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 REPLY IN SUPPORT OF MOTION FOR EXCLUSION, OR IN THE ALTERNATIVE, DISCLOSURE, OF ADVICE OF COUNSEL

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The Division of Enforcement ("Division"), by its Motion, has asked the Hearing Officer to exclude from the hearing on this matter all evidence Respondents may seek to introduce pertaining to the advice of counsel, because Respondents, rather than fully disclosing that advice, have asserted privilege. Alternately, the Division has requested an opportunity depose Respondents, and the counsel on whose advice they purport to rely, and ask them the very same questions they refused, on the basis of privilege, to answer during the Division's investigation; namely, what their counsel advised regarding the misappropriation of money from CEC's investment advisory clients in the form of illegitimately allocated overhead expenses, and its issuance of undisclosed and unauthorized interest-bearing loans to the funds that they advised, among other issues.

In opposing the Motion, Respondents make three arguments. First, they argue that the Hearing Officer cannot exclude the advice of counsel because it is relevant to Respondents' defenses to certain of the Division's scienter claims. (Respondents' Opposition ("Opp.") at 1-2.) Second, Respondents argue that this evidence should not be excluded because they have in fact disclosed the advice of counsel on which they intend to rely, so it would be unfair to Respondents to exclude it. (*Id.*) And third, Respondents contend that the Hearing Officer lacks the ability to require any additional disclosure of the advice before the hearing. Respondents are wrong on all counts.

First, the Hearing Officer is clearly empowered to exclude relevant evidence of the advice of counsel where, as here, the party asserting the privilege has not made a full privilege waiver. The fact that some of this evidence may be relevant to Respondents' scienter does not, in and of itself, make it admissible. Rather the question is whether Respondents had refused to disclose this evidence on the basis of a privilege—which they clearly did. In other words, the relevance of legal advice to a party's defense is a precondition to the evidence's admissibility, not a basis to deny the exclusion of the advice where it has not first been fully disclosed. On the other hand, much of the evidence Respondents seek to introduce under a so-called "advice of counsel" defense is ***not*** relevant. They appear to seek

admission of a wide array of attorney communications that have no bearing on any of the claims or defenses in this case. And they do not deny that, while the advice of counsel may be relevant to their scienter—that is, their knowing or reckless conduct—it is, as a matter of law, irrelevant to their negligence; as such, the evidence has no bearing on the Division's many negligence-based claims.

Second, contrary to Respondents' assertion that they fully waived privilege over counsel's advice during the Division's pre-litigation investigation, they in fact expressly asserted privilege both in producing documents and during investigative testimony. They were the ones who asked the Division to enter into a non-waiver agreement during the investigation to govern their document production. They now claim they fully waived privilege, because this agreement somehow did not apply to the Division, but only to third parties. (*Id.* at 8-9.) But that is not what the agreement says. It ***explicitly precludes the Division*** from arguing that a subject matter waiver resulted from the production. In fact, in their testimony during the investigation, Respondents—consistent with this agreement—refused to testify about the contents of the legal advice they received. Nor did Respondents make a Wells submission where they waived privilege over this advice (nor any Wells submission at all). Thus, at the time the Order Instituting Proceeding ("OIP") was issued in this case, Respondents' refusal to waive privilege over the subject matters of counsel's advice remained intact.

A subject matter waiver only occurred when Respondents asserted reliance on counsel as a defense to certain of the Division's scienter claims. Respondents assert that the Division "has only itself to blame" (Opp. at 14) for their failure to make full disclosure of this legal advice before they answered, and that they "did not need to volunteer information absent some demand for it." (*Id.*) But the Division did inquire as to counsel's advice on the exact issues now before the Hearing Officer, and was advised that Respondents were not waiving privilege. If Respondents planned to assert an advice of counsel defense, it was incumbent on Respondents to alert the Division that they had changed their mind—not incumbent on the Division to take legal action to force Respondents to abandon their

privileges.

Third and finally, the Hearing Officer does not lack the power to order, before the hearing on this matter, Respondents and their counsel to sit for pre-hearing depositions to finally disclose what purported advice of counsel they received, as they now argue. (Opp. at 16.) The Hearing Officer is plainly authorized under Commission Rule of Practice Rule 300, 17 C.F.R. § 201.300, to conduct its administrative hearings in a "fair and orderly" manner. Permitting Respondents to sandbag the Commission by waiting until the hearing to divulge the advice of counsel on which they purport to rely would run afoul of this Rule and should be disallowed.

