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.

RESPONDENTS' OPPOSITION TO THE DIVISION OF ENFORCEMENT'S MOTION TO EXCLUDE RELEVANT EVIDENCE OF ADVICE OF COUNSEL

Dated: New York, NY
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TABLE OF CONTENTS

Preliminary Statement 1

Argument 3

I. EVIDENCE OF COUNSEL'S ADVICE CANNOT BE EXCLUDABLE UNDER RULES 326 AND 320 BECAUSE IT IS RELEVANT AND MATERIAL TO THE DEFENSE OF THIS CASE 3

II. RESPONDENTS WAIVED ATTORNEY-CLIENT PRIVILEGE 8

A. Respondents Waived the Privilege During the Investigation 8

B. Evidence of Counsel's Advice is Also Admissible Because Privilege Was Waived by Respondents' Answer 14

Conclusion 18

TABLE OF AUTHORITIES

CASES

Bisno v. United States,
299 F.2d 711 (9th Cir. 1961)..... 7

Chevron Corp. v. Pennzoil Co.,
974 F.2d 1156 (9th Cir. 1992)..... 12

Ernst & Ernst v. Hochfelder,
425 U.S. 185 (1976)..... 6

Hollinger v. Titan Capital Corp.,
914 F.2d 1564 (9th Cir. 1990)(*en banc*)..... 6

In re John Doe Corp.,
675 F.2d 482 (2d Cir. 1982)..... 10n.4

In re Silicon Graphics Inc. Sec. Litig.,
183 F.3d 970 (9th Cir 1999)..... 6

Matter of Ferrer and Ortiz,
104 S.E.C. Docket 3960, 2012 WL 8751437 (Nov. 2, 2012)..... 15&n.6

Permian Corp. v. United States,
665 F.2d 1214 (D.C. Cir. 1981)..... 9, 10n.4

Povenz v. Miller,
102 F.3d 1478 (9th Cir. 1996)..... 7

Pozez, et ano. v. Clean Energy Capital LLC, et al.,
No 07-CV-00319-TUC-CKJ(Jorgenson, U.S.D.J.)(Order, March 29, 2011)..... 1-2, 5-6

SEC v. Amster & Co.,
126 F.R.D 28 (S.D.N.Y. 1989)..... 10n.4, 14

Sidco Ind. Inc. v. Wimar Tahoe Corp.,
1992 WL 58732 (D. Or., Mar. 19, 1992)..... 15n.5

Steadman v. SEC,
450 U.S. 91 (1981)..... 6

Vicinanzo v. Brunschwig & Fils, Inc.,
739 F. Supp. 891 (S.D.N.Y. 1990)..... 15n.5

COMMISSION RULES OF PRACTICE

Rule 230(g)..... 18n.8

Rule 320..... 8, 18

Rule 326..... 8, 16, 18

OTHER STATUTES AND RULES

F.R.C.P. 26 15

F.R.C.P. 37..... 15

OTHER AUTHORITIES

Securities and Exchange Commission, Division of Enforcement,
Enforcement Manual (Oct. 9, 2013)..... 18n.8

Securities and Exchange Commission Website,
http://www.sec.gov/News/Article/Detail/Article/1356125787012#.U8McyGcg-po... 17

National District Attorneys Association,
National Prosecution Standards, 3d Ed. § 1-1.1 17

Revision to comment to Rule 232,
59 SEC Docket 1170 (June 9, 1995)..... 17-18

Preliminary Statement

When the Division asked our position on its proposed motion to take the prehearing depositions of Respondents' attorney, Tonya Grindon, Esq. ("Grindon"), and of Respondent Scott A. Brittenham ("Brittenham"), we emailed on July 2, 2014, that we would not *consent*. See Exhibit 6 to the Division's Motion Papers. Our response was deliberate: We did not say that we would *oppose* a well-founded motion to take such discovery.

