ORIGINAL

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15766

In the Matter of

CLEAN ENERGY CAPITAL, LLC and SCOTT A BRITTENHAM,

Respondents.

DIVISION OF ENFORCEMENT'S MOTION FOR EXCLUSION, OR IN THE ALTERNATIVE, DISCLOSURE, OF ADVICE OF COUNSEL

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Pursuant to Commission Rules of Practice 300 and 320, 17 C.F.R. §§ 201.300, 201.320, the Division of Enforcement ("Division") respectfully submits this motion to exclude from the hearing on this matter scheduled to commence on August 11, 2014, the testimony of Tonya Grindon ("Grindon"), a partner at Baker, Donelson, Bearman, Caldwell & Berkowitz, PC ("Baker Donelson") who serves as outside counsel to Respondent Clean Energy Capital, LLC ("CEC"). Additionally, the Division seeks to exclude the testimony of Respondent Scott Brittenham ("Brittenham") or any other of Respondents' witnesses, with respect to the communications with counsel over which Respondents have previously asserted attorney-client privilege. In the alternative, the Division seeks an order permitting it to take the testimony of Grindon and Brittenham on these issues before trial.

Throughout the Division's investigation, Respondents refused to waive privilege regarding any legal advice received from Baker Donelson. Although Respondents did not withhold communications with counsel from CEC's document production, they expressly limited any waiver associated with such production to the documents themselves. All of the Division's attempts during testimony to inquire about legal advice received by CEC were consistently rebuffed.

In their Answer filed March 26, 2014 ("Answer"), however, Respondents assert reliance on counsel in defense of at least four of the seven areas of misconduct alleged by the Division. Respondents have listed Grindon as one of their witnesses in this matter, and have identified as hearing exhibits all of the CEC invoices produced by Baker Donelson in response to the subpoena issued to it on April 3, 2014 (the "Subpoena"). Notwithstanding their reversal on shielding from disclosure the contents of their attorney client privileged communications, Respondents recently refused the Division's request for an opportunity to examine Grindon and Brittenham before hearing.

Given Respondents' prior—and continuing—refusal to divulge the legal advice they purportedly received, it would be fundamentally unfair to permit Grindon and Brittenham, or any other CEC witness, to testify regarding advice from Baker Donelson concerning the issues that are the subject of this proceeding. Simply put, Respondents should not be permitted to use their privileged communications with counsel as both sword and shield. The Division therefore requests that this evidence be excluded from hearing of this action, or in the alternative, that the Division be granted the opportunity to examine Grindon and Brittenham before the hearing in this matter concerning any legal advice on which Respondents seek to rely.

I. FACTUAL BACKGROUND

The Order Instituting Proceedings in this action was filed on February 25, 2014 ("OIP"). The Division alleges that Respondents committed multiple violations of the antifraud and advisory fraud provisions of the securities laws. The alleged violations arise from CEC's provision of investment management services to a group of twenty limited partnerships (the "ECP Funds") founded by Brittenham and a co-founder, of which CEC is the general partner.

At the center of the Division's claims are the allegations that Respondents: (1) misappropriated several million dollars from the ECP Funds over at least three year period by allocating the operating expenses of CEC to the Funds, contrary to CEC's disclosures to Fund investors and the ECP Funds' Limited Partnership Agreements ("LPAs") ; (2) without disclosure to or consent from the investors, issued millions of dollars in interest-bearing loans from CEC to the ECP Funds in the form of promissory notes secured by pledges of the Funds' assets; (3) retroactively and in contravention of the LPAs, changed the calculation of carried interest and dividend distributions to CEC's benefit and to investors' detriment; (4) violated the custody rule, under an internal compliance policy that ineptly described the rule's obligations, commingled

assets, and failed to use a qualified custodian; and (5) omitted the SEC disciplinary history of CEC co-founder Gary Schwendiman ("Schwendiman") from certain of the ECP Funds' Private Placement Memoranda ("PPMs"). (OIP ¶ 2.)[1]

A. Respondents' Assertions Of Privilege During The Division's Investigation

When CEC produced documents in response to the Division's investigative subpoena, it did so, at its own request, pursuant to a Confidentiality Agreement dated September 6, 2012 (the "Confidentiality Agreement"; attached hereto as Exhibit 1). The Agreement provides that, as to any documents that "may" contain attorney client privileged information or attorney work product, CEC intended to "limit waiver of the protections of the attorney work product doctrine," and that the Division staff would not "assert that CEC's production of the Communications to the Commission constitutes a waiver of the protection of the attorney-client privilege or attorney work-product doctrine…". (*Id.* at 1.) CEC requested this accommodation from Division staff, rather than conduct a pre-production document review, "because [Respondents] thought [reviewing documents] was too costly and [Brittenham] decided not to pay the cost of it." (Exhibit 2, excerpted testimony of Gary Schwendiman dated April 4, 2013 ("Schwendiman Tr."), 53:24-55:22.)

Throughout the Division's investigation, CEC and its officers repeatedly and uniformly invoked the attorney client privilege regarding the substance of all communications with counsel—typically following an admonishment by Baker Donelson. These invocations of privilege pertained to the very issues with respect to which Respondents now seek to assert the advice of counsel in defense to the Division's claims, including: the allocation of CEC's expenses to the ECP Funds, CEC's issuance of loans to the ECP Funds, disclosure of Schwendiman's disciplinary history, and others.

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[1] The Division further alleges that Respondents misrepresented Brittenham's and Schwendiman's planned investment in Series R to investor Steven Roth. (*Id.*) However, Respondents do not appear to assert the advice of counsel with respect to this claim.

1. Respondents' Assertions of Privilege re: Allocated Expenses

Brittenham (who, during his testimony, was simultaneously represented in his individual capacity by CEC's current trial counsel, Stern Tannenbaum & Bell), was asked what legal advice CEC received on expense allocations, and was instructed not to answer:

> Q: So what do you remember your counsel advising you about expense allocations?
>
> MR. SHERMAN: Objection, and I would instruct you not to answer.

(Exhibit 3, excerpted testimony of Scott Brittenham dated March 14-15, 2013 ("Brittenham Tr."), 314:7-10, 315:3-4.) Brittenham abided by his counsel's instruction and refused to answer this question. He was also asked how often he talked to Gary Riggs, CEC's outside auditor, about CEC's 70/30 allocation of expenses to the Funds, in response to which counsel objected "to the extent that is (*sic*) any conversations that included counsel, there is a good faith argument that those would be covered by attorney-client privilege..." (*Id.* 307:21-308:2; *see also id.* 313:3-4 (Brittenham cautioned not to reveal attorney client privileged communications amongst him, Riggs and Grindon on expense allocation).) Again, Brittenham followed his counsel's instruction, and refused to answer the Division staff's questions on this point.[2]

2. Respondents' Assertions of Privilege re: Loans to the Funds

Brittenham was asked if he received legal advice pertaining to CEC's issuance of loans to the Funds. He was instructed not to divulge the contents of the communications:

> Q: And did [Baker Donelson] give you advice on this loan issue?
>
> MR. SHERMAN: I'm going to object because that's asking a question on attorney client privileged communications. And as we

[2] Counsel also interposed a privilege objection during the testimony of CEC CFO Jonathan Henness concerning legal advice about expenses. (Exhibit 4, excerpted Testimony of Jonathan Henness dated March 25-26, 2013 ("Henness Tr."), 63:14-23.)

> talked about earlier, I think you can ask the subject, if it was discussed, but if you're going to ask, "Did you get advice?" that gets into the discussions. So I would instruct you not to answer that question.

(Brittenham Tr. at 131:5-14.)[3] As before, once instructed by his attorney, Brittenham did not answer the Division staff's questions regarding this issue.

3. Respondents' Assertions of Privilege re: Disclosure of Schwendiman's SEC Disciplinary History

Brittenham was asked if he discussed with counsel whether CEC co-founder Schwendiman's disciplinary history could be omitted from the ECP Funds' PPMs. He was instructed not to answer, and did not answer, these questions. (Brittenham Tr., 76:15-77:12, 77:10-12, 79:11-22, 82:14-16.) Schwendiman himself was also instructed not to answer the same line of questioning:

> Q: Can you describe, from beginning to end, the process for updating a PPM so that it is for a new series?...
>
> A: ...Then, once Tonya [Grindon] reviewed it, if there were changes to be made, she commented on those changes and—
>
> MR. SHERMAN: Without getting into any specifics of it now.
>
> A: —suggested that we make—
>
> MR. SHERMAN: I don't want you to get into specifics. There is a discussion here that you will have about this specific email. But we're not waiving—***there is not a general waiver of privilege***. So just be careful. You can talk generally about that Tonya was involved. But I don't want you to get into specific discussions generally about your discussions with Tonya [Grindon].

(Schwendiman Tr., 60:1-61:22; emphasis added.)[4]

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[3] Counsel gave a similar instruction during Henness's testimony, when Henness was asked to relate any discussions he had with Brittenham regarding legal advice CEC received concerning the loans. (Henness Tr., 75:6-24).

Respondents' counsel interposed similar objections regarding legal advice about CEC's adherence to the custody rule and its compliance policy. (*See* Brittenham Tr., 269:21-22; Black Tr., 151:21-152:1). Their counsel also objected to questions about CEC's changes to the distribution of dividends to the ECP Fund limited partners. (Brittenham Tr., 335:17-18; Henness Tr., 302:14-303:7, 306:4-15).

Respondents subsequently declined to make any submissions during the Wells process, where they were advised of the potential charges against them and provided the opportunity to present information to the Commission in response. Thus, despite many opportunities, Respondents never raised the defense of advice of counsel prior to the institution of this proceeding.

B. Respondents' Assertions Of Advice Of Counsel In This Proceeding

In stark contrast to their zealous protection of attorney client privilege during testimony, Respondents in this proceeding have sounded heavily the theme of reliance on counsel as a defense to many of the Division's claims. In their Answer, in addition to asserting globally that each PPM and LPA was "drafted" by counsel and then "reviewed" and "finally approved by such counsel before being distributed" (Answer ¶ 7), Respondents assert reliance on counsel in defense to at least four subject areas of the Division's claims, including:

- ***Expenses:*** "CEC ***consulted legal counsel*** concerning both the allocation of expenses to the ECP Limited Partnerships and the amendment of the partnership agreements to authorize the ECP Limited Partnerships to authorize [] secured promissory notes") (Answer ¶ 1(b));

[4] CEC's former CCO, Patricia Black, was similarly instructed. (Exhibit 5, excerpted testimony of Patricia Black dated April 1, 2013 ("Black Tr."), 67:25-69:6.) Brittenham was also admonished not to disclose privileged communications concerning why his own history was omitted from Series L. (Brittenham Tr., 93:13-19, 119:24-120:1).

and the "Split Ratio was adopted by CEC after being ***advised by its legal counsel*** that doing so was permitted by the ECP LPAs and Delaware law" (*id.* ¶ 11) (emphasis added);

- ***Loans:*** "CEC was ***advised by accounting and legal counsel*** that it was necessary to document the obligations of the ECP Limited Partnerships to CEC" (*id.* ¶ 24(g)); and the process of amending the LPAs was "taken ***in consultation with accounting and legal counsel***, and no actions were taken against any such advice" (*id.* ¶ 28) (emphasis added);

- ***Disclosure of disciplinary history:*** CEC "***relied in good faith on such counsel's advice*** regarding whether disclosure of the Sanction Order was required" (*id.* ¶ 54) (emphasis added); and

- ***Custody/compliance:*** CEC's "compliance policies were ***prepared by its legal counsel***" (*id.* ¶ 52) (emphasis added).

Respondents have included Tonya Grindon on their Witness List, disclosed on June 23, 2014. Their Exhibit List, disclosed on June 25, 2014, contains all of the CEC invoices produced by Baker Donelson in response to the Subpoena.[5]

The day after receiving Respondents' Witness and Exhibit Lists, the Division requested that Respondents agree to make Grindon and Brittenham available for depositions before trial. (*See* Exhibit 6, June 26, 2014 email from Amy Longo to Aegis Frumento). Counsel for Respondents refused, on the grounds of time constraints, and also because of the asserted "fair clarity of the nature of their testimony from the Answer and the depositions already had." (*Id.*, July 2, 2014 email from Aegis Frumento to Amy Longo). As noted, however, Respondents'

[5] In response to the Subpoena, Baker Donelson also produced Grindon's and other Baker Donelson attorneys' email communications with CEC, none of which were identified by Respondents as trial exhibits.

counsel repeatedly refused to allow any such testimony about the substance of legal advice during the investigative depositions.

II. LEGAL ANALYSIS

The advice of counsel may not be invoked during trial absent full pretrial disclosure of the advice in question. "A party who intends to rely at trial on the advice of counsel must make full disclosure during discovery; failure to do so constitutes a waiver." *Contour Design, Inc. v. Chance Mold Steel Co., Ltd.*, 2011 WL 6300622, at *8 n.5 (D.N.H. Dec. 16, 2011) (citing *Vicinanzo v. Brunschwig & Fils, Inc.* 739 F. Supp. 891, 894 (S.D.N.Y. 1990)), *overruled on other grounds*, 693 F.3d 102 (1st Cir. 2012); *see also In the Matter of Miguel A. Ferrer and Carlos J. Ortiz*, 104 S.E.C. Docket 3960, 2012 WL 8751437 (Nov. 2, 2012) (attached as Exhibit 7).

