

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION, :

Applicant, :

- against - :

Shawn Carter, :

Respondent. :

Case No. 18-mc-182-PGG

-----X
MEMORANDUM OF LAW IN OPPOSITION TO THE SECURITIES AND EXCHANGE
COMMISSION'S APPLICATION FOR AN ORDER TO SHOW CAUSE AND FOR AN
ORDER REQUIRING COMPLIANCE WITH SUBPOENA

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Respondent Shawn C. Carter respectfully submits this Memorandum of Law in opposition to the Application of the United States Securities and Exchange Commission (“SEC”), dated May 2, 2018, for an Order to Show Cause and for an Order Requiring Compliance with Subpoena. ECF No. 1. Because the SEC has asked the Court for an order exceeding the authorized terms of the subpoena issued to Mr. Carter, and because that subpoena is unreasonable and compliance with it would be unreasonably burdensome, as set forth herein, Mr. Carter respectfully requests that the Court deny the Commission’s Application.

PRELIMINARY STATEMENT

The SEC is overreaching by trying to compel Mr. Carter to testify without reasonable limitation. Although Mr. Carter has offered to supply a *full day* of testimony, the SEC has insisted upon *more*, thereby necessitating the instant opposition. In reality, the SEC has no legal warrant to insist upon more. That the SEC is overreaching is evident from the face of the SEC’s own subpoena for Mr. Carter’s testimony, which called for a single day and nothing more. The resulting disconnect between the SEC’s request for compulsion, on the one hand, and the SEC’s actual, underlying subpoena, on the other, is fatal to the SEC’s position and basis for denying its request. Simply stated, the SEC cannot obtain judicial compulsion of multiple days of testimony when its own subpoena to Mr. Carter is itself limited to a single day of testimony.

The SEC’s subpoena to Mr. Carter is all the more unreasonable and, indeed, oppressive, considering that Mr. Carter has not been shown to possess any noncumulative or unique information regarding the relevant subject matters. Although the SEC’s investigation focuses on a different entity with different principals, the SEC has issued subpoena after subpoena (a series of nine) to Mr. Carter, his colleagues, and his affiliated businesses, which have produced troves of documents (almost eleven thousand pages). The Chief Operating Officer of two of those businesses, who is closely connected to Mr. Carter and aware of his business decisions, has

already given sworn testimony to the SEC for a full day. Further, Mr. Carter has made several proposals that would accommodate the SEC's request while limiting the unnecessary burden, including, most recently, an offer to testify for up to one day, notwithstanding the serious prejudice that this poses to his schedule and his businesses. This dispute now proceeds before the Court only because the SEC insists that Mr. Carter appear to testify before it, without limitation, from "day-to-day until completed." The SEC has identified no reasonable basis for imposing such immense burdens. Not only does the subpoena itself not contemplate such burdens, but they are inordinate considering Mr. Carter's peripheral role in the investigation, as compared to his extensive commitments and the demands on his time. This opposition reflects Mr. Carter's concern that the SEC's instant request is unreasonably and unnecessarily burdensome and is driven more by governmental fascination with celebrity and headlines than by any proper investigative purpose.

STATEMENT OF FACTS

I. Respondent

Mr. Carter, also known professionally as JAY-Z, is an internationally renowned recording artist, entrepreneur, and philanthropist. *See generally* Carter Decl.

Mr. Carter's extensive business empire includes investment in and/or management of various companies, including Tidal, Roc Nation LLC ("Roc Nation"), and others. The businesses in which Mr. Carter is a principal employ thousands of individuals. *See* Carter Decl.

Mr. Carter also has substantial philanthropic commitments, including the Shawn Carter Foundation, Red Cross, United Way, Boys & Girls Clubs of America, Keep a Child Alive, Music for Relief, PlayPumps, Global Poverty Project, Artists for Peace & Justice, Broadway Cares/Equity Fights AIDS, and the GRAMMY Foundation.