I. ARGUMENT

A. Respondents Cannot Rely on the Advice of Counsel Unless It Is Both Relevant and Fully Disclosed

Respondents first argue that the advice of counsel must be admitted simply because it is relevant to their defenses to the Division's scienter claims. (Opp. at 3.) But to the extent the advice of counsel may be relevant to Respondents' defenses to certain of the Division's scienter claims, that relevance is a prerequisite for its admissibility, not, as Respondents suggest, a bar to its exclusion where it has not been previously disclosed.

1. Advice of counsel is excludable, notwithstanding its relevance, where a party fails to make full prior disclosure of the advice

Relevance is a necessary finding for the admission of any evidence. *See* Commission Rule of Practice Rule 320, 17 C.F.R. § 201.320 (providing that the hearing officer "may receive relevant evidence, and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious"); *In the Matter of Gonnella*, --SEC Docket--, AP No. 3-15737, Order on Motions in Limine (July 2, 2014) (noting that Rule 320 provides for the exclusion of evidence that is irrelevant). Thus, the portion of Respondents' brief devoted to demonstrating the relevance of the advice of counsel as to subject matters that are the bases for certain of the Division's scienter claims—particularly regarding CEC's expense allocations, and its issuance of loans to and taking of pledges of collateral from the

ECP Funds (Opp. at 3-7)—misses the mark.

Assuming evidence of advice of counsel is relevant to Respondents' scienter, the issue is whether the failure to fully disclose it before trial precludes a party from relying on it. As the numerous cases cited in the Division's Motion reflect, courts do not permit the use of privilege as a "sword and a shield," and instead exclude evidence that has not been fully disclosed—despite its relevance. (Mot. at 8-11.) "Defendants cannot assert the advice of counsel defense while simultaneously and strategically selecting which communications to disclose for self-serving purposes and which communications to retain as confidential." *SEC v. Wall Street Capital Funding, LLC*, No. 11-20413 (CIV), 2011 WL 2295561, at *7 (S.D. Fl. June 10, 2011) (rejecting limitation on scope of subject matter waiver); *see also SEC v. Welliver*, No. 11-CV-3076 (RHK/SER), 2012 WL 8015672, at *10 (D. Minn. Oct. 26, 2012) (ordering disclosure of advice of counsel based on implied waiver, find that "[e]xamination of any conversations Defendants had with [] professionals ... is the only way to assess the validity of the defenses. There is no other reasonable way for the SEC to explore the basis for Defendants' 'good faith' beliefs and state of mind, considerations central to this suit."). This principle applies with equal force to this proceeding. *See In the Matter of Miguel A. Ferrer and Carlos J. Ortiz*, 104 S.E.C. Docket 3960, 2012 WL 8751437, at *3 (Nov. 2, 2012) ("[I]f the Division was not allowed to explore the [lawyers'] involvement because of objections by [] 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").

As discussed more fully below and in the Division's Motion, there is no question that the Respondents did not fully disclose the advice of their counsel. They demanded that the Division sign a non-waiver agreement ensuring that their production of privileged documents did not constitute a waiver, and refused to answer questions in testimony about advice they received from

counsel. Having blocked the Division from any inquiry into these topics, they should not be allowed now to argue that, just because this evidence may be relevant, they should be able to introduce it at trial.

2. Advice of counsel that is not relevant to any claim or defense is inadmissible

By contrast, there is no basis to admit evidence of advice of counsel that is not relevant. That is clearly the case in two respects.

First, the Division has a number of claims against Respondents where the Division needs only to establish their negligence—as opposed to their scienter—to prevail. Any alleged reliance on legal advice has no bearing on a Respondents' negligence, and thus has no relevance to these claims. *See, e.g., In the Matter of the Application of Howard Brett Berger*, 2008 SEC LEXIS 3141, at *39 (Nov. 14, 2008) (affirming sanction for violation of NASD Rule 8210, noting that since "[s]cienter is not an element of a Rule 8210 violation," an "advice-of-counsel claim is not relevant to liability in this case"); *In the Matter of Public Finance Consultants, Inc.*, 2005 SEC LEXIS 433, at *138 (Feb. 25, 2005) ("[t]he Commission considers reliance on counsel evidence only when the underlying violation involves scienter"). Respondents do not dispute and tacitly agree that their purported reliance on legal advice has no bearing on the Division's non-scienter claims. (*E.g.* Opp. at 2 (asserting a right to "present this evidence as one of the circumstantial facts that undercut the Division's ability to prove ***scienter***"; emphasis added), 8 (arguing that "this evidence dooms the Division's ability to prove ***scienter***"; emphasis added); Mot. at 9, n.7 (noting that advice of counsel may only be considered as a defense to claims requiring scienter).)[1]