Nor would we, because, frankly, Respondents do not care whether the Division deposes Grindon or Brittenham, our only concern being the time constraints imposed by the tight trial schedule. The testimony the Division seeks is no secret, and the Division already knows the sum and substance of it. Brittenham testified throughout his deposition that he relied on advice from Grindon in making every decision here at issue, he testified as to his understanding of that advice, and Grindon's advice was detailed in the Answer filed over three months ago. In a nutshell, she advised that the acts of which the Division now complains were delegated by the limited partners and Delaware law to Respondents' good faith business judgment.

That could have been no surprise, as it happens to be just what a United States District Court found when, in reviewing those same acts with respect to one of the entities that is the subject of this Proceeding, it ruled on a motion for summary judgment that Respondents did not violate Delaware law, did not breach the partnership agreements or their fiduciary duties, and could not be liable for federal securities fraud. *See Pozez, et ano. v. Clean Energy Capital LLC,*

et al., No 07-CV-00319-TUC-CKJ(Jorgenson, U.S.D.J.)(Order, March 29, 2011)(the *"Pozez* Order," Exhibit A to the Answer[1]), at 16-22.

The Division knows all that because Respondents expressly waived attorney-client privilege as to communications between Brittenham and Grindon in 2012. The Division—if it wanted to—could have required Brittenham to answer any and all questions about his conversations with Grindon, and it could have interrogated Grindon herself. The Division never did either. It never even tried.

In the end, the Division chose not to make its threatened discovery motion, because the Rules of Practice do not empower the court to order Grindon's or Brittenham's deposition before the hearing since they both can be compelled to appear at the hearing itself. So instead, after mulling it over for five days, the Division moved to exclude evidence of counsel communications altogether—in effect, a motion *in limine*—unless Respondents consent to discovery relief that this court has no power to grant. It is a strange kind of blackmail, and one wonders how to respond.

Yet, there is no sound basis in law or fact to exclude highly relevant evidence of counsel's advice from being heard in this Proceeding. The Rules give the Respondents the right to present this evidence as one of the circumstantial facts that undercut the Division's ability to prove *scienter*. The Division's counter-arguments fail because it relies on three false premises:

First, the Division misstates that the evidence it seeks was previously shielded from it by the attorney-client privilege, ignoring that Respondents waived the privilege in 2012 and throughout the investigation;

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[1] As used herein, "Answer" refers to the Answer of Respondents Clean Energy Capital, LLC and Scott A Brittenham, filed herein on March 26, 2014.

Second, even if that were not so, an assertion of privilege during an investigation cannot preclude a respondent from waiving the privilege and presenting once-privileged evidence in a later administrative proceeding; and

Third, the Division suffers no "prejudice" from which it ought to be protected merely because it is inconvenienced by the Rules' lack of pre-hearing discovery provisions.

For all or any one of the reasons set forth below, the Division's motion must be denied.

Argument

I. EVIDENCE OF COUNSEL'S ADVICE CANNOT BE EXCLUDABLE UNDER RULES 326 AND 320 BECAUSE IT IS RELEVANT AND MATERIAL TO THE DEFENSE OF THIS CASE

This case is not terribly complicated. Respondent Clean Energy Capital LLC ("CEC"), under Brittenham's stewardship, organized and acted as general partner of 20 limited partnerships (the "ECP Limited Partnerships") that own interests in seven privately-held limited liability companies (the "Portfolio Companies"). The Portfolio Companies operate ethanol refining plants in the Midwest. Answer ¶¶ 5-6.

The limited partners of the ECP Limited Partnerships (the "Limited Partners") are various qualified and sophisticated individuals and institutions that invested an aggregate of $64 Million in order to participate in the businesses of the Portfolio Companies. Each ECP Limited Partnership has fewer than 100 Limited Partners. Answer ¶ 5. The relationships between CEC and the Limited Partners is governed by the various limited partnership agreements ("LPAs") of the ECP Limited Partnerships. Answer ¶ 7. CEC was registered as an investment advisor with the Securities and Exchange Commission until 2012 when, due to the change in the law, CEC

was required to deregister because it was too small. It is now registered only in the State of Arizona. Answer ¶ 1(b).

