

UNITED STATES DISTRICT COURT  
DISTRICT OF RHODE ISLAND

SECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

v.

PATRICK CHURCHVILLE; and  
CLEARPATH WEALTH  
MANAGEMENT, LLC,  
Defendants,

and

CLEARPATH MULTI-STRATEGY  
FUND I, L.P.; CLEARPATH MULTI-  
STRATEGY FUND II, L.P.;  
CLEARPATH MULTI-STRATEGY  
FUND III, L.P.; HCR VALUE FUND,  
L.P.,

Relief Defendants.

Civil Action No.  
15-CV-00191-WES-LDA

**OPPOSITION TO CLAIMANT’S MOTION FOR SUBPOENA COMPLIANCE AND  
CROSS-MOTION BY THE UNITED STATES OF AMERICA TO QUASH**

The United States, by and through its attorneys, Aaron L. Weisman, United States Attorney for the District of Rhode Island, and Helen H. Lee, Assistant United States Attorney, hereby opposes Claimants’ Motion to Compel Compliance with Subpoenas Duces Tecum (Dkt. 164), and respectfully cross-moves this Court for an Order quashing the subpoena.

**INTRODUCTION**

Claimants Linda Rosenberg, individually and as Executrix of the Estate of S. Michael Rosenberg (collectively, the “Rosenbergs” or “Claimants”), who are not parties to this lawsuit, have filed a motion to compel compliance with a subpoena duces tecum, which had a purported deadline that *preceded* the date of service on the United States Attorney’s Office (“USAO”). Beyond seeking compliance with an unreasonable (and in fact, temporally impossible) production

deadline, Claimants filed their motion to compel without making any effort to confer, without properly making a *Touhy* request, and without giving the USAO an opportunity to commence, let alone complete, the *Touhy* process. Furthermore, to the extent the subpoena seeks information protected by the investigative files or law enforcement privilege, Fed. R. Crim. P. 6(e), or attorney work-product doctrine, this Office objects to the request. Lastly, as the United States Securities and Exchange Commission (“SEC”) notes in its Opposition, Claimants are not parties to the lawsuit, and thus the subpoenas they have issue are improper under Federal Rules of Civil Procedure 45. The USAO adopts and incorporates all arguments and objections the SEC has put forth in its Opposition. For the reasons stated below, the USAO respectfully requests that the Court dismiss Claimants’ motion and grants the USAO’s motion to quash.

## **FACTS**

### **I. Criminal Case**

The United States conducted a criminal investigation that ultimately led to charges against Patrick Churchville for defrauding investors, committing wire fraud, and tax evasion. Dkt. 1, *United States v. Churchville*, 18-cv-97-WES (Information); Churchville eventually pled guilty. At his change of plea hearing, Churchville admitted to, among other things, a scheme in which he obtained \$21 million of his investors’ money to hide millions of dollars in losses his investors had sustained in a Ponzi scheme in Maryland. Dkt. 18 at 3, *United States v. Churchville* (United States’ Sentencing Memorandum). Specifically, he created the Receivable Partners Ponzi scheme in order to hide the fact that he had lost millions of his investors’ money in his investments with JER Receivables, for which the principal was Jonathan Rosenberg. *See id.* at 3. Churchville and Jonathan Rosenberg worked together to carry out this Ponzi scheme. *See id.* at 11.

## **II. Claimants' Subpoena**

On June 4, 2020, Claimants hand delivered to the USAO a subpoena addressed to Assistant United States Attorney Dulce Donovan in the District of Rhode Island, requesting production of documents by a purported deadline (June 1, 2020 at 10:00 a.m.) that preceded the service date. Ex. A, Subpoena received by USAO. Although Claimants represent in their motion that they sent the USAO a letter on May 12, 2020, seeking information, and that this Office received electronic notice of the subpoena via email on May 21, 2020 (*see* Dkt. 164 at 4, 3 fn.2), neither the USAO nor AUSA Donovan has any record of receiving a letter or a subpoena on those dates by email or by mail.

