U.S. SECURITIES AND EXCHANGE COMMISSION

Matter of

EQUITY TRUST COMPANY, A.P. File No. 3-16594

Respondent.

RESPONDENT'S REPLY ON MOTION FOR ADDITIONAL DISCLOSURE (SUPPLEMENTAL AUTHORITY)

In connection with Respondent Equity Trust Company's ("ETC") July 29, 2015 reply in further support of its motion for additional disclosure, pursuant to Rule 220(d), Rule 222(a) and Rule 232(a), ETC respectfully requests leave to furnish a supplemental authority in further response to the work product point raised in the Division's opposition.

The additional authority is the Commission's interlocutory ruling in *Matter of Blizzard*, A.P. No. 3-10007, I.A. Rel. 2030 (April 23, 2002). A copy of the ruling is attached. The Commission's discussion of work product appears on pages 3 through 5.

Dated: August 13, 2015

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CERTIFICATE OF SERVICE AND FILING

Pursuant to Rule 150(c)(2), I certify that on August 13, 2015, I caused the foregoing to be sent: **(1)** By **email** directed to Honorable Carol Fox Foelak, Administrative Law Judge, Securities and Exchange Commission, 100 F Street NE, Washington DC 20549-2557, and alj@sec.gov, and to OALJ Attorney-Advisor William Miller at millerwi@sec.gov. **(2)** By **email** directed to David Stoelting, Luke M. Fitzgerald, and Andrew Dean, New York Regional Office, Securities and Exchange Commission, 200 Vesey St., Suite 400, New York NY 10281, and StoeltingD@sec.gov, FitzgeraldL@sec.gov, and DeanAn@sec.gov. An original and 3 copies will be filed by US Mail tomorrow, directed to the Office of the Secretary, Securities and Exchange Commission, 100 F Street NE, Washington DC 20549-1090.

Stephen J. Crimmins

U.S. Securities and Exchange Commission

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2030 / April 23, 2002

Admin. Proc. File No. 3-10007

In the Matter of CLARKE T. BLIZZARD	ORDER GRANTING INTERLOCUTORY REVIEW ON COMMISSION'S MOTION AND REMANDING TO LAW JUDGE

Background

On February 28, 2002, an administrative law judge issued an order (the "Order") directing the law firm of Ropes & Gray ("R&G" or the "Firm") to produce documents responsive to a subpoena duces tecum served on it by Clarke T. Blizzard, one of the respondents in this proceeding.[1] The documents at issue are notes and memoranda (the "Documents") prepared by R&G in connection with an April 1996 interview of Blizzard by Michael Fee, a Firm lawyer. The Blizzard interview was part of an investigation by R&G of Shawmut Investment Advisors, on behalf of R&G's client, FleetBoston Financial Corp., formerly known as Fleet Financial Group (which acquired Shawmut in 1995), and Fleet's subsidiary, Fleet Investment Advisors, Inc., which assumed Shawmut's operations.[2] Blizzard was a Shawmut employee.

The Division of Enforcement has indicated that it intends to call Fee as a witness at the administrative hearing in this proceeding and that the Division may introduce a 1997 reportprepared by R&G summarizing the interview (the "Report").[3] R&G has indicated that, if called as a witness, Fee will testify about the Blizzard interview but decline to answer questions about the Documents, which R&G asserts are protected from disclosure by the attorney-client privilege and the work product doctrine.

The law judge ordered the Firm to produce the Documents redacted of opinion content. In doing so, she rejected the Firm's claim, made on behalf of its client, that the Documents are protected from disclosure.

On March 1, 2002, R&G asked the law judge to certify the Order for interlocutory appeal pursuant to Commission Rule of Practice 400(c).[4] At the same time, R&G also requested that, "given the extraordinary circumstances present here," the Commission "exercise its authority, pursuant to 17 C.F.R. § 201.400(a), to direct that this matter be submitted to it for review." On March 5, 2002, the law judge denied R&G's motion for

certification. Also on March 5, 2002, following the law judge's denial of R&G's motion, we granted an interim stay pending our consideration of the Firm's request for interlocutory review.

