

**Knight Equity Mkts., L.P. v McCarthy**

2007 NY Slip Op 33757(U)

November 1, 2007

Supreme Court, New York County

Docket Number: 0600539/2007

Judge: Richard B. Lowe

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

RICHARD B. LOWE III

PRESENT:

Index Number : 600539/2007  
KNIGHT EQUITY MARKETS, L.P.

PART 56

vs  
MCCARTHY, JASON E.

Sequence Number : 005  
ORDER OF PROTECTION

DATE 10/9/07  
EQ. NO. \_\_\_\_\_  
L. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
NOV 21 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION**

Dated: 11/1/07

**RICHARD B. LOWE III**

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
KNIGHT EQUITY MARKETS, L.P.,

Plaintiff,

-against-

Index No: 600539/07

**DECISION AND ORDER**

JASON E. MCCARTHY, MICHAEL JENKINS,  
TIMOTHY REYNOLDS, IAN SCHAAD,  
RICHARD EMMET, MARC GERSTEIN, STUART  
MILSTEN, NICHOLAS KOKONAS, JAMES  
HANSEN, JANE STREET HOLDING, LLC,  
FORMERLY KNOWN AS HENRY CAPITAL,  
LLC, AND JANE STREET TRADING, LLC,  
FORMERLY KNOWN AS BOWERY CAPITAL,  
LLC,

Defendants.

-----X

**RICHARD B. LOWE III, J:**

This action arises out of the alleged plan by Defendants to purchase stock and to appropriate the dividends paid on those shares of stock. Defendants Jane Street Holding, LLC, and Jane Street Trading, LLC (collectively "Jane Street"), move pursuant to CPLR 3103 seeking a protective order and pursuant to CPLR 2304 seeking quashal of a subpoena issued by Plaintiff Knight Equity Markets, L.P., ("Knight") to non-party JH Darbie & Co., Inc. ("Darbie") dated June 19, 2007 (the "Subpoena").

**BACKGROUND**

Knight is a market maker in NASDAQ securities. It accepts and fills orders placed by

other broker dealers on behalf of such broker dealers' customers.

Jane Street Trading engages in the buying and selling of securities for a profit. Defendant Jason McCarthy ("McCarthy") is a managing director of Jane Street Trading.

Knight alleges that Jane Street devised a plan to obtain dividends by buying stocks on or around the ex-dividend date for cash or expedited settlement in order to obtain the dividends without paying for them. Jane Street learned that they could appropriate dividends by purchasing stock on or shortly after an ex-dividend date and requesting that settlement occur on the same day or the next business day or on a cash basis. By doing so, the purchaser would obtain the securities at the ex-dividend price, a price that is a lower price to reflect that the purchaser is not entitled to receive the dividend. By settling on a cash or expedited basis, the purchaser could become a record holder of the stock on or before the record date, and thereby automatically receive the dividend without paying for it.

Knight further alleges that, as part of its plan, Jane Street purchased stock from Knight and received dividends that were charged to and paid by Knight. In numerous transactions from 2002 to 2004, Jane Street utilized various brokers to place orders with Knight. In its Complaint, Knight alleges that Darbie was one of the numerous brokers utilized by Jane Street to purchase stock from Knight and to improperly receive dividends.

While Jane Street admits to purchasing some stocks through various brokers, it denies purchasing certain stocks through Darbie. However, Knight's records show that Darbie, among others, was used as a broker in the dividend plan to purchase stocks from Knight. Furthermore, Knight has learned from a separate litigation that an entity called Pearl Securities, LLC ("Pearl"), allegedly used Darbie as a broker in a similar dividend plan.

Pearl is an entity formed by Jane Street and managed by McCarthy, who is also a Jane Street managing director. Knight believes that Jane Street used Pearl to purchase stock through Darbie. Knight issued the Subpoena to Darbie in order to determine Jane Street's involvement in stock purchases through Darbie from Knight. The Subpoena seeks information relating to customers who purchased stock on or after the ex-dividend date for expedited settlement and to the pattern of the transactions.

