Hard Copy

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17950

In the Matter of,

David Pruitt, CPA

Respondent.

RESPONDENT DAVID PRUITT'S MOTION TO CLARIFY THE COURT'S ORDER ON RESPONDENT'S MOTION TO QUASH AND TO AMEND PRIVILEGE LOG

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (CONT'D)

Page(s)

Respondent David N. Pruitt ("Mr. Pruitt"), through his undersigned counsel, respectfully submits this motion to clarify the Court's Order on Respondent's Motion to Quash issued on April 16, 2018[1] and seeks leave to amend Respondent David Pruitt's Privilege Log.[2] In the Order, the Court directed Respondent to produce certain documents to the Division of Enforcement (the "Division"), including memoranda of any factual statements made by Mr. Timothy Keenan, that are not responsive to the Subpoena to Produce Documents served on Mr. Pruitt on March 28, 2018.[3] The Court, in ordering Respondent to produce materials, cited the Division's opposition brief[4] rather than the language of the Subpoena and stated that because Respondent did not list these materials on the Privilege Log they should be produced. Respondent respectfully seeks clarification from the Court that Respondent is not required to produce privileged documents and protected attorney work product that are not responsive to the Subpoena. Respondent does not object to the production of non-privileged communications with Mr. Keenan and calendar entries indicating the dates of meetings. Respondent does object to the production of internal notes and memoranda shared solely between Respondent's defense team (the "protected materials").

Furthermore, even if these protected materials were responsive to the Subpoena, finding that Respondent waived privilege and work product protection by not listing them on the

---

[1] Admin. Proc. Rulings Release No. 5684, *In the Matter of David Pruitt, CPA*, Admin. Proc. File No. 3-17950 (Apr. 16, 2018) (the "Order").
[2] Respondent David Pruitt's Privilege Log, *In the Matter of David Pruitt, CPA*, Admin. Proc. File No. 3-17950 (Apr. 9, 2018) (the "Privilege Log").
[3] *See* Exhibit A to the Affidavit of Bari R. Nadworny dated April 4, 2018 in support of Respondent David Pruitt's Motion to Quash or Modify Subpoenas Served on Respondent and Timothy Keenan (the "Subpoena").
[4] Division of Enforcement's Opposition to Respondent's Motion to Quash or Modify Subpoenas Served on Respondent and Timothy Keenan, *In the Matter of David Pruitt, CPA*, Admin. Proc. File No. 3-17950 (Apr. 12, 2018) (the "Opposition").

Privilege Log imposes a draconian sanction usually reserved for situations involving bad faith, unjustified delay, or other similar conduct not present here. Indeed, after discussing on April 3, 2018[5] with counsel for the Division the records called for by the Subpoena, the Division confirmed it was not seeking attorney work product and Respondent in good faith determined that the protected materials were not responsive. Although Respondent does not believe he was required to log these documents in the first place, to the extent the Court determines the protected materials are responsive to the Subpoena, he respectfully seeks leave of the Court to submit an amended privilege log setting forth these materials.[6]

BACKGROUND

On March 27, 2018, Respondent voluntarily produced to the Division an affidavit of Mr. Timothy Keenan (the "Keenan Affidavit"). The Keenan Affidavit undermines and completely contradicts the core allegations made against Mr. Pruitt in the Order Instituting Proceedings ("OIP"). The following day, on March 28, the Division submitted to the Court for its signature the Subpoena and a Subpoena to Appear and Testify at a Deposition to Timothy Keenan. On April 3, 2018, during a call regarding the joint motion to stay these proceedings, the Division confirmed it was not requesting attorney work product in the Subpoena. On April 4, 2018, Respondent moved to quash both subpoenas.[7] On Friday, April 6, 2018, the Court issued an

[5] To the extent the Court or Division deem it necessary, Respondent shall provide an affidavit regarding the content of the April 3, 2018 conversation.

