, a month thereafter, eight months thereafter. I don't know. I'm trying to figure out what should Mr. Hanamirian have

intuited from your letter and your use of the word "confirmed."

MR. ELLENBOGEN: That's a good point, your Honor. I apologize for not understanding it.

THE COURT: No, no. I asked a better question this MR.

ELLENBOGEN: Well, okay. Well, what was intended by that was we were not -- we still may consider taking Mr. O'Brien's testimony subsequent to the proffer as we had just surfaced and our investigation was still at its early stages and that we would revisit the idea of a potential testimony at some point at a later date. That's all that that meant.

THE COURT: At or about the time of the proffer -- no, I will back up. At or about the time of the confirmation of the proffer did you have any discussions with Mr. Hanamirian regarding the revisiting of this issue?

MR. ELLENBOGEN: No. I don't believe we did.

THE COURT: At or about the time of the proffer itself did you have any conversations with Mr. Hanamirian about revisiting the issue?

MR. ELLENBOGEN: No. Not at that time. We did not.

THE COURT: At any point before you issued the second subpoena did you have conversations with Mr. Hanamirian about revisiting the issue?

MR. ELLENBOGEN: I know we had followup with Mr. Hanamirian about producing documents --

THE COURT: Sorry. Mr. Hanamirian lacks a poker face.

MR. ELLENBOGEN: Too bad I'm not at the poker table. In this situation we had conversations pursuant to

producing additional documents that they had yet to produce pursuant to the subpoena but I don't believe we had additional

conversation about when, that the Commission was still interested in taking his testimony until we reached the decision that we wanted to take his testimony pursuant to a subpoena.

THE COURT: When he was producing documents after the proffer, that wasn't pursuant to any request made at the proffer, you are saying that is pursuant to the first subpoena?

MR. ELLENBOGEN: I think it was pursuant to both. We had follow up from the proffer as well where some documents were referred to that I believe either we -- the SEC or the

U.S. Attorney's office -- referred to that Mr. O'Brien wasn't familiar with and I asked them to follow up and see if he had such documents. Arguably, they were responsive both to what happened at the proffer but also to the investigative testimony and on several occasions I had asked Mr. O'Brien to confirm, in writing, that they had produced all documents in their possession, custody, and control that were responsive to the subpoena and I was having some difficulty getting that confirmation from them.

THE COURT: And therefore what? You just continued to reach out to him to try and get that confirmation?

MR. ELLENBOGEN: Yes, correct.

THE COURT: Or those documents?

MR. ELLENBOGEN: Yes. We did receive a response that basically said that they had produced all documents they identified as responsive.

THE COURT: I may be asking you questions now that because of the nature of your investigation you may be limited in your ability to answer and I'm not trying to probe into things I can't.

MR. ELLENBOGEN: Okay.

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THE COURT: So, don't be uncomfortable about saying I can't answer that question.

MR. ELLENBOGEN: Pardon me if I confer with Mr. Gizzi before I answer some of these questions as well.

THE COURT: That is no problem. I don't want to trip you up, that's not my intention.

MR. ELLENBOGEN: Thank you, your Honor.

THE COURT: At the time of the proffer you indicated -- at the time you issued the subpoena you indicated that you had just surfaced, I believe that was the term you had used.

MR. ELLENBOGEN: Yes, your Honor. Yes.

THE COURT: Explaining that you had now made known to Mr. O'Brien and others that there was investigation into American River.

THE COURT: Bankshare is one word, not American River. So, you surfaced; fair to say you were at the early stage of that investigation.

MR. ELLENBOGEN: That is fair to say.

THE COURT: Is there some power that you received from the Commission to begin the investigation?

MR. ELLENBOGEN: Yes. We received a formal order of investigation.

THE COURT: And when, approximately, did you receive that?

MR. ELLENBOGEN: That is a good question. Bear with me for one moment. I believe it was in January of 2018.

THE COURT: All right. So you are surfacing in or about April or May?

MR. ELLENBOGEN: That's correct.

THE COURT: And this proffer is in --

MR. ELLENBOGEN: February 17, 2017. I'm sorry I gave the wrong year as well as the month. February 2017 was the formal --

THE COURT: So this investigation had been going on for nine and a year when you issued the request for testimony?

MR. ELLENBOGEN: That's correct.