Given their refusal to waive privilege during the Division's investigation, during the Wells process, or during this proceeding, Respondents should be precluded under Commission Rules of Practice 300 and 320 from alluding to such advice as evidence of their purported good faith conduct. 17 C.F.R. §§ 201.300, 201.320. In the alternative, they should be compelled to make full disclosure of any legal advice before trial.

A. Respondents May Not Assert Defenses Based On Advice Of Counsel Without Providing Full Disclosure Of The Alleged Advice

"[I]n order to establish good faith reliance on the advice of counsel, [a party] must show that they (1) made a complete disclosure to counsel; (2) requested counsel's advice as to the legality of the contemplated action; (3) received advice that it was legal; and (4) relied in good faith on that advice." *SEC v. Goldfield Deep Mines Co.*, 758 F.2d 459, 467 (9th Cir. 1985); *see also SEC v. Caserta*, 75 F. Supp. 2d 79, 95 (E.D.N.Y. 1999) (same).[6] Even where a party

[6] Thus it is the content of the advice—not the fact of the consultation—that is germane to this defense. To the extent Respondents contend otherwise, as perhaps shown by their identification as

establishes the elements of good faith reliance on counsel, such reliance does not operate as an automatic defense, but rather as a factor pertinent to scienter. *SEC v. Retail Pro, Inc.*, 2011 U.S. Dist. LEXIS 68238, 16-17 (S.D. Cal. June 23, 2011), *citing Goldfield Deep Mines*, 758 F.2d at 467 ("Even if appellants had established a claim of [good faith] reliance [on professionals], such reliance does not operate as an automatic defense, but is only one factor to be considered in determining the propriety of injunctive relief."); *United States v. Bush*, 626 F.3d 527, 540 (9th Cir. 2010) ("[A]dvice of counsel is not regarded as a separate and distinct defense but rather as a circumstance indicating good faith which the trier of fact is entitled to consider on the issue of fraudulent intent....").[7]

Thus, a party who seeks to introduce evidence of its good faith reliance on counsel must disclose not only the counsel involved, but also the exact content of the legal advice that was supposedly received:

> When a party intends to rely at trial on the advice of counsel as a defense to a claim of bad faith, that advice becomes a factual issue, and 'opposing counsel is entitled to know not only whether such an opinion was obtained but also its content and what conduct it advised.'

Trouble v. Wet Seal, Inc., 179 F. Supp. 2d 291 (S.D.N.Y. 1999) (citations omitted) (holding that advice of counsel defense had been waived by objections to discovery); *see also Arista Records, et*

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a single proposed trial exhibit of all, rather than selected excerpts of, the Baker Donelson legal invoices, the Division would, apart from this Motion, object to the invoices' *en masse* introduction as irrelevant under Rule 320, absent some showing that the billing records bear on the subjects at issue. 17 C.F.R. § 201.320 (permitting exclusion of evidence that is irrelevant).

[7] Good faith reliance on the advice of counsel or other professionals, where established, may be a defense to claims that require a showing of scienter. *See In the Matter of Tri-Star Advisors, Inc.*, -- S.E.C. Docket --, 2014 SEC LEXIS 1872 (June 2, 2014) (denying respondents' motion for summary disposition, noting that where "[n]o showing of scienter is required", advice of advisor "would not be an absolute defense"), *citing SEC v. Johnson*, 174 F. App'x 111, 114-15 (3d Cir. 2006).

al., v. Lime Group LLC, et al., 2011 U.S. Dist. LEXIS 42881 at *8 (S.D.N.Y. 2011) ("A party who intends to rely at trial on the advice of counsel must make a full disclosure during discovery; failure to do so constitutes a waiver of the advice-of-counsel defense.'").

Applying similar reasoning, Chief Administrative Law Judge Brenda P. Murray excluded evidence of advice of counsel due to a prior failure to disclose the advice in *Ferrer*. *See* 104 S.E.C. Docket 3960, 2012 WL 8751437. In that case, the respondents sought to introduce evidence of their employer's legal department's involvement in the subject areas at issue, despite the Division not having been permitted to inquire about this advice during the investigation. Because the advice of counsel was first introduced during trial, there was no opportunity for pretrial disclosure. Under Commission Rule of Practice 300, which requires that hearings be conducted in a "fair, impartial, expeditious and orderly manner," Judge Murray found that the evidence should be excluded:

> The testimony that Respondents want in the record could have considerable probative weight. Since UBS prevented the Division from investigating the Legal Department's involvement in these issues, the Division is unfairly prejudiced if Respondents are allowed to show that they consulted UBS's Legal Department and it allowed or approved use of the materials.

Ferrer, 2012 WL 8751437, at *4 (noting that while the language of Rule 320 does not address unfairly prejudicial evidence, "[o]ther knowledgeable authorities take a different position," and finding that Rule 300 barred introduction of the previously-undisclosed legal advice); *see also In the Matter of Thorn, Welch & Co., Inc.*, 58 S.E.C. Docket, 1995 WL 148989 (Mar. 28, 1995) (overruling privilege objection, finding that "the concept of fairness require[d]" disclosure of exam report where witness referred to it at trial, to give a "full and fair opportunity" for examination of witness).

The same is true here. Respondents' communications with counsel could have significant probative weight, yet Respondents prevented the Division from investigating these communications (and counsel's communications with their outside auditor). To allow

Respondents to now, at this late stage, assert a defense directly based on those communications would be unfairly prejudicial to the Division. Evidence of these communications in support of such a defense should therefore be excluded.

B. Respondents Should Be Compelled To Divulge The Alleged Advice Of Counsel, Absent Its Exclusion From This Proceeding

"A defendant may not use the privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes.'" *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir.), *cert. denied*, 502 U.S. 813, 112 S. Ct. 63, 116 L. Ed. 2d 39 (1991) (affirming ruling that if defendant put his reliance on counsel at issue to demonstrate good faith, he would waive privilege); *accord Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992) ("Where a party raises a claim which in fairness requires disclosure of the protected communication, the privilege may be implicitly waived."). To allow a respondent to maintain assertions of attorney client privilege throughout the Division's investigation, then abandon the privilege and rely on advice of counsel at trial without first making full pretrial disclosure, would be both inefficient and unfair:

> [C]ourts should look with skepticism on efforts by parties to reserve decision whether to use privileged material as evidence in their case-in-chief at trial... [T]he use of some privileged material as evidence provides a basis for insisting that all related material also be disclosed.

Charles Alan Wright & Arthur R. Miller, 8 Fed. Prac. & Proc. Civ. § 2016.6 (3d ed. 2014) at 2; *see also Sidco Industries Inc. v. Wimar Tahoe Corp.*, No. 91–110–FR, 1992 WL 58732, at *1 (D. Or. Mar. 19, 1992) (for a defendant "to rely on the advice-of-counsel as a defense to a claim of bad faith or willfulness, it must make a full disclosure of the discovery supporting this defense").

To redress the prejudice the Division will suffer if Respondents are permitted to submit previously undisclosed evidence of advice of counsel at trial, the Division should be permitted to examine Grindon, and to re-examine Brittenham, to learn the substance of their testimony on this

issue.[8] Having refused the Division's request for these depositions, Respondents should not be permitted to stand on their prior refusal to waive the attorney client privilege, nor to ambush the Division by waiving privilege over that advice for the first time at trial.

III. CONCLUSION

Based on the foregoing, the Division respectfully requests that the Court exclude from the hearing on this matter any evidence, including testimony or documents, relating to the advice of counsel; or in the alternative, order full disclosure of the testimony of Grindon and of Brittenham (solely with respect to attorney client privileged communications) before trial.

DATED: July 7, 2014

Respectfully submitted,

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Securities and Exchange Commission
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COUNSEL FOR
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[8] The Division makes this request under Commission Rule 300, rather than Rule 233, because while Rule 233(b) permits a party to seek a deposition, it requires a finding that the witness will be unavailable at trial. 17 C.F.R. § 201.233(b); *see e.g.*, *In the Matter of Anthony J. Negus*, 62 S.E.C. Docket 2805, 1996 WL 595702, at *1 (Oct. 7, 1996) (granting motion for deposition of foreign witness).

EXHIBIT 1

As part of Clean Energy Capital, LLC's ("CEC") efforts to respond to the staff of the U.S. Securities and Exchange Commission's (the "Staff") subpoena dated March 14, 2012 in the above referenced investigation, CEC intends to produce to the Staff certain communications which CEC believes may contain, among other documents, a variety of attorney-client communications and attorney work-product (hereinafter collectively referred to as the "Communications"). In light of CEC's desire to respond to the subpoena in as timely a manner as possible, it will produce these Communications without (i) review of all Communications to determine whether they are, in fact, privileged or attorney work-product and (ii) withholding any such Communications it could have determined to be privileged and work-product documents. CEC will provide a privilege log for any documents withheld on the basis of attorney-client privilege and/or work product doctrine.

Please be advised that, by producing the Communications pursuant to this Agreement, CEC intends to limit waiver of the protections of the attorney work-product doctrine, the attorney-client privilege, and any other privilege applicable as to third parties. CEC believes that some of the Communications are protected by, at a minimum, the attorney-client privilege and attorney work-product doctrine. CEC believes that some of the Communications warrant protection from disclosure.

The Staff will maintain the confidentiality of the Communications pursuant to this agreement and will not disclose them to any third party, except to the extent that the Staff determines that disclosure is otherwise required by law or would be in furtherance of the Commission's discharge of its duties and responsibilities.

The Staff will not assert that CEC's production of the Communications to the Commission constitutes a waiver of the protection of the attorney-client privilege or attorney work-product doctrine, or any other privilege applicable as to any third party. The Staff agrees that production of the Communications provides the Staff with no additional grounds to subpoena testimony, documents or other privileged materials from CEC (e.g., the SEC will not claim that the production discussed herein creates a subject-matter waiver for all subjects discussed in any privileged and/or work-product document produced), although any such grounds that may exist apart from such production shall remain unaffected by this Agreement.

CEC recognizes and agrees that in the event the Staff receives privileged documents that are produced as part of the Communications, the SEC's receipt and review of such documents in accordance with this agreement will not serve as a basis to disqualify the SEC or its staff that received or reviewed such documents from participating in the investigation or any further related proceedings.

The Staff's agreement to the terms of this letter is signified by your signature on the line provided below.

Dated: 9-6-12 Dated: 9-3-12

SECURITIES & EXCHANGE COMMISSION

By: Marshall S. Sprung

Title: Deputy Chief, AMU

Clean Energy Capital, LLC

By: _____
Scott A. Brittenham

Title: President & CEO

EXHIBIT 2

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

In the Matter of:)

) File No. LA-04174-A

CLEAN ENERGY CAPITAL, LLC)

WITNESS: Gary Schwendiman

PAGES: 1 through 110

PLACE: Securities and Exchange Commission
5670 Wilshire Boulevard, Room No. 710
Los Angeles, CA 90036

DATE: Thursday, April 4, 2013

The above-entitled matter came on for hearing, pursuant to notice, at 8:00 a.m.

A It would have been Scott's final decision, as he made all decisions with regard to those matters.
Q Now, the ECP funds paid a management fee to Clean Energy Capital as the investment adviser; isn't that right?
A Yes.
Q And are you aware that a percentage of all employee compensation, including Mr. Brittenham's, was being allocated to the ECP funds?
A I know that there was some allocation mechanism for expenses generally, but I don't know the specifics.
Q Okay. Have you ever heard of like a 70/30 split in terms of allocation to the ECP funds and CEC?
A Yes, I've heard discussions about that. But I don't know what 70/30 means or with regard to allocation.
Q And I'm not sure if you were answering my question when I asked you if you knew the employee compensation and benefits was actually being expensed to some degree to the ECP funds?
A I don't know that.
Q Do you know what the rationale behind a split of expenses was?
A No.
Q So just to be clear, you were present during some discussions regarding a split of expenses but you

cannot recall what the rationale for that split was?
A I can't recall. And if I had been present in any discussions, it would have been after we had talked about some of the research I was doing.
Q Do you know of any basis why Clean Energy Capital would charge the ECP funds a management fee and on top of that also allocate a percentage of employee compensation and benefits to the ECP funds?
MR. SHERMAN: That assumes facts that he says he's not aware of generally, and so it makes a general statement. But I think it assumes facts not in evidence, is the best way I can describe it.
THE WITNESS: I know that in the PPM, there was some discussion of operational expenses, administrative expenses and expenses generally, but I don't know what the details were.
BY MR. DANIALYPOUR:
Q So to your knowledge, does the PPM actually disclose employee compensation or health benefits as an operational or administrative expense?
MR. SHERMAN: Are you asking him whether he recalls whether any PPM specifically uses those words?
BY MR. DANIALYPOUR:
Q If any PPM discloses that, not by use of those specific words, but to your knowledge?

A I'm not certain, but I have great confidence that the affairs of the business were conducted according to regulations, the law and the statements in the PPM.
Q Did you ever look at the PPMs for the purposes of determining whether they actually disclosed such things as employee compensation or health benefits as an operational or other expense?
A No.
Q Did you ever look at the limited partnership agreements to see if they disclosed whether employee compensation or health benefits would be an operational or other expense?
A No.
Q Now, we talked about the Ponce Kleinman lawsuit.
A Um-hum.
Q Was the issue of expenses being allocated to the ECP funds one of the actual allegations that they made?
A I'm not certain.
Q Does that sound familiar?
A I can't recall.
MR. DANIALYPOUR: Let's go off the record. It's 10:28.
(Recess.)