[6] While Respondent is willing to provide an amended privilege log immediately following clarification from the Court, Respondent respectfully submits that it would be burdensome and inefficient, particularly in light of the fast-approaching date of Mr. Keenan's deposition, to be required to log each and every purely internal communication, email, phone call, and the like between and among Respondent's defense team which the Court has already determined are not called for by the Subpoena.

[7] Respondent David Pruitt's Motion to Quash or Modify Subpoenas Served on Respondent and Timothy Keenan, *In the Matter of David Pruitt, CPA*, Admin. Proc. File No. 3-17950 (Apr. 4, 2018) (the "Motion to Quash").

order directing Respondent to forthwith file a privilege log,[8] which was filed the next business day, April 9, 2018, in accordance with the Court's order. The Division filed its Opposition to the Motion to Quash on April 12, 2018. The Court then issued the Order on the Motion to Quash, which Respondent now seeks to clarify, on April 16, 2018.

The Order, quoting from the Division's Opposition rather than the Subpoena,[9] directed that "to the extent there are 'records of phone calls, calendar entries indicating when counsel spoke to Keenan and who was present, contemporaneous notes or memoranda of the factual statements made by Keenan during any prior communications,' or other responsive records that were not listed in Pruitt's privilege log, he should immediately disclose those documents to the Division." The plain language of Subpoena does not call for all of these materials.[10] The Order cites to case law for the proposition that failing to log these documents on the Privilege Log would result in waiver of the privilege.[11] Respondent respectfully seeks clarification and, to the extent the Order requires production of the protected materials, reconsideration of that portion of the Order as such materials were not responsive to the Subpoena. Moreover, waiver under these circumstances is not the appropriate remedy for a good faith omission of such documents from Respondent's Privilege Log in reliance on the April 3, 2018 discussion with the Division. For

---

[8] Order Directing Respondent to File Privilege Log, Admin. Proc. Rulings Release No. 5674, *In the Matter of David Pruitt, CPA*, Admin. Proc. File No. 3-17950 (Apr. 6, 2018).

[9] The Subpoena calls for "[a]ll Communications between Respondent and Timothy Keenan" and "[a]ll Documents and Communications Concerning the notarized affidavit bearing the signature of Timothy Keenan, dated as of February 2, 2018, including, but not limited to, drafts of the affidavit." *See* Exhibit A to the Affidavit of Bari R. Nadworny dated April 4, 2018 in support of Respondent David Pruitt's Motion to Quash or Modify Subpoenas Served on Respondent and Timothy Keenan.

[10] Order at 4 (quoting Opposition at 11).

[11] The Court cited *OneBeacon Ins. Co. v. Forman Int'l Ltd.*, No. 04 Civ. 2271(RWS), 2006 WL 3771010, at *7 (S.D.N.Y. Dec. 15, 2006) and noted in a parenthetical that failure to list privileged documents on privilege log waives a claim of privilege.

the following reasons, Respondent respectfully submits that the protected materials are not responsive, any claim of privilege and work product protection was not waived, and the Court should not order disclosure of these materials to the Division.

ARGUMENT

I. THE PROTECTED MATERIALS ARE NOT RESPONSIVE TO THE SUBPOENA AND NEED NOT BE INCLUDED ON THE PRIVILEGE LOG

The protected materials are not responsive to the Subpoena. Specifically, the Division has retroactively sought to expand the scope of the Subpoena by claiming in its Opposition, for the first time, that the Subpoena called for "contemporaneous notes or memoranda of the factual statements made by Keenan during any prior communications."[12] In fact, the plain language of the Subpoena drafted by the Division requires no such production. The Subpoena only seeks communications between Respondent (including Respondent's counsel and consultants) and Timothy Keenan, and documents and communications concerning the Keenan Affidavit. The protected materials fall under neither category as they are not communications between Respondent and Mr. Keenan, nor do they "concern" the Keenan Affidavit, having been prepared independently of and several months prior to the creation of the executed affidavit.[13] Had the Division requested these materials in the Subpoena, Respondent would have asserted work product protection and included them on the Privilege Log. In fact, the Division did not seek these materials because to do so would have improperly required the production of privileged documents. The Division should not now be permitted to retroactively expand the scope of the

[12] Opposition at 11.