THE COURT: Okay. Understood. What did you develop after the proffer that you had not developed in the year plus of investigation prior? Now, to be clear, I would imagine that you had more than one investigation going on at the same time and I would not have expected every moment of every working day to have been spent developing this investigation, although if it were I would be interested but I really want to understand, you are asking me or you are representing to me that the evidence changed, it increased, you had different information. What changed? What did you develop that you didn't have at the time of the proffer?

MR. ELLENBOGEN: What I can tell you is that the staff reviewed thousands upon thousands of trades of Mr. O'Brien that was ongoing from earlier stages all the way through the proffer and subsequent to the proffer. We reached a much more detailed, granular understanding of the method of the coordinated trading that Mr. O'Brien undertook. We have specific examples of the types of trades and methods of how he traded. We obtained additional materials -- I am just being a little cautious about what I want to say.

THE COURT: That's fine. Talk to Mr. Gizzi. That's why he is there.

(Counsel conferring)

MR. ELLENBOGEN: Among other things, we obtained internal communications from the brokerage firms that discussed Mr. O'Brien's tradings and we would like to present that to

Mr. O'Brien to get his reaction to get his response to that. We would like to explore -- we learned more details about other parties that we don't believe are related to Mr. O'Brien but we are not sure, that engaged in similar, coordinated trading in New Jersey. What we were aware of is that there is more information that we have, and we have more records from Mr. O'Brien, for example's phone

records that we can explore his communications with other people about either their knowledge of each other's trades. Let's put it that way.

I think those are some of the major topics.

THE COURT: Did you meet with other witnesses?

MR. ELLENBOGEN: We have not met with other witnesses.

THE COURT: Other than Mr. O'Brien there is no other witness with whom you met?

MR. ELLENBOGEN: There is no other witness with whom we have met. This really relates to Mr. O'Brien's trading and the specific intent behind his trades and what he was thinking when he made these trades.

THE COURT: Let me please return to Mr. Gizzi, unless you want to start answering legal questions.

MR. ELLENBOGEN: I will let Mr. Gizzi take care of That.

THE COURT: Thank you.

Mr. Gizzi, it is the position of Mr. Hanamirian that the Commission breached its proffer agreement with the issuance of this second subpoena. I know you are familiar with the text of your own proffer agreement. I would like to understand from you, I am imagining you don't agree but I would like to know why you don't agree.

MR. GIZZI: Primarily, your Honor, because the agreement is very express on its face that it only applies to the statements made at the specific meeting identified in the agreement and it is -- it is not plausible that, as Mr. O'Brien argues, that the proffer agreement did not expire when the proffer was over. That was -- it applies to the statements made there but it does not apply to any other statements at any other time. And so --

THE COURT: But I thought I understood the language of it to be that the statements that were received from Mr. O'Brien during the proffer could not be used against him, they could be used to develop leads. And that's what I think I am focusing on. That's why I asked you earlier the hypothetical about a situation where the Commission did

the proffer, no additional investigation, and then tried to obtain testimony by subpoena because it would seem to me that that might be a breach of the spirit of not the letter of the proffer agreement if you have done not one other thing and you have gotten this information with the promise that it would be used for leads and then you immediately go around and ask for testimony. Perhaps you may disagree with me, and I welcome your disagreement if you want to explain it, but here I am trying to understand what is permissible in terms of the use of the proffer statements?

MR. GIZZI: Well, just as to your hypothetical, I believe it was conditioned on the notion that we said we will never ask, issue a subpoena for your testimony in the future and then after the proffer we go ahead and do that.

THE COURT: That was the first hypo. There was the second hypo which was the policy of the Commission to issue, to take, to have proffers and then the next day turn around and seek testimony without doing any other investigation.

So, perhaps I should make that more clear.

MR. GIZZI: And I don't -- listen. If it is the policy and it's a thought through policy it sounds a little bit -- it doesn't sound like it's a well-founded policy and I don't believe the agency would have ever such a policy but as to the proffer agreement it is very clear. It is very clear that it applies to one meeting. So, if we were to interview him next day and in fact his client is willing -- Mr. O'Brien is willing to appear for an interview, he just wants the proffer agreement to continue to apply. So, there is really no dispute that we should be entitled to speak to him in more detail about the subjects that we covered at the proffer and about any additional subjects that were not covered either because we didn't have enough time or because we didn't appreciate the conduct well enough at the time.