Interlocutory Review

Our Rules of Practice provide us with discretionary authority to grant interlocutory review notwithstanding the denial of law judge certification.[5] We have determined to exercise that authority and to grant review here.[6]

R&G argues that the law judge's order to produce the Documents raises a controlling question of law about which there is a substantial difference of opinion. The Firm further argues that Commission review would materially advance the completion of the proceeding because, until the matter is resolved, "there is considerable uncertainty as to the outcome of any ancillary proceedings that may be brought to enforce the Order, and whathappens to Mr. Fee's testimony in the meantime." In this connection, we note that the proceedings, which were instituted in 1999, already have been delayed because of a stay that was issued as a result of a parallel criminal proceeding. Under the circumstances, including the delay which has afflicted these proceedings and the significance to the proceedings of the legal issue involved, we believe it is appropriate to exercise our discretion to grant review.

Procedural History

On May 2, 1997, R&G provided the Report to the Division, at the Division's request, as part of a "Voluntary Disclosure" to the Commission. The Firm states that the contents of the Report constituted "non-privileged matters," and emphasizes that it provided the Report "only after the Division specifically agreed that the Disclosure would not . . . waive the attorney-client privilege and work product doctrine."[7] The cover page of the Report also stated "Confidential Treatment Requested by Fleet Financial Group." On November 8, 1999, the Division provided the Report, which it described as "part of its non-privileged investigative file," to Blizzard and the other parties to the proceeding, pursuant to Commission Rules of Practice 230(a) and 231.[8]

On January 14, 2000, Blizzard requested that the law judge issue a subpoena, pursuant to Rule of Practice 232,[9] for "[a]ll documents created by Ropes & Gray (includ[ing] internal and external e-mails, notes, memos, letters and other items constituting documents) concerning the . . . Investigation." Blizzard justified his request by claiming, among other things,that he "believes that there will be numerous inconsistencies between the raw interview notes and the testimony of some witnesses." On February 14, 2002, Blizzard informed the law judge that he was modifying his subpoena request to include notes or memoranda relating only to the April 1996 interview with Blizzard. Blizzard stated that this modification was based on representations from the Division that the only testimony the Division intends to elicit from Fee relates to alleged statements by Blizzard during that interview.

On February 15, 2002, the law judge ordered that, in the event Fee testifies, "notes and memoranda of the interview, redacted of opinion content, must be made available to Respondent Blizzard so that he may cross-examine effectively."[10] The law judge further held that "[a]ny claim of privilege would be waived by Mr. Fee's testimony." On February 28,

2002, the law judge, noting that the Division had confirmed that Fee would testify regarding the Blizzard interview, set March 6, 2002 as the date for compliance with the subpoena. We issued an interim stay of the Order on March 5, 2002, at R&G's request, pending our consideration of the Firm's request for interlocutory review.

By letter dated March 20, 2002, R&G was asked by the Commission's Secretary to provide a statement concerning Fee's anticipated testimony at the hearing. In particular, R&G was asked to state (i) whether Fee intended to assert any privilege, or the "work product" doctrine, with respect to any questions concerning the Blizzard interview; (ii) the subject matter of any such privilege; and (iii) the extent to which that subject matter differs from the subject matter of the Report.

The Firm, by letter dated March 21, 2002, responded that Fee would answer questions regarding "the facts that were conveyed to him by Mr. Blizzard during their April 19, 1996 interview." It further asserted that Fee would decline to answer questions "concerning his notes and memoranda from that April 19, 1996 interview, as those notes and memoranda have never been produced to the Division or any other party, and have been treated at all times by Ropes & Gray and the Division as privileged and confidential." Finally, R&G asserted that the "subject" of any privilege claimed (which it would assert on behalf of its client, Fleet) would "pertain to the content of the undisclosed workproduct and privileged communications contained in [Fee's] notes and memoranda" related to the Blizzard interview.