[13] The Court has already determined that communications by and between Respondent's defense team are not called for by the Subpoena and handwritten notes by Respondent's counsel should similarly fall outside the scope of the Subpoena. For the reasons set forth above, Respondent should not be required to log these privileged items.

Subpoena after the Privilege Log was submitted and deny Respondent the opportunity to protect and log these materials.

The Division also failed to meet and confer with Respondent regarding the Subpoena, despite Respondent's offer to do so, and provided no prior indication before this motion practice that the Division would take the position that the Subpoena included these protected materials. In fact, as referenced above, on a telephone call on April 3, 2018 with counsel for the Division regarding the joint motion to stay these proceedings, the Division confirmed that it was not seeking attorney work product generally but only drafts of the affidavit exchanged with Mr. Keenan.

The protected materials at issue contain thoughts and mental impressions, have only been distributed to the attorneys and consultants of Respondent's defense team, and have never been shared with Mr. Keenan or any other third party. Respondent did not deliberately fail to log these materials but made a determination, based in good faith reliance on the language of the Subpoena and the Division's contemporaneous statements, that such documents are not responsive and therefore did not need to be individually logged. There is no basis for a finding of waiver necessitating the production of what is clearly protected attorney work product. The Privilege Log was complete and Respondent should not be held to a logically and linguistically impossible standard that would have required him to speculate as to what the Division might deem responsive when it did not specifically ask for these materials in the Subpoena.

II. WAIVER IS A SEVERE SANCTION UNWARRANTED BY THE FACTS AND RESPONDENT SHOULD HAVE THE OPPORTUNITY TO AMEND THE PRIVILEGE LOG

Even if the Court determines that these documents were responsive to the Subpoena and Respondent should have identified them on the Privilege Log, the Court should not find that Respondent waived privilege or work product protection. Respondent should be afforded the

opportunity to amend the Privilege Log and the Division should not be permitted to invade Mr. Pruitt's attorney-client relationship or free ride on his defense counsel's work product as part of its hearing preparation.

The purpose of the attorney-client privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The attorney work product doctrine is distinct and even broader than the attorney-client privilege. *United States v. Nobles*, 422 U.S. 225, 238 n.11 (1975). As the Supreme Court long ago recognized, "an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties . . . falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims." *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). "Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney." *Id.* Mindful of these principles and the strong legal protections afforded to privileged materials and attorney work product, waiver is a severe sanction generally reserved for cases involving abuse of the discovery process, bad faith, willfulness, unjustified delay, or inexcusable conduct. *See, e.g., Drone Techs., Inc. v. Parrot S.A.*, No. 2:14-cv-00111-AJS, 2015 WL 12752848, at *4 (W.D. Pa. Feb. 20, 2015) (noting courts in Third Circuit "generally apply the severe sanction of privilege waiver only when a party fails to timely disclose a privilege log pursuant to a Court-ordered deadline"); *Smith v. James C. Hormel Sch. of Va. Inst. of Autism*, No. 3:08cv00030, 2010 WL 3702528, at *5 (W.D. Va. Sept. 14, 2010) (collecting cases) ("Given the sanctity of the attorney-client privilege and the seriousness of privilege waiver, courts