When we had the proffer that was our first time speaking directly to Mr. O'Brien about his trading. It's a very complex type of trading, it's a lot of information to get your

arms around and that was a first shot at understanding what the conduct was.

So, yes, we can't use any statements he made against him if we were to -- if the Commission were to bring some type of enforcement proceeding against him, but it does not prohibit us -- the proffer agreement does not prohibit the Commission from subsequently issuing a testimony subpoena the same way

having issued one testimony subpoena does not stop the Commission from issuing a subsequent testimony subpoena.

THE COURT: I see. Because what you are saying is, and this is what you want to clarify for me, this is not a situation where you are using the information he has against

him, you are asking for the information to be provided in another context in which these protections do not adhere.

MR. GIZZI: The information plus much more detailed information.

THE COURT: I think I understand that.

Could you please respond to Mr. Hanamirian's argument that were I to accept your arguments today, there would be a chilling effect on the use of proffers generally because individuals who aren't given assurances that there will never be testimony would be foolish, indeed, to submit to a proffer if there was going to be a testimonial subpoena just a few months later?

MR. GIZZI: Yes, but I don't believe that that's something that is for the Court to consider. That's the Agency's decision. If there is a chilling effect, then the agency has to live with that and perhaps proffers will be used less frequently, but that's a decision for the Agency to make.

THE COURT: I see. So you are saying if there were a chilling effect that might be unfortunate but it is not bad faith.

MR. GIZZI: That's correct, your Honor.

THE COURT: I think I understand that argument. One moment, please, sir.

(Pause)

THE COURT: Do you think Mr. O'Brien had or could reasonably have had some expectation that there would be no subpoena for his testimony or no interest on the Commission's part in obtaining his testimony without the protections of the proffer agreement?

MR. GIZZI: I don't believe so, your Honor. The agreement could not be clearer that it only applies to the statements made at that date and when we did issue the subpoena, the second testimony subpoena in May of this year, Mr. Hanamirian informed us that his client, that he was authorized by his client to accept service of the subpoena and we set a date for the testimony. And so, it was only after time passed by that he, Mr. Hanamirian contacted the staff and asked whether or not the terms of the proffer agreement would continue to apply and we promptly informed him, no, it would not.

So, even Mr. O'Brien, when he received the subpoena initially, the second subpoena initially, understood that it was completely proper and that he should testify. He has used this to try to secure another proffer agreement but the staff is simply not willing to do so. And that is his right in response to receiving a subpoena. He can refuse to comply and force us to seek a court order to direct him to comply.

THE COURT: And that's why we are here, yes?

MR. GIZZI: But the staff cannot -- the Commission cannot be forced to enter into a proffer agreement that it does not wish to enter into.

THE COURT: Thank you very much. Let me hear from Mr. Hanamirian.

Mr. Hanamirian, before I ask you some questions are there any things that you would like to speak about that

you have heard me discussing with the Commission's attorneys?

MR. HANAMIRIAN: Just a few. I think just factually I know you have the record. So, in each instance in providing documentation subsequent to the proffer each of the covering letters says that these documents are submitted to you pursuant to the terms of the proffer. And so, they weren't submitted pursuant to the terms of the subpoena.

THE COURT: Well, these are the -- excuse me, sir, these are the materials that you submitted to the Commission.

MR. HANAMIRIAN: Yes, but even after the proffer session itself I said these are submitted as follow up and pursuant to the terms of the proffer, not in response to the subpoena.

THE COURT: I see. But does that foreclose them from now issuing the subpoena? That's part that I'm not -- it is not obvious to me that your reservation of rights with respect

to documents that you produced forecloses them from issuing the subpoena.

MR. HANAMIRIAN: I don't think that they're foreclosed from issuing the subpoena and I think that the way that the arguments are couched creates a detour. And this is what I was saying in the outset, is we have subsumed in the analysis of bad faith is a contractual bad faith analysis. And so, subpoena 1 and subpoena 2 are fine standing alone but that ignoring the existence of the proffer is not fine. So, the breach of contract or breach of agreement analysis has to come into play in the appropriateness of the issuance of subpoena 2 and the enforcement or furtherance of subpoena 1. And so, the proffer agreement is executed and advances in response to the issuance of a subpoena. That's how it goes.