As a recording artist, Mr. Carter recently released an album (*4:44*) on June 30, 2017. Mr. Carter toured in support of that album from October 27, 2017 to December 21, 2017, performing in 32 cities across North America. Mr. Carter's work on *4:44* as a performer, songwriter, producer, and video director garnered eight nominations at the 60th Grammy Awards, which were held on January 28, 2018. Mr. Carter will commence a global tour consisting of 45 shows on June 6, 2018. Suffice to say, the professional and publicity demands on his time are enormous.

II. The SEC's Investigation

The SEC initiated an investigation into Iconix following the company's announcement on November 5, 2015 in its Form 8-K that a Special Committee of the Board of Directors had conducted a review of accounting treatment and concluded that the company would file restatements amending its (i) fourth quarter and annual results of 2013; (ii) 2014 fiscal year and each quarterly period thereof; and (iii) first and second quarters of 2015.

The SEC asserts that impairment loss stemming from Rocawear is a "large component" of the total impairment figure that Iconix recorded for fiscal years ending in December 31, 2015 and December 31, 2017. At the same time, the SEC recognizes that the impairment loss in the latter year was a mere fraction of the total trademark impairment loss of approximately \$525.7 million, at \$34.6 million, or 6.5%. The amount attributable to Rocawear in December 31, 2015 was \$169 million out of a \$402 million reported impairment loss.

III. The SEC's Subpoenas to Mr. Carter and His Businesses

Although Mr. Carter never had any role in Iconix's financial reporting, and although the SEC has not shown that Mr. Carter has first-hand, relevant, and non-cumulative information about the subjects of the investigation, the SEC has insisted, unreasonably, that Mr. Carter appear to testify before it for an unlimited period of time. Lest there be any doubt that the SEC

wants specifically to compel testimony for multiple days, that insistence proved to be the *sole issue* dividing the parties: Mr. Carter has offered to testify for a *full day*, but the SEC refused to accept that offer *precisely* because it insists that he commit to testify for *multiple days* should the SEC elect to detain him that long. In taking its instant position, the SEC has acknowledged that a full day should be ample yet refuses to accept any limitation in that regard and still presses for compulsion entitling it to more.

On February 6, 2017, the SEC issued seven separate document subpoenas to Mr. Carter, S. Carter Enterprises and Roc Nation's Chief Operating Officer ("COO") Desiree Perez, and five of Mr. Carter's business entities: Marcy Media LLC and Marcy Media Holdings, LLC; Roc Apparel Group, LLC; Roc Nation Apparel Group, LLC; Roc Nation LLC; and S. Carter Enterprises, LLC. Various respondents, including Ms. Perez and the business entities, complied with those subpoenas in good faith and produced almost eleven thousand pages relating to communications and agreements with Iconix, flow of funds to and disputes with Iconix, transactions into which Marcy Media and Roc Nation entered, the financial performance of Roc Apparel Group, and various other requests relating to related entities, transactions and communications with specific individuals. What is more, Ms. Perez appeared before the SEC and spent an entire day testifying for some seven hours at the SEC's request.

On November 16, 2017, the SEC issued a subpoena requiring Mr. Carter to testify on unspecified topics. To be clear, that subpoena is explicitly *not* at issue in the SEC's instant application, yet the SEC for some reason discusses it at some length in its supporting memorandum and declaration. That initial subpoena, since superseded, was issued while Mr. Carter was (1) performing a North American tour of his album *4:44*; and (2) represented by different counsel in this matter. That counsel, on behalf of the companies that had received the

initial seven document production subpoenas, were in the midst of producing a large number of documents to the SEC. At no time did the SEC seek to enforce that initial subpoena, nor does it now.

On February 6, 2018, attorney Alex Spiro of Quinn Emanuel Urquhart & Sullivan, LLP, notified the SEC that he was taking over Mr. Carter's representation in the Iconix Investigation. (Mr. Carter's previous law firm also represents the various business entities that have received subpoenas in this investigation). Spiro Decl. at 3. Mr. Spiro explained that, although new to the case, he and his team were "working diligently to understand the pertinent facts and transactions so that we can properly advise our client." Edwards Decl, Exh. 7 (ECF No. 3).