generally find waiver only in cases involving unjustified delay, inexcusable conduct and bad faith."); *Trs. of Elec. Workers Local No. 26 Pension Tr. Fund v. Tr. Fund Advisors, Inc.*, 266 F.R.D. 1, 9 n.8 (D.D.C. 2010) (finding harsh sanction of production of privileged documents is reserved for cases of unjustified delay, inexcusable conduct, or bad faith); *Sprint Commc'ns Co. v. Big River Tel. Co.*, No. 08-2046-JWL, 2009 WL 2878446, at *1 (D. Kan. Sept. 2, 2009) (noting that because waiver is a harsh sanction, courts often reserve such a penalty for cases in which there was unjustified delay or bad faith); *Equal Rights Ctr. v. Post Properties, Inc.*, 247 F.R.D. 208, 212 n.3 (D.D.C. 2008) (noting waiver of privilege is a serious sanction most suitable for cases of unjustified delay, inexcusable conduct, and bad faith); *see also In re Infinity Bus. Grp., Inc.*, 530 B.R. 316, 326–27 (Bankr. D.S.C. 2015) (determining no waiver of attorney-client privilege due to alleged insufficiency of privilege logs where there was no evidence of bad faith or unjustifiable delay and Trustee agreed to provide revised logs).

"[F]ailure to include a document in a privilege log 'does not necessarily trigger waiver of the privilege as a sanction.'" *Post Properties*, 247 F.R.D. at 212 n.3 (quoting *United States v. British Am. Tobacco (Invs.) Ltd.*, 387 F.3d 884, 890 (D.C. Cir. 2004)); *see also Smith*, 2010 WL 3702528, at *4 ("[W]aiver is not automatic."). Cases in which courts find that waiver is an appropriate sanction often involve repeated failures in bad faith to comply with court orders over a lengthy period of time or conduct intended to unjustifiably delay proceedings. In *OneBeacon Insurance Company*, the case cited by the Court,[14] there were several factors, none of which are present here, that ultimately led that court to determine waiver was appropriate. OneBeacon, over several months, failed to provide a privilege log, refused to produce additional responsive documents, and provided an incomplete revised privilege log. No. 04 Civ. 2271(RWS), 2006

[14] Order at 4 n.20.

WL 3771010, at *3 (S.D.N.Y. Dec. 15, 2006). Similarly, in *FG Hemisphere Associates, L.L.C. v. Republique Du Congo*, a case on which *OneBeacon* relies, over the course of the parties' discovery disputes Republique Du Congo failed to provide an index of documents withheld on the ground of privilege, failed to adhere to its representation to counsel that it would provide such an index, and failed to prepare a privilege log in response to a judge's admonition. No. 01 Civ.8700SASHBP, 2005 WL 545218, at *1–2 (S.D.N.Y. Mar. 8, 2005).

Here, in contrast, Respondent has not engaged in any bad faith, inexcusable conduct, unjustified delay, or abuse or evasion of the discovery process. The Court ordered Respondent forthwith to file a privilege log on a Friday afternoon and Respondent did so the next business day. Respondent listed on the Privilege Log the materials he, in good faith, believed were responsive to the Subpoena, were being sought by the Division, and were protected by the attorney work product doctrine. Respondent could not have foreseen that the Division would attempt to expand the scope of the Subpoena and include materials not otherwise called for therein. Respondent should not be penalized for complying in good faith with the Subpoena's plain language and not anticipating how the Division would later shift its ground and attempt to construe the Subpoena. The Subpoena could have plainly sought these materials and given Respondent sufficient notice to enable him to assert privilege and log them. The Division's attempt to expand the scope and then claim waiver impermissibly invades the attorney-client relationship and gravely prejudices Mr. Pruitt.

Respondent should have the opportunity to amend the Privilege Log to the extent the Court determines that the protected materials are responsive to the Subpoena. This is consistent with how district courts throughout the country have remedied similar situations not involving bad faith or unjustified delay. *See, e.g., Pactiv Corp. v. Multisorb Techs., Inc.*, No. 10 C 461,

2012 WL 1831517, at *2 (N.D. Ill. May 18, 2012) (allowing plaintiff to revise its privilege log after "five tries"); *Ypsilanti Cmty. Util. Auth. v. Meadwestvaco Air Sys. LLC*, No. 07-CV-15280, 2009 WL 3614997, at *4 (E.D. Mich. Oct. 27, 2009) (allowing defendant to produce second amended privilege log); *Sajda v. Brewton*, 265 F.R.D. 334, 339 (N.D. Ind. 2009) (finding current version of privilege log that underwent several revisions satisfactory and thus determining not to impose sanction of waiver). Respondent respectfully seeks leave to submit an amended privilege log for this purpose.

