

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO.

SECURITIES AND EXCHANGE COMMISSION,

Applicant,

v.

ALEXANDER KON,

Respondent.

**SECURITIES AND EXCHANGE COMMISSION’S APPLICATION FOR
AN ORDER TO SHOW CAUSE ENFORCING ADMINISTRATIVE SUBPOENAS**

Applicant Securities and Exchange Commission (the “Commission”) applies for an order compelling Respondent Alexander Kon to comply with the Commission’s subpoena to appear for testimony by audio-visual teleconference means, using the WebEx Internet platform [Declaration of Julie Russo (“Russo Dec.”), Aug. 26, 2021, Attach. L] and subpoena to produce documents [Russo Dec. Attach. J]. In support of this application, the Commission states as follows:

I. BACKGROUND

The Commission has been investigating Kon, a microcap stock promoter, in connection with a potential violation of the federal securities laws (the “Investigation”). Issues central to the potential violation include whether Kon promoted microcap stocks and hired others to promote microcap stocks during a May 2018 – May 2019 penny stock bar imposed against him by the Commission [Russo Dec. Attach. B (the “2018 Order”)]. In the 2018 Order, issued with Kon’s consent without him admitting or denying the findings therein, the Commission found that Kon had violated Section 17(b) of the Securities Act of 1933 (“Securities Act”), 15 U.S.C. 77q(b), by promoting a stock without accurately disclosing the source of the compensation he received for

doing so. The Commission imposed a cease-and-desist order against future violations, a one-year suspension from participation in penny stock offerings, and disgorgement, prejudgment interest, and civil penalties totaling \$45,332.

Kon was the sole member of 007Stockchat LLC and World Wide Media Group LLC, which are both Kansas entities through which Kon promoted microcap stocks. During the time of Kon's penny stock bar, he maintained a World Wide Media Group LLC bank account and other accounts under his exclusive control and he was the sole signatory on the accounts. The Commission is seeking to take Kon's testimony and is seeking documents. Kon failed to appear for testimony on the date set forth in the subpoena for testimony and failed to produce any documents on the production date.

Kon has alternated between stating he is unable to appear for testimony because of conflicts or that signed settlement papers would be submitted in lieu of providing testimony. Kon has also failed to comply with the subpoena for production. He initially claimed that he had no responsive documents, and has since ignored the subpoena.

For the reasons set forth below, the Commission requests that this Court enter an Order to Show Cause, compelling Kon to appear before the Court and show cause why the Commission's subpoenas should not be enforced.

II. STATEMENT OF FACTS

A. The Commission's Authority and Reason for Investigation

1. The Commission has issued a Formal Order Directing Private Investigation and Designating Officers to Take Testimony in the Matter of Alexander Kon (FL-04216) [Russo Dec. Attach. A].

2. Under the Formal Order, members of the Commission's staff are officers of the Commission empowered to administer oaths, subpoena witnesses, compel their attendance, take

evidence, and require the production of any books, papers, correspondence, memoranda, or other records deemed relevant or material to the investigation. *Id.*

3. The Formal Order directs the Commission's staff to conduct a private investigation to determine whether Kon and has engaged in the enumerated potential violation of the federal securities laws. *Id.* The investigation has revealed that Kon, acting individually and through the entities identified in paragraph 5 below, promoted microcap stocks and hired others to promote microcap stocks in contravention of the 2018 Order.

4. The Commission is investigating Kon's possible violation of Section 15(b)(6)(B)(i) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78o(b)(6)(B)(i). Section 15(b)(6)(B)(i) prohibits participation in an offering of penny stock in contravention of a Commission order. *Id.*

5. Kon is the sole member of 007Stockchat LLC and World Wide Media Group LLC, and also operates under the pseudonym JS Media, LLC. At all relevant times, Kon had exclusive control over World Wide Media Group LLC and its U.S. bank account [Russo Dec. Attach. N].

