

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS  
Release No. 1671/August 6, 2014

ADMINISTRATIVE PROCEEDING  
File No. 3-15873

In the Matter of

THOMAS R. DELANEY II and  
CHARLES W. YANCEY

ORDER ON MOTION FOR  
CLARIFICATION

The Securities and Exchange Commission (Commission) initiated this proceeding by issuing an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) on May 19, 2014, pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 and Section 9(b) of the Investment Company Act of 1940. A hearing will begin on October 27, 2014.

On July 25, 2014, I issued an Order on Motions (Order) in which I attempted to resolve a dispute between Respondent Thomas R. Delaney II (Delaney) and the Division of Enforcement (Division) about the production of documents. Thomas R. Delaney II, Admin. Proc. Rulings Release No. 1652, 2014 SEC LEXIS 2679. The Order required the Division to submit for my review “a privilege log that includes for each withheld document the date of the document, the author and recipient, the type of document, and the privileged claimed.” Id. at 4.

On July 31, 2014, the Division filed a Motion for Clarification of Order Regarding Withheld Document List (Division’s Motion).

**Issue**

The Division’s Motion states that the Division has produced all the documents that it is required to produce under Rule 230(a)(1) and “is not withholding any documents,” but it then proceeds to request clarification as to the Order’s application to five categories of documents, which presumably it has withheld pursuant to Rule 230(b)(1). Division’s Motion at 1-2. The Division questions (1) how it should list several hundred electronic documents and a substantial number of handwritten notes protected by the work product privilege; (2) whether it should list Commission employees’ notes because it will be producing all interview notes of potential witnesses for my review on whether they constitute Jencks Act material; (3) whether it should list at least 6,000 internal emails among Commission staff; (4) whether it should list written communications between Division staff and experts since no party has requested this material, except to the extent it constitutes Brady material; and (5) whether it should collect and list

written communications between the Commission's Information Technology Department (IT) or other support staff and third parties constituting non-substantive, ministerial matters. Id. at 3-6.

### **Ruling**

The privilege log has two purposes: (1) disabuse Delaney from his concerns that the Division has improperly withheld certain materials from its production and has not acted in conformity with the Commission's Rules of Practice; and (2) provide me with sufficient information to determine whether Delaney's concerns have a reasonable basis. To accomplish these purposes, the privilege log need not contain withheld communications between any IT or other support staff and third parties, communications between Division staff and experts, or interview notes that the Division is producing for my Jencks Act review. If the documents and emails in the Division's Motion's categories of Internal Memoranda, Notes, and Writings of Commission Staff and Written Communications Among Commission Staff are too numerous to list separately, the privilege log should organize them in some logical order and provide enough detail that I can determine whether they were properly withheld. For example, the Division may group together emails between the same persons during an identified date range regarding a particular subject, and it may group together documents and notes authored by the same person or group of people with a similar subject matter, but in any event, I need more information regarding the claimed privilege than I now have. The burden of proof for assertion of the privilege falls, initially, on the party asserting the privilege. See United States v. BDO Seidman, 337 F.3d 802, 811 (7th Cir. 2003); Bureau of Nat'l Affairs, Inc. v. United States Dep't of Justice, 742 F.2d 1484, 1497 (D.C. Cir. 1984); In re Grand Jury Investigation, 723 F.2d 447, 450-51 (6th Cir. 1983)

The privilege log shall be due thirty days from the date of this Order. If the Division has problems complying with this Order at the same time as it prepares for the hearing, it should contact my Office and we will hold a prehearing conference to discuss how to resolve Delaney's concerns.

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Brenda P. Murray  
Chief Administrative Law Judge