[1] Thus, any advice of counsel Respondents may have received is concededly irrelevant to the following of the Division's claims: (1) its antifraud claims under Advisers Act Sections 206(2) and (4), 15 U.S.C. §§ 80b-6(2) & 80b-6(4), and Rule 206(4)-8 thereunder,17 C.F.R. §§ 274.206(4)-8; its claims for violation of the Advisers Act's custody and compliance requirements under Section 206(4), 15 U.S.C. § 80b-6(4), and Rules 206(4)-2 and 206(4)-7 thereunder, 17 C.F.R. §§

Second, Respondents seek to introduce evidence of the advice of counsel, regardless of the topics of that advice. In particular, they argue that "the mere fact of" Respondents' "regular consultations about matters relating to the ECP Limited Partnerships" with Baker Donelson is "inconsistent with any conclusion that Brittenham acted with [scienter]." (Opp. at 7.) Though Respondents placed none of their email communications with Baker Donelson on their list of proposed trial exhibits, they did identify as a single proposed trial exhibit 1,500 pages of Baker Donelson's billing records to CEC, and they appear to argue that any advice relating to the Funds should be admissible. (*See* Mot. at 7; Opp. at 7.) But any advice of counsel defense is specific to the advice received; thus the proponent of the defense must show: "(i) a request for advice on the legality of a proposed action; (ii) full disclosure of the relevant facts; (iii) receipt of advice that the action to be taken will be legal, and (iv) reliance in good faith on counsel's advice." *In the Matter of Gallagher & Co.*, 50 S.E.C. Docket 557, 1991 WL 294210, at *6 n.5 (May 29, 1991) (affirming initial decision that found antifraud violations, finding elements of reliance on counsel unmet), citing *SEC v. Savoy Indus., Inc.*, 665 F.2d 1310, 1314 n.28 (D.C. Cir. 1981). Notably absent from these elements is a party's consultation with counsel about other, unrelated subjects. Respondents do not argue, nor can they, that all, or even most, of Respondents' communications with Baker Donelson are relevant to the issues that are the subject of the Division's claims, given that as CEC's general outside counsel, the firm advised CEC on numerous unrelated matters.[2]

275.206(4)-2 & 275.206(4)-7, and its antifraud claims under Securities Act Section 17(a)(2)-(3), 15 U.S.C. § 77q(a)(2)-(3), all of which require only a showing of negligence; and (2) its claims for prohibited conflict of interest transactions under Advisers Act Section 206(3), 15 U.S.C. § 80b-6(3), and for materially omissive Form ADVs under Section 207 of the Advisers Act, 15 U.S.C. § 80b-7, both of which require only a showing of willful (*i.e.* sentient) conduct in the acts constituting the violations, but not intent to violate, nor recklessness or negligence.

[2] To the extent evidence of advice counsel is allowed at the hearing, the Division will therefore seek to exclude advice about unrelated subject matters. (*Cf.* Opp. at 7, asserting that the "mere fact" of "regular consultations" with counsel about the Funds negates scienter.)