B. The Commission's Subpoenas, and Kon's Failure to Comply

6. On November 27, 2019, the Commission issued a subpoena for Kon to produce documents no later than December 13, 2019 and appear for testimony in Miami, Florida on January 14, 2020 [Russo Dec. Attach. C].¹

7. No documents were produced, and on January 22, 2020, Kon forwarded to the Commission's staff a letter dated January 11, 2020 from a physician stating that Kon was unable to take a flight to testify in person because of his "diagnosis of Panic Disorder with Agoraphobia" [Russo Dec. Attach. D].

¹ The subpoena contained a typo and noted a testimony date of January 14, 2019. It was clearly understood that the testimony would occur on January 14, 2020 as indicated by Kon's actions in responding to the subpoena.

8. The Commission's staff followed up with Kon's counsel on Kon's failure to produce documents, and in response, Kon replied that he was not involved in any stock promotion during the relevant time period [Russo Dec. Attach. E].

9. After taking into consideration Kon's condition as well as pandemic safety concerns, the Commission's staff coordinated with counsel in taking testimony by video conferencing. Per discussions with counsel, the Commission's staff sent a subpoena for Kon's testimony to take place on December 22, 2020 [Russo Dec. Attach. F].

10. Since then, Kon has alternated between agreeing to specific dates for his testimony but cancelling his appearance shortly before the testimony date, seeking extensions of time for his testimony, and offering to sign settlement documents in lieu of testimony. Some of this history is as follows:

a. **Kon asks for testimony to be postponed for settlement purposes.** On December 15, 2020, Kon offers to settle this matter [Russo Dec. ¶ 6].

b. **After settlement talks failed, the Commission's staff subpoenaed Kon for his testimony to take place on February 11, 2021 [Russo Dec. Attach. G], in response to which Kon requests a postponement.** On February 2, 2021, due to a volume of documents that Kon is retrieving and reviewing, Kon requests that testimony be postponed until March [Russo Dec. Attach. H].

c. **Counsel withdrew, and the Commission's staff subsequently subpoenaed Kon to produce documents by February 22, 2021 and to testify on February 23, 2021 [Russo Dec. Attach. I].** Kon requests additional time to secure legal representation [Russo Dec. ¶ 9].

d. **Through new counsel, the Commission's staff subpoenaed Kon to produce documents by April 8, 2021 and to testify on April 15, 2021 [Russo Dec. Attach. J], in response to which Kon requests a postponement [Russo Dec. ¶ 9].** Settlement talks fail [Russo Dec. ¶ 9].

e. **The Commission then reschedules Kon's testimony to May 20, 2021 [Russo Dec. Attach. K].** Kon again requests a postponement for settlement purposes [Russo Dec. ¶ 10]. On July 2, 2021, Kon submits \$45,000 to make a partial payment on disgorgement and penalty amounts outstanding on the 2018 Order [Russo Dec. ¶ 10]. Settlement talks fail [Russo Dec. ¶ 10].

f. **The Commission then reschedules Kon’s testimony to July 20, 2021 and relays to counsel that there will be no further postponements, the Commission’s staff will proceed with a “no-show” testimony should Kon fail to appear, and as a consequence, the Commission’s staff would proceed with a subpoena enforcement action [Russo Dec. Attach. L]. Kon fails to appear for testimony [Russo Dec. Attach. M].**

11. The Commission has exhausted all efforts to obtain Kon’s testimony. Despite serving Kon repeatedly with the subpoena for production, he refuses to comply. Accordingly, we are seeking an Order to Show Cause why Kon should not appear for testimony and produce documents pursuant to the subpoenas.

III. MEMORANDUM OF LAW

A. The Court Has Jurisdiction and Venue Properly Lies In This District

Congress gave the Commission broad authority to conduct investigations and require production of evidence and testimony relevant to those investigations. *See, e.g.*, Sections 21(a) and (b) of the Exchange Act, 15 U.S.C. §§ 78u(a) and (b) (“For the purpose of any such investigation, or any other proceeding under this title, any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence”); *see also SEC v. Jerry T. O’Brien, Inc.*, 467 U.S. 735, 745 (1984) (“It appears, in short, that Congress intended to vest the Commission with considerable discretion in determining when and how to investigate possible violations of the statutes administered by the Commission”); *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1380 (D.C. Cir. 1980) (given the Commission’s broad statutory mandate to investigate, there was “virtually no possibility” the Commission exceeded its authority in issuing an investigative subpoena).

