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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 6361/November 26, 2018

ADMINISTRATIVE PROCEEDING
File No. 3-18292

In the Matter of	:	
	:	
ANTON & CHIA, LLP,	:	ORDER
GREGORY A. WAHL, CPA	:	
MICHAEL DEUTCHMAN, CPA	:	
GEORGIA CHUNG, CPA, and	:	
TOMMY SHEK, CPA	:	

The Securities and Exchange Commission instituted this proceeding with an Order Instituting Proceedings (OIP) on December 4, 2017, pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice. The OIP alleges that Respondents violated the antifraud and reporting provisions of the federal securities laws and engaged in improper professional conduct related to audit and/or interim review engagements for three microcap company clients.[1] The proceeding was stayed between June 21 and August 22, 2018. *Pending Admin. Proc.*, Securities Act of 1933 Release Nos. 10510, 2018 SEC LEXIS 1490 (June 21, 2018); 10522, 2018 SEC LEXIS 1774 (July 20, 2018); 10536, 2018 SEC LEXIS 2058 (Aug. 22, 2018).

Under consideration are the Division of Enforcement's September 11, 2018, Motion for a Protective Order (Motion); Respondent Gregory A. Wahl, CPA's, September 21, 2018, opposition; the Division's October 1, 2018, reply; as well as material provided by the Division for *in camera* review as ordered on September 14, 2018. *See Anton & Chia, LLP*, Admin. Proc. Rulings Release No. 5972, 2018 SEC LEXIS 2305 (September 14 Order).

The Motion concerns a voicemail left on the telephone of Wahl's prior attorney, Michael MacPhail.[2] The Motion states that Division counsel telephoned MacPhail on June 22, 2018, and left a voicemail advising him of the stay. After leaving the message, counsel attempted to end the call by hanging up but did not realize that the call was not actually disconnected, and a discussion, which the Division argues is privileged, with another Division attorney about an unrelated,

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[1] The proceeding has ended as to Tommy Shek, CPA. *Anton & Chia, LLP*, Exchange Act Release No. 83622, 2018 SEC LEXIS 1704 (July 12, 2018).

[2] On July 16, 2018, MacPhail and co-counsel filed a notice of withdrawal, effective July 23, 2018, as counsel for Wahl, Anton & Chia, LLP, and Georgia Chung, CPA, pursuant to 17 C.F.R. § 201.102(d)(4).

nonpublic, investigation was recorded on the voicemail. The Division learned of this from a July 26, 2018, letter from Stephen M. Lobbin, Esq., a partner in a different law firm from MacPhail's. The letter identifies Respondents as his clients, argues that the claim against them is meritless, and offers to reach a settlement that would include dismissing the proceeding.[3] The letter contains excerpts, which are redacted from the copy attached to the Motion as Exhibit A, from a transcript of the discussion.[4] The Division obtained the agreement of MacPhail's and Lobbin's law firms not to use or disclose the recording.

In August 2018, the Division learned that Wahl had provided the recording to Christopher J. Langley, Esq., who represents Wahl in his Chapter 11 bankruptcy proceeding, *Gregory Anton Wahl*, No. 8:18-bk-12449 (Bankr. C.D. Cal.) (*Wahl*). The Division requested Langley to direct Wahl to destroy the recording and to refrain from disclosing its contents to others. In response, Langley advised that his firm would not disclose the recording and that he had deleted it from his files. Wahl himself, however, responded by suggesting that he might disclose it to third parties and urged the Division to dismiss this proceeding. The Division then obtained a protective order from the Bankruptcy Court, which was subsequently renewed. *Wahl*, ECF Nos. 97 (Aug. 29, 2018), 138 (Oct. 2, 2018).[5]

In his opposition, Wahl argues that the undersigned does not have the authority to issue a protective order. While noting that the parties discussed in the voicemail are not relevant to the instant case, he argues that the voicemail shows the "consistent and criminal behavior of the SEC, its ALJ and its employees" as practiced against small businesses and their owners generally. In an August 16, 2018, email to the Division, Wahl had requested that the case be dropped and suggested that, if it is not, he might disclose some damaging information to the news media.[6] Mot. at Ex. 1(G).