For example, among the matters Baker Donelson provided advice on is the prior litigation against CEC, *Pozez et al. v. Clean Energy Capital, LLC, et al.*, Case No. 07-CV-00319 (D. Ariz.). (*See* Opp. at 1-2.) Respondents argue that the Division's claims concerning CEC's expense allocations and loans to its advisee funds are barred by a summary judgment ruling in CEC's favor in that action. (*Id.*) In *Pozez*, two program monitors brought derivative claims on behalf of one of CEC's funds for breach of fiduciary duty, breach of contract, unjust enrichment and negligent misrepresentation, as well as a direct claim for breach of contract. Although the court dismissed the derivative claims under Delaware partnership law (*see Pozez v. Clean Energy Capital, LLC*, No. 07-CV-00319, 2011 WL 1135896 (D. Ariz. Mar. 29, 2011)), the ruling is of limited import here, because: (1) the Commission was not a party to the *Pozez* action, so is in no way estopped by any of its rulings; (2) the ruling dismissed derivative claims as a matter of Delaware partnership law, not antifraud or Advisers Act claims under the federal securities laws; and (3) the case addressed only one of the Funds, which had a combination of disclosures that differed from the other nineteen.[3] Regardless, Respondents do not argue that they interposed an advice of counsel defense in that action, nor that it has any bearing on this Motion. Therefore, like many other communications with counsel that Respondents seek to introduce that have nothing to do with the conduct in this case, this evidence is irrelevant and should be excluded.

B. Respondents Have Not Fully Disclosed the Advice of Counsel on Which They Now Seek to Rely

In addition to arguing that the advice of counsel is relevant to scienter and therefore cannot

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[3] Respondents claim that the *Pozez* court held that "none" of their expense allocations "could be the basis of a federal securities fraud claim." (Opp. at 5.) That is not correct; beyond the fact that the case only involved one fund, there were also ***no securities claims asserted*** in the *Pozez* case. Rather, the court's reference to the securities laws cited a single paragraph of Pozez's amended complaint, which included, as alleged facts in support of its derivative breach of fiduciary duty claims, "knowing violations of securities and other laws." *Pozez*, 2011 WL 1135896, at *15. However, no pleading in the *Pozez* case ever asserted any claims under the federal securities laws, and none were adjudicated by the court in that case.

be excluded, Respondents argue that they have, either "expressly or implicitly" waived privilege, and that if the Division lacks full disclosure of the advice, "it has only itself to blame." (Opp. at 8, 14.) This position results from a distortion of the privilege assertions made by Respondents and their prior counsel during the investigation, and, if accepted, would impose an untenable obligation on the Division to seek to force the subjects of its investigations to waive the attorney-client privilege over their stated objections.

1. Respondents explicitly forswore a subject matter waiver by producing documents during the investigation under a non-waiver agreement

There is no dispute here that the Division and Respondents—at Respondents' request—entered into an agreement to govern their production of documents during the investigation, which required the Division ***not*** to "assert that CEC's production of the Communications to the Commission constitutes a waiver." (Mot., Exh. 1, at 1.) Respondents however argue that this non-waiver agreement (the "Confidentiality Agreement," Mot., Exh. 1), only restricted the scope of the waiver of privilege as to third parties, and that Respondents' production of privileged documents effected an "absolute waiver" of privilege as to the Division. (Opp. at 8-9.) This reading is precluded by the Agreement itself (and by Respondents' counsel's statements about the Agreement during testimony) as well as by applicable law, which provides that voluntary production of privileged documents to a government agency alone does not constitute a subject matter waiver.

Respondents do not contest that, in order to avoid the cost of conducting a privilege review, they requested the non-waiver agreement pursuant to which CEC produced documents during the investigation. (Mot. at 3.)[4] Instead, Respondents claim that the Agreement "does not" restrict the scope of the waiver "as to the Division itself," but only "as to third parties." (Opp. at 9.) But the

[4] Respondents now suggest that the Agreement was futile, because a limited waiver may not have "even [been] possible." (Opp. at 9, 10 n.4 (suggesting that the Agreement's ability to protect disclosure as against third parties was "doubtful").) But one can only infer that Respondents did not seek a non-waiver agreement from the Commission under the belief that it was purposeless.

plain language of the Agreement shows otherwise: it ***explicitly prohibits the Division*** from claiming that Respondents, through their production of documents, waived privilege matter over the subject matters of their counsel's advice:

> The Staff will not assert that CEC's production of the Communications to the Commission constitutes a waiver 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 production 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.

(Mot., Exh. 1 at 1; emphasis added.) Respondents' prior counsel's statements about the Agreement during the investigative testimony (and instructions not to divulge the contents of legal advice, discussed further below) give witness to Respondents' understanding of the limited waiver resulting from the production. As noted in the Opposition Brief, Respondents' prior counsel expressly stated that there was no subject matter waiver:

> So the agreement we entered into with 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 the email,*** could be presented by the SEC in testimony or used in this case.

(Opp. at 9, citing Motion, Exh. 2 (Schwendiman Tr., 53-55).)