When parties refuse to comply with lawful Commission demands for testimony issued pursuant to the Commission’s broad statutory authority to investigate, Congress has authorized the Commission to seek, and the federal courts to issue, orders compelling production or testimony.

“In case of . . . refusal to obey a subpoena issued to any person, the Commission may invoke the aid of any court of the United States within which the jurisdiction of which such investigation or proceeding is carried on . . . in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records.” Section 21(c) of the Exchange Act, 15 U.S.C. § 78u(c). That very language also provides that venue lies in the Southern District of Florida, as it provides the Commission may seek a court order “within which the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business.” *Id.*

Here, venue is proper in this district because the investigation is being carried on in and originally required Kon to appear in the Southern District of Florida. [Russo Dec. Attach. C & J]. There is personal jurisdiction over Kon because the Exchange Act authorizes nationwide service of process in subpoena enforcement actions. 15 U.S.C. § 78u(c); *see SEC v. Marin*, 982 F.3d 1341, 1349 (11th Cir. 2020).

B. The Court Should Conduct a Summary Proceeding

Subpoena enforcement actions are generally summary in nature and the Court may therefore hear them in summary fashion without strict adherence to the Federal Rules of Civil Procedure. *United States v. Elmes*, 532 F.3d 1138, 1143 (11th Cir. 2008) (under Rule 81(a)(3) of the Federal Rules of Civil Procedure “the district court has discretion to deny hearings or limit the applicability of discovery in a proceeding to compel the production of documents in accordance with a subpoena issued by an officer or agency of the United States”); *SEC v. Sprecher*, 594 F.2d 317, 320 (2d Cir. 1979) (upholding right of district court to enforce subpoenas in summary proceedings without the filing of a complaint pursuant to Section 22(b) of the Securities Act,

15 U.S.C. § 77v(b), which allows a district court to enforce a subpoena “upon application by the Commission”).

Accordingly, the Commission asks the Court to promptly set an Order to Show Cause Hearing so that Kon’s failure to comply with the subpoena is not allowed to continue. *SEC v. First Security Bank*, 447 F.2d 166, 168 (10th Cir. 1971).

C. The Commission’s Subpoena Satisfies All Requirements for Enforcement

A district court’s role in a proceeding to enforce an administrative subpoena “is limited.” *Marin*, 982 F.3d at 1352; *EEOC v. Tire Kingdom, Inc.*, 80 F.3d 449, 450 (11th Cir. 1996). Under that limited review, a court should enforce an administrative subpoena if it is reasonably relevant to an authorized investigation. *Tire Kingdom*, 80 F.3d at 450; *EEOC v. Technocrest Sys.*, 448 F.3d 1035, 1040 (8th Cir. 2006).

Courts have generally looked at four criteria to determine whether to enforce a Commission subpoena: (1) the investigation is being conducted pursuant to a legitimate purpose; (2) the inquiry is relevant to that purpose; (3) the information the Commission seeks is not already in its possession; and (4) the Commission has fulfilled the necessary administrative steps. *United States v. Powell*, 379 U.S. 48, 57-58 (1964); *RNR Enterprises, Inc. v. SEC*, 122 F.3d 93, 96-97 (2d Cir. 1997); *SEC v. Howatt*, 525 F.2d 226, 229 (1st Cir. 1975); *SEC v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1053 (2d Cir. 1973). Once the Commission satisfies these criteria, the burden shifts to a respondent to demonstrate the subpoena is unreasonable. *Brigadoon Scotch*, 480 F.2d at 1056. However, the burden of showing unreasonableness “is not easily met” as long as the Commission’s inquiry is legally authorized and the information it seeks is relevant to the inquiry. *Id.*

1. The Commission's Purpose is Lawful

As discussed above, Congress has given the Commission broad authority to investigate whether the federal securities laws, rules, and regulations “have been or are about to be violated.” Section 20(a) of the Securities Act, 15 U.S.C. § 77t(a); Sections 21(a) and (b) of the Exchange Act, 15 U.S.C. §§ 78u(a) and (b). Pursuant to that authority, the Commission issued the Formal Order authorizing designated officers to conduct an investigation into possible violation of Section 15(b)(6)(B)(i) of the Exchange Act by Kon [Russo Dec. Attach. A].