On June 11, 2020, Claimants filed a “Motion . . . to Compel Compliance with Subpoenas Duces Tecum and/or an Order from the Court Authorizing the Issuance of Same.” Dkt. 164. By letter dated June 12, 2020, the USAO set forth its objections to the subpoena advising them of the federal regulations that pertain to the disclosure of information or documents. Ex. B, USAO letter to Claimants' counsel. Claimants were advised that this Office would not be producing documents in response to the subpoena but that they retained the ability to properly comply with *Touhy* regulations so that the USAO can review the request for information. *Id.* To date, the USAO has not received a response.

## **ARGUMENT**

### **I. The United States Attorney's Office Has Not Been Given the Opportunity to Complete the *Touhy* Process.**

Setting aside the fact that Claimants have served the USAO with a subpoena with a deadline that precedes the service date, which cannot, by definition, allow a reasonable time to respond to the subpoena, Claimants have not complied with the U.S. Department of Justice's (“DOJ”) *Touhy* regulation in seeking information from the USAO. For this reason, as well as those advanced by the SEC, the Court should quash the subpoena.

**A. DOJ's *Touhy* Regulations Apply to Claimants' Records Request.**

The DOJ has promulgated regulations under the authority of the federal housekeeping statute, 5 U.S.C. § 301, to centralize decisions on releasing information in response to subpoenas.

The federal housekeeping statute provides:

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

5 U.S.C. § 301.

DOJ's regulations, codified at 28 C.F.R. §§ 16.21-29, prohibit employees from producing material relating to their official duties without prior approval of the proper DOJ official. 28 C.F.R. § 16.22(a). These regulations set out specific requirements and procedures for obtaining access to information in agency files.<sup>1</sup> The first step in the procedure for any individual seeking production of documents under DOJ's regulations is to provide a written statement setting forth a summary of the information sought and its relevance to the proceeding. 28 C.F.R. §§ 16.22(c) & (d). Section 16.26(b) and (c) permit disclosure only after balancing various factors, such as the importance of the legal issues presented; whether disclosure would violate a statute or regulation; whether disclosure would interfere with enforcement proceedings; and whether disclosure would reveal

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<sup>1</sup> The *Touhy* regulations provide, *inter alia*, the following:

In any federal or state case or matter in which the United States is not a party, no employee or former employee of the Department of Justice shall, in response to a demand, produce any material contained in the files of the Department, or disclose any information relating to or based upon material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that person's official duties or because of that person's official status without prior approval of the proper Department official in accordance with §§ 16.24 and 16.25 of this part.

classified information, a confidential source of informant, investigatory records or techniques, or trade secrets. 28 C.F.R. § 16.26(b), (c).

In order to request the required approval, the person presenting the demand must submit an affidavit or statement that states with particularity what is being sought and its relevance to the proceeding. Title 28 C.F.R. §§ 16.22(c) and (d) provide as follows:

(c) If oral testimony is sought by a demand in any case or matter in which the United States is not a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or by his attorney, setting forth a summary of the testimony sought and its relevance to the proceeding, must be furnished to the responsible U.S. Attorney. Any authorization for testimony by a present or former employee of the Department shall be limited to the scope of the demand as summarized in such statement.

(d) When information other than oral testimony is sought by a demand, the responsible U.S. Attorney shall request a summary of the information sought and its relevance to the proceeding.

Here, Claimant's subpoena was not accompanied by an affidavit or statement that summarizes the substance of the testimony or information being sought with an explanation of its relevance to the subject proceeding. The USAO notified Claimants' counsel of this deficiency, and gave the option for Claimants to provide the appropriate statement to accompany the subpoena. *See Ex. B.* As of now, Claimants have not responded to the USAO's letter.