Respondents also claim that, whether intended or not, their voluntary production of privileged materials under the non-waiver agreement "constituted an absolute waiver of attorney-client communication privilege as a matter of law." (Opp. at 8-9, and 10 n.4, *citing Permian Corp. v. U.S.*, 665 F.2d 1214, 1219 (D.C. Cir. 1981).)[5] But putting aside whether or not a third party, in

[5] *Permian* is inapposite here, as it does not pertain to the question of whether the intentional production of privileged documents constitutes a waiver of the entire subject matter of the advice.

future litigation, would be entitled to obtain these documents from the Commission, Federal Rule of Evidence 502(a) makes clear that unless and until Respondents sought to rely those documents, their voluntary disclosure of privileged materials to the Commission did not effect a subject matter waiver:

> When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product doctrine, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:
>
> (1) the waiver is intentional;
>
> (2) the disclosed and undisclosed communications or information concern the same subject matter; and
>
> (3) they ought in fairness to be considered together.

Fed. R. Evid. R. 502(a). As the Advisory Committee notes reflect, Rule 502(a) was intended to permit parties to limit an intentional waiver to the "materials actually disclosed"—unless and until they "intentionally put[] protected information into the litigation in a selective, misleading and unfair manner"—at which point a subject matter waiver would result. Advisory Committee Note to Fed. R. Evid. 502(a) (2008); *see, e.g.,* Keith W. Miller, 6 Bus. & Com. Litig. Fed. Cts. § 69:22 (3d ed. 2013) ("The common law rule, providing for a subject matter waiver when the client interposes an advice of counsel defense, has been codified by Federal Rule of Evidence 502(a)").

Thus, here, Respondents had clearly not waived their privilege. If Respondents had not subsequently chosen to put their counsel's advice at issue in this proceeding, then any waiver resulting from their production would have remained limited to the documents themselves.

In Permian, the defendants sought to prevent disclosure to the U.S. Department of Energy of thirty-six privileged documents voluntarily produced to the Commission. *Id.* at 1217. The appellate court overturned the decision below that defendants could selectively waive privilege over the documents only as to the Commission, yet subsequently assert privilege over the same documents as against another federal agency. *Id.* at 1221.

2. Respondents refused to disclose the subject matter of counsel's advice during testimony

Respondents claim that by "assert[ing] throughout the investigatory depositions that they relied on advice of counsel," they waived privilege. (Opp. at 8.) But Respondents' prior counsel carefully conscribed the extent to which Respondents' witnesses could answer questions about attorney client communications: they testified only to the existence and the general topic of the communication—but without revealing what counsel advised. (*See, e.g.,* Mot., Exh. 3 (Brittenham Tr., 77:10-12 (counsel's admonishment that "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"), 131:7-12 (counsel's admonishment that "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."), Exh. 4 (Henness Tr., 75:20-25 (counsel's admonishment that Henness could testify "generally" about Brittenham's allusions to having received advice of counsel, but "[w]ithout getting into the specifics of what legal discussions from attorney-client privilege").

This was not an "occasional 'direction not to answer'" as Respondents now describe it (Opp. at 10), nor was it somehow non-"binding" on Respondents. (Opp. at 14.) Rather, it reflected a distinction meticulously drawn between information that is not privileged (whether an attorney was consulted and the subject of the advice) and information that is privileged (the contents of the attorney-client communications). To assert privilege, a party is required to reveal the fact of their communications with counsel and the general subject matter. *See, e.g.*, FED. R. CIV. P. 26(b)(5)(A)(ii) (to assert a privilege claim, a party must "describe the nature of the [] communications...not produced or disclosed...in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim."); *New Jersey v. Sprint Corp.*, 258 F.R.D. 421, 426 (D. Kan. 2009) (declining to find implied waiver based on deposition

testimony, noting that "[r]evealing the general topic of discussion between an attorney and client does not waive the privilege, unless the revelation also reveals the substance of a protected communication."). Given prior counsel's repeated insistence that CEC's witnesses reveal no more than the existence of a communication with counsel and its general topic, Respondents clearly continued to maintain that there was no subject matter waiver during the investigative testimony.