Attorney-Client Privilege

It is axiomatic that, when a person chooses to disclose information that would otherwise be protected by the attorney-client privilege, the protection of that privilege is lost as to the subject matter of the information disclosed.[11] The Firm has stated that Fee will testify as to the "facts that were conveyed to him by Mr. Blizzard" during the April 19 interview. Despite the specific invitation to do so in the March 20 letter, the Firm does not suggest that the subject matter of Fee's contemporaneously written notes and memoranda of that interview is in any way different from the subject matter of Fee's expected testimony. This failure dooms the Firm's claim of privilege.

The attorney-client privilege protects disclosure of the substance of communications.[12] Assuming the validity of the claim that any communications made during the interview are privileged, any privilege will be waived by disclosure of those communications during Fee's testimony.[13] The Firm cannot waiveprivilege with respect to Fee's testimony and assert it with respect to information concerning the same subject, whether it resides in his memory, electronically, or in pieces of paper.

Work Product

The Firm's claim that the Documents are protected by the work product doctrine also is unavailing. That doctrine, which was first recognized by the United States Supreme Court in Hickman v. Taylor[14] and is codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure,[15] is intended "to encourage optimal amounts of trial preparation by guaranteeing parties that their pretrial efforts need not be shared with the opposition except under limited circumstances."[16] Rule 26(b)(3) provides that:

> [A] party may obtain discovery of documents . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney . . .) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.[17]

Assuming that the Documents constitute work product, work product protection would be overcome because Blizzard has a substantial need for the Documents and no alternative source for the information that they contain. Fee has stated that he will answer questions regarding statements he claims were made by Blizzard during the 1996 interview. Contrary to R&G's claim that Blizzard does not need the Documents because Blizzard was present at the interview, we believe that denial of the Documents would put Blizzard at a significant disadvantage. The interview occurred roughly six years ago. Fee will be able to refresh his recollection of the interview by reference to contemporaneously written notes, and Blizzard's counsel, in the interest of fairness,[18] should have equal access to those notes. More significantly, any possible inconsistencies between the Documents and Fee's testimony may provide Blizzard with the most probative evidence to impeach Fee's testimony during cross-examination.[19]

We note that the Supreme Court has held that the disclosure of "notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes."[20] Such material, which is referred to as "opinion work product," includes a lawyer's "mental impressions, conclusions, opinions, or legal theories."[21] According to the Court, opinion work product is entitled to "special protection,"[22] beyond that which is accorded "ordinary" work product, i.e., work product that does not reveal an attorney's mental processes. The law judge's sensitivity to these concerns is revealed by the fact that she ordered production of the Documents redacted of opinion content. Consequently, we believe that compliance with the Order will serve the policy behind the work product doctrine by not compromising "the privacy of preparation that is essential to the attorney's adversary role."[23]

Additionally, assuming arguendo that the Documents constitute protected work product and that the standards for mandatory disclosure were not met, Blizzard would still be entitled to the Documents based on R&G's waiver of its right toclaim the doctrine.[24] In U.S. v, Nobles,[25] the Supreme Court held that a person who chose to present testimony by an investigator waived any privilege derived from the work product doctrine "with respect to matters covered in [the investigator's] testimony."[26] The defendant in that case, who had been charged with armed robbery, planned to use the investigator's testimony to impeach the credibility of two witnesses. The government, in turn, sought a report prepared by the investigator to assist it in cross-examining the investigator. When the defendant refused to provide the report, the court refused to allow the investigator's testimony. In upholding the trial court, the Court held that

Respondent can no more advance the work-product doctrine to sustain a unilateral testimonial use of work-product materials than he could elect to testify in his own behalf and thereafter assert his Fifth Amendment privilege to resist cross-examination on matters reasonably related to those brought out in direct examination.[27]

The Court further held that, in refusing to allow the testimony, the trial court "merely prevented respondent from presenting to the jury a partial view of the credibility issue by adducing the investigator's testimony and thereafter refusing to disclose the contemporaneous report that might offer further critical insights."[28] Similar considerations affect our decision here. Without access to the Documents, Blizzard and the law judge will have limited means of verifying that Fee's current recollection of the interview conforms with his contemporaneous notes. Allowing Fee to testify but denying Blizzard access to the Documents could result in producing the kind of evidentiary "half truth" the trial court sought to avoid in Nobles.[29]