*Touhy* regulations provide a procedure for the DOJ to decide whether any legitimate and defensible reasons for withholding the requested evidence exist. Given that Claimants served a subpoena—without any requisite accompanying affidavit or statement, pursuant to 28 C.F.R. §§ 16.22(c) and (d)—and with a deadline for production that predates the date of service, the DOJ has not had the opportunity to properly begin, let alone complete, its process of evaluating Claimants' request for production. Because compliance with DOJ *Touhy* regulations is a prerequisite to a motion to compel, the USAO respectfully requests that the Court find Claimant's motion premature. *See Manzo v. Stanley Black & Decker, Inc.*, No. 13-cv-3963, 2017 WL 1194651, at \*

7 (E.D.N.Y. Mar. 30, 2017) (finding plaintiff’s motion to compel premature where he failed to comply with Department of Labor’s *Touhy* regulations); *see also Denny v. Carey*, 78 F.R.D. 370, 372 (E.D. Pa. 1978) (“When a party seeking discovery from such departments has not complied with the [Touhy] regulations, a motion for discovery of such material must be denied.”).

## **II. The Standards in Fed. R. Civ. P. 45 Are Inapplicable.**

“To obtain information from a federal agency, a party ‘must file a request pursuant to the agency’s regulations, and may seek judicial review *only* under the [Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-06].’” *Cabral v. U.S. Dep’t of Justice*, 587 F.3d 13, 22-23 (1st Cir. 2009) (quoting *Puerto Rico v. United States*, 490 F.3d 50, 61 (1st Cir. 2007)) (emphasis added). A litigant may not use Rule 45 of the Federal Rules of Civil Procedure to compel an agency employee to produce Government documents or testimony, but must instead present his request to the agency and, in the first instance, allow the agency to make a centralized decision under its regulations. *See id.*; *see also Houston Bus. Journal v. Office of the Comptroller of the Currency*, 86 F.3d 1208, 1212 n.4 (D.C. Cir. 1996) (“Under *Touhy*, neither state-court nor federal-court litigants may obtain a subpoena *ad testificandum* against an employee of a federal agency that has enacted a *Touhy* regulation. . . . In that situation, the litigant must proceed under the APA . . . .”) (citations omitted); *In re Boeh*, 25 F.3d 761, 763-64, 766-67 (9th Cir. 1994). The judicial review provided by the APA over the agency’s application of its *Touhy* insures that the agency’s actions are “in accordance with law” and not “arbitrary or capricious.” *See* 5 U.S.C. § 706; *see also Cabral*, 587 F.3d at 23.

It is the USAO’s position that an APA review at this juncture is premature as Claimants have not even begun to comply with the *Touhy* process, and the USAO has not been given the time and opportunity to evaluate Claimants’ request for information.

**III. Claimants' Subpoena Is Objectionable To the Extent that It Seeks Information Protected by investigative files, law enforcement privilege, Fed. R. Crim. P. 6(e), or attorney work-product doctrine.**

Claimants seek all witness statements and accounting evidence concerning the Rosenbergs, interview notes, recordings, transcripts of the USAO's communication with either of the Rosenbergs, evidence showing that the Rosenbergs were "net winners" or "insiders" in Churchville's Ponzi scheme, presentations the USAO made to the Receiver concerning the Rosenbergs, and deposition transcripts, sworn statements, affidavits, or other sworn testimony relating to the Rosenbergs. *See* Ex. A.

Although the USAO has not had the opportunity to evaluate Claimants' request for information, to the extent these requests seek information protected by investigative files, law enforcement privilege, Federal Rules of Criminal Procedure 6(e), or attorney work-product doctrine, the USAO objects to the subpoena, and preserves all applicable privilege objections to production.

**IV. The USAO Incorporates and Adopts the SEC's Objections to the Subpoena on the Grounds that Discovery Has Closed and that Claimants are Not Parties to the Litigation.**

The SEC also notes that Claimants' subpoena is improper because discovery in this case has been over and because Claimants are not empowered to issue subpoenas in this case as they are not parties to this lawsuit. The USAO also incorporates those arguments in this memorandum.