MR. DANIALYPOUR: We are on the record. It's 10:46.
BY MR. DANIALYPOUR:
Q Mr. Schwendiman, did you have any substantive conversations with anyone from the Staff during this break?
A No.
Q Okay, would you like to clarify anything?
A Yes. I was thinking about the answer I gave to what I had learned or what I had studied or my conclusions after the last matter with the SEC. And one of the things I said was with regard to using the word "fiduciary."
And I think I overstated that, because I do realize that fiduciary responsibilities are larger than financial responsibilities. But what I really meant to say was financial. I didn't want any financial decision making or any decision making with regard to any matters that I had encountered with the SEC in the previous one. So that's what I wanted to clarify.
MR. DANIALYPOUR: Okay. And during this break, your counsel and I discussed a particular issue. Scott, do you want to --
MR. SHERMAN: Sure. As the SEC is aware, we have a confidentiality agreement in this case that

relates to some part of our production in this case. The agreement was, as I understand it -- I don't want to speak out of turn and the agreement speaks for itself in a sense. But just to be clear, there may be some documents that my client Mr. Schwendiman was shown that are between counsel, Tonya Grindon, and you or others it could be. We had an agreement and Clean Energy agreed, because of an inability from a cost perspective to review all emails that were requested, there was not an ability from Clean Energy's perspective to review all emails for privilege.

So the agreement we entered into with the SEC was for limited purposes for producing in the context of this case, and there's various caveats, but for producing in this case, if an email from outside counsel was produced that would normally be privileged, there would be a limited waiver in the sense that, not for subject matter, all subjects related to that email, but for that email, could be presented by the SEC in testimony or used in this case. And so that was the general agreement, as I understood it. There's some caveats, as it doesn't apply to third parties and other things. But it can be used in the context of this investigation.

That is my understanding. I don't know if that's Clean Energy's discussions. I believe I had

discussions with Mr. Schwendiman about that. But tell me if you have a difference of view or any clarifications that you have. That's my understanding of what we agreed to.

MR. DANIALYPOUR: I'm not going to agree to all of that. I'll just agree to the extent that it is my understanding that documents that were produced pursuant to that confidentiality agreement could be used by us during testimony. Why don't I just leave it at that.

THE WITNESS: I did want to add a clarification to what you said. And I believe that you said we didn't do it because of our inability to do it.

MR. SHERMAN: No, I said there was a decision made from the likely cost of reviewing, there was a decision not to undertake.

THE WITNESS: You used the word "inability."

MR. SHERMAN: Okay, well --

THE WITNESS: And it wasn't because of inability. It was because we thought it was too costly and Scott decided not to pay the cost of it.

MR. SHERMAN: Okay, I apologize if I used the word "inability." That's what I meant to say.

(SEC Exhibit No. 165 was marked for identification.)

BY MR. DANIALYPOUR:

Q Mr. Schwendiman, I am handing you what has now been marked as Exhibit 165. It is a three-page document that was identified with a Bates stamp of [redacted] Please take a moment to review it.

A Oh, Steve Schoffman.

Q Is this an email from you to Tonya Mitchem-Grindon dated February 28, 2007?

A Yes.

Q Okay.

MR. SHERMAN: Is there a Bates number you said? Sorry.

MR. DANIALYPOUR: Yeah, the Bates number for this is [redacted]

BY MR. DANIALYPOUR:

Q I'm not sure if I mentioned the date. The date is February 28, 2007. I'm just going to read from here. It says, "Hi, Tonya. Thanks for reviewing this. You caught some very important points. The SEC and Washington disclosures need to be in the PPM. They were somehow not included when it was redone. I'm very glad you caught that." Do you see that?

A "Thanks for" -- yes. "You caught some very important points. The SEC and Washington disclosures need to be in the PPM. They were somehow not included when it was redone. I'm very glad you caught that."

Q So when it says -- when you wrote the SEC disclosures, is that that SEC case that you were involved in? Is that what you're referring to?

A I'm referring to -- yes, the SEC. And I think the Washington comment is with regard to the case that Scott had in Washington.

Q Right. And again, the SEC comment refers to your SEC matter; is that right?

A Yes.

Q So is it fair to say that you were discussing what actually goes in the PPM with counsel for Clean Energy Capital?

MR. SHERMAN: Objection as kind of vague and to the extent it mischaracterizes what the document says. But you can answer as to what you understand the email is about.

THE WITNESS: Yes, I remember this issue. It's primarily about a blind pool.

But I would like to take just a minute and read the prior emails.

MR. DANIALYPOUR: Please take your time.

THE WITNESS: Okay, Pat had sent this for review --

MS. O'RIORDAN: Just so you know, as you speak out loud to yourself, it's being recorded, so --

THE WITNESS: Oh, I'm --
MR. SHERMAN: Thank you.
You may need to repeat the question after he finishes.
THE WITNESS: I'm familiar with it now.
BY MR. DANIALYPOUR:
Q Let's start from the very beginning. Just turning to the last page, I see an email from Patricia Black to Tonya Mitchem, where you are CC'd. And it says, "Tonya, attached PPM, LP agreement and subscription document for Series M and N. Please review."
Did Patricia Black or CEC generally create the first draft of the PPM and LP agreement for the various ECP funds?
A No.
Q Who did?
A The initial PPMs for the first series were created by an attorney in New York whose name, I believe, was Geffner. We at some point engaged the services of Mr. Friedman in Phoenix who, I think, had a hand in correcting or changing the PPM that Mr. Geffner had drafted.
MR. SHERMAN: I don't want you to disclose any attorney-client privilege. I understand you're talking generally about what was done. But just be careful not

to discuss any conversations you may be aware of from those folks.
THE WITNESS: We then transitioned to Tonya at Baker Donelson, and she was then the person who reviewed the PPMs that were prepared.
BY MR. DANIALYPOUR:
Q So, for example, for Series M and N, it looks like Patricia Black is sending actually to Tonya these documents for her review.
A Yes.
Q So was there a draft that was like initially done at CEC, which was then sent to the attorneys, such as Tonya, for review?
A No. The draft that was sent was this -- to some extent the same as what the previous series would have been. That's the origin of the next series. You start with the last series and then make changes or alterations or something in it.
Q So who had the task of actually changing the last series's PPM or LP agreements to make it the next series's PPM or LP agreement?
MR. SHERMAN: To the extent you know.
THE WITNESS: Pat would have been the person who made the changes in the document.
BY MS. O'RIORDAN:

Q Can we just back up a little bit? Can you describe, from beginning to end, the process for updating a PPM so that it is for a new series? So let's just say the last series you did was Series L. You have decided to do Series M. Can you walk me through the process how that new PPM was created?
A I wasn't involved to a great extent in that process, but I can give you a description of what I think --
MR. SHERMAN: Don't guess.
MS. O'RIORDAN: I don't want him to guess.
BY MS. O'RIORDAN:
Q But based on your work -- let's back up --
A Based on what I know --
Q That would be helpful.
A Based on what I know, Scott would have decided that a new series should be offered. He would review the current PPM and instruct Pat to make whatever changes were -- whatever changes he decided should be made in the PPM.
He would ask me to review the information on ethanol that appeared in the front of the PPM. And if he were absent, he would ask me to look at the rest of the document and see if I saw anything that didn't match or was somehow inconsistent. And there were some things

that I paid attention to and other things that were kind of boilerplate and I didn't pay attention to.
Q And then what happened?
A Then those changes or recommendations or comments would have been given to either Pat or to Scott. If they were given to Pat, she would review them with Scott and then decisions would be made with regard to the final preparation of the PPM. And then it would be sent to Tonya for review.
Q Then what happened?
A Then, once Tonya reviewed it, if there were changes to be made, she commented on those changes and --
MR. SHERMAN: Without getting into any specifics of it now.
THE WITNESS: -- suggested that we make --
MR. SHERMAN: I don't want you to get into specifics. There is a discussion here that you will have about this specific email. But we're not waiving -- there is not a general waiver of privilege. So just be careful. You can talk generally about that Tonya was involved. But I don't want you to get into specific discussions generally about your discussions with Tonya.
THE WITNESS: There were conversations between Scott and Tonya and there was some written communication. And once the final decisions were made, then the PPM was

EXHIBIT 3

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

In the Matter of:)

) File No. LA-04174-A

CLEAN ENERGY CAPITAL, LLC)

WITNESS: Scott Alan Brittenham

PAGES: 1 through 221

PLACE: Securities and Exchange Commission
5670 Wilshire Boulevard, 11th Floor
Los Angeles, California 90036

DATE: Thursday, March 14, 2013

The above-entitled matter came on for hearing, pursuant to notice, at 9:07 a.m.

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UNITED STATES SECURITIES AND EXCHANGE COMMISSION

In the Matter of:)

) File No. LA-04174-A

CLEAN ENERGY CAPITAL, LLC)

WITNESS: Scott A. Brittenham

PAGES: 222 through 370

PLACE: Securities and Exchange Commission
5670 Wilshire Boulevard, Room No. 710
Los Angeles, CA 90036

DATE: Friday, March 15, 2013

The above-entitled matter came on for hearing, pursuant to notice, at 9:09 a.m.

Q Do you have any reason to believe that Exhibit 28 does not contain the PPM for Series T?
A No.
Q Please turn to previously marked Exhibit 29.
(SEC Exhibit No. 29 was referred to.)
Q Do you have any reason to believe that Exhibit 29 does not contain the PPM for Series V?
A No.
Q And please turn to newly marked Exhibit 83.
(SEC Exhibit No. 83 was marked for identification.)
Q Do you have any reason to believe that Exhibit 83 does not contain the PPM for Tennessee Ethanol Partners LP?
A No.
Q Okay. Mr. Brittenham, was Gary Schwendiman previously charged by the SEC as having violated the securities laws?
A I believe there's some issue with regard to -- in connection with the SEC at his previous employment, which was Schwendiman Funds.
Q When you say there was some issue, are you aware that he was actually charged by the SEC as having violated the securities laws?

A I'm aware -- vaguely aware of the situation.
Q In reading some of the PPMs for the ECP Funds, I noted that Mr. Schwendiman's SEC history was disclosed in the PPMs. However, in reading some of the other PPMs, I could not find any similar disclosure.
I'd like to direct your attention to -- and you may find this behind Tab R, which has previously been marked as Exhibit No. 5.
Does Exhibit No. 5 contain any disclosure regarding Mr. Schwendiman's disciplinary history -- of SEC history?
A Do you want me to look through it?
Q Yes, sir.
(The witness reviewed the document.)
A Okay, I've looked through it.
Q Do you see any disclosure about Mr. Schwendiman's disciplinary history in Exhibit 5?
A No.
Q Okay. I'd like to direct your attention to Exhibit 73, which is behind Tab E and ask you the same question.
Is Mr. Schwendiman's disciplinary history disclosed in Exhibit 73?
(The witness reviewed the document.)
A Yeah, it is in there.

Q Okay. Do you believe that Mr. Schwendiman's SEC history should have always been disclosed to investors?
A We --
MR. SHERMAN: Objection to the extent you are asking for a legal conclusion.
MR. DANIALYPOUR: I'm asking for his opinion on whether he thinks it should have been disclosed.
MS. O'RIORDAN: You can go ahead and answer the question.
THE WITNESS: We made every effort to comply with disclosure requirements and we consulted counsel on that matter.
BY MR. DANIALYPOUR:
Q So you made a conscious decision to actually not disclose this to investors?
A I'm saying we complied -- we made a good faith effort to comply with all disclosure requirements on advice of counsel.
Q But you actually discussed this issue with counsel?
MR. SHERMAN: Objection to the extent it's going to attorney-client privilege.
MS. O'RIORDAN: So are you going to instruct him not to answer?

MR. SHERMAN: If it's going to attorney-client privilege communications.
MS. O'RIORDAN: Okay. Topics are allowed. As to what you covered with your counsel, but we're not going to ask about the substance.
MR. SHERMAN: That fine. I mean --
MS. O'RIORDAN: I do need to make that clear.
MR. SHERMAN: Yeah, to clarify.
The concept of if you discussed an issue with counsel, like he asked you, "Did you talk about X?" You can say, "I talked about generally -- " But you can't talk about the substance of the conversation.
THE WITNESS: Okay. Yes, I discussed broadly speaking this issue.
BY MR. DANIALYPOUR:
Q And then you made a conscious decision to actually exclude Mr. Schwendiman's SEC history from the PPM?
A I can't sitting here today tell you the exact decision that was made, however long ago this was, probably seven years ago, six years ago. Sitting here today, I can't recall the specific decision that was made in the substance of those conversations.
Q You said that you can't recall the specific decision that was made, but you recall that you spoke to

your attorneys about this issue?
MS. O'RIORDAN: You can answer the question. Do you understand the question?
THE WITNESS: Yes, I understand the question.
MS. O'RIORDAN: Okay. You can go ahead and answer it then.
THE WITNESS: Yes.
BY MR. DANIALYPOUR:
Q So why did you not disclose Mr. Schwendiman's SEC history?
A Again, like I said, sitting here today, I can't tell you specifically why.
Q Do you feel that that is a fact that investors should be aware of?
A As I said, we've made a good faith effort to disclose -- to comply with disclosure requirements.
Q That wasn't my question.
Do you believe that that is a fact that investors should be aware of?
A Not necessarily.
Q And why not?
A Because if it's not part of the disclosure requirement, then there's no reason to disclose it.
Q So if Mr. Schwendiman was found to have breached his fiduciary duty to investors, that is not

something that you felt was important to disclose to investors?
A If the law requires us to disclose it, we would disclose it.
Q Okay.
BY MS. O'RIORDAN:
Q Now, you said you don't remember why you took Mr. Schwendiman's SEC disciplinary history out of the PPM, is that correct?
A I don't remember the specific reason.
Q Okay. Is there anything that would help refresh your memory? Any document or person or anything like that that would help you refresh your memory?
A Probably a conversation with my counsel.
Q Anything else?
A That would be the bulk of it.
Q And why would a conversation with your counsel help you remember why you removed Mr. Schwendiman's SEC disciplinary history from the PPM?
MR. SHERMAN: As long as you're not asking what your discussions with counsel were, to the extent you can remember.
THE WITNESS: All I can say is that if I were to consult with my counsel, I would be able to tell you the reason we took it out.