Based on the foregoing, we find that Fee's anticipated testimony will constitute a waiver of any attorney-client privilege with respect to the Documents. We further find that the Documents are not protected by the work product doctrine.[30]

Accordingly, it is ORDERED that, pursuant to Rule of Practice 400(a), the February 28, 2002 order of the law judge directing Ropes & Gray to produce documents pursuant to a subpoena duces tecum be, and it hereby is, submitted to the Commission for review; and it is further

ORDERED that this matter be, and it hereby is, remanded to the law judge for action consistent with this order.

By the Commission.

Jonathan G. Katz
Secretary

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1 The Order clarified, at R&G's request, a February 15, 2002 order of the law judge denying the Firm's motion to quash the subpoena.

2 According to the law judge, Fleet initiated the investigation because it questioned commission allocation practices at Shawmut following the acquisition. Fleet also notified the Commission of its concern, which triggered the investigation by the Commission's staff.

3 The Division asserts that, according to the Report, Blizzard made various admissions during the interview concerning the practices at issue.

4 17 C.F.R. § 201.400(c).

5 See, e.g., Jean Paul Bolduc, Securities Exchange Act Rel. No. 42096 (Nov. 4, 1999), 70 SEC Docket 3224 (granting interlocutory review on the Commission's own motion after denial of certification by law judge).

6 See id. (granting interlocutory review based on possible ambiguity in Commission rules and the possibility that failure to grant review could result in need for second trial).

7 R&G further notes that, when it provided the Division with the Report, it did so "with an express reservation of its rights in which it prominently stated (emphasis in original) that:

> **IT IS UNDERSTOOD AND AGREED THAT THROUGH THIS DISCLOSURE FLEET IS NOT WAIVING, IN WHOLE OR IN PART, FLEET'S ATTORNEY-CLIENT PRIVILEGE, THE ATTORNEY WORK PRODUCT DOCTRINE OR ANY OTHER APPLICABLE PRIVILEGE."**

As noted, infra, at p.5, given Fee's intention to testify, our decision does not impact this reservation.

8 17 C.F.R. §§ 201.230(a) and 201.231. According to the law judge, the Division lists the Report as Exhibit 108 in its revised exhibit list.

9 17 C.F.R. § 201.232.

10 The law judge originally set February 28, 2000 as the date for compliance with the subpoena. On February 29, 2000, after Blizzard had agreed to extend the time for compliance, R&G moved to quash the subpoena. The law judge then deferred ruling on enforcement of the subpoena pending discussions between Blizzard and R&G. On January 24, 2002, Blizzard's counsel informed the law judge that the dispute regarding documents relating to Fee's planned testimony had not been resolved and asked her to order compliance with the subpoena.

11 See, e.g., U.S. v. McCambridge, 551 F.2d 865, 873 (1st Cir. 1977) (criminal defendant who questioned trial counsel, as a witness, about conversations they had regarding use of prior convictions to impeach defendant if defendant testified waived right to prevent government from cross-examining counsel regarding his entire advice concerning taking the stand). See also John W. Strong, McCormick on Evidence § 93 (5th ed. 1999) ("If the client elicits testimony from the lawyer-witness as to privileged communications this obviously would waive as to all consultations relating to the same subject"); Vincent S. Walkowiak, Attorney-Client Privilege in Civil Litigation, 160 (1997) ("Most courts agree that an implied waiver of attorney-client privilege, once established, extends to all communications on the applicable 'subject matter'."); 8 John Henry Wigmore, Evidence in Trials at Common Law § 2327 (1961) ("The client's offer of his own or the attorney's testimony as to a specific communication to the attorney is a waiver as to all other communications to the attorney on the same matter.").