On February 23, 2018, the SEC issued a new subpoena requiring Mr. Carter's testimony "on **Wednesday, March 21, 2018**," without reference to any subsequent day or days. Exh. 1. At that time, Mr. Carter's new counsel was still getting up to speed alongside a variety of professional demands and commitments, including a trial for a different client that took place from April 23 to May 3 (*i.e.*, concluded this past Thursday), *USA v. Demos*, No. 3:16-CR-220 (D. Conn.). Nevertheless, Mr. Carter's legal team continued to propose ways that the SEC's request could be accommodated without subjecting Mr. Carter to the unreasonable burdens associated with giving testimony for an unlimited time. To date, Mr. Carter's counsel have offered numerous alternative methods for the SEC to obtain the information it requires, including attorney proffers, a declaration made under penalty of perjury, a telephone interview with Mr. Carter, reasonable time limits on any testimony given by Mr. Carter, and sworn testimony from alternative persons who have a significant understanding of the transactions at issue, including Kashyap Bakhai, who was heavily involved in the financials of the transactions at issue, and

Ronnie DeMichael, the Chief Financial Officer of Roc Apparel Group LLC. The SEC has rejected all of those proposals.

Over the course of this past weekend, Mr. Spiro continued to engage extensively with the SEC about whether the instant opposition might be obviated. Despite considerable progress, negotiations broke down over a single issue that has proved to be a deal-breaker: while Mr. Carter has offered to commit to testify before the SEC for a full day, the SEC insists that Mr. Carter commit to continuing to testify for multiple days to the extent that the SEC wants to keep questioning him. Communications between Mr. Carter's counsel and the SEC are described in the declarations of James L. Sanders and Alex Spiro, filed with this opposition. *See generally* Sanders Decl. and Spiro Decl.

In the present posture, Mr. Carter and his counsel feel obliged to proceed with this respectful opposition and seek ruling from the Court. The SEC has rejected the numerous methods Mr. Carter's attorneys have offered to obtain the necessary information. Instead, the SEC continues to insist on meeting Mr. Carter *in person* for an *unlimited* period of time. The upshot imposes unreasonable burdens on Mr. Carter and raises serious questions about whether this exercise has transcended any investigative purpose and crossed over into a celebrity hunt.

LEGAL STANDARD

To establish that an administrative subpoena is *prima facie* valid and therefore entitled to judicial enforcement under 15 U.S.C. § 78u(c), the SEC must show “(1) that the investigation will be conducted pursuant to a legitimate purpose, (2) that the inquiry may be relevant to the purpose, (3) that the information sought is not already within the Commissioner's possession, and (4) that the administrative steps required have been followed.” *SEC v. Comm. On Ways and Means of the U.S. House of Representatives*, 161 F. Supp. 3d 199, 214 (S.D.N.Y. 2015).

If the SEC makes that *prima facie* showing, “[t]he respondent opposing enforcement must shoulder the burden of showing that the subpoena is ‘unreasonabl[e]’ or was issued in bad faith or for an ‘improper purpose,’ or that compliance would be ‘unnecessarily burdensome.’” *Id.* at 215 (second alteration in original) (quoting *RNR Enters., Inc. v. SEC*, 122 F.3d 93, 97 (2d Cir. 1997)).

ARGUMENT

I. The Application Should Be Denied Because It Seeks An Order Beyond the Scope of the Subpoena

This Court has the power to “enforce” the SEC’s subpoena, not to expand it. *See id.* at 214 (discussing the courts’ role “in a proceeding to *enforce* an administrative subpoena” (emphasis added)). Because the SEC is seeking an order that plainly exceeds the scope of the subpoena, its Application should be denied. Notably, diligent search has uncovered no prior instance in which the SEC has secured compulsion for a witness to testify from “day to day,” much less an instance in which the SEC did so on the basis of a subpoena that demanded testimony on a single, specified day.