And so in this instance, in particular, the United States Attorney's office and the Federal Bureau of Investigation visited my client and two days later I got a call from the

SEC. So, the assistant United States said, okay, I am assuming that you guys all know that this is each going – that you are all going together. And so I then began a dialogue with the Assistant United States Attorney and a parallel dialogue with the SEC for the negotiation and the implementation of the proffer agreement.

THE COURT: But you are not suggesting -- I can exclude the involvement of the U.S. Attorney's office.

MR. HANAMIRIAN: Yes.

THE COURT: Whatever they did has nothing to do with this. What you are saying is that the fact remains that for whatever reason, the Commission elected to meet with your client pursuant to a proffer agreement and having done that, they can't walk away from it now.

MR. HANAMIRIAN: No. That's exactly right. That's exactly the argument. And then I -- you know, if you take the benefit of the substance of the proffer agreement and then say, okay, well, systematically or institutionally on the back end, well, we will have to deal with that showing the fact you are both the breaching party and the remediating party. Right?

So, you can't really do it that way. So, either you have accepted the benefits of the proffer, you engage in the proffer session and you accept the testimony under the terms of the proffer agreement but you can't then turn around and say, well, institutionally and SEC-wide we have changed our mind and this may have a chilling effect on the balance of proffer agreements in the entirety of the United States but, you know, in this instance this is important enough that we are going to take that risk.

THE COURT: I am pretty sure Mr. Gizzi is not saying that. I think what he is saying is if counsel understand that abiding by or reading the proffer agreements as we do correctly -- and I am not saying it is correct or not, we will talk about that later -- but if our interpretation is correct and our correct interpretation yields folks to think twice about meeting with the Commission, sobeit. They're

saying nonetheless they haven't violated the proffer agreement because, to them, the proffer agreement does not foreclose them from asking for the same stuff without the protections of the proffer agreement.

So, let's talk about that.

MR. HANAMIRIAN: It seems like --

THE COURT: Get your thought out and I will ask my question.

MR. HANAMIRIAN: It seems exactly the opposite. The proffer agreement does foreclose you from asking about the same stuff. In fairness, you can follow it up, and we did. And you can ask follow-up questions from the proffer and as long as we all understand that it is a part and parcel to that agreement. Okay. But, whether the follow up takes place two days or 30 days after or six months after, I mean, it is still follow up to the same session, it is not -- we aren't somehow sanitized by the passage of time. The passage of time is not something within the respondent's control. The government controls time.

THE COURT: Let me push back on that a little bit based on the longer conversation I was having with Mr. Gizzi. What Mr. Gizzi was trying to explain to me, I believe -- and he will tell me if I am wrong -- is that the proffer agreement is the proffer agreement and what they can't do, for example, is take the statements that were made pursuant to the proffer and broadcast them to the world or to use them in a complaint against your client. They can't do that. I don't think they're trying to do that but what they're saying is that does not mean that it suddenly becomes a more transactional immunity or use immunity that forecloses them from ever asking your clients the same questions again without the protections of the proffer agreement -- wait -- they're also saying that the reason they're doing it now is not because of some decision on the part of the Commission to hoodwink you into appearing for a proffer and then not appearing, having the protections of the proffer and then not. They're saying we

have now had eight months to actually get our ducks in a row, we want to ask new questions. Some of them may overlap areas we have discussed but we want to ask new questions.

So, that's what they're saying. *We are acting in accordance with the proffer. The proffer prevents us from using this material. If doesn't prevent us from asking the questions a second time.*

Do you disagree?

MR. HANAMIRIAN: I do, because the use of the materials in the context of a testimonial -- in the testimonial context pursuant to the subpoena is using it against us.

THE COURT: All right.

MR. HANAMIRIAN: Because we don't have the protection of the proffer. That's the point, it is an immunity. And so, the point is to provide it to them in response and to give them an understanding of what took place and they accept that. So, if you accept that information coming from us on a voluntary basis, you know that it's imposing on our Fifth Amendment rights, it is imposing on other rights and you accept that.

That's a serious thing.

THE COURT: But are you then suggesting they could never, not ever, subpoena your client for testimony?