III. THE DIVISION CANNOT SHOW SUBSTANTIAL NEED FOR THE PROTECTED MATERIALS OR UNDUE HARDSHIP IN THEIR ABSENCE

The Division has not and cannot establish a substantial need for the protected materials or an inability to secure their substantial equivalent by other means even if the materials fall within the scope of the Subpoena.[15] Nor will the Division suffer undue hardship from not being permitted to access Respondent's diligent trial preparation.

The Division will be taking Mr. Keenan's deposition where it will have full and ample opportunity to question him regarding the exculpatory statements made in his affidavit as well as any interactions with Respondent's counsel not subject to work product protection. The ability to take Mr. Keenan's deposition undercuts any claims of substantial need that might allow for the production of these materials. *See Clemmons v. Acad. for Educ. Dev.*, 300 F.R.D. 6, 8 (D.D.C. 2013) (burden to establish substantial need not met where witness was available for deposition); *Inst. for Dev. of Earth Awareness v. PETA*, 272 F.R.D. 124, 125 (S.D.N.Y. 2011) (no showing of substantial need where witnesses were available for deposition and no other special circumstances exist); *Randleman v. Fidelity Nat. Title Ins. Co.*, 251 F.R.D. 281, 286 (N.D. Ohio

[15] *See* Memorandum of Points and Authorities in Support of Respondent David Pruitt's Motion to Quash or Modify Subpoenas Served on Respondent and Timothy Keenan, *In the Matter of David Pruitt, CPA*, Admin. Proc. File No. 3-17950, at 8–9 (Apr. 4, 2018).

2008) (no substantial need or undue hardship because plaintiffs can test credibility of affiants through depositions); *Schipp v. Gen. Motors Corp.*, 457 F. Supp. 2d 917, 923–24 (E.D. Ark. 2006) (substantial need not met when party took depositions of witnesses who provided previous statements and information sought is merely corroborative).

The Division should not be permitted to invade Respondent's attorney-client relationship in order to decipher and anticipate his counsel's thought processes, mental impressions, and hearing strategy. For many of the same reasons the Court ruled that an unsigned draft affidavit is not discoverable, counsel's notes, memoranda, and internal communications are similarly not discoverable. These protected materials are not transcripts or recordings made by Mr. Keenan. Moreover, Mr. Keenan has never read, revised, ratified, or adopted them. The Division will have more than ample opportunity to question him and test his knowledge of the facts and his credibility. Under these circumstances, the Division simply cannot show substantial need, inability to secure a substantial equivalent, or undue hardship if it is not permitted a free ride on Respondent's attorney work product.

Moreover, the work product doctrine expressly prohibits such an infringement of the attorney-client relationship as "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Hickman*, 329 U.S. at 510–11. While the Division may be "perplexed" by Mr. Keenan's exculpatory statements regarding Mr. Pruitt, the Division should not seek to solve its predicament by compromising the privilege rightfully belonging to Mr. Pruitt. This is

especially so where the protected materials relate to a witness that is not only available, but is actually scheduled to be deposed in twelve days.

CONCLUSION

For the reasons set forth herein, the Court should grant Mr. Pruitt's Motion.

Dated: April 20, 2018
New York, New York

By: /BRN

Jonathan R. Barr
John J. Carney
Jimmy Fokas
Margaret E. Hirce
Bari R. Nadworny
BAKER & HOSTETLER LLP
45 Rockefeller Plaza
New York, New York 10111
Telephone: 212.589.4200
Facsimile: 212.589.4201

Attorneys for Respondent David Pruitt