The actions at issue in this Proceeding stem from the decline in the demand for gasoline—and the ethanol it contains—that occurred in the wake of the financial crisis of 2008. As the evidence at trial will show, the decline in ethanol demand so debilitated the Portfolio Companies that Respondents were forced to take an aggressive role to turn them around and keep them afloat. Answer ¶ 24. Respondents prevented, to a large degree, the crisis from destroying the ECP Limited Partnerships and wiping out the investments of the Limited Partners. Showing again that no good deed goes unpunished, some of those actions are at the heart of the Division's Complaint.

Thus, the Division alleges, in relevant part, that Respondents—with the intent to deceive the Limited Partners—

- allocated certain staff and overhead expenses to the ECP Funds above and beyond the management fee stated in the LPAs; and
- amended the LPAs to permit the ECP Funds to issue notes and security interests to secure the repayment of over $1 million that Brittenham and CEC's co-founder actually infused into CEC from their own pockets to keep the ECP Funds afloat.[2]

That Respondents did these things is not substantially in dispute. However, Respondents demonstrated to the Division from the very beginning of the investigation that the LPAs

[2]The Division also alleges that in some of the PPMs, CEC omitted disclosure of an old SEC penalty against CEC's co-founder. Counsel also advised that deletion, but the correctness of that decision is clear enough in the law that counsel's involvement is not as critical to its resolution. Likewise, the Division's other charges do not implicate advice of counsel to as great an extent as do those cited above.

permitted CEC to take those actions. Respondents also told the Division early on that they sought and received that legal advice from Grindon, their long-standing legal counsel and a partner and senior securities lawyer of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC. Grindon and her firm reviewed the LPAs and related private placement memoranda ("PPMs") of each series of the ECP Partnerships before they were released to Limited Partners. Moreover, this consultation was not sporadic. On the contrary, the evidence will show that Respondents and Grindon were in regular communication about the business of CEC and the ECP Limited Partnerships throughout this time period; that Respondents did not take any actions with respect to the ECP Limited Partnerships without counsel's guidance; and they never acted against counsel's advice.

Nor is the substance of Grindon's advice on these particular matters any surprise. The Answer to the Complaint states quite clearly that Grindon advised Respondents that under the LPAs, allocation of expenses and amendments to permit emergency funds to be infused by Brittenham and CEC's co-founder were relegated to the exercise of CEC's good faith business judgment as the general partner of the ECP Limited Partnerships. *See, e.g.,* Answer ¶¶ 1(b), 2(b), 7, 11, 24(g), 28, 51, 54. Moreover, the substance of counsel's advice was itself tested in court and fully vindicated in the *Pozez* Order. The *Pozez* case was brought on behalf of some of the Limited Partners of one of the ECP Funds—Series G—who raised all the key issues that the Division raises here. In the *Pozez* Order, Judge Jorgenson held that the Respondents' allocation of expenses to the ECP Partnerships and amendment of the LPAs to document the emergency financing, (a) were all permitted under the LPAs and lawful under Delaware partnership law, (b) that none of them were a breach of fiduciary duty, and (c) that none of them could be the basis of a federal securities fraud claim. *Id.* at 16-22. Series G was treated no differently than any of the

other ECP Limited Partnerships; accordingly, what was true for Series G must necessarily be true for all the ECP Limited Partnerships as well. The *Pozez* Order was issued on March 29, 2011, almost a year before the formal order of investigation of this matter on February 3, 2012. The Division surely knew about it.