MR. HANAMIRIAN: They can't subpoena my client for testimony against himself with respect to the subject matter of the proffer. So, that's why I have people come to the proffer and take detailed notes about what was discussed because we can't transcribe them and so we have people who identify from -- that's what we do. We take detailed notes so we know the subject matter, and so that if there is a subsequent deviation -- but, quite candidly, in 31 years I haven't had anybody deviate from a proffer agreement.

THE COURT: This is first time you have had this issue?

MR. HANAMIRIAN: Yeah. And I think given the case law I might -- I mean it is not -- it is unique to the body of law as well. In particular I mean this circumstance where you have subpoena 1, proffer subpoena 2, and even instances of attempts to compel testimony after the fact. Nobody breaches these agreements.

THE COURT: Well, I am not necessarily agreeing that this is a breach of the agreement. The fact is they told you before your client showed up that they hadn't made a decision with respect to testimony.

MR. HANAMIRIAN: No. He said to me that once they confirmed the proffer -- meaning his proffer and we did -- they were done.

THE COURT: No, I didn't say that. That's not what the letter said. I know you are trying to make an argument out of the questions I was making to him but that is not in fact what the letter said.

MR. HANAMIRIAN: Well then maybe it is testimony on my part. My impression of it, your Honor, was that -- obviously we are revisiting whether, and whether we enter into a proffer or not and so it is an either or. It wasn't an, *oh okay then*, afterwards. How would I have assured my client that this process was, quote unquote, safe for providing testimony if the subpoena remained out in effect and say, okay, you can come back and be compelled to testify just as you have in the proffer session. And you say, well, what's the point of the proffer?

There is no point in having a proffer in that situation unless you just want to go forward and somehow just talk in that context and say, well, you know, you have got the wrong person, it is a case of misidentification. But that's not what we have here. This is an investigation that was a year old so they knew who he was. And I didn't provide them with documentation in response to the proffer or in the context of that. It was all third-party documentation and so they have that or they had access to it. So, there is nothing new.

THE COURT: But in none of the submissions that I have seen, none of the written materials do I see Mr. Ellenbogen forswearing testimony. What he says is we are willing to push the date of testimony but that doesn't mean that they weren't going to have it. And I don't see anything in which he said, in writing, that having the proffer would satisfy their request for testimony forever and that they would never come back on that. Why would they do that? Why would they -- I am just -- you are saying to me, and I understand why you are saying this -- that for someone in your position, you wouldn't advise your client to go to a proffer if there was a possibility that they could come back and seek testimony but why would they participate in a proffer if it foreclosed them from ever asking for your client's testimony? To that end, the proffer was initiated by the U.S. Attorney's office. Are you suggesting that the USAO's decision to have a proffer foreclosed the Commission from requesting testimony? No. It is just the fact that they showed up.

MR. HANAMIRIAN: Because the Commission executed their own proffer. So, we have a double layer of proffer agreements.

So, this wasn't an afterthought, this was a detailed analysis and a dialogue. And so, right? I mean, they can choose not to participate in the proffer.

THE COURT: You each could.

MR. HANAMIRIAN: Yes.

THE COURT: You each could.

MR. HANAMIRIAN: Yes.

THE COURT: But my question is who told you that they were never going to seek his testimony without the protections of the proffer agreement? Who told you that?

MR. HANAMIRIAN: The proffer agreement itself tells me that.

THE COURT: But it doesn't tell me that.

MR. HANAMIRIAN: Well, it says that they're not going to use the testimony against him in any context except A, B, C, D, and E.

THE COURT: All right. Well, now I will have Mr. Ellenbogen give me chapter and verse of what happened after your proffer. You are saying, what, they can't ask questions about this now that they have an understanding they didn't have beforehand?

MR. HANAMIRIAN: You can't take the substance of the proffer and then use it against him in a sworn testimony --

THE COURT: He is not saying that that's what happened. He is saying afterwards he got the trades that he didn't look at prior to the proffer, he has got the better understanding of the nature of the trading, he has got additional material including communications from the broker-dealer. Can he ask about that?

MR. HANAMIRIAN: I found it to be a vague response, your Honor. I don't mean interrogatorily with respect to Mr. Ellenbogen.

THE COURT: It came out that way, but okay. Go on.

MR. HANAMIRIAN: He said in response to your question and he is saying that, well, you know, we had additional time to review the documentation and whatever else but in response to you again he said no other witnesses were interviewed, no additional third-party documentation from any other source was obtained.