The subpoena issued to Mr. Carter specifies that he must testify “at the place, date and time specified below.” Edwards Decl. Exh. 2 (ECF No. 3). The “place, date and time” the subpoena identifies are the headquarters of the Securities and Exchange Commission in Washington, DC, on “**Wednesday, March 21, 2018 at 9:30 a.m.**” Exh. 1. Neither the subpoena itself nor even the accompanying letter hints that Mr. Carter’s testimony might go beyond that single day. Nor, based on the SEC’s own assertions, should such an extended period of time realistically be warranted, even assuming *arguendo* (contrary to all available indications) that in-person testimony is necessary at all. While purporting to ask this Court to enforce that

subpoena, the SEC has proposed an order of compulsion that exceeds the terms of the subpoena the SEC actually issued.

In the instant application, the SEC asks the Court to order Mr. Carter to give testimony that “shall continue day-to-day until completed.” Appl. at 6. By so doing, the SEC has attempted to expand the parameters of the underlying subpoena—without so alerting the Court—and has sought relief that lacks basis in law. In other words, this is the extraordinary case in which the requisite “administrative steps required have [*not*] been followed.” *Comm. On Ways and Means of the U.S. House of Representatives*, 161 F. Supp. 3d at 214, for the SEC has *not* authorized and issued an administrative subpoena corresponding with the multi-day duration of testimony it is urging this Court to compel.

Nor can the Court correct the obvious legal defect. Although Rule 45 of the Federal Rules of Civil Procedure does not apply when courts enforce an SEC subpoena, that Rule should inform and constrain any use of judicial compulsion, as distinct from the administrative command set forth in the administrative subpoena. To reiterate, the operative administrative command for Mr. Carter’s testimony stops at a single day. Moreover, because the subpoena commands testimony in Washington, DC, as does the SEC’s requested compulsion, it would be not only extraordinary but contrary to settled law for this Court, sitting in New York, to compel any extension of the testimony the SEC seeks elsewhere. If, nevertheless, the SEC thinks it can show that requiring Mr. Carter to give testimony for multiple days, without limit, is reasonable and not unduly burdensome, it remains free to issue a subpoena properly seeking testimony on those terms. It suffices to note that the SEC has not done so at this point. Considering the subpoena that is actually at issue, this Court does not have the power to order Mr. Carter to

testify in Washington, DC, for more than one day, and the SEC has badly and baldly overreached by seeking the compulsion it has. Its request fails and should be denied for this reason alone.

II. The Application Should Be Denied Because Compliance with the Subpoena Would Be Unreasonably Burdensome

Even taking the subpoena by its one-day terms, however, the subpoena is unreasonable and unduly burdensome such that compulsion should be denied. “[T]here are real limits on any agency's subpoena power.” *Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colleges & Sch.*, 854 F.3d 683, 689 (D.C. Cir. 2017). The Court’s role is not merely to “rubber-stamp” administrative subpoenas; “the deference courts afford agencies does not eviscerate the independent role which the federal courts play in subpoena enforcement proceedings.” *Id.* “A respondent who seeks to defeat enforcement of a Commission subpoena bears the burden of demonstrating that the subpoena is unreasonable or was issued in bad faith or for an improper purpose, or that compliance would be unnecessarily burdensome.” *S.E.C. v. Finazzo*, 543 F. Supp. 2d 224, 226 (S.D.N.Y. 2008), *aff’d*, 360 F. App’x 169 (2d Cir. 2009). An unreasonable burden can be found when “compliance threatens to unduly disrupt or seriously hinder normal operations of a business.” *Long Island Precast, Inc. v. OSHA*, 2014 WL 3735943, at *5 (E.D.N.Y. July 29, 2014).

Compliance with the subpoena (with or without the unbounded parameters set by the SEC) would be unreasonably burdensome and beyond the limits of the law. The SEC seeks Mr. Carter’s testimony at its headquarters in the District of Columbia and has refused requests by counsel to limit the duration of the testimony to a reasonable time period that seems more than ample to accommodate every discernible line of inquiry the SEC might want to pursue—which can be covered in hours, rather than days. As things stand, the SEC will not accept any accommodation from Mr. Carter short of him committing to provide sworn testimony for an

unlimited number of days. Enforcing the subpoena on these terms—terms that, as discussed, are beyond the scope of the subpoena itself—would impose extreme hardship on Mr. Carter and would seriously impair and unduly disrupt the normal operations of Mr. Carter’s businesses. That is neither a lawful nor a just result. Administrative subpoenas have limits, and those limits deserve to be enforced over the SEC’s *ipse dixit* demand for Mr. Carter, as an ancillary subject of curiosity, to produce day, after day, after day of sworn testimony.