There is no doubt that the Division would rather not have to face evidence of Respondents' consultations with counsel. The Division telegraphs this clearly in pre-arguing a future motion *in limine*: that evidence of continuous communication between counsel and client is irrelevant to show lack of fraudulent intent. *See* Motion at 8-9 and n.6. However, the Division bears the burden of proof by a preponderance of evidence to show *scienter*, one of the key elements of its fraud-based claims. *Steadman v. SEC*, 450 U.S. 91 (1981). *Scienter* is "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193n.12 (1976). Although such intent may be proven by showing that Respondents acted knowingly or recklessly, such proof must at least show

> a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers [of securities] that is either known to the [Respondents] or is so obvious that [they] must have been aware of it.

Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1568-69 (9th Cir. 1990)(*en banc*).

Here, the Division must prove fraudulent intent by independent evidence that Respondents'—really Brittenham's—state of mind "reflect[ed] some degree of intentional or conscious misconduct." *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 977 (9th Cir 1999). Unlike in many securities cases, the acts here complained of, taken in and of themselves, *do not* imply fraudulent intent; the District Court in the *Pozez* Order already determined that. Therefore, the Division must prove *scienter* independently, either by direct evidence from

Brittenham himself or by circumstantial evidence from the facts surrounding the actions he took. *See Povenz v. Miller*, 102 F.3d 1478, 1490 (9th Cir. 1996).

One of those unavoidable circumstantial facts is that Brittenham and Grindon or other lawyers of her firm had regular consultations about matters relating to the ECP Limited Partnerships, and the mere fact of that contact is inconsistent with any conclusion that Brittenham acted with a knowing intent to deceive or in "an extreme departure from the standards of ordinary care." "Advice 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." *Bisno v. United States*, 299 F.2d 711, 719 (9th Cir. 1961). The Division knows this. The Division put Grindon on its own Witness List a week before the Respondents filed theirs, and the only trial subpoena currently served on her is the Division's. In response to the Division's document subpoena, Grindon's firm delivered to the Division over 4 gigabytes of emails to and from it and CEC, which would be over 240,000 pages of emails—enough to overfill 96 boxes—were they to be printed.[3] The firm's invoices *alone* exceed 1,500 pages. As shown below, these emails had already been produced by Respondents in the investigation in response to subpoenas for *their* emails. But now that the Division has seen the sheer volume of counsel communications standing alone, it wants to exclude it. The Division now sees that it cannot avoid the evidence of regular and ongoing counsel communication—there is just too much of it! That—not some esoteric point about attorney-client privilege and its waiver—is the real object of this motion.

[3]According to the eDiscovery calculator available at http://ediscovery.lexbe.com/resources/ediscovery-calculator/.

That this evidence dooms the Division's ability to prove *scienter* is itself proof of its relevance and admissibility. Rule 326 provides that "a party is entitled to present its case or defense by oral or documentary evidence, to submit rebuttal evidence" in furtherance of "a full and true disclosure of the facts." Rule 320 provides that *all* relevant evidence may be received, and only "evidence that is irrelevant, immaterial or unduly repetitious" shall be excluded. Evidence of Respondents' communications with counsel are clearly relevant and indeed essential to the "full and true disclosure of the facts" surrounding the Division's allegation that Respondents acted with *scienter*. Accordingly, Respondents cannot be precluded from presenting it.

II. RESPONDENTS WAIVED ATTORNEY-CLIENT PRIVILEGE

A. Respondents Waived the Privilege During the Investigation

The Division's motion is entirely predicated on the assumption that Respondents "refused to waive privilege regarding any legal advice it received from Baker Donelson." Motion at 1. That is flatly untrue. Respondents produced early in the investigation *all* communications between them and their counsel, and they asserted throughout the investigatory depositions that they relied on advice of counsel in taking action. By those two acts, Respondents waived attorney-client privilege as a matter of law, both expressly and implicitly. In such situations, the courts do not preclude evidence of counsel communication, they *compel* it. The Division had all the opportunity and resources to obtain all the information it now seeks during its investigation, and it is not Respondents' fault if it failed to do so.