THE COURT: No. That's not what he said.

MR. HANAMIRIAN: Okay, but no other witnesses.

THE COURT: That's what he said.

MR. HANAMIRIAN: So it all has to have come from us.

THE COURT: No.

MR. HANAMIRIAN: Which was made --

THE COURT: Sir, he just said to me he got additional third-party documentation. I will ask you, please, not to misstate what he said to me.

MR. HANAMIRIAN: No, no. That's what I misunderstood then. No, that's good.

THE COURT: He said he didn't interview anybody else because perhaps this a one-man operation, I have no idea, but he said he did get additional material including internal

communications from the brokerage firm and there were other parties that may or may not have been involved in coordinated trading who may or may not know your client. So, that's what they have that they didn't have at the time of the proffer.

MR. HANAMIRIAN: Right. But the idea is if it is an investigative tool -- if their use of the proffer agreement is an investigative tool it is not an investigative tool as against the person offering the proffer, it is an investigative tool vis-à-vis third-parties that's what it says. So, if you

are going to use it to investigate us then you shouldn't be in the proffer because it is too soon in your case. That's not my fault.

THE COURT: I see. What else would you like me to know, sir?

MR. HANAMIRIAN: You have made all the arguments, your Honor.

THE COURT: No, no, no. I want to make sure I have all of your arguments, sir.

MR. HANAMIRIAN: I was just at least initially concerned with respect to the analysis of bad faith in going down that path but it seems clear that the existence of the proffer and the intervening proffer agreement as between subpoena 1 and subpoena 2 is accounted for in this dialogue and so I am satisfied with that. It really is a matter of criminal defense practice. I don't know how you go forward -- you have to just invalidate the proffer process entirely if this is the case.

THE COURT: Okay. Let me please hear from Mr. Gizzi.

MR. HANAMIRIAN: Thank you.

THE COURT: Mr. Gizzi, the arguments made by your adversary are -- in the parlance of the Failla chambers -- not crazy. How could he have known that you were going to come back and then seek his testimony without the protections of the proffer agreement? He thought he got a great deal. Why didn't he get that great deal? I mean, look. I wouldn't have done the proffer in the first instance but that's just from where I come from. He did it and maybe it was too soon and maybe you should have absented yourself from it, but you didn't. Why should his client not be forced to submit to a subpoena?

MR. GIZZI: Well, your Honor, the proffer agreement itself does contemplate that there will subsequent testimony because it says that the Commission can use the statements he makes at the proffer against him if he testifies subsequently in any proceeding and his testimony is inconsistent.

THE COURT: But when I read that I thought I understood that to be if there were a trial or if there were a hearing where he was testifying. I'm not sure I understood that to encompass the situation where you subpoenaed him again for his testimony.

MR. GIZZI: Well, certainly, right, it would if there were a trial. If we proceed with a litigation against him at his deposition but it also, it says in any subsequent testimony so it's -- it is implicit that it could be investigative testimony in the same investigation or different SEC investigation, and again, the proffer agreement is just very clear that it only applies to the statements made and there is nothing in there that says the SEC will not seek further information from you, will not subpoena you. It just doesn't say anything like that. So, for Mr. O'Brien to believe that it's there, that it says that, it is just -- it doesn't make any sense.

Mr. O'Brien is trying to avoid having to answer questions in a format that can actually be used.

THE COURT: Absolutely right and we can all stipulate to that. He thought he snookered you into having his statements subjected to the proffer agreement but I don't know someone is going to come out of this feel like they've misread something but he thought he had managed to get a great, great deal for himself.

MR. GIZZI: I don't think Mr. O'Brien misread anything. I think the Court used the term "snookered" and that's what he is trying to do, he is trying to prevent the SEC from completing its investigation in this matter and concocting an argument that the staff is acting in bad faith and that the proffer agreement prohibits the staff from later seeking investigative testimony.

THE COURT: Have you ever had another case in which you were involved in which you had a witness make statements pursuant to a proffer agreement and then thereafter sought their testimony by subpoena?

MR. GIZZI: Well, I personally have not, but.

THE COURT: Okay. Can you find me someone in your organization who has?

MR. GIZZI: Yes. So, for instance in a case in the New York office there were proffers with two witnesses, as an example. Meanwhile, somebody was charged criminally. There was an SEC enforcement proceeding brought against the entity that was involved and then the staff subsequently subpoenaed the two witnesses and took their testimony.