**CONCLUSION**

For all of the foregoing reasons, the Court should deny Claimants' Motion to Compel and should quash the subpoena based on their failure to comply with the requirements of DOJ's *Touhy* regulations, as well as on the other grounds addressed herein.

Dated: June 25, 2020

Respectfully submitted,

UNITED STATES ATTORNEY'S OFFICE  
By its Attorney,

AARON L. WEISMAN  
United States Attorney

/s/ Helen H. Lee  
HELEN H. LEE  
Assistant U.S. Attorney  
United States Attorney's Office  
50 Kennedy Plaza, 8<sup>th</sup> Floor  
Providence, RI 02903  
Tel: (401) 709-5000  
Fax: (401) 709-5001  
[Helen.Lee2@usdoj.gov](mailto:Helen.Lee2@usdoj.gov)

CERTIFICATION OF SERVICE

I hereby certify that on June 25, 2020, the foregoing document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants.

/s/ Helen H. Lee  
Helen H. Lee  
Assistant United States Attorney



# Exhibit A

AO 88B (Rev. 02/14) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action

# UNITED STATES DISTRICT COURT

for the

District of Rhode Island

Securities and Exchange Commission

*Plaintiff*

v.

Patrick Churchville, et al.

*Defendant*

Civil Action No. 15-CV-00191-S-LDA

US ATTORNEY'S OFFICE - R  
4 JUN 2020 AM 10:54

## SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: Dulce Donovan, Esq., 50 Kennedy Plaza, 8th Floor, Providence, RI 02903

*(Name of person to whom this subpoena is directed)*

**Production: YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material: Please see Schedule A, attached hereto.

Place: Kelly, Souza, Rocha & Parmenter, P.C. 128 Dorrance Street, Suite 300 Providence, RI 02903	Date and Time: June 1, 2020 at 10 AM
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**Inspection of Premises: YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:
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The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 05/21/2020

CLERK OF COURT

**A True Copy Attest**  
**James Sylvester**  
#1103 Date 6/4/2020

Randall L. Souza, Esq.

*Signature of Clerk or Deputy Clerk*

*Attorney's signature*

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Linda Rosenberg as Executrix of the Estate of S. Michael Rosenberg and individually \_\_\_\_\_, who issues or requests this subpoena, are:

Randall L. Souza, Esq., 128 Dorrance St., Ste. 300, Providence RI 02903, rsouza@ksrplaw.com; 401-490-7334

### Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

MR 6-4-20  
by hand

AO 88B (Rev. 02/14) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action (Page 2)

Civil Action No. 15-CV-00191-S-LDA

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)*

I received this subpoena for *(name of individual and title, if any)* \_\_\_\_\_  
on *(date)* \_\_\_\_\_.

I served the subpoena by delivering a copy to the named person as follows: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I returned the subpoena unexecuted because: \_\_\_\_\_  
\_\_\_\_\_.

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also  
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of  
\$ \_\_\_\_\_.

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_ 0.00 \_\_\_\_\_.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_  
\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc.:

**Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)****(c) Place of Compliance.**

**(1) For a Trial, Hearing, or Deposition.** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

**(A)** within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

**(B)** within the state where the person resides, is employed, or regularly transacts business in person, if the person

**(i)** is a party or a party's officer; or

**(ii)** is commanded to attend a trial and would not incur substantial expense.

**(2) For Other Discovery.** A subpoena may command:

**(A)** production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

**(B)** inspection of premises at the premises to be inspected.

**(d) Protecting a Person Subject to a Subpoena; Enforcement.**

**(1) Avoiding Undue Burden or Expense; Sanctions.** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

**(2) Command to Produce Materials or Permit Inspection.**

**(A) Appearance Not Required.** A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

**(B) Objections.** A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

**(i)** At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

**(ii)** These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

**(3) Quashing or Modifying a Subpoena.**

**(A) When Required.** On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

**(i)** fails to allow a reasonable time to comply;

**(ii)** requires a person to comply beyond the geographical limits specified in Rule 45(c);

**(iii)** requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

**(iv)** subjects a person to undue burden.

**(B) When Permitted.** To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

**(i)** disclosing a trade secret or other confidential research, development, or commercial information; or

**(ii)** disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

**(C) Specifying Conditions as an Alternative.** In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

**(i)** shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

**(ii)** ensures that the subpoenaed person will be reasonably compensated.

**(e) Duties in Responding to a Subpoena.**

**(1) Producing Documents or Electronically Stored Information.** These procedures apply to producing documents or electronically stored information:

