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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 1637/July 22, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15766

In the Matter of CLEAN ENERGY CAPITAL, LLC AND SCOTT A. BRITTENHAM	ORDER DENYING DIVISION'S MOTION FOR EXCLUSION, OR IN THE ALTERNATIVE, DISCLOSURE, OF ADVICE OF COUNSEL

On February 25, 2014, the Securities and Exchange Commission issued an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP). Respondents were served with the OIP on March 3, 2014, and filed an answer on March 26, 2014. A hearing is scheduled to begin on August 11, 2014, in Los Angeles, California.

The Division of Enforcement has filed a motion to exclude or alternatively disclose advice of counsel. Specifically, the Division alleges that Respondents have attempted to interpose an advice-of-counsel defense without permitting investigation into the substance of counsel's advice. Respondents have opposed the Division's motion. As is discussed below, the Division's motion is DENIED.

Background

As far as can be determined from the evidence submitted in support of the Division's motion, the Commission issued Respondent Clean Energy Capital, LLC, a subpoena in March 2012 seeking certain documents. Motion Exhibit (Ex.) 1 at 1. Clean Energy and the Commission's staff entered into an agreement in September 2012, whereby Clean Energy produced documents without reviewing them to determine whether the documents contained privileged information. Id. Clean Energy reserved the right to assert its attorney-client privilege as to third parties. Id. The staff agreed: (1) not to disclose the documents to third parties; (2) not to assert that Clean Energy's production of documents constituted a waiver of its privilege as to third parties; and (3) that Clean Energy's production of documents did not provide the staff with additional grounds to subpoena testimony or materials. Id.

As part the investigation in this matter, the Division took investigative testimony of witnesses in March and April 2013. Exs. 2-5. During the testimony of Respondent Scott A. Brittenham, Mr. Brittenham asserted that "we made a good faith effort to comply with all

disclosure requirements on advice of counsel." Ex. 3 at 76. When Division counsel asked whether Mr. Brittenham discussed the issue with counsel, his counsel objected that the question was "going to attorney-client privilege." Id. Division counsel responded, "Okay. Topics are allowed. As to what you covered with your counsel, but we're not going to ask about the substance." Id. at 77. Mr. Brittenham's counsel then instructed Mr. Brittenham that he could not "talk about the substance of the conversation." Id. On several occasions during the remainder of the deposition, Mr. Brittenham's counsel either interposed similar objections or limitations or instructed Mr. Brittenham not to answer the question asked. Id. at 79, 82, 93, 119-20, 131, 269, 307-08, 313-15, 335.

At one point during Mr. Brittenham's testimony, his counsel instructed him not to answer the Division's question about certain legal advice. Ex. 3 at 314. Division counsel responded that it was Mr. Brittenham's burden to establish the privilege, and, as to the specific conversation at issue, Mr. Brittenham could not remember who was present. Id. After Mr. Brittenham's counsel reaffirmed his instruction not to testify, Division counsel said, "Okay, so we will have to deal with this later and we will just bring your client back at some point in time to try to address this issue." Id. at 315.

Respondents' counsel posed attorney-client-based objections or limitations during the later testimony of Jonathan K. Henness, Patricia Black, and Gary Schwendiman. See generally Exs. 2, 4, 5.

In its current motion, the Division asserts that because Respondents previously declined to waive their assertion of privilege and failed to disclose the nature of the advice counsel gave, they should be barred from presenting advice of counsel as a defense. Alternatively, the Division argues that Respondents should be required to disclose the advice counsel allegedly provided and seeks an order requiring two witnesses, including Mr. Brittenham, to submit to prehearing depositions.

Respondents oppose the Division's motion, arguing that because the advice counsel provided is relevant, it is admissible. Despite former counsel's objections and instructions not to testify during depositions, they also assert that they waived the privilege during the investigation. In this regard, Respondents assert that because witnesses testified that they consulted with counsel, the "waiver [was not] undone by" counsel's "occasional" direction not to testify. Respondents also now concede that they have waived the privilege through their answer to the OIP.

Respondents claim more persuasively that had the Division wished, it could have pursued the matter during its investigation by seeking to compel testimony or by seeking to subpoena Respondents' counsel for investigative testimony. Neither party has presented evidence showing that either course of action was pursued. Respondents also note that there is no basis in the Rules of Practice to do as the Division alternatively proposes.

Ruling

The Division's strongest argument is also its greatest weakness. As it notes, Respondents repeatedly invoked attorney-client privilege and their counsel repeatedly directed witnesses not to respond to questions. But this fact begs the question of why the Division has waited since March 2013 to do anything about Respondents' invocation of privilege.