Wahl states that he is not arguing for disclosure of the names of the parties discussed in the voicemail. Opp. at 1, 2. However, it is concluded that it is necessary to go beyond a protective order regarding the names. The undersigned is authorized to issue a protective order regarding the

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[3] Neither Lobbin nor his firm has entered an appearance in this proceeding.

[4] In response to the September 14 Order, the Division provided to the Office of Administrative Law Judges: an unredacted paper copy of Lobbin's letter and a copy of the recording that it received from Lobbin on August 10, 2018. The undersigned has reviewed these materials.

[5] The court ordered that

> Gregory A. Wahl, his attorneys, agents, spouse and all those acting in concert with them shall not disclose to any other party (a) the . . . recording . . .; or (b) any copies of any transcripts, documents, or other materials (including electronically stored information) in their possession or control describing or derived from the contents of the recording until further Order of this Court.

[6] It is not clear that the damaging information includes the voicemail.

voicemail. *See* 17 C.F.R. § 201.111(d) (authorizing "Regulating the course of a proceeding and the conduct of the parties and their counsel"). It is clear that the inadvertent disclosure by the Division and subsequent use of the voicemail by Wahl, and by Lobbin on Wahl's behalf, as a Respondent in this proceeding, is "conduct of the parties and their counsel" within the meaning of that rule. The inadvertent disclosure occurred in the process of the Division's communication about a matter in this proceeding with Wahl's then-counsel, and Wahl and an attorney later used the existence of the voicemail in negotiating with the Division to dismiss the proceeding. Wahl also argues that the voicemail is an asset of the bankruptcy estate that should be used for the benefit of creditors. This also suggests that he sees it as a bargaining chip in negotiations to dismiss the proceeding.

Wahl also argues that restricting the use of the voicemail that he obtained in connection with this proceeding is a violation of his First Amendment rights. However, the Commission has a substantial interest in protecting the integrity of its investigations and proceedings. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984). Wahl remains free to publicize his view that the Commission unfairly targets small businesses while ignoring violations by big business.

The voicemail and transcript are privileged and/or attorney work product and are subject to the requested protective order on that basis. *Cf.* 17 C.F.R. § 201.230(b)(1)(i), (ii) (authorizing the Division to withhold from a respondent material that is privileged or is otherwise attorney work product). The discussion captured in the material at issue is work product because it concerns the merits of an ongoing investigation or litigation.[7] *See SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1203 (D.C. Cir. 1991). The Division also argues that the material at issue can be protected under the attorney client privilege. However, the extent of attorney client privilege applicable to government attorneys, as opposed to attorneys in a corporate setting, is unsettled. *See In re Grand Jury Investigation*, 399 F.3d 527, 530-36 (2d Cir. 2005).

There are no countervailing factors that would warrant an exception to protecting the material at issue from disclosure. In particular, the material at issue is not relevant to the issues in this proceeding, which concern the alleged violation by *Wahl and other respondents* of the antifraud and reporting provisions of the federal securities laws and *their* alleged improper professional conduct related to audit and/or interim review engagements for certain public companies. Wahl, however, argues that the material is relevant to showing that *the Commission* is essentially a criminal enterprise. However, alleged misconduct by the Commission or any of its employees is not at issue in this proceeding.

Accordingly, IT IS ORDERED that Gregory A. Wahl, the other Respondents, and their attorneys, agents, and those acting in concert with any of them, return or destroy all copies of the above-referenced voicemail and transcript; not disclose the voicemail, transcript, or their contents to any person; and notify the Division, by December 14, 2018, of all persons (other than those referenced above) to whom they have given or otherwise disclosed the substance of the voicemail.

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[7] The Division also argues that the material is subject to the deliberative process privilege. However, it is not completely clear that the discussion was predecisional, or whether it was supporting "a decision already made," in which case it would not be subject to the privilege. *Petroleum Info. Corp. v. Dep't of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992).

/S/ Carol Fox Foelak
Carol Fox Foelak
Administrative Law Judge