

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-17950

In the Matter of

David Pruitt, CPA,

Respondent.

DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENT'S MOTION TO CLARIFY THE COURT'S ORDER ON RESPONDENT'S MOTION TO QUASH

The Division of Enforcement (the "Division") respectfully submits this Memorandum of Law in Opposition to Respondent David Pruitt, CPA's April 20, 2018 Motion to Clarify the Court's Order on Respondent's Motion to Quash (the "Motion"). For the reasons discussed below, Respondent's Motion should be denied in its entirety.

Although Respondent styles his Motion as a request for "clarification" (Motion at 1), there is nothing about the Court's April 16, 2018 Order on Respondent's Motion to Quash (the "Order") that is unclear. In a well-reasoned opinion that applied the relevant case law regarding the consequences of failing to list documents on a privilege log, the Court ordered that "records of phone calls, calendar entries . . . 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 [must be] immediately disclose[d] ... to the Division." Order at 4.

Respondent has failed to comply with the Court's Order. It is now five business days since the Court's Order and Respondent has not produced *any* documents – including documents

that Respondent concedes he has no legal basis to withhold. *See* Motion at 1 (“Respondent does not object to the production of non-privileged communications with Mr. Keenan and calendar entries indicating the dates of meetings.”). The Court should deny Respondent’s Motion and order him to produce all responsive documents immediately.

BACKGROUND

On March 27, 2018, Respondent produced to the Division a February 2, 2018 affidavit from Timothy Keenan (the “Keenan Affidavit”), a critical fact witness in this proceeding. Keenan was the Senior Vice President and Chief Financial Officer of Aerospace Systems, one of L3’s four business segments, and one of Respondent’s supervisors. Although Keenan has consistently maintained that he did not authorize Respondent to generate certain invoices and recognize revenue that is at the heart of this proceeding, Keenan now swears that he directed Respondent to do both things. On April 5, 2018, the Court granted the parties’ joint motion to stay these proceedings, with the exception of allowing the Division to proceed with a deposition of Timothy Keenan, which is currently scheduled for May 2, 2018, and allowing the Division to obtain documents in connection with that deposition.

Upon receiving the Keenan Affidavit, the Division immediately sought leave of this Court to serve a document subpoena and deposition notice on Keenan (“Keenan Subpoena”), and a document subpoena on Respondent (“Pruitt Subpoena”), which were served on March 30 and March 28, respectively. The instructions accompanying both subpoenas specify that “[i]f, for any reason – including a claim of attorney-client privilege – you do not produce something called for by the request, you should submit a list of what [you are] not producing,” and describes information to be included on the list as, among other things: the authors, date, subject matter, custodian of the document, basis upon which the document is not being produced,

attorneys and clients involved, and in the case of work produce doctrine, the litigation for which the document was prepared in anticipation.

On April 4, 2018, Respondent moved to quash or modify Requests 1 through 3 (out of 4 requests) of the Keenan Subpoena, and Requests 1 and 2 (out of 2 requests) of the Pruitt Subpoena. Respondent, however, failed to produce a privilege log that would allow the Division or the Court to evaluate his privilege assertions. Accordingly, on April 6, 2018, the Court ordered Respondent to “file a privilege log or declaration that describes the evidence in question with sufficient detail to assess his claims of privilege.” 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, at *2 (Apr. 6, 2018). On Monday, April 9, 2018, Respondent filed a privilege log identifying two documents over which he is asserting work product: a single e-mail communication from Respondent’s counsel to Keenan on February 1, 2018, attaching a draft affidavit, and the draft affidavit itself.

On April 12, 2018, the Division opposed Respondent’s motion to quash, and on April 16, 2018, the Court issued its Order on Respondent’s motion. In that Order, the Court held that although Respondent could withhold the two documents that he listed on his privilege log, Respondent had waived any potentially applicable privilege claim regarding other responsive documents. *See* Order at 4 (citing *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) (failure to list privileged documents on privilege log waives claim of privilege). The Court directed Respondent to produce responsive documents “immediately.” *Id.*

In response, on April 20, 2018 – four business days later – Respondent moved to “clarify” the Court’s Order. Respondent argued that the Court should excuse his failure to log

various documents because Respondent did not view them as responsive to the Pruitt and Keenan Subpoenas. Although Respondent now asks the Court for a third opportunity to properly assert his potential privilege claims, Respondent has – *for the third time* – opted not to support his broad privilege assertions with a privilege log.

ARGUMENT

Twelve days before the deposition of Keenan, Respondent has asked the Court to revise its prior holding and permit him to withhold important documents related to that deposition despite having now failed to produce a proper privilege log on three occasions. In making this request, Respondent is *not* seeking “clarification.” *See Generally* Motion. Rather, he is seeking the “extraordinary remedy” of reconsideration – relief that is granted “only in exceptional cases.” Admin Proc. Rulings Release No. 10468, *In the Matter of Edward Daspin*, Admin. Proc. File No. 3-16509, 2018 WL 1234189, at *1 (March 8, 2018).¹ In particular, “[a] motion for reconsideration is designed to correct manifest errors of law or fact or to permit the presentation of newly discovered evidence.” Admin. Proc. Rulings Release No. 2901, *In the Matter of Mitchell Maynard*, Admin. Proc. File No. 3-13008, at *1 (July 16, 2009). Respondent has not satisfied this standard, and his Motion should be denied.