Pursuant to the authority conferred under the Formal Order, the Commission's investigative team issued a subpoena to Kon seeking his testimony [Russo Dec. Attach. C]. The subpoena is within the parameters of the Commission's broad discretion to investigate: “For the purpose of any such investigation, or any other proceeding under this title, any member of the Commission or any officer designated it is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence”); *see also O'Brien*, 467 U.S. at 745 (“It appears, in short, that Congress intended to vest the SEC with considerable discretion in determining when and how to investigate possible violations of the statutes administered by the Commission.”); *Dresser Indus.*, 628 F.2d at 1380 (given the Commission's broad statutory mandate to investigate, there was “virtually no possibility” the Commission exceeded its authority in issuing an investigative subpoena).

Accordingly, the Commission's purpose in issuing the subpoena was lawful.

2. The Commission Seeks Relevant Information

The measure of relevance used in subpoena enforcement actions is “quite broad.” *United States v. Florida Azalea Specialists*, 19 F.3d 620, 624 (11th Cir. 1994). A district court may enforce a subpoena so long as “the materials sought are not clearly irrelevant or immaterial.” *SEC*

v. Arthur Young & Co., 584 F.2d 1018, 1029 (D.C. Cir. 1978) (upholding district court's use of that language as standard for relevance).

Kon's testimony is highly pertinent to the Commission's investigation. The investigation concerns his promotion of penny stocks and hiring of others to promote penny stocks in violation of the federal securities laws. Bank account statements preliminarily show Kon transacting in microcap stock promotional activities in contravention of the 2018 Order [Russo Dec. Attach. N].

3. Kon Possesses Information the Commission Lacks

Kon possesses information the Commission lacks. Documents and facts surrounding the transactions noted above is critical to the Commission's inquiry. Furthermore, Kon has further convoluted matters by sometimes operating under the pseudonym JS Media, LLC. Kon's testimony concerning these matters is therefore critical to the investigation. The Commission has continued the investigation since the initial date of the original subpoena to Kon. We cannot obtain complete evidence surrounding Kon's activities during his penny stock bar absent his testimony and production of documents.

4. The Commission Has Satisfied All Necessary Administrative Steps

The Commission issued all subpoenas in accord with all applicable administrative requirements. Section 19(b) of the Securities Act, 15 U.S.C. § 77s(b), and Section 21(b) of the Exchange Act, 15 U.S.C. § 78u(b), empower the Commission to subpoena documents and testimony in the course of investigations. Here, Julie Russo, an attorney for the Division of Enforcement, designated as an officer of the Commission in the Formal Order, issued the subpoenas to Kon [*e.g.*, Russo Dec. Attach. C & L].

D. Kon Cannot Show the Subpoenas Are Unreasonable and His Excuses Lack Merit

As set forth above, the Commission has satisfied all requirements for enforcement of the subpoenas. Accordingly, Kon would have to demonstrate that the subpoenas are unreasonable. *Brigadoon Scotch*, 480 F.2d at 1056. Because the Commission’s inquiry is legally authorized and the Commission seeks information relevant to the Investigation, Kon’s burden “is not easily met.” *Id.* Kon has not argued that any subpoena is unreasonable. Accordingly, he cannot meet this burden. Instead, he has offered shifting excuses over time. The Commission accommodated his first excuse—his fear of flying—by offering to take the testimony remotely. His excuse then shifted to his alleged desire to settle the charges, but a settlement has never materialized.

IV. CONCLUSION

The Commission has satisfied all the requirements for enforcement of the subpoenas. Accordingly, the Commission requests this Court to expeditiously conduct a summary proceeding and issue an Order to Show Cause compelling Kon to appear before the Court and show cause why the Commission’s subpoenas should not be enforced.

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Respectfully submitted,

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