Many people and businesses depend on Mr. Carter’s time. In addition to preparing for a 45-date global tour that begins in less than a month, Mr. Carter has daily responsibilities for a number of his businesses and deals with urgent matters as they come up as a regular part of his duties. Mr. Carter’s absence while testifying, even for a period of hours, and especially for the unlimited time the SEC seeks, will unduly disrupt the operations of those businesses and their employees, as well as the work of the many people and entities that rely upon those businesses.

III. The Subpoena Is Unreasonably and Unnecessarily Burdensome Because the SEC Has Not Shown that Mr. Carter’s Testimony Is Relevant to the Investigation

The hardship the SEC is threatening to visit upon Mr. Carter and his businesses is inordinate considering that Mr. Carter and his businesses, even by the SEC’s account, were not involved in Iconix’s financial reporting (or in the management of Iconix itself). What is more, the evidence that the SEC does have, including documents and sworn testimony from Roc Nation, establishes that Mr. Carter has no information to offer the SEC about “any violations of the federal securities laws in connection with Iconix’s reported financial results.” Appl. at 7. The notion that Mr. Carter has unique knowledge of consequence to the SEC in this matter is farfetched, at best; the notion that he has more than a couple of hours’ worth, let alone one full day’s worth, of such knowledge is fanciful at this point; and insistence that Mr. Carter be compelled to testify for multiple days is nothing short of abusive. The SEC’s demands on Mr.

Carter are out of all proportion to any showing it has made. Indeed, the SEC whistles past the fact that it has already obtained, in response to parallel subpoenas, a litany of responsive documents from business entities associated with Mr. Carter and that the relevant COO responsible for overseeing the businesses and handling their day-to-day operations has testified for a full day in response to SEC subpoenas in this investigation. Those businesses are all private while Iconix, the public company under investigation, has never had Mr. Carter as a board member or principal.

Nor has the SEC offered any meaningful explanation as to why it desires the personal testimony of Mr. Carter in addition to the large number of responsive documents already produced and the testimony already offered by Ms. Perez. To the extent the SEC wants to ask Mr. Carter about a handful of emails that appear to have been sent or received from his account, there is no plausible reason why the SEC could not accomplish that—and then some—without going beyond one day, or, for that matter, just a couple of hours of live testimony. To be clear, Mr. Carter continues respectfully to believe that a proffer from counsel or telephone interview should suffice, without forcing the point via litigation. Opposition is proceeding because the SEC has gone altogether beyond the pale—pushing even beyond a full day of testimony and beyond the scope of the subpoena, and thereby unduly burdening and disrupting the normal, expected business operations of Mr. Carter and his businesses to an egregious extent.

In attempting to justify its extravagant demands, the SEC submits that it seeks the testimony of Mr. Carter regarding: “[1] the value of the Rocawear trademark and his involvement with that brand after the sale to Iconix; [2] the Carter-affiliated companies that did business with Iconix; [3] the multiple transactions involving Respondent Carter, his affiliated companies, and Iconix; [4] Respondent Carter’s knowledge and intent with respect to those

transactions, and his awareness of the knowledge and intent of other people with respect to those transactions; and [5] multiple emails, meetings, and phone calls related to Iconix in which Respondent Carter was or may have been a participant, according to the evidence developed by the Commission thus far.” Appl. Mem. at 3–4.

