

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

Administrative Proceedings Rulings
Release No. 5696 / April 24, 2018

Administrative Proceeding
File No. 3-17950

In the Matter of
David Pruitt, CPA

**Order on Motion for
Clarification**

On March 28, 2018, the Division of Enforcement requested and I issued a subpoena to Respondent David Pruitt. The subpoena required Pruitt to produce:

1. All Communications between Respondent and [witness] Timothy Keenan.
2. All Documents and Communications Concerning the notarized affidavit bearing the signature of Timothy Keenan, dated as of February 2, 2018, including, but not limited to, drafts of the affidavit.¹

The subpoena defined the term *Respondent* to include Pruitt's counsel and *Document* to include, among other things, "summaries" and "notes of meetings." The subpoena also required Pruitt to submit a list of any responsive documents he planned to withhold.

The following week, Pruitt moved to quash or modify the subpoena, arguing that it sought evidence protected by the work-product and attorney-client privileges. Because Pruitt failed to support his motion with a privilege log or declaration that described what documents were at issue, I ordered him to submit such information. He responded with a privilege log that listed

¹ The subpoena covers the period July 1, 2014, through the present.

two documents: an e-mail his counsel sent to Keenan on February 1, 2018, and a draft affidavit attached to the e-mail.

On April 16, 2018, I directed that Pruitt need not disclose the two documents listed in his privilege log. I added, however, that:

to the extent there are “records of phone calls, calendar entries indicating when counsel spoke to Keenan and who was present, contemporaneous notes or memoranda of the factual statements made by Keenan during any prior communications,” or other responsive records that were not listed in Pruitt’s privilege log, he should immediately disclose those documents.

Four days later, Pruitt filed a motion to clarify the April 16 order or to amend his privilege log. Pruitt correctly points out that the language above from the April 16 order is quoted from the Division’s opposition rather than the subpoena.² He argues that the Division’s opposition sought to expand the subpoena.³ Pruitt also argues he should not be required to produce “internal notes and memoranda shared solely between Respondent’s defense team” because Division counsel previously represented that the Division’s subpoena did not seek attorney work product.⁴ Pruitt further asserts that if his counsel had realized the subpoena sought attorney work product, he would have asserted that privilege and logged the documents.⁵

In opposition, Division counsel confirms that the subpoena does not seek attorney work product.⁶ It asserts, however, that it never told Pruitt’s counsel that he “that he did not have to log all responsive documents over which he

² Mot. at 1.

³ *Id.* at 4.

⁴ *Id.* at 1–2, 4–5.

⁵ *Id.* at 5.

⁶ The Division says that it “is not seeking documents that are clearly protected by the attorney-client privilege and attorney work product doctrine including emails solely between Respondent and his counsel, emails between various members of Respondent’s defense team (including experts), and internal memoranda or documents analyzing either Keenan’s statements or the Keenan Affidavit.” Opp’n at 5 n.3. It asserts, however, that Pruitt must nonetheless disclose documents memorializing “factual statements made by Keenan to Respondent’s counsel.” *Id.*

was asserting a privilege.”⁷ The Division argues that Pruitt is seeking reconsideration and should be required to disclose “contemporaneous notes or memoranda of the factual statements made by Keenan.”⁸

In reply, Respondent has submitted a proposed amended privilege log, which contains five new entries: Two e-mails from November 2017, sent by Rachel Pirt, a defense “consultant,” to defense counsel discussing an interview with Keenan; two sets of notes of the interview, attached to the e-mails; and one set of defense counsel’s handwritten notes of a 2018 meeting with Keenan.

Discussion

Given the subpoena’s definition of the terms *Respondent* and *Document*, the subpoena encompasses Pruitt’s counsel’s “notes or memoranda of the factual statements made by Keenan.” Ordinarily, Pruitt would be required to include those notes in his privilege log or risk waiving any claim of privilege as to the notes.

Pruitt’s counsel, however, evidently relied on Division counsel’s representation that the subpoena did not seek attorney work product. Pruitt, therefore, did not include his counsel’s notes in his privilege log. I agree that it would be inequitable in this circumstance and at this stage to require Pruitt to disclose his counsel’s notes.

Pruitt’s motion is granted. The order on Respondent’s motion to quash, issued on April 16, 2018, is amended. The last sentence of the order is deleted and replaced with the following:

However, to the extent there are other “Communications between Respondent and Timothy Keenan” or “Documents and Communications Concerning the notarized affidavit bearing the signature of Timothy Keenan, dated as of February 2, 2018,” which are not listed in Pruitt’s privilege log, he should immediately disclose those documents to the Division.

⁷ *Id.* at 5 n.4.

⁸ *Id.* at 4–6.

Pruitt’s amended privilege log is facially adequate but adds for the first time three people whom he describes as “consultants and members of [his] defense team” who have sent or received e-mails and documents he asserts are privileged. The work-product doctrine covers communications with “consultants.”⁹ Given this fact and the “nature of the document[s] and the factual situation in [this] case,”¹⁰ the four consultant-produced documents and the handwritten attorney notes listed in his amended privilege log likely are covered by the work-product privilege. Pruitt shall submit a declaration explaining the connection to his defense team of the three people listed in footnote two in his log.

The deposition of Timothy Keenan will take place as scheduled. If the Division shows “a substantial need for the materials [in Pruitt’s log] and an undue hardship in acquiring the information any other way,”¹¹ I will entertain a motion to reopen Keenan’s deposition.

James E. Grimes
Administrative Law Judge

⁹ See *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 665 (3d Cir. 2003); Fed. R. Civ. P. 26(b)(3)(A).

¹⁰ *Binks Mfg. Co. v. Nat’l Presto Indus., Inc.*, 709 F.2d 1109, 1119 (7th Cir. 1983).

¹¹ *Dir., Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997).