The Division does not dispute that Respondents deliberately and knowingly produced all emails between them and Grindon and her firm in 2012. That production constituted an absolute

waiver of attorney-client communication privilege as a matter of law. *See, e.g., Permian Corp. v. United States,* 665 F.2d 1214, 1219 (D.C. Cir. 1981)("Any voluntary disclosure by the holder of [the attorney-client] privilege is inconsistent with the confidential relationship and thus waives the privilege."). That waiver was not, nor was it intended to be, limited by the so-called Confidentiality Agreement dated September 6, 2012 (the "Confidentiality Agreement," attached as Exhibit 1 to the Motion). The Division takes the language of the Confidentiality Agreement out of context to argue that it limited the waiver *as to the Division itself.* It does not. The Confidentiality Agreement specifically states that "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*" (emphasis added). Clearly, the Agreement states that there had been a waiver of the privilege; the limitation on that waiver—if one were even possible—only applies as to third parties. Naturally, CEC was concerned that production of privileged material to the Division might destroy the privilege as to parties other than the Division, and that alone was the danger which the Confidentiality Agreement sought to allay. Accordingly, the Division's undertaking in that Agreement was simply not to disclose the material produced to third parties, but the exception "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." That was made perfectly clear by Respondents' counsel in the colloquy cited by the Division in Exhibit 2 to the Motion (at Transcript pages 53-55):

> MR. SHERMAN: * * * 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. * * *
>
> MR DANIALYPOUR: I'm not going to agree to all of that. I'll just agree that 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 we just leave it at that.

Thus, the aim of the Confidentiality Agreement was to limit waiver of the privilege as to third parties. That is why it was called a *Confidentiality* Agreement—clearly the "confidentiality" did not apply to the Division itself.[4]

Nor was that waiver undone by the occasional "direction-not-to-answer" interposed during investigatory depositions. The Division's motion focuses on purported assertions of privilege in the investigatory deposition transcripts but ignores the testimony itself. In each case cited by the Division, the witness first testified that Grindon or her firm was consulted and that Respondents followed counsel's advice. For example, Mr. Schwendiman testified that the PPMs were sent to Grindon to review, that her changes were made and she commented on them, and that there were conversations between Brittenham and Grindon before PPMs were finalized. Motion Ex. 2 at TR p. 61. Brittenham testified that "we made a good faith effort to comply with all disclosure requirements on advice of counsel;" that "I am not an attorney. I don't know the exact disclosure laws and regulations pertaining to that. But I'm sure talking to my counsel I

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[4]Moreover, the effectiveness of the Confidentiality Agreement is doubtful even as to third parties. In *SEC v. Amster & Co.*, 126 F.R.D 28 (S.D.N.Y. 1989), the defendant sought to prevent the Division from producing documents to a third party that had been produced in response to investigatory subpoenas, citing an "agreement" similar to the Confidentiality Agreement. The court held that the Division was not bound by any such agreement. "Once a corporate decision is made to disclose [privileged communications] . . . , the privilege is lost, not because of voluntariness or involuntariness, but because the need for confidentiality served by the privilege is inconsistent with such disclosure." *Id.* at 31, quoting *In re John Doe Corp.*, 675 F.2d 482, 489 (2d Cir. 1982). *Accord, Permian Corp. v. United States*, 665 F.2d at 403 ("The client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his benefit.").

would be able to determine why the decision was made"; that "We did consult legal counsel before we ever made any loans"; that CEC's Form ADV "was ultimately signed off on by our outside counsel"; that "we're in conversations with our outside counsel . . . you know, constantly"; and that "When we went through this process at the end, we did have our outside counsel review the PPM." Motion Ex. 3 at TR pp. 76, 79-80, 130, 269, 313, 335. CEC's CFO Jonathan Henness testified that he was aware that Brittenham "had a discussion [with counsel] of whether [the note transactions] needed to be disclosed or not"; that the revision of the distribution formula "was coming from a discussion that [Brittenham] had with legal counsel and would close the circular loop"; and that, again concerning the revision of the distribution formula, "In discussions with legal counsel, they . . . advised that it was actually a distribution of distributable cash, because there were assets still in play, and not a distribution of disposition." Motion Ex. 4 at TR pp. 75-76, 302-303, 306. And Patricia Black testified, as to a disclosure issue, "My role was probably just asking for legal advice . . . . * * * 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. * * * I take the lead from discussion that have been made and then from legal that, as I mentioned, I'm not an attorney and we looked to them for advice." Motion Ex. 5 at TR pp. 66-69.