**(A) Documents.** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

**(B) Form for Producing Electronically Stored Information Not Specified.** If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

**(C) Electronically Stored Information Produced in Only One Form.** The person responding need not produce the same electronically stored information in more than one form.

**(D) Inaccessible Electronically Stored Information.** The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

**(2) Claiming Privilege or Protection.**

**(A) Information Withheld.** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

**(i)** expressly make the claim; and

**(ii)** describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

**(B) Information Produced.** If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

**(g) Contempt.**

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

## SCHEDULE A

### Definitions

For the purposes of this Schedule A, the following terms are defined:

1. “ClearPath” – This term shall mean ClearPath Wealth Management, LLC and its associated funds, including, but not limited to, ClearPath Multi-Strategy Fund I, L.P., ClearPath Multi-Strategy Fund II, L.P., ClearPath Multi-Strategy Fund III, L.P., and HCR Value Fund, L.P.
2. “Receiver” – This term shall mean the Receiver, Stephen Del Sesto, appointed in SEC v. Patrick Churchville and ClearPath Wealth Management, LLC, Case No. 15-CV-00191-S-LDA in United States Federal District Court for the District of Rhode Island.
3. “Rosenbergs” – This term shall mean Linda Rosenberg and S. Michael Rosenberg, both individually and collectively.

### Documents

1. All witness statements concerning or regarding the Rosenbergs in relation to investigations into or related to Patrick Churchville, ClearPath, or Jonathan E. Rosenberg.
2. All interview notes, recordings, or transcripts of you or your office’s communications with the Rosenbergs in regards to investigations into or related to Patrick Churchville, ClearPath, or Jonathan E. Rosenberg.
3. Any witness statements made by witness regarding the Rosenbergs in relation to investigations into or related to Patrick Churchville, ClearPath, or Jonathan E. Rosenberg.
4. All accounting evidence relating to the Rosenbergs in regards to investigations into or related to Patrick Churchville, ClearPath, or Jonathan E. Rosenberg.
5. All evidence demonstrating or showing that the Rosenbergs were “net winners” in the Patrick Churchville Ponzi scheme.

6. All presentations that your office (and/or any Federal agency) made to the Receiver concerning the Rosenbergs.

7. All deposition transcripts, sworn statements, affidavits, or other sworn testimony relating to or regarding the Rosenbergs in relation to investigations into or related to Patrick Churchville, ClearPath, or Jonathan E. Rosenberg.

8. All documents showing that the Rosenbergs were “insiders” as defined by the Receiver in this matter.

# Exhibit B

**From:** [Lee, Helen \(USARI\)](#)  
**To:** [rsouza@ksrplaw.com](mailto:rsouza@ksrplaw.com)  
**Cc:** [Bowe, Linda \(USARI\)](#)  
**Subject:** SEC v. Churchville, 15-cv-191  
**Date:** Friday, June 12, 2020 11:47:43 AM  
**Attachments:** [2020.06.12 - USAO Letter to Souza re Subpoena \[served\].pdf](#)

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Mr. Souza,

Please find attached the US Attorney's Office's response to the subpoena that was received on June 4, 2020.