THE COURT: One of whom was charged criminally.

MR. GIZZI: No, no, no. I am saying somebody in the related investigation was already under criminal charges.

THE COURT: Let me please make sure I understand what you are recounting to me. There was an investigation in the New York office. There was witness testimony taken pursuant to proffer agreements or there were meetings held pursuant to proffer agreements. Thereafter, someone other than those witnesses was charged criminally.

MR. GIZZI: Correct, your Honor.

THE COURT: Thereafter, the Commission brought an enforcement action and sought their testimony again, this time.

MR. GIZZI: No.

THE COURT: No? Okay.

MR. GIZZI: So, an SEC case was brought against the entity that was involved.

THE COURT: Yes.

MR. GIZZI: The investigation was continuing. The two witnesses were brought in to the New York office and gave sworn testimony under oath in the investigation.

So, that's before even any litigation was brought against those individuals or other individuals and they appeared and testified, and I think the reason that there hasn't been a prior case is because I don't think -- I don't think anyone else would take this position.

THE COURT: Don't you think Mr. O'Brien figured he was not going to be subject to a subpoena for his testimony after completing the proffers?

MR. GIZZI: No. I don't see how he could have thought that.

THE COURT: It would not have been reasonable for him to have thought that.

MR. GIZZI: I don't think so.

THE COURT: I am derailing you. Let me continue.

MR. GIZZI: Simply, I was going to say simply because the agreement, he was under subpoena, the agreement by its terms only applies to that meeting. When we subsequently subpoenaed him a second time he initially scheduled it, he made arrangements to appear, and then it was later that he decided let me try to back my way into a proffer agreement again.

THE COURT: Well, he would say he always was planning on backing his way into that proffer agreement, but okay.

I think it was always the intent of Mr. O'Brien to raise the proffer agreement so I don't think he -- I don't think he went into this and suddenly realized at the eleventh hour that he should do it. Whether he is doing it correctly or not -- I have no evidence suggesting that he waited to tell you that. I mean, he waited as a matter of time but I don't think that was strategic. I think he wanted confirmation that you were accepting his argument.

MR. GIZZI: But that I submit, your Honor, would have been something that it would have been brought up immediately rather than saying, okay, here is the date I'm available for testimony when, incidentally, when it is testimony at the SEC's office not at the U.S. Attorney's office it's, yes, I can accept testimony, I'm not available that date, here is the date I'm available, and then a month goes by, oh, I just want to confirm that it is pursuant to the proffer agreement which, in the proffer agreement again, your Honor, it says explicitly that it only applies to the August 21, 2018 proffer, not to any other statement made at any other time or in any other form.

THE COURT: Just one moment, please, sir.

(pause)

THE COURT: Yes. Please, continue.

MR. GIZZI: I have nothing further.

THE COURT: Mr. Ellenbogen, you look like you have an unspoken argument.

MR. ELLENBOGEN: I just wasn't sure if Mr. Gizzi was clear that when I contacted Mr. Hanamirian's office and asked if they would accept service of the second subpoena they responded they would accept service of the subpoena and then I sent the subpoena, they accepted service of the subpoena, and it wasn't until we were almost at the date for the testimony that Mr. Hanamirian first made his arguments.

I just wanted to make sure that that was clear.

THE COURT: It was not clear. All right.

Mr. Hanamirian, anything else that I haven't covered with you, sir?

MR. HANAMIRIAN: No, your Honor. Thank you.

THE COURT: What I am going to do, I'm going ask for your patience. I am going to step off the bench for a few minutes. I will see if I can give you a decision. If I cannot, I will come back quite promptly.

Thank you very much.

(recess)

THE COURT: Thank you very much for your patience and, please, be seated.