We could have added many more passages like those, but the Division's excerpts are sufficient to make two points. The first point is that the record is replete with invocations by witnesses that counsel advice was sought and heeded with respect to all the issues of which the Division now complains. Thus, there can be no "surprise" that reliance on counsel would be a key issue in this proceeding.

The second point is that the Division's conclusion that these colloquies amount to an assertion of privilege is completely backwards. Rather, the law is clear that in testifying that

they consulted and relied on counsel in making these decisions amounts, Respondents implicitly waived the attorney-client privilege as to those conversations, and no later assertion by counsel can resurrect it. "Where a party raises a claim which in fairness requires disclosure of the protected communication, the privilege may be implicitly waived." *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992). In *Chevron*, Pennzoil claimed its Schedule 13D filing was not materially misleading because it relied on tax counsel's advice, but on the basis of privilege refused to supply substantiating evidence of counsel's advice. The district court denied Chevron's motion to compel discovery of counsel's advice, but the Court of Appeals reversed. "[T]o the extent that Pennzoil claims that its tax position is reasonable because it was based on advice of counsel, Pennzoil puts at issue the tax advice it received. . . . Pennzoil cannot invoke the attorney-client privilege to deny Chevron access to the very information that Chevron must refute in order to demonstrate that Pennzoil's Schedule 13D is materially misleading." *Id.* at 1162-63. Here, too, Respondents clearly put at issue the advice they received from Grindon, which the Division must refute to carry its burden of proof on the issue of *scienter*. Respondents effectively waived attorney-client privilege as to those conversations by their answers at the investigatory depositions, even if they had not earlier waived it by their wholesale delivery of all their written attorney-client communications to the Division.

So, the Division's issue is not really one of assertion of attorney-client privilege. That privilege was absolutely and unequivocally waived. Rather, the issue is the narrower one of what to make of Respondents' counsel's occasional cautions during the investigatory depositions not to testify as to attorney-client conversations. A review of the transcript sections attached to the motion reveals very few outright directions-not-to-answer. Most of the witnesses testified to knowing of discussions with counsel, but not having themselves participated in them, so any

restrictions imposed be counsel were pure formalities that did not block any substantive testimony. As to directions not to answer, it is clear that these were acquiesced in by the Division for the purpose of keeping the testimony going. For example, this colloquy clearly shows that counsel's position was uncertain and that the Division acquiesced in but did not concede that the privilege held:

> 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 its your burden to prove privilege and that the privilege applies. . . . .
>
> MR. SHERMAN: * * * 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 to 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.

Motion Ex. 3, TR pp. 314:9-315:12.

Such colloquies, in the heat of depositions, are common. Parties in proceedings of all kinds interpose objections and directions, and those objections and directions are generally acquiesced in to be dealt with later so as not to disrupt and delay the deposition already in progress. This reflects a "pragmatic, question-by-question approach to a deposition" that does

not in and of itself imply a definitive stand on substantive issues. *See SEC v. Amster & Co.*, 126 F.R.D. at 31("such exchanges . . . constitute no more than staff agreement 'that an answer to one question would not estop the witness from asserting a claim of privilege with respect to another.'"). Such assertions are not commonly understood to be binding without a more formal process to definitively establish the rights of the parties—either a motion to compel or an agreement by counsel after they have had time to think through the legal consequences of the proceedings to date.