BY MS. O'RIORDAN:
Q So was it based on advice of counsel that you removed Mr. Schwendiman's SEC disciplinary history from the PPM?
MR. SHERMAN: I think he already testified he doesn't remember specific discussions from 2007.
MS. O'RIORDAN: Right. And I asked him -- well, I asked him if there was anything that would help refresh his memory and he said, "Discussion with counsel."
So I'm trying to understand why talking with counsel would help him remember.
THE WITNESS: Because we made every effort to comply with disclosure requirements. I am not an attorney. I don't know the exact disclosure laws and regulations pertaining to that. But I'm sure talking to counsel I would be able to determine why the decision was made.
BY MS. O'RIORDAN:
Q Okay. And I'm sorry. Maybe my question was not clear.
I'm trying to understand -- one of the questions I asked you, because you did say you can't remember why, but talking to your counsel might help you -- my question was following up from that was, whether or

not you made the decision not to include Mr. Schwendiman's SEC disciplinary history based on the advice you received from your counsel.
And do you not remember that either?
A Again, this goes back a long time ago, but the decision to take that out would have been based on advice from counsel.
Q And is there anything else other than talking to your counsel that would help you remember why Mr. Schwendiman's SEC disciplinary history was removed from the PPM?
A Sitting here today, I can't think of it exactly, but I'm going to reserve that comment to say that I can't say for sure.
Q But sitting here today, you can't think of anything else that would refresh your memory?
A I would have to think about it.
Q You can think about it now.
But my question is, sitting here today, you can't think of anything to help refresh your --
A I think I could perhaps go back and look at the documentation surrounding Series E. Perhaps there's some documents that have some note or some notation in the file. I can't say for sure.
Q And would have been produced to the SEC

pursuant to the subpoena?
A It should have been.
MR. SHERMAN: Just to clarify.
I think -- I'm just going to object to the extent there's a mischaracterization of the documents. I think there was a comment that says, "Taking out."
And you started with a later series document, and then went back to an earlier one. And I think there was a question of the decision to take out --
MS. O'RIORDAN: You know, I think you're right. I think it would be the decision not to include it.
How about that? Is that a fair characterization?
MR. SHERMAN: Yeah. I mean obviously he still has the same answer, he doesn't remember. And obviously attorney-client privilege.
But I think that's a better -- whether to include it in the question of how that decision was made is probably a more fair way of characterizing, since we weren't looking at a previous document that therefore would mean it was taken out. If that makes sense.
BY MR. DANIALYPOUR:
Q So, Mr. Brittenham, did you make a conscious decision to no longer include Schwendiman's SEC history in the more recent private placement memorandum

specifically -- I believe it was Exhibit 5?
A Which --
Q Behind Tab R.
A Which one is that?
Q Behind Tab R. It's the first one we started with.
A Oh, the first one I read. Yeah.
MR. SHERMAN: I think he's answered that question already.
MR. DANIALYPOUR: No, actually we rephrased it pursuant to your comment. So I'm not describing it as "taken out."
BY MR. DANIALYPOUR:
Q I'm just saying, did you decide not to include it?
A Oh, I think it's pretty obvious we did.
Q Did Mr. Schwendiman ask for this disclosure to be excluded?
A No.
Q Did the CCO at the time raise any concerns about not including this disclosure about Mr. Schwendiman's SEC history?
A I don't remember exactly.
Q And who was the CCO at the time of Series R?
A Oh, this would have been -- this would have

been I believe Howard Schildhouse, but I'm not positive.
Q Okay. Can you recall if Mr. Schildhouse ever objected to not disclosing this about Mr. Schwendiman's SEC history?
A I don't recall.
Q Okay. Mr. Brittenham, please turn to Exhibit 77, which is behind Tab L.
I'd like to direct your attention to what has been numbered as page 8. It has a Bates stamp of [redacted]
And I'm just going to read here, sort of like in the middle of the page --
A Which page again?
Q Page 8, [redacted]. Under the heading that has your name, the third paragraph. It says, "Mr. Brittenham graduated with honors from the University of Nebraska in 1980, with a business degree specializing in finance and economics."
Are you following me?
A Yes.
Q Okay. "He was named to the Dean's List of Outstanding Students. He served as assistant to the dean of the Business College for two years. He then went on to the New York University Graduate School of Business."
Do you see that?

A Yes.
Q Okay. And then it follows. "Mr. Brittenham is a member of the National Dean's List Omicron Delta Epsilon National Honorary Society of Economics and Phi Kappa Psi Fraternity."
And then it says, "After graduating, he joined the Wall Street firm Salomon Brothers."
Mr. Brittenham, doesn't this imply that you graduated from the New York University Graduate School of Business?
A No. Not at all.
Q Why is that?
A Well, because it's very clear. It says that I graduated with honors from the University of Nebraska.
Q Uh-huh.
A "He then went on to New York University Grad School of Business."
It does not say "He then graduated from the New York University Graduate School of Business."
Q So the fact that it says "After graduating -- "
A Yeah, graduating is tied in with graduate, which is the third word on that paragraph. "Mr. Britterham graduated." "After graduating."
Q So do you feel that what's disclosed there regarding NYU Graduate School of Business fairly

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Q Okay. But you --
A But if you actually read the entire file, you should see that we were not personally the ones that conducted this activity. It was our employees.
Q But didn't you personally write letters to the individuals who complained?
A We -- the letters were sent out with our signatures on them.
Q So does that not mean that you personally wrote letters to them?
A Well, if my signature is on it, then I wrote it.
Q Okay.
MR. SHERMAN: I'll object to your latter question. It didn't appear to connect to the first question. You asked about letters written as opposed to what the allegation of the charge was.
MR. DANIALYPOUR: Okay. Well, there's no pending question, so I'm just going to move on.
MS. O'RIORDAN: And that's really not a form objection or anything like that. So I'm not really clear.
BY MR. DANIALYPOUR:
Q Mr. Brittenham, what happened to your job at Fidelity after this disciplinary action was taken against

you by the State of Washington?
A What happened to my job?
Q Yes.
A What do you mean?
Q Were you fired?
A No.
Q Did you remain at Fidelity?
A Yes, I remained at Fidelity.
Q For how long?
A I don't recall.
Q Okay. Did you resign?
A No.
Q Do you believe that an investor in one of the ECP Funds should be aware of your prior disciplinary action by the State of Washington?
A If according to the disclosure law and regulations it's required, then it would be disclosed.
Q But do you believe that that's something that an investor might want to know?
A Again, if it's disclosable, it would be in the PPM.
Q Okay.
BY MS. O'RIORDAN:
Q Did you consider disclosing that information in the PPM?

A Yes.
Q And how did you go about deciding not to include it in the PPM?
MR. SHERMAN: Which PPM are you talking about?
MS. O'RIORDAN: Go ahead. Sorry, Payam.
MR. SHERMAN: So you're withdrawing the question for the moment?
MS. O'RIORDAN: We're going to withdraw that question, yes.
BY MR. DANIALYPOUR:
Q Mr. Brittenham, let's just stick to Exhibit 77 for a moment.
A What tab is that please?
Q That's Tab L, sir.
Was this prior disciplinary history by the State of Washington disclosed in this PPM, Exhibit 77?
A I'd have to look through it.
(The witness reviewed the document.)
A Okay. I've been through it.
Q Is that disciplinary history disclosed in the Series L PPM, sir?
A I didn't see it.
Q Okay. I'd like to direct your attention to Exhibit 78, which is behind Tab M.
A M as in --

Q Mary.
MR. SHERMAN: Do you want him to look through it?
MR. DANIALYPOUR: I'm going to point out a page.
BY MR. DANIALYPOUR:
Q Mr. Brittenham, I know you're busy, so I'm just going to point you to the right page here. On page 16, [redacted] of Exhibit 78.
Do you see that this Fidelity Mortgage case was disclosed there?
A Yes.
Q Okay. Can you tell me why it is that the PPM for Series M discloses your previous -- I'll just call it Washington -- State of Washington disciplinary history, but the Series L PPM does not?
MR. SHERMAN: Without getting involved in attorney-client privilege discussions, you can answer that question.
THE WITNESS: I can't say for sure sitting here today.
BY MR. DANIALYPOUR:
Q Do you have any reason, like any idea, why it's in one but not the other?
A No, not without doing more research, I couldn't

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6.2(d).
Do you recall that discussion?
A Yes.
Q I believe it was your testimony that although the words were different, the meaning was essentially the same, is that correct?
A Yes.
Q If the meaning was the same, then why change the words?
A Well, the meaning could be the same, but there may be the need to clarify some of the language, just so that it's clearer what the -- you know, the message. Sometimes that's necessary. The meaning, the general meaning, could be the same, but to clarify the language may make it easier for everyone to fully understand what it's saying.
Q Well, I would like to focus on Exhibit 61 and 58.
Why in this instance were the words changed?
A I don't know.
MR. SHERMAN: Are you asking if he remembers?
BY MR. HINSON:
Q Do you recall changing the language?
A No.
Q Do you recall any discussions about changing

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the language?
A No.
Q I also want to go back to something that was discussed earlier this morning, in particular regarding certain disclosures about Gary Schwendiman's prior SEC action and your prior involvement with the Washington issue.
You said that information -- or disclosures about these two instances, the Washington State issue and Gary Schwendiman's prior SEC action, was not included after a discussion with counsel, and advice of counsel, is that correct?
A Could you read back my answer to that question please?
MS. O'RIORDAN: We can't read back.
THE WITNESS: Oh, sorry.
BY MS. O'RIORDAN:
Q Is that consistent with your memory of what actually happened?
A It sounds generally like what my answer was, but I still would like to hear my answer specifically. And if you can't do that, then --
MR. HINSON: Well, let me ask you a question.
MR. SHERMAN: I'm just going to object to the extent it gets into attorney-client privilege

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communications.
MR. HINSON: I haven't gone into anything that touched on attorney-client privilege yet.
THE WITNESS: Actually you just did, but that's okay.
BY MR. HINSON:
Q Without disclosing any discussions, or the content of any discussions that you've had with counsel, did you initiate changes to the LPAs or the PPMs regarding the communications about -- or the prior SEC action with Gary Schwendiman?
MR. SHERMAN: Objection to the extent it doesn't define the time period.
BY MR. HINSON:
Q At any point in time, did you initiate discussions with counsel regarding modifications of the PPMs to not include Gary Schwendiman's prior SEC action?
A I don't recall.
BY MR. DANIALYPOUR:
Q And, Mr. Brittenham, you testified that Baker Donelson was your counsel I believe when Series L, M and Z were offered.
Were they also the counsel that you actually consulted with with respect to the disclosures in the PPM?

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A Yes.
Q And can you recall which of the attorneys at Baker Donelson you consulted with?
A It would be predominately Tonya Grindon.
Q Okay. Prior to the --
A Let me just clarify one thing.
There are multiple attorneys we work with there. So the main contact was Tonya Grindon, but there could have been other counsel involved in those discussions.
Q I'd like to direct your attention back to the big binder in front of you. And as I go through these various exhibits, if you don't mind going through them as well and checking to see if you signed the particular documents.
So Exhibit 88, on the cover it says, "Agreement of Limited Partnership of Series D. It has a Bates stamp [redacted] through [redacted]
(SEC Exhibit No. 88 was marked for identification.)
Q Exhibit 89 from the cover, it says, "Agreement of Limited Partnership of Series E.
(SEC Exhibit No. 89 was marked for identification.)
A Do you want me to do these one at a time as

really, really terrible time to try obtain credit, you know, in this country for any asset.

Q But why do you not apply for a loan of this nature?

A This is an institutional loan, and you don't apply for a loan like you would in a home loan. You know, it's not like you go into Citibank and say, "Can I have a loan application for a loan for $1.5 million or three-quarters of a million for a private equity fund, Series M, that has assets invested in these three ethanol plants." That's just not the way it's done.

Q So was it your idea to have CEC loan money to the ECP Funds?

A It was the only option left.

Q Did any of the CEC's chief compliance officers ever raise a concern with CEC loaning money to the ECP Funds?

A When you say "concern," regarding --

Q Did they ever see a problem with that?

A I don't recall that ever occurring.

And let me make one point for clarification.

We did consult with our legal counsel before we ever made any loans.

Q And who was your legal counsel?

A Baker Donelson.

Q And previously you mentioned a name. Was it --

A Tonya Grindon.

