

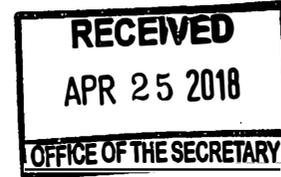
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17950

In the Matter of,

David Pruitt, CPA

Respondent.



**REPLY MEMORANDUM IN FURTHER SUPPORT OF RESPONDENT DAVID
PRUITT'S MOTION TO CLARIFY THE COURT'S ORDER ON RESPONDENT'S
MOTION TO QUASH AND TO AMEND PRIVILEGE LOG**

Respondent respectfully submits this reply memorandum in support of his motion for clarification and to amend his privilege log. First, and most telling, is the Division's complete failure to address the case law that squarely holds that waiver of privilege is a sanction reserved for egregious or bad faith conduct simply not present here. *See, e.g., 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). Instead, the Division mischaracterizes the record in order to deflect from the inconvenient fact that the Division's subpoena does not call for the documents at issue. Moreover, the Division's opposition confirms the statements the Division made to Respondent's counsel that its subpoena did not seek protected work product or other privileged information. Respondent was

not put on notice by the subpoena and was led to believe by the Division itself that it was only seeking Respondent and his counsel's communications with Mr. Timothy Keenan¹ and any drafts of the affidavit exchanged with Mr. Keenan. Respondent's reliance on these statements demonstrates that his belief that the materials at issue were not responsive to the poorly drafted subpoena was reasonable and made in good faith. Respondent cannot be expected to log and assert privilege over materials not demanded by subpoena.

Respondent has not engaged in any bad faith, inexcusable conduct, or unjustified delay that would warrant the imposition of waiver and nothing in the Division's opposition demonstrates otherwise. The Court should not be swayed by the Division's attempts to characterize Respondent's conduct as "repeated" or in any way related to conduct that would warrant a waiver sanction. That the Division chose to arbitrarily expand the scope of the subpoena beyond its plain meaning does not render Respondent's conduct unreasonable or taken in bad faith. Had the subpoena made the request for internal memoranda clear and had the Division not made the statement that it explicitly was not seeking work product, then Respondent would have logged them. There is no grounds for a waiver sanction on this record and the Division should not be permitted to invade Respondent's attorney-client relationship.

Second, because waiver is not appropriate, in order to compel disclosure, the Division must demonstrate substantial need for the work product and that the Division cannot, without undue hardship, obtain its substantial equivalent by some other means. *See* Fed. R. Civ. P. 26(b)(3)(A)(ii). The Division's opposition does not even attempt to address either factor as it would be a futile effort. The ability to question Mr. Keenan under oath is fatal to any claim of

¹ Respondent has complied with the Court's order and already made a production of all responsive non-privileged materials in response to the subpoena.

need or hardship. 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). The Division will have the opportunity to ask Mr. Keenan about his affidavit and his non-privileged interactions with Respondent's counsel during his deposition. As such, there is no basis whatsoever for the Court to order Respondent to disclose his counsel's work product.

Finally, the Division will suffer no prejudice by Respondent filing an amended privilege log since it is not entitled to the protected materials. Respondent has included a proposed amended privilege log with this filing for the Court's consideration.² As the Court is aware, Respondent is duty bound to protect the privileges that apply to his relationship with his counsel lest he suffer the consequences of waiver. The Division should recognize this undeniable fact and focus on the import of Mr. Keenan's sworn statements and their impact on the now unsupported allegations of the OIP instead of seeking to interfere with Mr. Pruitt's attorney-client relationship.

² The Division has now made clear in its opposition that it is not seeking any internal communications or internal memoranda between Respondent and his counsel and between Respondent's defense team. As such, in reliance on this representation, Respondent has not logged those items but continues to assert privilege over them.

The Court should grant Mr. Pruitt's motion and allow Respondent to amend his privilege log and prevent the unwarranted and improper disclosure of his counsel's work product.

Dated: April 24, 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