If the Division had thought the problem through, it would have reached the only legally possible conclusion—that the attorney-client privilege had been waived and that discovery of counsel consultations was proper. In other words, the Division could have compelled all the answers which were withheld (and there weren't that many), and it could have deposed Grindon. But the Division never followed up. It never did seek to compel testimony about actual conversations with counsel and it never did subpoena or attempt to depose Grindon during the two years in which this investigation was pending. It was not Respondents' place to do the Division's job for it. Respondents did not need to volunteer information absent some demand for it, and they were not compelled to make a submission in response to the Division's Wells notice. In short, if the Division did not obtain all the information is wanted during the investigation, when it had all the investigatory resources available to it, it has only itself to blame.

B. Evidence of Counsel's Advice is Also Admissible Because Privilege Was Waived by Respondents' Answer

Even assuming that Respondents had not waived attorney-client privilege during the Division's investigation, they are entitled to do so, as they have, in defense of this Administrative

Proceeding. The Division's argument assumes that its investigation is somehow the same as pretrial discovery in a civil court action, and it is not. The discovery rules of the Federal Rules of Civil Procedure require private litigants to disclose to each other all evidence that will be used in the trial of the case, and they authorize courts to exclude evidence that has not been disclosed in accordance with those rules. *See* F.R.C.P. 26 and 37. Hence, most of the cases that the Division cites are inapposite because they arise in the context of federal court civil litigation under the disclosure obligations of the Federal Rules of Civil Procedure.[5]

Indeed, the only case that the Division cites that has any contextual bearing here is Judge Murray's in *Matter of Ferrer and Ortiz,* 104 S.E.C. Docket 3960, 2012 WL 8751437 (Nov. 2, 2012). There, a witness employed by a firm, UBS, and represented by the same counsel as UBS, was asked a question by that counsel to elicit that the UBS legal department had approved a document. However, that question was asked *on the third day of the hearing*, and it appears that before then UBS had resolutely asserted privilege. The Division objected to the question, and Judge Murray sustained the objection after noting that UBS had never waived, and apparently admitted that it had never waived, attorney-client privilege until that very moment.[6] That is not the case here, where all counsel communications were delivered during the investigation, where attorney-client communications were testified to in depositions, where attorney consultations

[5]Even in private civil actions, courts rarely preclude evidence of counsel advice. Usually, if there is time before hearing, parties are simply compelled to produce the evidence. *See, e.g., Vicinanzo v. Brunschwig & Fils, Inc.*, 739 F. Supp. 891, 894 (S.D.N.Y. 1990); *Sidco Ind. Inc. v. Wimar Tahoe Corp.*, 1992 WL 58732 (D. Or., Mar. 19, 1992).

[6]Even so, Judge Murray acknowledged that conclusion was not obvious, and permitted offers of proof to preserve the evidence "in the event that others that may examine these issues later in the process may decide to use the material in making a decision." *Id.* at p. 4.

were expressly put in issue by the Answer, and where the Division has already subpoenaed and received attorney-client documents directly from Grindon's firm.

Unlike a federal civil litigation, there are no discovery obligations before the commencement of an Administrative Proceeding. Before the commencement of this Proceeding, Respondents had no obligation to the Division other than to give truthful testimony in response to questions, which they did. Thus, the Division is simply wrong in suggesting that Respondents are somehow frustrating its efforts to obtain discovery. After the Answer was filed, the Division subpoenaed documents from Grindon and her firm. Respondents did not object. Grindon and her firm delivered over 240,000 pages of documents to the Division. Respondents did not object. And now, if the Division had a basis in the Rules to take depositions, Respondents *would not object*. All we said was we did not *consent* to the Division taking depositions, and why would we consent to what the Rules do not permit. The Division's problem is not with Respondents; it is with the Rules. Yet the Division would penalize Respondents—deprive Respondents of their right to present evidence in furtherance of "a full and true disclosure of the facts" as guaranteed by Rule 326—because the Rules do not permit pre-hearing depositions. That is what is really at stake here, and that is fundamentally unfair.