Q So Tonya Grindon at Baker Donelson?

A We consulted.

Q And did they give you advice on this loan issue?

MR. SHERMAN: I'm going to object because that's asking a question on attorney-client privileged communications. And as we talked about earlier, I think you can ask the subject, if it was discussed, but if you're going to ask, "Did you get advice?" that gets into the discussions.

So I would instruct you not to answer that question.

BY MR. DANIALYPOUR:

Q On what basis did you decide that it was okay to issue loans to the ECP Funds?

A The PPM allows us to obtain credit to make loans, to obtain loans for the Funds. And then in addition to the consultation we did with our legal counsel.

Q Anything else?

A No.

Q Was there any effort to get a loan from an outside party, maybe not a bank, but a credit union or

anything like that?

A Yeah. The 40 institutions, I don't recall all -- you know, the exact names, but they were banks, they were credit companies, I believe there were some credit unions in there. It was a fairly diversified group of financial institutions. But we did extensive research to determine what institutions would lend for this type of asset. And those institutions were the ones that we approached.

Q Was there any effort made to obtain a loan from an investor, like an individual?

A We talked to some of our investors, but they were, you know, they were stretched, I think like most people in this country were at that time.

Q Do you remember which investors you spoke to?

A No, I don't remember exactly, but I know we had some brief discussions.

Q And backing up just a little bit.

You mentioned that if you had sold the assets of the funds, you might obtain I think 30 percent, based on a 70 percent discount that you would have to see it for.

Who calculated, you know, that discount?

A Well, it's fairly well known in the investment world that if you have an illiquid investment, a non-

majority position, that you're going to get -- today, even in a good environment, you're going to give probably a 30 or 40 percent discount. We actually confirmed this with a number of valuation firms in the United States, and that's today.

Now, if you talk about an asset that is in somewhat of a stressed situation, which is what this would have been, then you're probably going to have to apply another 20 or 30 percent discount, and then if you take into account the environment that we're in, you're probably adding another 20 percent, so you're down to probably 70 or 80 percent discount.

If we even could have gotten it. I frankly don't think -- I'm not sure we could have even got that discount.

Q So was there anyone at CEC who actually calculated what the potential loss would have been?

A We did.

Q Who did it?

A Our financial staff, my CFO.

Q And who was that?

A At that time, it would have been I believe Neil Hwang.

Q And are you aware of any documentation that memorialized this analysis?

was a question about whether the special purpose vehicles, Highwater Investment Partners, ECG and EIP, whether they were ever subject to a surprise examination. Do you understand --

MR. DANIALYPOUR: Actually, I think the question was whether any of the ECP funds were subject to a surprise examination.

MR. SHERMAN: I think you said by an auditor or accountant?

MR. DANIALYPOUR: Right, by any auditor or accountant. Anyone.

BY MR. HINSON:

Q Do you understand what a surprise examination is?

A Yes.

Q What is your understanding of what a surprise examination is?

A It's an examination that occurs without any advance notice.

Q In the context of a surprise examination of the ECP funds, do you understand what we are referring to?

A Yes, it would be an examination without any prior notification by the surprise examiner.

Q Are you aware of a rule that is generally referred to as the custody rule?

A Generally, I've heard of it and I'm aware of different aspects of it.

Q Are you aware that the custody rule requires an annual surprise examination, which is an unannounced examination of the assets that are under management?

A I'm not aware of that.

BY MR. DANIALYPOUR:

Q Can you recall if anyone at CEC ever contracted with any auditor or an accountant for a surprise examination of the ECP funds?

A I can't say for sure.

Q Who authored the Form ADVs?

MR. SHERMAN: At what point in time?

BY MR. DANIALYPOUR:

Q Did you ever author the Form ADVs?

MR. SHERMAN: You mean him, personally?

MR. DANIALYPOUR: Yes, personally.

THE WITNESS: I would review them. They were prepared in connection with consultation of our outside counsel.

BY MR. DANIALYPOUR:

Q Didn't you sign some Form ADVs?

A I believe so.

Q Who historically has had the job of actually creating the Form ADVs since 2007?

A It would be the chief compliance officer.

Q And what was the purpose of the review that you conducted?

A Just so that I was familiar with it and if there were any changes that were made, I was made aware of those.

Q Did you ever make any changes yourself to the Form ADVs?

A Not that wasn't signed off by our outside counsel.

Q So was one of the purposes of your review to determine whether what was in the Form ADV was accurate?

A I would review it just for, you know, authenticity and factual information but, again, all of the form was ultimately signed off on by our outside counsel.

BY MR. HINSON:

Q What do you mean, signed off?

A Well, before we submitted it, we would submit the final copy to them and they would --

MR. SHERMAN: Without getting into attorney-client privileged communications.

THE WITNESS: -- give us their final approval.

BY MS. O'RIORDAN:

Q So you did make changes to the Form ADV over

time, you personally?

A No, I never -- that's what I said. I don't recall ever making any changes. I would review it. If there were -- look for any changes that were made, just for the facts and information that was in the Form ADV, just so I was familiar with it.

Q Did you ever note any inaccuracies in the Form ADV that you reviewed?

A I don't recall.

(SEC Exhibit No. 20 was referred to.)

BY MR. DANIALYPOUR:

Q I am handing you what has previously been marked as Exhibit 20. Please take a moment to review Exhibit 20. I think that's Tab 5.

Do you recognize Exhibit 20?

A Yeah, it appears to be the ADV, the application for registration.

Q And you signed Exhibit 20, didn't you?

A Are you saying my signature is in here?

Q You can turn to page 37 of 40.

A Okay.

Q Do you see your signature?

A No.

Q Okay, do you see a typewritten signature?

Q And do you recall anything more specific about expense allocations for how -- like the 30/70 split that we were talking about yesterday? Do you remember any discussions with Mr. Riggs about that?
A Yes.
Q And what do you recall from those conversations?
A Well, that was the genesis of the whole discussion, is how expenses should be allocated.
Q So I need you to walk me through those conversations. How often did you talk to Mr. Riggs about the 70/30 split?
A Again, I don't remember specific conversations. And as I stated before, the conversations that I was involved in were sporadic. They would -- you know, had me get on a conference call. He would be in the office and they have a discussion with him and they would ask me to join. But I don't recall the specific dates or anything else, other than it was a discussion about the expense allocation.
MR. SHERMAN: And just to preserve the record, to the extent that is any conversations that included counsel, there is a good faith argument that those would be covered by attorney-client privilege. And so I'm just going to object to the extent you were trying to infer

conversations that -- I know you didn't say it, but infer conversations that included counsel and Mr. Riggs.
BY MS. O'RIORDAN:
Q So Mr. Riggs was the independent auditor for CEC and the ECP funds, right?
A That's correct.
Q Did he have any employment role at CEC or ECP?
A Was he an employee? Is that what you're asking?
Q Yeah, was he an employee?
A No.
Q And what other services other than audit services did Mr. Riggs or his firm provide to ECP or CEC?
A As I stated before earlier, he provides services as it pertains to the quarterly report that we do and the valuation of those ethanol assets.
Q And, I'm sorry, what quarterly report are you referring to?
A Our quarterly investment report.
Q Okay, and is that in his role as your independent auditor?
A I'm sorry?
Q Is that in Mr. Riggs's role as your independent auditor?
A Yes, he reviews our valuation.

MS. O'RIORDAN: So, counsel, is it your position that Mr. Riggs being present during conversations with counsel, there is still a privilege to that conversation?
MR. SHERMAN: There may be, depending on -- I mean, I don't have every e-mail and every conversation. And I think it's impossible to say here today that if there was a role that he undertook doing one thing specific and whether Ms. Grindon asked him to participate or otherwise depending on the situation, I can't speak to everything.
So we're talking generally, in generalities of conversations from four years ago. So I could say there could be a situation where, once I analyzed the e-mails or whatever there was, where attorney-client privilege could be claimed. But I can't speak -- I can't say one way or the other.
MS. O'RIORDAN: But we're not talking about e-mails. We're talking about conversations.
MR. SHERMAN: Well, conversations. I mean, well, if there is a specific situation and a specific discussion, I would have to assess it on an individual basis. I can't make a general comment. I'm saying that there could be conversations that have a good faith argument that attorney-client privilege applies.

MS. O'RIORDAN: Even when Mr. Riggs was present?
MR. SHERMAN: Yes, because he was part of a discussion -- he could be asked to be part of a discussion. You asked a general question about in his role as an independent auditor. But you asked him before possibly other roles that were not in connection with his role, you know, possibly as -- I'm just saying I'm guessing. But I wasn't there, so I can't make a specific statement that there can't be a possible time where attorney-client privilege could be claimed when Ms. Grindon was on the phone with Mr. Riggs. I just can't say that.
So I made a general comment that I'm preserving an objection to the extent a specific discussion comes up at some point that we want to talk about and it turns out after reviewing it that there's an attorney-client privilege communication that can be claimed. That's all I'm saying.
MS. O'RIORDAN: Are you instructing him not to answer any questions at this point?
MR. SHERMAN: No.
BY MS. O'RIORDAN:
Q Okay, so for conversations --
MR. SHERMAN: Because we're talking generally,

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by the way.
MS. O'RIORDAN: We are talking generally, but I'm going to now ask the more specific question, so then we can bring up the topic.
MR. SHERMAN: To the extent he remembers a specific discussion.
BY MS. O'RIORDAN:
Q So, can you convey to us what was discussed with Mr. Riggs when your counsel was present?
A Specifically?
Q Generally.
A As I said, generally, it was around the allocation of expenses.
Q Do you remember in any of those instances in which Mr. Riggs was present, if your counsel said, you know, those expenses, this is good to allocate this way?
A I don't remember specific discussions but we made every good faith effort to ensure that both our auditors and our outside counsel were supportive of what we were doing.
Q And what was the reason for having counsel on the phone or present when you were consulting with Mr. Riggs about expense allocations?
MR. SHERMAN: Without getting into the specific conversations.

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THE WITNESS: Well, just to have her weigh in on how we were doing things.
BY MS. O'RIORDAN:
Q So it was to provide advice?
A Well, I mean, call it whatever you want. I mean, we have our outside counsel weigh in on everything we do. I mean, I'm on the phone with her a lot.
Q And that includes conversations with Mr. Riggs, you have counsel on the phone?
A Well, no, I have -- we have conversations with Mr. Riggs without our counsel on the phone.
Q Right, but some of the conversations with Mr. Riggs does include your counsel, correct?
A It has in the past, yes.
Q Okay. And then is it my understanding that you also consulted with your counsel without Mr. Riggs's presence regarding expense allocation issues?
MR. SHERMAN: To the extent you remember.
THE WITNESS: What's that?
MR. SHERMAN: To the extent you remember.
THE WITNESS: Yeah, I could have. I just don't remember.
BY MS. O'RIORDAN:
Q So you can't remember one way or another if, in your consultations with counsel regarding expense

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allocations, whether or not Mr. Riggs participated in those discussions or not?
MR. SHERMAN: Without getting into any attorney-client privileged communications.
THE WITNESS: Repeat your question. I didn't really understand.
BY MS. O'RIORDAN:
Q Sure, I'm just trying to make sure I understand your testimony. So are you saying that you cannot remember in your consultations with counsel regarding expense allocation, what meetings Mr. Riggs was present and those meetings he was not present for?
A No.
Q Is there anything that would help refresh your memory about that?
A I don't -- I don't know how I would do that.
BY MR. HINSON:
Q Are there meeting notes, minutes?
A No.
Q Does anybody take notes at these meetings?
A I -- I mean, I don't think -- I mean, again, we're in conversations with our outside counsel, auditors, you know, constantly. And it may be a two-minute phone call, it may be a 10-minute phone call. I mean, there's just -- you know, I just remember

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generally speaking, we have discussions with our auditors about this on an annual basis and during the year. Sometimes discussions would involve our outside counsel, but it's not obviously all the time, not even close to all the time.
BY MS. O'RIORDAN:
Q So what do you remember your counsel advising you about expense allocations?
MR. SHERMAN: Objection, and I would instruct you not to answer.
MS. O'RIORDAN: Okay, we're going to have to have a discussion about this. We can do this afterwards. But it's your burden to prove privilege and that the privilege applies. If he can't remember who was present when, but he does know Mr. Riggs was present during conversations with counsel --
MR. SHERMAN: You had made a general comment about -- do you remember generally about what your counsel advised. You're saying my burden to prove that there's attorney-client privilege. We're talking about a general concept. And right now you just asked him a straightforward question of if -- what did your counsel advise you on expense allocations. He said that there were sometimes when he talked to his counsel separately.
MS. O'RIORDAN: Yes, but he said also that he

could not remember or distinguish those times he did and those times he didn't.

MR. SHERMAN: Right now, I'm going to instruct my client not to answer.

MS. O'RIORDAN: 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 and address this issue.

MR. SHERMAN: Well, we can also talk -- I can also talk with -- we can have a separate discussion where I can try to figure this out while we're here so that we don't have to come back.

MS. O'RIORDAN: Okay, fair enough.

MR. SHERMAN: Because I don't think, quite frankly, of everything else that happened, I don't think for some questions specifically on this one issue people have to be flying back to LA for one question or two questions. I'm willing to work with you. I'm just trying to preserve and I have the right to preserve. But I will try to figure this out while we're here.

MS. O'RIORDAN: That's fine. I don't have any more questions on that.