Darbie has advised Knight that they are in possession of the documents and are prepared to produce documents relating to the Defendants' purchase of stock at a reduced ex-dividend price where they also received a dividend.

The Defendants object to the production of the documents by Darbie and file this motion to quash the subpoena. Accordingly, this Court considers whether Defendants have standing to challenge a subpoena *duces tecum* served on a nonparty and, if Defendants have standing, whether Defendants have met their burden in making that challenge.

### DISCUSSION

As a preliminary matter, the Court addresses whether Defendants have standing to challenge the subpoena issued by Plaintiffs (*see Norkin v Hoey*, 181 AD2d 248, 250 [1st Dept 1992] ["Absent standing, the issue of relevance raised by petitioners is never reached."]). Where the movant is not the person being subpoenaed, it must show a proprietary interest in the subject matter or a privileged communication (*38-14 Realty Corp. v New York City Dep't of Consumer Affairs*, 103 AD2d 804, 804 [2d Dept 1984]; *In re Selesnick*, 115 Misc 2d 993, 994 [Sup Ct Westchester County 1982] ["a subpoena may only be challenged by the person to whom it is directed or by a person whose property rights or privileges may be violated."]). With respect to a

proprietary interest, quashal of a subpoena *duces tecum* has been justified where the subpoena sought documents in the possession of another actually belonging to petitioner (*see e.g. State of Com. on Governmental Operations v Manhattan Water Work, Inc.*, 10 AD2d 306, 308 [1st Dept 1960] [papers sought were corporate records in the possession of a person the corporation employed to perform the task of recreating books kept in the normal course of business]; *see also Oncor Communications v State*, 165 Misc 2d 262, 264 [Sup Ct Albany County 1995], *affd* 218 AD2d 60 [3d Dept 1996]). With respect to privileged communications, the movant must generally establish a privilege as between a client and attorney (*see e.g. Beach v Oil Transfer Corp.*, 23 Misc 2d 47, 49-50 [Sup Ct Kings County 1960]), or patient and physician (*see e.g. In re D'Agostino*, 181 Misc. 2d 710, 713-14 [Sup Ct Richmond County 1999]).

Here, the movant is not the person being subpoenaed. Therefore, Jane Street must demonstrate that it has a proprietary interest or that the documents involve privileged communications, which it fails to do. At best, Jane Street argues that the information sought in the Subpoena is confidential. However, even this argument fails from the outset when it is supported by the conclusory allegation that the information relates to the confidential and proprietary business activities of Jane Street and numerous parties and non-parties (Gasperetti Aff ¶ 1, 14). Jane Street's affidavit is devoid of any factual support to demonstrate, let alone suggest, that any information requested by the Subpoena is confidential. Jane Street argues that the Subpoena should be quashed because the information sought relates to its business activities. However, Jane Street, tellingly, does not allege ownership of or privilege over the information. As the court noted in *38-14 Realty*, even if the petitioner was a party to the contracts required to be produced by the subpoena, that alone would not constitute a sufficient interest in the

subpoenaed material (*38-14 Realty Corp.*, 103 AD2d at 804). Accordingly, because Jane Street is not the person subpoenaed and because Jane Street fails to demonstrate a proprietary interest or privilege in the documents requested, Jane Street lacks standing to challenge the Subpoena.

