

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 2262/January 27, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16037

In the Matter of

EDGAR R. PAGE and
PAGEONE FINANCIAL INC.

: ORDER
:
:

On January 21, 2015, I provided Respondents the opportunity to identify binding or persuasive authorities that support an engagement of counsel defense as it relates to Respondents' good faith, mental state, and scienter, and allowed the Division to file a responsive letter to Respondents' filing. Respondents' filed a letter on January 23; and the Division on January 26.¹

Respondents have convinced me that their evidence of engagement of counsel is admissible under 17 C.F.R. § 201.320. However, based on the parties' briefing, which was helpful in cementing this issue, I would be disinclined to recognize an engagement of counsel defense as relevant to issues of good faith, mental state, or scienter. *See In re Cnty of Erie*, 546 F.3d 222, 228-29 (2d Cir. 2008) (“[A]ssertion of a good-faith defense involves an inquiry into state of mind, which typically calls forth the possibility of implied waiver of the attorney-client privilege.”); *United States v. Blizerian*, 926 F.2d 1285, 1291-94 (2d Cir. 1991) (testifying to good faith or state of mind means that there needs to be some waiver of attorney-client privilege); *see also* Jan. 20, 2015, Tr. 4 (“[W]e intend . . . to produce evidence of Mr. Page’s engagement of counsel . . . to show his intent and state of mind and good faith.”). However, Respondents may rely on the documentary evidence discussing the engagement of counsel for some other proper purpose, and in any event such evidence would seem to represent potentially

¹ On January 26, Respondents requested leave to provide a short brief in reply to the Division’s submission; the Division opposed that request. Respondents’ request is DENIED as the parties have had ample opportunity to present argument on this issue (with their recent letters, with their earlier briefing on motions *in limine*, and at the January 20, 2015, prehearing conference). However, Respondents’ counsel will be permitted to identify, at the start of next week’s hearing, the parties to an email as legal counsel for Respondents.

useful background evidence that would not prejudice the Division.² While I will admit this documentary evidence, Respondents should not need to present testimony relating to Respondents' engagement of counsel, as the exhibits prove the engagement and presence of counsel, and any testimony about the specific nature and extent of counsel's involvement would be an unfair attempt to access the advice of counsel defense.

Jason S. Patil
Administrative Law Judge

² As they deem appropriate, Respondents may address an engagement of counsel defense in their closing argument and post-hearing briefs, but, barring a change in the controlling law, I do not anticipate recognizing such a defense in deciding this case.