The first three of these topics implicate basic background facts that could be derived from reviewing the documents that have already been produced to the SEC in its investigation. Further, each of these topics was already covered during the full-day testimony provided by Ms. Perez. Sanders Decl. at 11. The SEC has not offered any reason to believe that Mr. Carter has unique personal knowledge regarding the companies that did business with Iconix, transactions with Iconix, the value of the Rocawear trademark, or even his involvement with the brand after the sale to Iconix. In fact, all such information should be in the possession of, and more appropriately sought from, Iconix, the public company under investigation. The fourth item is irrelevant to the SEC’s inquiry into Iconix’s financial reporting, given that the SEC has no information to suggest that Mr. Carter at any time had a controlling role over that reporting. The fifth item demonstrates by its own terms (“in which Mr. Carter . . . *may have been* a participant”) (emphasis added) that the SEC is on a fishing expedition unfounded in the facts turned up by its extensive investigation to date. *See SEC v. Forster*, 147 F.Supp.3d 223 (S.D.N.Y. 2015) (denying the SEC’s application to compel production of documents from an individual in violation of his fifth amendment privilege when the documents could reasonably have been provided from other sources).

Being made to testify about these topics for a full day (much less for the unlimited period of days sought by the SEC) would impose unreasonable, unnecessary burdens on Mr. Carter. The excessiveness of those burdens should be especially apparent given his tangential

relationship, at best, to the Iconix Investigation and the vast amount of on-point information that the SEC has already elicited from Ms. Perez and from relevant businesses as respondents.

IV. The SEC Has Rejected Reasonable Accommodations

In an attempt to accommodate the SEC's request while mitigating the hardship upon Mr. Carter and his businesses, Mr. Carter's legal team has proposed numerous alternatives to the SEC's insistence that Mr. Carter personally testify for an indeterminate, unlimited amount of time. *See Doe v. United States*, 253 F.3d 256, 268–69 (6th Cir. 2001) (“Doe has made no attempt to reach a reasonable accommodation with the government regarding this aspect of the subpoena, an effort the Supreme Court has suggested should be expected before a court is willing to hold an administrative subpoena overly burdensome.” (citing *United States v. Morton Salt*, 338 U.S. 632, 653 (1950))).

Among other things, Mr. Carter's legal team offered to provide information to the SEC through an attorney proffer or through a telephone interview with Mr. Carter. Although both methods are provided for by the SEC's Enforcement Manual, *see Enforcement Manual* §§ 3.3.3, 3.3.7 (Nov. 28, 2017), <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>, the SEC rejected both proposals. Most recently, this past weekend, Mr. Carter's legal team has further offered to produce Mr. Carter to the SEC for a *full day* of testimony—an offer that is more than generous considering what the subpoena says by its terms, Mr. Carter's extensive business commitments, the SEC's failure to specify any reason why it believes Mr. Carter has any unique personal knowledge of the relevant facts, and the troves of information that the SEC has already obtained from the relevant business entities and from Ms. Perez, the COO of Roc Nation and Carter Enterprises, in response to a series of subpoenas. Mr. Carter's legal team has also suggested that the SEC could take the testimony of Kashyap Bakhai, who was heavily involved in the financials of the transactions at issue, and Ronnie DeMichael, the Chief Financial Officer

of Roc Apparel Group LLC. The SEC still insists on more, more, more—day, to day, to day of continuing testimony—from Mr. Carter. Before getting more, however, the SEC should need to show more, starting with an authorized subpoena that actually provides for multiple days of testimony.


The Edwards Declaration, filed with the SEC’s application, nonetheless throws out extraneous facts relating to a prior subpoena that is not at issue and purported “delays” resulting from new counsel getting up to speed alongside trial and other commitments. At the same time, the declaration somehow skips past the substantial productions, testimony, and offers of accommodations. The actual, complete record refutes any insinuation that Mr. Carter has deliberately delayed or obstructed proceedings. In actuality, this dispute has resulted only from the SEC’s unreasonable refusal to accept any of the alternatives Mr. Carter has offered short of agreeing to testify, beyond the scope of the subpoena, “day-to-day until completed.” This demand is excessive, unwarranted, and in need of judicial curtailment.

CONCLUSION

For the foregoing reasons, the SEC’s application for an order requiring compliance with its subpoena should be denied. If the Court does order Mr. Carter to appear for testimony, it should at most follow the terms of the subpoena actually issued by the Commission, rather than the expanded terms proposed by the SEC here. A proposed order is attached as Exhibit 2.

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May 7, 2018

Respectfully submitted,

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