BY MR. HINSON:

Q Mr. Brittenham, do you take notes during meetings?

A Sometimes, I do.

Q And how do you take those notes?

A With my hand.

Q In a notebook?

A I will just write it down on a piece of paper.

Q And do you save those pieces of paper?

A Sometimes.

Q Typically, how do you save them?

A What do you mean?

Q Do you put them in a file folder?

A I will just put them in one of my drawers in my desk in a file.

Q And are there times in which you do not maintain those notes.

A Yeah, I will go through them on an -- you know, just periodically and look at them and if it's something I don't need to keep. But I don't keep a lot of them, though. Because I don't take a lot -- I don't take a lot of notes.

MR. DANIALYPOUR: Okay, we're going to go off the record. It is 11:47.

(Whereupon, at 11:47 a.m., a luncheon recess was taken.)

AFTERNOON SESSION

(Ms. O'Riordan is not present.)

MR. DANIALYPOUR: We're on the record at 12:52.

BY MR. DANIALYPOUR:

Q Mr. Brittenham, during this break, did you have any substantive conversations with anyone from the Staff?

A No.

Q Did anything happen during the break that would keep you from giving your best testimony today?

A No.

Q Okay. Who at CEC would make the decision as to whether a particular ECP fund would pay out a dividend distribution to the limited partners?

A Well, as a group decision between myself and the CFO and sometimes the controller.

Q Did the ECP funds have a tiered structure in terms of how dividend distributions would be made to the limited partners?

MR. SHERMAN: Objection to the extent tiered structure is not defined.

THE WITNESS: Yeah, I don't understand the question. Sorry.

BY MR. DANIALYPOUR:

Q Okay, is there any kind of description in terms of how a dividend would be distributed to the limited partners, in terms of the extent of the dividend distributions to the limited partners?

MR. SHERMAN: Do you mean how or when?

MR. DANIALYPOUR: How.

MR. SHERMAN: Like the process of?

MR. DANIALYPOUR: The process, yes.

THE WITNESS: You mean like was it by check or wire?

BY MR. DANIALYPOUR:

Q No. So how would it be decided how much a limited partner would receive as part of a distribution?

A Oh, generally speaking, if -- as long as we had sufficient reserves in the fund, as I said I think yesterday, we try to keep 30 months of reserves in the fund. Anything above that, we would distribute.

Q Okay, would all of that go to the limited partners?

A Yes. Unless, of course, carried interest pay part of that to the general partner.

Q Okay, so did the ECP funds have a structure where each fund would have a preferred return that would initially go to the limited partners?

A Yeah, many of our funds do have a preferred -- well, we call it -- it's not a -- we call it a hurdle rate.

Q Okay.

A Yeah. And it varies from fund to fund and there are some funds with no hurdle rate.

MR. SHERMAN: Same objection as before.
THE WITNESS: That's correct.
MR. FURMENTO: Is not -- I'm sorry. I have to object. I am looking at this thing and I'm reading it as English sentence, and it seems to me that reserves and disbursements are treated the same way and therefore they are deducted from available receipts in order to come up to the definition of distributable cash.
Now if I understood what the two of you were saying, it sounded as though you were saying just the opposite, which doesn't make sense to me. Because that's not what the sentence says.
THE WITNESS: I just want to make one point also. When we went through this process at the end, we did have our outside counsel review the PPM in connection with this letter from Gary Riggs.
MR. SHERMAN: Without getting into attorney-client privilege.
BY MR. DANIALYPOUR:
Q You're referring to PPM, but you're --
MR. SHERMAN: You said PPM. This is --
THE WITNESS: I'm sorry, LPA. I apologize.
BY MR. DANIALYPOUR:
Q Okay. And Exhibit 56, was it sent to all investors of Series A?

A Yes.
Q And who sent that letter? Who sent what's been marked as Exhibit 56 to the limited partners of Series A?
A You mean physically who sent it?
Q Yes.
A I think -- I don't know for sure. Normally, that would have been sent out by our chief compliance officer, Pat Black.
Q So it was sent internally by CEC, then?
A You know something? I have to retract that. I can't remember if it was sent by Gary Riggs's office or our office; I just don't remember.
Q Now, this change in distribution methodology or calculation, was it unique to Series A or did it apply for the other ECP funds?
MR. SHERMAN: Objection to the term used, change.
MR. DANIALYPOUR: Your client testified that this was a change in distribution methodology.
MR. SHERMAN: I think the letter specifically says correction. And you didn't say based on what he testified. So I'm just trying to be specific and I can only guess, because you didn't specify.
THE WITNESS: Well in this, this is the document I just gave you, then this would have been sent

clearly to Series A.
BY MR. DANIALYPOUR:
Q Was a similar letter sent to investors in the other ECP funds?
A I -- I don't recall.
Q So do you know if any investors in any other ECP funds other than Series A may have received this letter?
A I -- you know, ask Jonathan Henness; I just don't remember. It seems to me that there were several series where this was done incorrectly, as I recall. But again, I can't say for a hundred percent certain.
Q And so based on this new distribution calculation, did the limited partners owe any of their distribution back to the general partner?
A No.
Q So what was the result of this change in distribution calculation?
MR. SHERMAN: Objection, vague.
THE WITNESS: When you say what was the result, what do you mean by that?
BY MR. DANIALYPOUR:
Q So there was this change in distribution calculation and a letter sent. Was this change in distribution calculation retroactively applied?

A Well, I'm not sure I understand what you mean by retroactively applied.
Q Do you know what retroactively applied means?
A Yes, but there is no -- you can't retroactively apply this. I mean, the reserves are what they are. We did -- yes, the calculation did go back and take into account those reserves that were not used in the calculation of the rate, for sure.
Q Okay, so based on going back and calculating the reserves, did CEC believe that the limited partners were overpaid?
A Yeah, based on that. So now you've got a new calculation, you've got a new numerator from which to calculate the hurdle rate.
Q Okay, so this corrected distribution calculation, it didn't just apply going forward; it was applied retroactively?
A That's correct, absolutely.
Q Okay, so based on that new calculation, how much did CEC consider that the limited partners were overpaid?
A I don't remember.
MR. SHERMAN: Objection. For Series A?
BY MR. DANIALYPOUR:
Q For Series A.

EXHIBIT 4

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

In the Matter of:)

) File No. LA-04174-A

CLEAN ENERGY CAPITAL, LLC)

WITNESS: Jonathan K. Henness

PAGES: 1 through 280

PLACE: Securities and Exchange Commission
5670 Wilshire Boulevard
11th Floor
Los Angeles, CA 90036

DATE: Monday, March 25, 2013

The above-entitled matter came on for hearing, pursuant to notice, at 8:35 a.m.

management monitor fee and cumulated interest. And then revolving credit -- actually, I'll flip that around real quickly. If we go to the far right, accrual of monitor, is the summary of all monitor fees.

Q I'm sorry, is the what?

A The summary of all monitor fees.

Q Okay.

A The accrual of management is the accrual of all management fees. And then the sum of all other columns, which is allocated direct credits and accumulated interest, is the revolving credit balance.

Q I'm sorry. Can you explain what the revolving credit column is again?

A Sure. So there are two general kinds of revolving credit or owed expenses. So there are certain ones that are done on a pure accrual basis, which are non-interest bearing, and that is the management fee and the monitor. And that's why it says accrual management and accrual monitor. The remaining are done on an interest bearing basis. So the revolving credit is the sum of allocated expenses, direct expenses netted against any credits and with the accumulated interest to add on top.

Q Now has it always been the case that management fees and monitor fees were not subject to interest?

A No. Originally they were treated as part of the interest bearing balance.

Q And when was that change made?

A That change was made, to the best of my knowledge, in roughly September/October of 2012. And they were removed in -- basically everything that had been charged on them had been removed.

MR. SHERMAN: For both management and --

THE WITNESS: For both management and monitor fees.

BY MR. DANIALYPOUR:

Q You mean it was retroactively?

A Yes, retroactively stated.

Q And why was that decision made to retroactively not charge interest on the management fee and the monitoring fee?

MR. SHERMAN: To the extent you know.

THE WITNESS: To the extent that I know --

MR. SHERMAN: Amid the legal attorney-client privilege.

THE WITNESS: Yeah. Without getting into legal attorney-client privilege, it was a decision that Scott Brittenham made in the best interests of our investors.

BY MR. DANIALYPOUR:

Q Were you involved in that decision?

A No.

Q Who was?

A To the extent that I know, it was Scott Brittenham and our legal counsel.

(SEC Exhibit No. 139 was marked for identification.)

MR. DANIALYPOUR: I'm handing you what has been marked as Exhibit 139. Please take a moment to review Exhibit 139. I printed Exhibit 139 from [redacted] This time the worksheet tab is "2012."

MR. BUTLER: I'm sorry. Could you give us the Bates number again.

MR. DANIALYPOUR: Sure.

MR. SHERMAN: It's [redacted]. Is that right?

MR. DANIALYPOUR: Right.

MR. BUTLER: Okay.

MR. DANIALYPOUR: And the worksheet tab was 2012. And for 138, I think I said it, but I'm not sure, but the worksheet tab was -- I'm sorry. I'm sorry. I made a mistake. For Exhibit 139, it is [redacted] but it's the "Summary-Series" worksheet tab that was printed. Whereas, for 138, it's the 2012 worksheet tab that was printed.

MR. SHERMAN: Can you repeat the last one, the 139 I mean?

MR. DANIALYPOUR: Yeah. 139 is the Summary-Series worksheet tab.

MR. SHERMAN: And just to be clear, for the record, that was an Excel document that had a label on the file name and when you opened it, it had different tabs. And then you printed off different tabs under the same Bates number.

MR. DANIALYPOUR: Right. So the different tabs, I'm referring to them as worksheet tabs.

MR. SHERMAN: Right. Okay.

MR. DANIALYPOUR: So 138 is worksheet tab 2012, 139 is worksheet tab Summary-Series.

MR. SHERMAN: Okay.

BY MR. DANIALYPOUR:

Q Okay. Mr. Henness, do you recognize Exhibit 139?

A Yes.

Q Okay. What is it?

A This is the same summary we saw in Exhibit 138, but there are some additional lines at the bottom that break it out by series that are invested in it says ABE only, which is Advanced BioEnergy, LLC. And then it further breaks that out according to the major investment entities. The top one, EIP only, is the Ethanol investment partners conduit, and then after that, it has

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whether -- with respect to asking or not asking limited partners to consent to this amendment to the limited partnership agreement?

MR. SHERMAN: Objection. Calls for a legal conclusion.

THE WITNESS: These are disclosed in the audited financials.

BY MS. O'RIORDAN:

Q What are disclosed in the audited financials? I'm sorry.

A The revolving credit loans.

BY MR. DANIALYPOUR:

Q Right. But you just testified that you acted in good faith pursuant to your disclosure obligations. I'm asking what is your basis for saying that?

A Those are GAAP disclosures. I have had a discussion with the CPA since I've been in charge. They were disclosed, and the financials want to know it was declared. And so when we have a new note declared, we disclose them in the financials as well.

Q But other than the financials, did you ever think that maybe limited partnership consent was required for this amendment.

MR. SHERMAN: Objection. I think it still calls for a legal conclusion.

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THE WITNESS: To the extent that I'm aware, we were acting in good faith and complying -- or in compliance with our disclosure obligations, which would be a discussion with Scott Brittenham and legal counsel.

BY MS. O'RIORDAN:

Q And did you actually have legal -- discussions with legal counsel regarding the disclosure?

A I did not personally.

Q Okay.

A I was primarily preparing the loans.

MR. SHERMAN: Clarification. Revolving credit.

THE WITNESS: Revolving credit, yes.

BY MS. O'RIORDAN:

Q So when you said that there were discussions with counsel, what are you basing that knowledge on?

A General discussions with Scott Brittenham where he just kind of alluded to discussion with counsel.

Q And what do you mean by alluded to?

A He said it generally in the conversation.

Q And can you just be more specific about what he said?

MR. SHERMAN: Without getting into the specifics of what legal discussions from attorney-client privilege.

THE WITNESS: Without getting into anything

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specific, he had just said, you know, he generally had a discussion of whether it needed to be disclosed or not.

BY MS. O'RIORDAN:

Q With counsel.

A With counsel.

Q With anyone else?

A Not that I'm aware of.

Q And did Mr. Brittenham just mention that to you on his own sui sponte or was this in response to a question that you had?

MR. SHERMAN: To the extent you know what sui sponte means.

THE WITNESS: Yeah. Can you define what that means?

BY MS. O'RIORDAN:

Q Sure. I can define sui sponte very easily. Is this something that Mr. Brittenham just blurted out to you out of the blue or was this in response to a conversation that you were having that he said that he had talked to counsel about?

MR. SHERMAN: To the extent you recall specifically.

THE WITNESS: To the extent I recall specifically, it was just something that he had mentioned while I was getting him to fill the documents out.

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BY MS. O'RIORDAN:

Q So it wasn't in response to a question you had?

A No.

BY MR. DANIALYPOUR:

Q Sticking with Exhibit 121, please turn to [redacted] Do you recognize the document that starts on [redacted] of Exhibit 121?

A Yes.

Q And what is that?

A This is the written consent to amend the LPA.

Q Okay. And did you similarly --

A This was a form document provided by legal counsel.

Q That you completed for Mr. Brittenham's signature?

A Yes.