**Helen H. Lee**  
**Assistant U.S. Attorney**  
United States Attorney's Office, District of Rhode Island  
50 Kennedy Plaza, 8<sup>th</sup> Fl.  
Providence, RI 02903  
(401) 709-5078 (Tel.)  
(401) 709-5001 (Fax)  
[Helen.Lee2@usdoj.gov](mailto:Helen.Lee2@usdoj.gov)





**U.S. Department of Justice**

*United States Attorney's Office  
District of Rhode Island*

50 Kennedy Plaza, 8<sup>th</sup> Floor  
Providence, Rhode Island 02903

(401) 709-5000  
FAX (401) 709-5001

June 12, 2020

**By Electronic Mail**

Randall L. Souza  
Kelly, Souza, Rocha & Paramenter, PC  
128 Dorrance Street, Suite 300  
Providence, RI 02903  
rsouza@ksrplaw.com

Re: *SEC v. Churchville et al.*, 15-CV-191

Dear Mr. Souza:

This responds to your subpoena directed to the United States Attorney's Office, which was received on June 4, 2020. For the reasons that follow, the USAO is not able to comply with your subpoena.

As an initial matter, although the subpoena requests production of material by June 1, 2020, this office received the subpoena, on June 4, and the subpoena itself had been dated and signed that day—*i.e.*, after the deadline for the requested production. This office has no record of receiving the subpoena prior to June 4.

Furthermore, Title 28 C.F.R. 16.21 *et seq.*, also known as the *Touhy*<sup>1</sup> regulations, set forth procedures to be followed with respect to "the production or disclosure of any material contained in the files of the Department [of Justice], any information relating to material contained in the files of the Department, or any information acquired by any person while such person was an employee of the Department as a part of the performance of that person's official duties or because of that person's official status." 28 C.F.R. § 16.21. The *Touhy* regulations provide, *inter alia*, the following:

In any federal or state case or matter in which the United States is not a party, no employee or former employee of the Department of Justice shall, in response to a demand, produce any material contained in the files of the Department, or disclose any information relating to or based upon material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that person's official duties or because of that person's official

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<sup>1</sup> See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

status without prior approval of the proper Department official in accordance with §§ 16.24 and 16.25 of this part.

In order to request the required approval, the person presenting the demand must submit an affidavit or statement that states with particularity what is being sought and its relevance to the proceeding. Title 28 C.F.R. §§ 16.22(c) and (d) provide as follows:

(c) If oral testimony is sought by a demand in any case or matter in which the United States is not a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or by his attorney, setting forth a summary of the testimony sought and its relevance to the proceeding, must be furnished to the responsible U.S. Attorney. Any authorization for testimony by a present or former employee of the Department shall be limited to the scope of the demand as summarized in such statement.

(d) When information other than oral testimony is sought by a demand, the responsible U.S. Attorney shall request a summary of the information sought and its relevance to the proceeding.

Your subpoena was not accompanied by an affidavit or statement that summarizes the substance of the testimony or information being sought with an explanation of its relevance to the subject proceeding. The Touhy regulations are an absolute condition precedent to obtaining information by subpoena from the Department of Justice (DOJ), and the regulations must be complied with before DOJ or the Securities and Exchange Commission may respond to any subpoena request. *See United States v. Bizzard*, 674 F.2d 1382 (11th Cir.), *cert. denied*. 459 U.S. 973 (1982); *United States v. Allen*, 554 F.2d 398 (10th Cir.), *cert. denied*. 434 U.S. 836 (1977); *United States v. Wallace*, 32 F.2d 921 (5th Cir. 1994); *United States v. Cleveland*, No. CRIM.A. 96-207, 1997 WL 271337 (E.D. La. May 21, 1997).

If you wish to comply with the regulations, please provide the appropriate statement to Assistant U.S. Attorney Helen H. Lee, U.S. Attorney's Office, District of Rhode Island, 50 Kennedy Plaza, 8th Floor, Providence, Rhode Island 02903, with a copy of this letter.

Please feel free to contact me at (401) 709-5078 if you have further questions.

Sincerely,

AARON L. WEISMAN,  
United States Attorney



Helen H. Lee  
Assistant U.S. Attorney