3. Although Respondents have now waived the privilege, they have yet to fully disclose the advice of counsel

Respondents' Answer was the first occasion on which they asserted advice of counsel (though they do not assert it as an affirmative defense). While this pleading arguably effected a subject matter waiver,[6] given Respondents' prior refusal to permit inquiry into the substance of the advice, and their failure to make a Wells submission, full disclosure remains to be made, a fact which Respondents acknowledge. (Opp. at 14.) Respondents note with some irony the result their actions will impose if the Hearing Officer does not now order full disclosure—or exclusion: "[T]his might be one of those rare cases when the very one-sided design of the Rules might actually work against [the Division]." (Opp. at 18.) But the Commission's Rule of Practice 300, which requires the "fair and orderly" hearing of matters, should not permit this brand of trickery, and it should not be countenanced.

In defending the Division's investigation, Respondents faced a choice: either (1) rely on the advice of counsel and make full disclosure of that advice, or (2) maintain the privilege applicable to counsel's advice, and not assert that advice as a defense. The decision was Respondents' alone—the Division had no control over Respondents' choice, nor should it have. *See* SEC, Division of Enforcement, Enforcement Manual ¶ 4.3 (Oct. 9, 2013) at 93 ("The staff must respect legitimate

[6] Merely invoking the advice of counsel in a pleading does not necessarily effect a waiver. *See, e.g., SEC v. Forma*, 117 F.R.D. 516, 523 (S.D.N.Y. 1987) (corporate officer did not impliedly waive privilege by assertion of reliance on counsel in pleading, since "parties are entitled to plead in the alternative").

assertions of the attorney-client privilege and attorney work product protection").

Respondents in effect suggest that they were entitled to, and did, pursue a third option: delay asserting an advice of counsel defense—by asserting privilege over the contents of that advice during testimony, while producing privileged documents under a non-waiver agreement—then argue that the Division should have forced a subject matter waiver, and now suffers no prejudice because it had the privileged documents all along. (Opp. at 14.)[7] But this scenario begs the question: if Respondents sought all along to rely on an advice of counsel defense, why did they not waive privilege as to the subject matters of that advice either during the investigation or during the Wells process? The "gotcha" scenario that Respondents propose, if permitted, would undermine the fair adjudication of administrative proceedings, which are guided by the obligations attendant to civil trials.[8]

Thus, as the Division acknowledged in its Motion at page 12, n.8, although the Commission's Rules do not contain a provision for deposition of witnesses who are available to testify at trial (Opp. at 16.),[9] such disclosure should be permitted under Rule 300. In emphasizing that there is no Rule providing for pretrial depositions of available witnesses, Respondents cite the Comments to Commission Rule 232, which provides for the depositions of unavailable trial witnesses. (Opp. at 17.) Those Comments, however, stress the importance of the Wells process to enabling the Commission to fully consider a matter before filing. *See* SEC Rules of Practice, 59 S.E.C. Docket 1170, 1995 WL 368865, at *60 (June 9, 1995) ("At the close of the investigation, a

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[7] Though Respondents did not withhold privileged materials from their production of emails for cost reasons, Respondents also did not undertake to affirmatively produce privileged non-email materials during the investigation, as would have been expected were there a subject matter waiver.

[8] *Ferrer,* 2012 WL 8751437, at *5 n. 1 (noting that the "Federal Rules of Evidence do not govern Commission proceedings, however, they are often used as a reference point").

[9] The fact that "the only trial subpoena currently served on [Grindon] is the Division's" (Opp. at 7), has no bearing on the propriety of excluding her testimony. If, contrary to their disclosed Witness List, Respondents do not intend to call Grindon, the Division will agree to withdraw its subpoena.

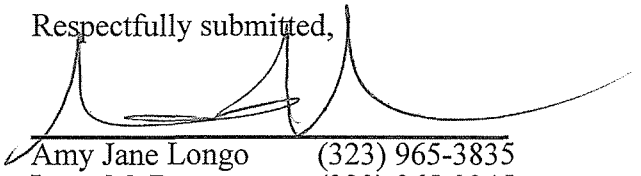
respondent is usually told the general conclusions reached by the Division of Enforcement and is afforded an opportunity to submit a written 'Wells' statement presenting arguments against commencement of an action."). Here, Respondents chose not to air their advice of counsel defense through a Wells submission or otherwise; they should not now be permitted to take advantage of unfair surprise by revealing it for the first time at the hearing on this matter.

II. 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 17, 2014

Respectfully submitted,



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