Assuming Jane Street demonstrated entitlement to challenge the subpoena, the motion to quash should still be denied on an independent ground because Jane Street fails to show that the material sought by the Subpoena was utterly irrelevant. In order to prevail on a motion to quash a subpoena *duces tecum*, the movant carries the burden of showing that the materials sought are “utterly irrelevant” (*see Velez v Hunts Point Multi-Service Ctr., Inc.*, 29 AD3d 104, 112[1st Dept 2006]).<sup>1</sup>

Here, Jane Street argues that the subpoena is “utterly irrelevant” because it is not tailored to the causes of action pleaded in the Complaint. Jane Street adds vague conclusions that the subpoena seeks “irrelevant securities transactions engaged in by non-parties and other securities transactions that are not at issue in this action” (Gasperetti Aff ¶ 3). Obfuscating matters further, Jane Street, the party who carries the burden of showing utter irrelevance, attempts to shift the burden onto Knight, the party issuing the subpoena.

Where Knight has alleged that Jane Street engaged in a scheme to improperly retain stock dividends by making orders through different brokers to purchase different stocks on, or soon after, the ex-dividend date and by requesting an expedited settlement, it cannot be said that the information requested by the Subpoena is utterly irrelevant. As Jane Street concedes in its

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<sup>1</sup>The court in *Velez* cites *Gertz v Richards* for the proposition that the burden of showing utter irrelevance is on the person being subpoenaed (233 AD2d 366 [2d Dept 1996]). This Court notes that in *Velez*, *Gertz*, and the cases cited in *Gertz*, the movant and the person being subpoenaed were the same individual. Placing the burden on the movant does not deviate from the statements of law in these cases.

affidavit in opposition, Knight's allegations concern trading activity engaged in by parties and non-parties, including Pearl (Gasperetti Aff ¶ 13). Furthermore, the Subpoena requested documents relating (1) to Darbie's purchase of stock on or after the ex-dividend date for expedited settlement; (2) to the customers to whom Darbie sold stock purchased on or after the ex-dividend date for expedited settlement; (3) to the sale of stock by Darbie to McCarthy and/or entities affiliated with McCarthy; and (4) to any communications between Darbie and McCarthy concerning the transacting of stock on or after the ex-dividend date for expedited settlement. Whether Pearl, or some other entity of Jane Street, purchased stock through Darbie from Knight affects the veracity of Jane Street's denial in its Answer. Thus, the information requested in the Subpoena relates to Knight's claim of a purported scheme to appropriate dividends. Moreover, arguing that the Subpoena asks for irrelevant information is even more unavailing when the person subpoenaed, Darbie, has acknowledged possession of the related documents and is prepared to turn over responsive documents.

Additionally, contrary to Jane Street's contention, this is not a case where the subpoena should be quashed on the basis of overbreadth (*see D'Alimonte v Kuriansky*, 144 AD2d 737, 739 [3d Dept 1988]). To avoid overbreadth, the subpoena must generally specify with reasonable precision the records sought (*Grotallio v Soft Drink Leasing Corp.*, 97 AD2d 383, 383 [1st Dept 1983]). Specificity will be wanting if the person subpoenaed is required to "cull the good from the bad" (*id.*, citing *People v Doe*, 39 AD2d 869, 870 [1st Dept 1972]; *Reuters Ltd. v Dow Jones Telerate*, 231 AD2d 337, 344 [1st Dept 1997]). In *Reuters*, the court found the subpoena "patently overbroad, burdensome, and oppressive" and held the subpoena unenforceable (231 AD2d at 344). The court noted that the subpoena did not "call for the files of specific officers of

the company or for documents regarding limited or specifically defined subjects.” (*Id.*)

Here, the Subpoena defined sufficiently specific parameters where it called for documents regarding specific types of transactions and transaction between specific entities. The information sought concerned stocks purchased on or soon after the ex-dividend date, purchases requesting expedited settlement, transactions and communications between Darbie and McCarthy. Moreover, any notion that the person subpoenaed must “cull the good from the bad” is again belied by Darbie’s willingness and readiness to turn over responsive documents.

**CONCLUSION**

Accordingly, it is hereby

ORDERED that the defendant’s motion is denied.

Dated: November 1, 2007

ENTER:

**FILED**  
NOV 21 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

RICHARD B. LOWE, III, J.S.C.