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By UPS and Email

The Honorable Jason S. Patil
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-2557

Re: In the Matter of Edgar R. Page, et al., Admin. Proc. File No. 3-16037

Dear Judge Patil:

The Court requested briefing as to whether Respondents can offer evidence that attorneys were present during the negotiation of United Group's acquisition of PageOne to show "Respondents' good faith, mental state, and scienter," without waiving privilege. (Order, Jan. 21, 2015, at 1.) Respondents' brief entirely fails to address this issue. Instead, Respondents merely state that these documents are not themselves privileged and, thus, should be allowed to show attorney involvement.[1] However, at the January 21 hearing, Respondents' made plain that they intend to use those documents (and testimony concerning them) to show that Respondents' lacked scienter:

> What we intend to do is to produce evidence of Mr. Page's engagement of counsel . . . to show his intent and state of mind and good faith . . . . And so, the fact that party has engaged counsel or has sought expert advice, I believe, under the case law is admissible without waiving privilege; and to show the state of mind of the particular actor when state of mind as an issue . . . .

(Jan. 20, 2014 Tr. at 4 (emphasis added).) In other words, Respondents intend to use such evidence to argue that they could not have acted with scienter in failing to disclose the truth of their relationship with United, without allowing the Division to explore the true underpinnings of that good faith.

This is plainly foreclosed by the case law. In In re County of Erie, the Second Circuit stated that "the assertion of a good-faith defense involves an inquiry into state of mind, which

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[1] As discussed in our Motion in Limine No. 1, there are not documents showing that attorneys provided any advice concerning the disclosure of PageOne's relationship with United Group.

typically calls forth the possibility of implied waiver of the attorney-client privilege." 546 F.3d 222, 228-29. The Second Circuit went on to note that just such a waiver would be implicated if, as here, a respondent claimed "a good faith or state of mind defense." Id. at 229 (finding no waiver precisely because defendants did not raise a state of mind defense).

In an attempt to side-step this black letter law, Respondents argue that they are merely seeking to introduce non-privileged communications with attorneys, stating that "[w]e are unaware of any case in which a party was required to waive privilege before introducing non-privileged testimonial or documentary evidence of the engagement of counsel." (Letter of Robert Iseman to Hon. Jason S. Patil, Jan. 23, 2015, at 3.) In United v. Blizerian, 926 F.2d 1285, the Second Circuit rejected exactly this argument, however. There, defendant argued that the testimony he sought to elicit "regarding his good faith" did not disclose "the content or even the existence of any privileged communication or the reliance on counsel defense." Id. at 1291. The Second Circuit roundly rejected that position:

> [T]he attorney-client privilege cannot at once be used as a shield and a sword . . . Thus, the privilege may implicitly be waived when defendant asserts a claim that in fairness requires examination of protected communications . . . This waiver principle is applicable here for Bilzerian's testimony that he thought his actions were legal would have put his knowledge of the law and the basis for his understanding of what the law required in issue. His conversations with counsel regarding the legality of his schemes would have been directly relevant in determining the extent of his knowledge and, as a result, his intent.

Id. (quotations and citations omitted and emphasis added). In Erie, the Second Circuit confirmed this holding—that a defendant cannot use even non-privileged evidence of an attorney's presence to demonstrate good faith without allowing an exploration of the advice given—noting that non-privileged communications could come because defendant was not attempting to use them to demonstrate his good faith or state of mind. 546 F.3d 222 at 228 ("[w]e noted that the District Court's ruling in Bilzerian left the defendant's privileged communication intact if he merely denied criminal intent but did not assert good faith . . . .") (emphasis added).

Respondents do not discuss the import of this Circuit precedent for their own attempted claim of good faith. Instead, they offer two cases, which are entirely inapposite because they did not involve use of the challenged evidence of the presence of counsel to support a defense of good faith. First, Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Americas, 727 F. Supp. 2d 256, involved the question of whether certain bondholders waived privilege by testifying that they were seeking shares of plaintiffs' stock. Id. at 274. That issue did not involve any party's good faith; the question presented here. Moreover, the Court held that such evidence did not require a waiver because (1) the parties had stipulated that limited testimony was allowable without waiver, and (2) the bondholders' belief that they would obtain such shares was not related to (or rooted in) legal advice, but was derived from other factors. Id. Second, in In re Residential Capital, LLC, 491 B.R. 63, the Bankruptcy Court held that, under Delaware law, privilege was not waived for the limited issue of whether a party sought advice of counsel to educate themselves as to the merits of a settlement.

Here, of course, there is no such stipulation and Delaware law is irrelevant. By their own admission, Respondents intend to offer the disputed evidence of counsel's involvement precisely to demonstrate their "intent and state of mind and good faith." (Jan. 20, 2014 Tr. at 4.) Without waiver, this should be foreclosed by the Second Circuit precedent. Were it not the case, the Division would be entirely blocked from examining the true impact that counsel's presence had on Respondents mental state (for example, if counsel advised Respondents that their disclosure was false or inadequate or, merely, refused to provide advice on Respondents' disclosures).[2] As Judge Forrest stated in SEC v. Tourre, 950 F. Supp. 2d 666, 682 (S.D.N.Y. 2013), allowing Respondents to offer evidence of the presence of attorneys to lessen their scienter without allowing a concomitant exploration of any advice received, "would give the defendant all of the essential benefits of an advice of counsel defense without having to bear the burden of proving any of the elements of the defense." Thus, the Court should preclude Respondents from offering any evidence of involvement of counsel to demonstrate anything about Respondents' good faith or lack of scienter.

Finally, Respondents vaguely state that they intend to offer evidence "that experienced securities counsel was engaged to handle all aspects of the complex transaction negotiations at issue in this case," but do not explain the relevance of such evidence. (Resp. Ltr. Br. at 1.) If they intend to offer it to show Respondents' lack of scienter, as they previously told the Court they planned to, they should be precluded from doing so for the reasons described above. If they intend to offer it for some other purpose, they should be required to provide an offer of proof explaining its relevance to a disputed issue and how such evidence will not implicate Respondents' scienter.[3]

Respectfully submitted,

Alexander Janghorbani
Senior Trial Counsel

cc: Richard D. Marshall, Esq., *Respondent's counsel*
Robert Iseman, Esq., *Respondent's counsel*
Brent Fields, *Secretary*

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[2] See the Division's Motion in Limine No. 1, Jan. 12, 2015, at 5-6 for a discussion of case law addressing the inherent unfairness of allowing a defendant to offer retention of attorneys as evidence to demonstrate lack of scienter without allowing exploration of those conversations.

[3] Respondents complain that the Division intends to offer documents including attorneys as if this somehow allows them to do so for the improper purpose of lessening scienter. However, as the Division explained in its Motion in Limine No. 1, we do not seek to preclude these exhibits wholesale, assuming that a proper purpose can be articulated.