As the Court has already recognized, contemporaneous notes or memoranda of the factual statements made by Keenan are responsive to the subpoena’s request for “[a]ll Documents and Communications Concerning the notarized affidavit bearing the signature of

¹ Although Rule 470 of the Commission’s Rules of Practice concerns reconsideration of Commission orders, the Court should apply this standard to Respondent’s Motion. Respondent chose – presumably for strategic reasons – to construe the subpoena exceedingly narrowly, and should not be permitted to shift his position to circumvent the Court’s Order. *Cf. Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1231 (3d Cir. 1995) (explaining that a party may not use a motion for reconsideration to “simply change[] theories and [try] again,” thus offering a “second bite at the apple”).

Timothy Keenan, dated as of February 2, 2018 (the “Keenan Affidavit”), including, but not limited to, drafts of the affidavit.” Respondent’s sole argument to the contrary is that documents created before the Keenan Affidavit was executed could not possibly “concern” the Keenan Affidavit. *See* Motion at 4. But this argument ignores the broad definition of “Concerning” in the subpoenas:

“Concerning” means directly or indirectly, in whole or in part, describing, constituting, evidencing, recording, evaluating, substantiating, concerning, referring to, alluding to, in connection with, commenting on, relating to, regarding, discussing, showing, describing, analyzing or reflecting.

See Pruitt Subpoena, Attachment A; Keenan Subpoena, Attachment A.² Memoranda or notes that contain factual statements made by Keenan easily satisfy this definition and are plainly responsive.

Although Respondent correctly points out that the Division indicated that the Subpoena did not seek information protected by the work product doctrine (Motion at 2),³ this argument is inapposite.⁴ The Court did not Order Respondent to produce all responsive documents (with the exception of the two documents that Respondent logged) because the Court determined that the documents were not privileged. Rather, the Court’s Order was based on Respondent’s repeated

² The Keenan Subpoena and Pruitt Subpoena can be found, respectively, as Exhibits B and C to the April 12, 2018 Declaration of David Oliwenstein in Support of the Division’s Opposition to Respondent’s Motion to Quash.

³ To be clear, the Division is not seeking documents that are clearly protected by the attorney-client privilege and attorney work product doctrine including emails solely between Respondent and his counsel, emails between various members of Respondent’s defense team (including experts), and internal memoranda or documents analyzing either Keenan’s statements or the Keenan Affidavit. However, factual statements made by Keenan to Respondent’s counsel are not privileged, and documents memorializing those statements should be produced.

⁴ Moreover, although the Division informed Respondent that it was not seeking privileged documents, the Division never told Respondent that he did not have to log all responsive documents over which he was asserting a privilege – particularly after the Court ordered him to do so.

failure to provide the Court – and the Division – with sufficient information to assess Respondent’s privilege assertions. Under those circumstances, the Court correctly concluded that Respondent waived any applicable claim of privilege. *See* Order at 4 (citing *OneBeacon Ins. Co. v. Forman Int’l, Ltd.*, No. 04-2271, 2006 WL 3771010, at *7 (S.D.N.Y. Dec. 15, 2006) (failure to list privileged documents on privilege log waives claim of privilege)).

Finally, it is noteworthy that despite imploring the Court to revisit his privilege claims, Respondent has failed to attach his proposed “amended privilege log” to his Motion. *See, e.g.*, Motion at 2. With the Keenan deposition now nine days away, Respondent should not be afforded a fourth opportunity to comply with a basic discovery obligation, and should be ordered to disclose all responsive documents immediately.⁵

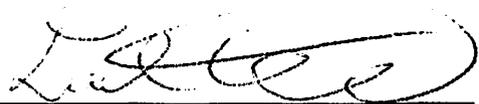
CONCLUSION

Based on the foregoing, the Division respectfully requests that the Court deny Respondent’s Motion and direct Respondent to produce all responsive documents immediately.

Dated: April 23, 2018
New York, New York

DIVISION OF ENFORCEMENT

By:



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⁵ At a minimum, the notes and memoranda of factual statements made by Keenan should be provided to the Court for *in camera* review so that the Court can determine whether they should be produced to the Division.



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April 23, 2018

VIA Fax and UPS

Honorable Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
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Re: In the Matter of David Pruitt, CPA;
Admin. Proc. File No. 3-17950

Dear Mr. Fields:

Enclosed please find the original and three copies of the Division of Enforcement's April 23, 2018 Opposition to Respondent's Motion to Clarify the Court's Order on Respondent's Motion to Quash.

Respectfully submitted,

David Oliwenstein
Senior Counsel
Division of Enforcement

Enclosure

cc: VIA EMAIL
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