Which leads directly to the question of who is really being prejudiced. There is no question that Respondents would be hampered in this action if they were precluded from asserting, as they did throughout the investigatory depositions and as they did in their Answer, that their decisions were taken in consultation with counsel. But the Division claims that it would be prejudiced if the Respondents are permitted to make these assertions. In saying so, the Division misunderstands the very nature of these proceedings, its own role, and what "prejudice" means.

"First and foremost, the SEC is a law enforcement agency." SEC Website, http://www.sec.gov/News/Article/Detail/Article/1356125787012#.U8McyGcg-po. As a prosecutor for a law enforcement agency, the Division is not in the position of a private litigant. It is more akin to a prosecutor, and as such its primary goal should be to foster Rule 326's aspiration of a "full and true disclosure of the facts." *Cf.,* National District Attorneys Association, National Prosecution Standards, 3d Ed., § 1-1.1 ("The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth.").

The Division's motion would make sense, as would its claim of "prejudice," only if the Division and Respondents were on a level playing field. But they are not. The Division had two years to investigate and to develop its case, including broad subpoena powers to fully investigate the counsel consultations that it must contend with—that is must refute—to prove *scienter*. The Respondents have had a scant few months to develop their defense. The Division had the enormous resources of the federal government behind it, compared to which the Respondents are mere paupers. This is not a level playing field.

The reason the Rules do not permit prehearing discovery for the Division is that the SEC, in promulgating the Rules, chose efficiency over comprehensiveness. The Commission reasoned that the Division would not normally need prehearing discovery because administrative proceedings would almost always be preceded by lengthy and detailed fact-finding investigations. *See* Revision to comment to Rule 232, 59 SEC Docket 1170, 1214-15 (June 9, 1995). Accordingly, the Commission determined that the "benefits from and the need for oral depositions are therefore different and less important in the context of Commission administrative proceedings than they may be in litigation between private parties under the

Federal Rules of Civil Procedure." *Id.*[7] It is assumed that when the Division files to commence an Administrative Proceeding, it is fully prepared to try its case, and does not need depositions.[8] The Division is not "prejudiced" because this might be one of those rare cases when the very one-sided design of the Rules might actually work against it.

Conclusion

Grindon's advice to Brittenham is clearly relevant to this Proceeding, and it is no surprise that the Division would suppress it. Such evidence establishes that Brittenham did not have the fraudulent intent necessary to support *scienter*, without which the Division's core case collapses. Counsel's advice being essential to Respondents' defense, Respondents have the right to present it under Rules 320 and 326. Moreover, Respondents waived attorney-client privilege during the investigation, and the Division could have had its discovery during the investigation had it put forth the effort. The Division's motion should be denied without qualification.

[7]But note that the Commission was not particularly concerned about the importance of depositions for *respondents*. In this very case, Respondents face charges that are based on the testimony of witnesses they did not know about until after the case was started, and certainly did not have the ability to depose during the Division's investigation. Of course, if prehearing depositions were made available to the Division, they would also have to be made available to Respondents, and clearly they are not.

[8]Indeed, even though the Division continues to have the power to issue investigatory subpoenas, once an administrative proceeding is commenced, it may not use such subpoenas to gather evidence for use in a pending proceeding. *See* Rule 230(g); Securities and Exchange Commission, Division of Enforcement, Enforcement Manual (Oct. 9, 2013) at 38-39.

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Respectfully submitted,

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Administrative Proceeding File No.: 3-15766

Certificate of Compliance with Rule of Practice 154(c)

The undersigned counsel for Respondents hereby certify, pursuant to Rule of Practice 154(c), that the total word count of the text and footnotes of the foregoing

RESPONDENTS' OPPOSITION TO THE DIVISION OF ENFORCEMENT'S MOTION TO EXCLUDE RELEVANT EVIDENCE OF ADVICE OF COUNSEL

according to the word-processing program used to prepare said document, is 6,283, and therefore that said document complies with length limitations of Rule of Practice 154(c).

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