Indeed, Division counsel seems to have acquiesced in Respondents' invocation of privilege. See Ex. 3 at 77 ("Okay. Topics are allowed. As to what you covered with your counsel, but we're not going to ask about the substance."). At one point, Division counsel contemplated the possibility of taking further action to force the issue, but for all that can be determined, decided not to do so. See id. at 315 ("Okay, so we will have to deal with this later and we will just bring your client back at some point in time to try to address this issue.").

In its reply to Respondents' opposition, the Division appears to suggest that its hands were tied during the investigation because its Enforcement Manual directs that "The staff must respect legitimate assertions of the attorney-client privilege and attorney work product protection." SEC, Enforcement Manual at 93 (Oct. 9, 2013). But the Manual did not tie the Division's hands. It provides that staff may request a waiver of the privilege after receiving "approval of the Director or Deputy Director." Id. (emphasis omitted). It also provides, as is relevant to this matter:

> In order to rely on advice-of-counsel as a defense, a party must waive the attorney-client privilege and work product protection to the extent necessary to enable the staff to evaluate the defense. Staff at the Assistant Director level or higher should attempt to explore the possibility of an advice-of-counsel defense with a party's counsel at an early stage in the investigation. It is important to obtain all relevant documents and testimony at the earliest possible date.

Id. at 95 (emphasis added). The answers of Mr. Brittenham and other witnesses during their investigative testimony put the advice of counsel at issue.

It is doubtlessly true that the attorney-client privilege cannot be used as both a sword and a shield. Chevron Corp. v. Pennzoil Co., 974 F.2d 1156, 1162 (9th Cir. 1992); Howard Brett Berger, Exchange Act Release No. 58950 (Nov. 14, 2008), 94 SEC Docket 11615, 11631 n.65. But given the Division's failure to pursue this issue earlier, it is in no position to now ask that I bar Respondents from presenting an advice-of-counsel defense.

The Division relies on precedent for the proposition that failure to make full disclosure during discovery of an advice-of-counsel defense constitutes a waiver of the defense. See, e.g., Vicinanzo v. Brunschwig & Fils, Inc., 739 F. Supp. 891, 894 (S.D.N.Y. 1990). The

pre-institution investigation and Wells process in Commission administrative proceedings, however, are not entirely analogous to pretrial discovery in federal court. After the Division completes its investigation and a respondent is afforded an opportunity to submit a Wells statement presenting arguments against commencement of an action, the Commission then takes into consideration the Division's investigative findings and any Wells statement submitted in deciding whether to authorize the institution of an administrative proceeding. Rules of Practice, 60 Fed. Reg. 32,738, 32,764-65 (June 23, 1995). And once a Commission administrative proceeding is instituted, formal discovery procedures, as they exist in federal district court, are not available. Gail G. Griseuk, Admin. Proc. Rulings Release 440 (Aug. 31, 1994), 57 SEC Docket 1488, 1489, cited in 60 Fed. Reg. at 32,765-66.

Furthermore, as explained in the Commission's comment to Rule 233, the Rules of Practice do not authorize me to order prehearing depositions for purposes of discovery. See 60 Fed. Reg. at 32,765. Rather, prehearing depositions are only permitted when necessary "to preserve testimony of a witness who would be unlikely to be able to attend the hearing." Id.; see Rule of Practice 233(a), 17 C.F.R. § 201.233(a). In this regard, when it promulgated Rule 232 regarding subpoenas, the Commission considered but rejected the suggestion that parties be permitted to conduct prehearing discovery depositions. See 60 Fed. Reg. at 32,764-65.

The Division suggests that I might order a prehearing discovery deposition under the general principle that "[a]ll hearings shall be conducted in a fair, impartial, expeditious and orderly manner." Rule of Practice 300, 17 C.F.R. § 201.300. Even if I thought that Rule 300 authorized me to order a deposition, which I do not, Rule 300 is a rule of general applicability; it cannot overcome the specific requirements of Rule 233. Cf. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992) ("it is a commonplace of statutory construction that the specific governs the general"). I therefore also deny the Division's alternative request.

During the hearing in this matter, the Division may question Mr. Brittenham, Respondents' former counsel, or any other witness with relevant information about the advice given by former counsel. If Respondents continue to object to these questions on the basis of attorney-client privilege, I will strike their advice-of-counsel defense and will not consider it.

The Division argues that advice-of-counsel is irrelevant to many of the allegations lodged against Respondents. Inasmuch as the Division has not claimed the defense is irrelevant as to all allegations, Respondents may present the defense and the Division will have the opportunity to develop its relevance argument during post-hearing briefing.

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James E. Grimes
Administrative Law Judge