Q Okay. And according to this exhibit, it says that the manager is relying on Section 14.2 of the LP agreement to amend it without consent. Is that right?

MR. SHERMAN: Are you asking him if that is what it says?

BY MR. DANIALYPOUR:

Q Is that your understanding?

MR. SHERMAN: Of what it says?

MR. DANIALYPOUR: Yes.

Q I just want to know, you know, what change occurred. Was there a change that occurred in the distribution, you know, provisions of the limited partnership agreement for Series A?
A Are you asking me, is there an amendment?
Q Is there an amendment to the distribution provisions of Series A?
MR. SHERMAN: Objection. Vague as to "distribution provisions."
THE WITNESS: Yes, there is an amendment sitting in front of us that is the amendment you're talking about.
BY MR. HINSON:
Q What's your understanding of the effect this amendment had on the limited partnership agreement?
MR. SHERMAN: If any.
THE WITNESS: The understanding that was communicated to me was that it would have no effect; it was just closing a circular loop.
BY MR. HINSON:
Q What was your understanding of the circular loop?
A That was the only understanding that I had, was that there was a circular loop, that this was coming from a discussion that Scott had with legal counsel and would

close the circular loop.
Q Did you inquire as to what the circular loop was?
A No, pursuant to discussions that Scott had had with legal counsel.
MR. SHERMAN: Without getting into any attorney-client privileged communications.
BY MR. DANIALYPOUR:
Q Turn to Exhibit 85 again.
MR. SHERMAN: Which one is that again? Is that A?
MR. DANIALYPOUR: That's the first document behind Tab A.
THE WITNESS: Is there a particular page?
BY MR. DANIALYPOUR:
Q Yes, so I think it would be page 29. Okay. So is Section 6.2(C) the section that describes distributions of distributable cash attributable to a disposition?
MR. SHERMAN: Are you asking him to read the document, because you just read what it says.
BY MR. DANIALYPOUR:
Q I am asking you if that's the section.
A Yes, it is.
Q These aren't hard questions, okay? These are

sort of simple questions.
And I just want to talk about the very first part. It says in Exhibit 85, not any amendments, Exhibit 85. It says, "Return of Capital and Costs. First, 100 percent to such limited partner until such limited partner has received, pursuant to this clause, 6.2(C)(I), cumulative distributions attributable to all realized investments in amount equal to the sum of such limited partner's capital contributions and such limited partner's pro rata share of all amounts applied to the payment of partnership expenses." Do you see that?
A Yes.
Q Okay. And then on Exhibit 105, it says that, "Section 6.2(C)(I) of the partnership agreement is deleted in its entirety and in lieu thereof replaced, "Return of Capital, first, 100 percent to such limited partner until such limited partner has received, pursuant to this clause, 6.2(C)(I), cumulative distributions attributable to all realized investments in an amount equal to such limited partner's capital contribution."
So it does not appear that the limited partner is able to capture their pro rata share of all amounts applied to the payment of partnership expenses. Do you read that differently?
MR. SHERMAN: Objection. Are you asking him to

interpret the document generally or just what the difference between the provisions are?
THE WITNESS: I can read you the differences. I guess -- are you saying do I read it differently. Are you saying, do I understand it differently?
BY MR. DANIALYPOUR:
Q Do you understand it differently?
A From the understanding that was communicated to me, this was purely an adjustment to close a circular loop, and that is the understanding that I have. Other than that, I wasn't involved in the discussions.
Q Have there been distributions of cash attributable to a disposition since you have been at Clean Energy Capital?
A To my knowledge, no, there have not.
Q Did the partnerships, any of them, in the ECP funds, sell their interest in Advanced BioEnergy?
A They effected into a partial sale of the assets of Advanced BioEnergy. They still own their same amount of the same assets that are left, I guess, in the field or in play.
Q So when they sold their interest partially, did they receive enough cash as part of that sale to make a distribution?
MR. SHERMAN: Objection. Distribution to whom?

BY MR. DANIALYPOUR:
Q To the limited partners?
A Certain series did.
Q Okay, so there have been distributions attributable to a disposition?
MR. SHERMAN: Objection as to the term -- vague. Vague as to the term "disposition."
THE WITNESS: In discussions with legal counsel, they --
MR. SHERMAN: Without getting into privileged communications.
THE WITNESS: Without getting into privilege, they advised that it was actually a distribution of distributable cash, because there were assets still in play, and not a distribution of disposition.
BY MR. DANIALYPOUR:
Q Okay, and was there any limited partner consent received for this amendment, Exhibit 105.
MR. SHERMAN: To your knowledge.
BY MR. DANIALYPOUR:
Q Everything is to your knowledge, in case -- I know your attorney likes to chime in, you know, every 30 seconds or so. But if it's not clear to you, let me make it clear, it's to your knowledge; it's not to Mr. Hinson's knowledge; it's not to the court reporter's

knowledge. It's to your knowledge. Is that clear?
A Yes.
Q So, was there limited partner consent received for this amendment that's reflected in Exhibit 105?
A To my knowledge, no.
Q Do you know why not?
A CEC, as the general partner, you know, endeavors to comply with its general disclosure obligations and comply in good faith and full credit -- good faith and full credit -- in good faith with the agreements. And so, to my understanding, if that was needed, then we would have done that and, if it wasn't needed, then we didn't do it.
Q Did the issue of getting limited partner consent ever come up?
A It was raised by one investor's counsel.
Q Which investor was that?
A It was a Fred Langley.
MR. SHERMAN: To this document?
THE WITNESS: Do you mean -- sorry about that. Do you mean specifically for Series A or do you mean if this ever came up in all of Clean Energy Capital?
BY MR. DANIALYPOUR:
Q I was speaking about just this amendment, Exhibit 105.

A Not in relation to this amendment.
Q That investor that you just mentioned, what series is he invested in?
A To the best of my knowledge, it was Series C.
Q And which amendments did he question whether there was -- whether it was appropriate or not appropriate to get limited partner consent?
A It would be the same amendment that we have in front of us, but for Series C.
Q Can you repeat his name again?
A It should have been Fred Langley.
Q Langley?
A L-A-N-G-L-E-Y, if I can spell it correctly.
Q And how did he find out about this amendment?
A I believe his -- we were looking at evaluating a potential sale of Series C and, to the best of my knowledge, his lawyer had requested the updated LPA with any amendments before a sale discussion.
Q So after this amendment was made, was there any general notice given out to the Series A investors or the Series C investors?
A To the best of my knowledge, no.
Q Did you ever object to this change in the distribution provision of Section 6.2(C) that was made by the general partner?

A No, per my understanding that it was just closing a circular loop in the distribution calculation.
Q Did the CCO at the time object to this change in the limited partnership agreement without any limited partner consent?
A To the best of my knowledge, no.
Q Have any of the ECP funds' term been extended?
A Yes.
Q Which funds?
A Series -- and this is to the best of my knowledge -- Series A, B, C, TEP, E, H and I believe I as well.
Q And do you know the reason for the extension of the terms of those partnership?
A Do I know --
MR. SHERMAN: Objection. The reason, vague. Why people signed? The reason it was requested?
BY MR. DANIALYPOUR:
Q Do you know why the general partner sought to extend the term of those partnerships?
A Yes. To the best of my knowledge, we were coming up to the end of the time period of the funds and it would be a position where you would kind of be forced to consider a sale option. And currently the U.S. is in a drought where we have seen valuations for ethanol

EXHIBIT 5

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

In the Matter of:)

) File No. LA-04174-A

CLEAN ENERGY CAPITAL, LLC)

WITNESS: Patricia Black

PAGES: 1 through 177

PLACE: Securities and Exchange Commission
5670 Wilshire Boulevard, Room No. 710
Los Angeles, CA 90036

DATE: Monday, April 1, 2013

The above-entitled matter came on for hearing, pursuant to notice, at 9:00 a.m.

A No, sir.
BY MR. HINSON:
Q Did you as the CCO play any role in the decision to include or not include that information in the PPMs?
MR. SHERMAN: You mean for an open fund when she was the CCO?
MR. HINSON: That is correct.
THE WITNESS: It was not my -- I'm sorry, Ryan, my decision in my role? Can you repeat the question?
BY MR. HINSON:
Q Yes. During the time in which you were the chief compliance officer, for those funds that were still open to new investors at that time, did you play any role in the decision to either include or not include those prior disciplinary histories?
A My role was probably just asking for legal advice. Probably. I don't recall right at the moment.
BY MR. DANIALYPOUR:
Q Okay, I just want to sort of make clear that we want to -- we're trying to find out what you actually do recall. Okay?
A Okay.
MR. SHERMAN: Don't guess.
BY MR. DANIALYPOUR:

Q If it's something that, you know, you think probably happened, don't want to know that, really, because --
MR. SHERMAN: If you don't remember, just say, I don't recall. Because then it gets confusing because then he doesn't know if you really knew it or not or remember it or not.
THE WITNESS: Okay. Okay. I don't remember.
BY MR. DANIALYPOUR:
Q Do you have a personal view as to whether Schwendiman's SEC history should have been disclosed?
A I wouldn't have a personal opinion on that. That would be -- legal would be the one that would be -- I'm not an attorney.
BY MR. HINSON:
Q But you are the chief compliance officer.
A That is correct.
Q So do you have a professional opinion?
A Today? Sitting here today?
Q Sure.
A Or, you know, when we had the funds open?
Q Sitting here today.
A Okay. I couldn't give you an answer.
BY MR. DANIALYPOUR:
Q Do you see that as something that is within

your, you know, role as chief compliance officer to decide, whether someone's disciplinary history should be disclosed or should not be disclosed?
A I believe, as CCO, that -- I take the lead from discussions that have been made and then from legal that, as I mentioned, I'm not an attorney and we looked to them for advice. And this is the way -- this is what was done at the time, and that has been vetted out and this is what I believe.
Q Okay, so you mentioned, you know, attorneys and advice. So I have to ask you, what did your legal counsel tell you?
MR. SHERMAN: Well, I'm going to object, attorney-client privilege.
MR. DANIALYPOUR: Are you instructing her not to answer?
MR. SHERMAN: Well, I am. But also I want to make clear that -- just so we don't get into an argument on it, like make sure that if you had a specific conversation or if you're talking about what you know. Because I'm not clear, at least from her testimony, whether or not she's talking about a personal conversation she had with outside counsel, or if she's just saying what she heard from somebody else.
So, before we get into an argument about

whether to instruct not to answer, because we've had some issues with whether it's her own personal knowledge or not, I just want to make sure I understand what she's testifying.
THE WITNESS: Right, I do not have -- I was not the person having the conversation with legal.
BY MR. HINSON:
Q Who would?
A I'm sure that it would have been Mr. Brittenham speaking with them. But I'm not going to guess. I'm just going to say I was not the one having the discussion.
Q Do you consider it part of the chief compliance officer's role to have discussions with outside legal counsel when it involves a compliance matter?
A Yes.
Q Then why would you not be included in those conversations?
A Right sitting here today, I do not remember having a conversation with legal when we were putting together those LP agreements for those particular series.
Q So is it possible that you did have conversations with outside legal counsel?
A I can't guess, Ryan. I do not remember.
BY MR. DANIALYPOUR:

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our GP, that the -- let me think of some of the other items on there. I believe it also has something to do with the securities.

Q Would it help you if I showed you a copy of the compliance manual?

A Sure, thank you.

(SEC Exhibit No. 55 was referred to.)

BY MR. DANIALYPOUR:

Q I don't have the most recent compliance manual right now but I'm handing you what has previously been marked as Exhibit 55. Do you recognize what has previously been marked as Exhibit 55?

A Yes, I do.

Q What is it?

A This was the compliance manual from March of 2010.

Q Have the rules relating to or the firm's procedures relating to custody changed since then?

A I would have to review it. I don't really recall from 2010. I wasn't the CCO right at that time. But I'd be happy to go through this with you.

Q Okay, well, let's turn to the section on custody, if you don't mind, and maybe that will refresh your recollection whether if it's the current custody

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rule that Clean Energy Capital currently has in place. So I see it on page 9 but feel free to point out some other section.

A Um-humm.

Q Okay, do you know if that's the current custody rule in place as of right now, what's shown on Exhibit 55, page 9?

MR. SHERMAN: Are you asking her if she knows whether the current custody rules, the legal custody rule is this custody rule?

MR. DANIALYPOUR: No, the current custody rule in the most current compliance manual, because I don't have that.

THE WITNESS: Okay.

MR. SHERMAN: Do you know off hand, basically? Do you recall if this is --

THE WITNESS: I don't recall right at this time if this is exactly what's in my current compliance manual.

BY MR. DANIALYPOUR:

Q So you said that legal is looking into, you know, compliance with the custody rule. But what can you tell me about that?

MR. SHERMAN: Without getting into attorney-client privilege, but you can talk about generally your

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understanding of what you guys are doing.

THE WITNESS: Right. Well, generally what we're doing is we're reviewing our compliance manual to be sure that we are following, you know, all of the rules. And because it's also the time that the ADV is revamped, so that's why we're making sure that we're following all the rules on it and we're reviewing our compliance manual.

BY MR. DANIALYPOUR:

Q Okay, so just to the best of your knowledge, sitting here right now, you mentioned something about like audited financial statements?

A That is correct.

Q Okay, so -- and I wish I had the most current compliance manual in front of you but I don't think I ever received it from Clean Energy Capital. I'm not sure if it was one of our requests.