Counsel, friends, I do not have a decision to give you today and let me explain exactly where I am because I am nothing if not transparent with you. The issue, to me, devolves to whether there is bad faith on the part of the Commission in light of *Knopfler*, in light of *LaSalle*, and yet I am being told by Mr. Gizzi that there may be, in fact, a policy at the Commission that interprets the proffer agreement in the way it is interpreted here. I am not giving a final read of the proffer agreement, I want that to be clear and I am trying, as I talked to you, to disaggregate my own use of proffer agreements in my past as a criminal prosecutor from something different which is what is here. But it would seem to me that an argument could be made that to the extent that Mr. O'Brien were questioned and the questions differed in any degree from the questions he was asked at the original proffer, that that would be permissible because if you have developed new information with or without his assistance, there is nothing in this agreement that would appear to forbid you from asking these new, better, more detailed, more granular questions. It is not as clear to me that you would be permitted to ask the identical questions that were asked of him during the proffer and I am having a little bit more difficulty accepting Mr. Gizzi's argument that this is a -- it is a protection from

one day but that it doesn't preclude the Commission from asking the identical questions the next day.

So, if the Commission were to tell me today that every question that would be asked at this testimony would be, in some degree, different as a result of the investigative work, then I suppose we could go forward. I don't know that you can make that representation. I'm not sure you want to. I think I would like to have from the Commission, if it would be so kind, some additional information about instances in which any office has done what has happened here. Mr. Hanamirian said to me in 31 years this is the first time he has seen it. I have not seen it but I have just not but that doesn't mean that it doesn't happen regularly. I would be interested. So, I don't think I need to decide today, the world will not end if I don't decide today, and I want to give you a correct answer rather than a timely answer but, Mr. Gizzi, how much time would it take for you to sort of ask around, see what information is out there, and to get to me information about instances in which the Commission has done exactly what is discussed here?

MR. GIZZI: Certainly we can make the request this afternoon but I am not sure how much time it would take because of the upcoming holiday.

THE COURT: Exactly.

MR. GIZZI: And the thought that a lot of people will be out for part, if not all of, next week.

THE COURT: Yes; people who have better schedules than I do.

Is there a time sensitivity to this, sir? I mean, there may have been at one point but can it be? This doesn't have to be decided today, correct?

MR. GIZZI: No. That's correct. That's correct, yes.

THE COURT: Okay.

MR. GIZZI: I was just trying to think about the statute of limitations. We have plenty of time.

THE COURT: Okay. What about the 6th of December?

MR. GIZZI: That Friday?

THE COURT: That is two weeks from now.

MR. GIZZI: Okay. That's fine. That's fine, your Honor.

THE COURT: If you need more I will give you more time.

MR. GIZZI: No. I think that would be more than enough. I just didn't want to have to try to get an answer before Thanksgiving.

THE COURT: Oh. I didn't want to ask you to do that. That's fine.

Mr. Hanamirian, you will sit tight while we get this information, correct?

MR. HANAMIRIAN: Yes, your Honor. Thank you.

THE COURT: Great. If it is appropriate, I will have a telephonic conference next time so I don't trouble you all to come in.

Mr. Hanamirian, something else you would like me to know?

MR. HANAMIRIAN: No, your Honor.

THE COURT: Thank you.

Mr. Gizzi, something else you would like me to know?

MR. GIZZI: I would note that if that were the case, if the case were that the Commission would not be able to take testimony of the same subjects after agreeing to a proffer, that the Commission would not be entering into proffer agreements anymore with witnesses.

THE COURT: I understand, and that is an argument you can make to me. I am just looking at your proffer agreement and I want to understand what it means when it says that the statements will not be used against you. If he says -- if you ask the same questions and he gives the same answers, are not his statements being used against him? You would tell me no.

And that's what I want to think about a little bit more than I have. I focused a lot on the increase to your base of knowledge that prompted the request for the second subpoena and that's what I have been focusing on and do I think having a second subpoena is bad faith? No. But, I

just want to make sure that there is no violation of your proffer agreement and I am also thinking to the extent that there is an ambiguity -- and I'm not saying there is -- Mr. Hanamirian will thoughtfully tell me that it would be construed against the Commission.

Again, I'm not saying it is, I just want to look at it more. So, whatever you want to tell me by the 6th of December, please, tell me.

Mr. Hanamirian, if there is something you want to tell me by the 6th of December, please, tell me. I will listen to you. I am not saying you have to, I just want to hear -- this is new to me, too, and I want to make sure I am looking at it correctly.

MR. HANAMIRIAN: Great. Thank you, your Honor.

THE COURT: Thank you very much. I thank you for coming in today. Excuse me for not being able to give you a decision but, again, please take correct over timely. We are adjourned.

Thank you. We are adjourned.