12 See generally McCormick on Evidence § 89.

13 The Firm discusses at length authorities suggesting that disclosure of factual summaries of privileged and confidential communications to a governmental agency (such as were made by the Firm in the Report) does not necessarilywaive any privileges attaching to such information. Given our disposition of this matter on other grounds, we need not decide whether any waiver of privilege occurred as a result of the Division's subsequent disclosure of the Report to Blizzard.

14 329 U.S. 495 (1947).

15 See, e.g., Michael F. Sharp, Audit-Inquiry Responses in the Arena of Discovery: Protected by the Work-Product Doctrine, 56 Bus. Law. 183,

190 (2000).

16 Mary Beth Brookshire Young, Comment, The Work Product Doctrine: Functional Considerations and the Question of the Insurer's Claim File, 64 U. Chi. L. Rev. 1425 (1997).

17 Although Commission administrative proceedings are not governed by the Federal Rules of Civil Procedure, the workproduct protection provided in Rule 26(b)(3) is consistent with that provided by the rules of most jurisdictions and with the Supreme Court's holding in Hickman v. Taylor. See Young, The Work Product Doctrine, 64 U. Chi. L. Rev. at 1425.

18 R&G questions whether it is appropriate for "fairness considerations" to influence a decision regarding disclosure under the work product doctrine. In our view, such considerations are reflected in Rule 26(b)(3)'s inclusion of substantial need and undue hardship requirements. See also Anderson, The Work Product Doctrine, 68 Cornell L. Rev. at 886 (discussing implications of doctrine, as applied in U.S. v.Nobles, see n.25, infra, by noting that "it would be patently unfair to allow an attorney to use work product doctrine materials to refresh a witness's memory of the facts and then deny his opponent access to those materials to effectively cross-examine the witness").

19 We note that Rule 26(b)(3) permits a party to "obtain without the required showing a statement concerning the action or its subject matter previously made by that party." While the Documents do not come within the express terms of the rule's definition of "statement previously made," see Havden v. Acadian Gas Pipeline System, 173 F.R.D. 429 (E.D. La. 1997) (rejecting claim that notes and memorandum prepared by defendant constituted statement of plaintiff because they did not come within definition of rule), similar considerations support their disclosure. See Report of the Judicial Conference of the United States, Proposed Amendments to the Federal Rules of Appellate Procedure,reprinted at 48 F.R.D. 481, 502 (justifying mandatory disclosure by noting, among other things, that there are often "[d]iscrepancies between [a party's] trial testimony and earlier statements . . . result[ing] from lapse of memory or ordinary inaccuracy" and that "a written statement produced for the first time at trial may give such discrepancies a prominence which they do not deserve."). Access to the Documents is necessary to assist Blizzard in defending against possible inconsistencies between his present position and earlier statements.

20 Upjohn Co. v. U.S., 449 U.S. 383, 399 (1981).

21 See text accompanying n.17, supra.

22 449 U.S. at 400.

23 Anderson, The Work Product Doctrine, 68 Cornell L. Rev. at 784. According to one commentator, the work product doctrine "revitalizes" the "competitive relationship" between opposing counsel that would otherwise be dulled by the requirements of open discovery "by creating a zone of privacy within which the attorney . . . may work relatively free of the fear that his efforts will be discoverable." Id. at 785.

24 We note that the standards governing a waiver of the work product doctrine differ from those governing a waiver of the attorney client

privilege because the policies underlying the two are "fundamentally different." See generally Anderson, The Work Product Doctrine, 68 Cornell L. Rev. at 882.

25 422 U.S. 225 (1975).

26 Id. at 239.

27 Id. at 239-40.

28 Id. at 241.

29 Id.

30 As a result of our earlier order staying the law judge's February 28, 2002 order, the date set by the law judge for compliance with the subpoena has passed. The law judge therefore will need to issue a new order setting a later date for compliance by R&G.

Because our earlier stay of the Order is now vacated, a motion filed by Blizzard on March 12, 2002 to vacate the stay is moot. Blizzard's March 12 motion also urges the Commission to "immediately enforce the Order in a federal court." Such action would be premature because R&G has not yet failed to comply with any order.

http://www.sec.gov/litigation/opinions/ia-2030.htm

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Modified: 04/24/2002