So what can you tell me that you remember about what Clean Energy Capital is doing to comply with the custody rule?

MR. SHERMAN: You mean today?

MR. DANIALYPOUR: Today.

THE WITNESS: Today, we are providing the audited financials to our investors and we're trying to keep it in the area of the 120 days. I understand that

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is one of the rulings.

BY MR. DANIALYPOUR:

Q Has Clean Energy Capital ever had an internal control report prepared by an auditor?

A What type of internal control report?

Q Any. Any kind of internal control report.

MR. SHERMAN: To the extent you know.

THE WITNESS: I don't recall.

BY MR. DANIALYPOUR:

Q Okay, has a surprise examination ever been conducted by an auditor?

A No.

Q And is the auditor that Clean Energy Capital currently has registered with the PCAOB?

A That is something that we're looking into right now.

Q So is that a no?

A I -- I believe that he is not, and this is why we are pursuing this right now.

Q Okay, when you say you are pursuing this, how are you pursuing that?

A With our legal counsel.

Q To do what? I'm sorry. Because I'm asking whether the auditors --

A Right, right. But we are reviewing this and

EXHIBIT 6

From: Aegis J. Frumento
To: Longo, Amy; Stephanie Korenman
Cc: Dean, Lynn M.; Danialypour, Payam
Subject: RE: SEC v. CEC - request re: depositions
Date: Wednesday, July 02, 2014 3:30:12 PM

Amy, sorry for the delay in getting back to you. We would not consent to the taking of these depositions, given the time constraints and the fair clarity of the nature of their testimony from the Answer and the depositions already had.

Thanks,
Aegis

Aegis J. Frumento
[redacted]

-----Original Message-----
From: Longo, Amy [mailto:LongoA@SEC.GOV]
Sent: Wednesday, July 02, 2014 1:34 PM
To: Aegis J. Frumento; Stephanie Korenman
Cc: Dean, Lynn M.; Danialypour, Payam
Subject: RE: SEC v. CEC - request re: depositions

Aegis and Stephanie, We plan to file our request for this testimony tomorrow; please let us know sometime today how to reflect your response to our request, whether opposed, unopposed, or as yet undecided. Thanks.

Amy Jane Longo, Senior Trial Counsel
Division of Enforcement
U.S. Securities & Exchange Commission
5670 Wilshire Blvd., 11th fl., LA, CA 90036 t. 323.965.3835 f. 323.965.3812 longoa@sec.gov

-----Original Message-----
From: Longo, Amy
Sent: Thursday, June 26, 2014 3:52 PM
To: [redacted] Stephanie Korenman [redacted]
Cc: Dean, Lynn M.; Danialypour, Payam
Subject: SEC v. CEC - request re: depositions

Aegis and Stephanie,
We wanted to advise you that the Division plans to request a pretrial subpoena for Ms. Grindon's deposition, as well as a pretrial subpoena in order to re-examine Mr. Brittenham as to any advice of counsel Respondents received. In connection with our anticipated request, please advise whether Respondents would object to the subpoenas or whether we may reflect that our request is unopposed. We plan to seek to take the depositions the week of July 14th, subject to the availability of the witnesses and counsel. If you have any questions or require further information about our request in order to respond, please let us know and we are available to discuss.
Thanks,
Amy

Amy Jane Longo, Senior Trial Counsel
Division of Enforcement
U.S. Securities & Exchange Commission

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EXHIBIT 7

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 730 / November 2, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14862

In the Matter of	:	
	:	ORDER ON EVIDENTIARY ISSUE
MIGUEL A. FERRER and	:	
CARLOS J. ORTIZ	:	

The Securities and Exchange Commission (Commission) issued an Order Instituting Administrative and Cease-and-Desist Proceedings on May 1, 2012. I held nine days of hearing between October 9 and 19, 2012, in San Juan, Puerto Rico. The hearing scheduled to resume on October 29, 2012, in Washington, D.C., has been postponed because of Hurricane Sandy. At the hearing on October 11, 2012, the Division of Enforcement (Division) objected to a question posed to Carlos J. Ortiz (Ortiz) by his counsel as to whether the document that Ortiz used in making a presentation, and the underlying policy described in the document, were reviewed by UBS Financial Services Inc. of Puerto Rico's (UBS) Legal and Compliance Departments. Tr. 720. According to the Division:

> During the investigation of this matter UBS asserted privilege and refused to allow us to question any witness about any matter involving - - I let this go a little bit yesterday - - involving their lawyer's review of documents or comments on any documents. And now Mr. Ortiz's counsel is attempting to introduce comments or reference to Legal's review of things. I think it's inappropriate. Tr. 720.

Ortiz's counsel responded that: (1) Ortiz has no power to assert or waive UBS's attorney-client privilege and has not asked UBS to do so; and (2) the evidence is not being used to show that UBS's Legal counsel approved the documents, but rather to show that Ortiz checked with Legal and Compliance to refute the Division's expected claim that Ortiz was negligent. Tr. 721-22. UBS is Ortiz's employer and is providing him with legal counsel. Tr. 725. I sustained the Division's motion to strike Ortiz's answer and sustained several similar objections during Ortiz and Miguel A. Ferrer's (Ferrer) testimony; I also allowed Respondents' counsel to make offers of proof of the material sought to be introduced. Tr. 732-33, 1486; 17 C.F.R. § 201.321. After some on-the-record discussion on October 15, 2012, it was decided that the Division should make a filing to support its position that during the investigation it was not allowed to question

witnesses about their communications with lawyers, and that Respondents would submit offers of proof. Tr. 1071-77.

On October 23, 2012, the Division sent me a Submission in Support of Its Objection to Respondents' Testimony on Consulting with Legal Department (Division Support), with Exhibits 1-3. Exhibit 1 contains about twenty transcript references involving four witnesses, including Ortiz, where the Division claims UBS lawyers would not let witnesses answer questions about discussions with lawyers. Exhibit 2 cites about fifteen situations where the Division, in response to UBS's regular warnings, told witnesses to exclude discussions with lawyers from their answers. Exhibit 3 contains about eight letters between the Division and UBS counsel addressing UBS's exercise of privilege.

The Division's position is that it "was prevented on several occasions from inquiring into matters involving discussions with lawyers," during the investigation; therefore, witnesses should not be allowed to testify "about consulting with UBS' legal department." Division Support at 1.

On October 26, 2012, Ortiz submitted his Offer of Proof Regarding Consultations with Counsel (Ortiz Offer of Proof) with Exhibits A-E. Ortiz argues that the Division Support Exhibits 1 and 2 are irrelevant and Division Support Exhibit 1 shows the Division was allowed to ask questions about non-privileged communications and UBS "merely objected to questions regarding the *substance* of witnesses' discussions with lawyers." Ortiz Offer of Proof at 3, 5. Ortiz maintains that he is not asserting a reliance-on-counsel defense but that he should have the opportunity to defend himself by showing that before he made any kind of statement or presentation concerning the securities that are the subject of this proceeding he had the underlying information checked by the Legal Department. Tr. 724.

On October 26, 2012, Ferrer submitted a Submission in Support of Offer of Proof and Joinder to Respondent Carlos J. Ortiz's Offer of Proof Regarding Consultations with Counsel (Ferrer Support), with Exhibits A and B. Ferrer cites to his investigative testimony on December 16, 2009, and James Price on February 23, 2010, as additional material supporting Ortiz's claim that the Division was permitted to explore the circumstances surrounding consultations that Ferrer and Ortiz had with counsel. Ferrer requests that his answer at the hearing on October 16, 2012, Tr. 125, lines 7-13, should be allowed to stand or, alternatively, that counsel's offer of proof at Tr. 125, lines 14-22, be accepted as evidence in the proceeding. Ferrer Support at 2.

Ruling

Rule 320 of the Commission's Rules of Practice, which allows the admission of relevant, material, and not unduly repetitious evidence, does not prohibit unfairly prejudicial evidence. Other knowledgeable authorities take a different position. The Financial Industry Regulatory Authority (FINRA) provides for the exclusion of evidence that is "unduly prejudicial." FINRA Rule 9263(a). "Undue prejudice" is defined as "The harm resulting from a fact-trier's being exposed to evidence that is persuasive but inadmissible (such as evidence of prior criminal conduct) or that so arouses the emotions that calm and logical reasoning is abandoned." Black's Law Dictionary 1198 (7th ed. 1999). And, perhaps more significantly, Rule 401 of the Federal Rules of Evidence provides that:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. [1]

"Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission," and "'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed. R. Evid. 403, Advisory Committee Notes 2012, Revised Edition, West.

Respondents seek to use evidence of UBS's Legal Department's involvement or participation in the matters at issue as part of their defense. My concern is that if the Division was not allowed to explore the Legal Department's involvement because of objections by UBS counsel based on an undue exercise of the attorney-client privilege during the investigation, it would be unduly prejudicial for Respondents to use as a defense what the Division was not allowed to investigate. The attorney-client privilege is the "client's right to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and the attorney." Black's Law Dictionary 1215 (7th ed. 1999).

Witnesses answered some questions about involvement with the Legal Department without objection during the investigation and the hearing. Division Support Exhibit 1, October 26, 2009, at Tr. 408-09; Ferrer Support at 1-2. There are other situations where there was simply dialogue over privilege. Division Support at Exhibit 1, June 22, 2010, Tr. 35-37. And there are situations where the attorney-client privilege was simply stated or appropriately invoked. Division Support Exhibit 1, October 8, 2009, Tr. 17; October 26, 2009, Tr. 239, 389; February 22, 2010, Tr. 74, 92. None of these situations are problematic.

The Division does, however, identify problems. For example, Ortiz interprets Division Support Exhibit 1, October 8, 2009, Tr. 190-92, as showing that "UBS expressly instructed Ortiz that he *could* testify to the fact that he conferred with persons in the Legal department, when he conferred, and with which lawyers." Ortiz Offer of Proof at 4. I read the material as showing that UBS effectively squelched the line of interrogation. UBS only allowed Ortiz to describe what was discussed on a phone call "if there were no lawyers involved." Tr. 190. After a lot of back and forth among UBS lawyers, they permitted the Division to ask "just who [was on that call], not what was said, just who." Division Tr. 191-92. UBS established there were two lawyers on the phone call and the Division stopped asking questions. Tr. 192.

Division Support Exhibit 1, October 8, 2009, Tr. 206, lines 16-19, shows a brief discussion of a document that required consultation before it was used with the witness because it "has a lawyer['s name] on it." At Division Support Exhibit 1, October 26, 2009, Tr. 368, lines 2-11, the Division struck use of an exhibit because UBS was concerned that an e-mail used to

[1] The Commission's case law is that the Federal Rules of Evidence do not govern Commission proceedings, however, they are often used as a reference point.

question the witness was "possibly privileged and as Counsel would agree, if it was produced, it was an inadvertent production." At Division Support Exhibit 1, February 22, 2010, Tr. 80, lines 22-24, a witness was cautioned "not to testify about the substance of what was discussed at that meeting," because one of the participants was an attorney. At Division Support Exhibit 1, February 22, 2010, Tr. 84, lines 14-15, a witness was instructed not to answer anything related to the substance of a call "to the extent there were lawyers present on the call."

At Division Support Exhibit 1, February 22, 2010, Tr. 87, line 2, UBS counsel advised the witness to exclude whatever he learned from conversations with UBS lawyers in answering the questions. After which, the witness's response to the question of how he had come to learn of an inventory limit on the desk trading of the closed-end funds was "I don't have a specific recollection of conversations or parsed conversations with whether an attorney was there or wasn't there." At Division Support Exhibit 1, February 22, 2010, Tr. 121, a witness was asked what caused his efforts at changing customer disclosure and was cut off and told not to testify by UBS counsel when he began his answer with "My legal colleagues had asked me –." It appears that the same witness was not allowed to testify about conversations in which Ortiz participated because there may have been lawyers on the phone. Division Support Exhibit 1, February 22, 2010, Tr. 175-76. When asked if he was aware that investor conferences were held in Puerto Rico, a question without any confidential ramifications, the witness was warned that "Other than what you may have discussed with counsel." Division Support Exhibit 1, February 22, 2010, Tr. 197.

My review of the Division Support shows that UBS counsel, on occasion, over-zealously invoked the attorney-client privilege to prevent the Division from exploring how and to what extent UBS's Legal Department participated in the events at issue. While Ortiz and Ferrer are not making a technical reliance-on-counsel defense, they are attempting to defend themselves by showing that the UBS Legal Department reviewed and presumably approved materials. The Division has the burden of showing that the allegations in the OIP are true by a preponderance of the evidence. Steadman v. SEC, 450 U.S. 91, 101-02 (1981). The testimony that Respondents want in the record could have considerable probative weight. Since UBS prevented the Division from investigating the Legal Department's involvement in these issues, the Division is unfairly prejudiced if Respondents are allowed to show they consulted UBS's Legal Department and it allowed or approved use of the materials, which are the bases of the allegations.

On these facts, the unfairly prejudice standard is a valid consideration in determining admissibility as part of conducting a fair, impartial hearing. 17 C.F.R. §§ 201.111, .300. For these reasons, I sustain the Division's objections to questions about clearance of material by UBS's Legal Department. I will not use that material in making a decision. Respondents may make offers of proof so that the material is available in the event that others that may examine these issues later in the process may decide to use the material in making a decision. 17 C.F.R. § 201.321.

Brenda P. Murray
Chief Administrative Law Judge