UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 3228/October 15, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16649

In the Matter of IRONRIDGE GLOBAL PARTNERS, LLC, IRONRIDGE GLOBAL IV, LTD.	SECOND ORDER ON SUBPOENAS

Respondents have asked that I issue a subpoena seeking four categories of documents from the Commission. The Division of Enforcement objects. Addressing Respondents' requests in turn, I GRANT in part and DENY in part their requests.

Legal Principles

Commission Rule of Practice 230(a)(1) describes categories of documents that the Division of Enforcement must make available to Respondents in administrative proceedings. 17 C.F.R. § 201.230(a)(1). By listing these categories, the Commission did not intend to limit a Respondent's ability to seek additional documents by subpoena or an administrative law judge's ability "to order the production of" additional documents. 17 C.F.R. § 201.230(a)(2).

Rule 230(a)(1) is subject to exceptions listed in Rule 230(b)(1). The Division is permitted to withhold privileged documents. 17 C.F.R. § 201.230(b)(1)(i). The Division may also withhold a document that:

> is an internal memorandum, note or writing prepared by a Commission employee, other than an examination or inspection report as specified in paragraph (a)(1)(vi) of this rule, or is otherwise attorney work product and will not be offered in evidence.

17 C.F.R. § 201.230(b)(1)(ii). This rule does not provide a blanket shield from disclosure for internal memoranda. Instead, the rule codifies the work-product privilege addressed in *Hickman v. Taylor*, 329 U.S. 495 (1947), and in Federal Rule of Civil Procedure 26(b). *See* Rules of Practice, 60 Fed. Reg. 32,738, 32,762 (June 23, 1995). An administrative law judge may review

whether the Division has properly withheld documents under Rule 230(b)(1). *See* 17 C.F.R. § 201.230(c).

Rules 231 and 232 work in conjunction with Rule 230. A Respondent may move for the production of witness statements. 17 C.F.R. § 201.231(a). A Respondent may also ask that an administrative law judge issue a subpoena requiring the production of documents. 17 C.F.R. § 201.232(a). If it appears that a subpoena "may be unreasonable, oppressive, excessive in scope, or unduly burdensome," an administrative law judge may require the party requesting the subpoena to show that the information sought is relevant and that the scope of what is sought is reasonable. 17 C.F.R. § 201.232(b). An administrative law judge is required to quash any subpoena that "would be unreasonable, oppressive, or unduly burdensome." 17 C.F.R. § 201.232(e)(2).

Discussion

1. Respondents first seek:

> all portions of notes and summaries from interviews of witness[es] conducted during the investigation of Respondents to the extent those portions relate to the facts and circumstances of this case, *the portions do not reflect attorney-opinion work product*, and the notes or summaries are not about examinations for which the Division has produced transcripts.

Subpoena Request at 3 (emphasis added). The Division of Enforcement opposes this request, arguing that the notes its personnel took during witness interviews are protected by the attorney work product privilege. Opp. at 2-4. The Division does not support its argument with a declaration or any other evidence.

Respondents reply that the Division's argument fails because it has not presented any evidence that its interview notes were prepared in anticipation of litigation. Reply at 6-7. Respondents alternatively contend that the factual parts of the interview notes are merely work product, not attorney-opinion work product. *Id*. at 7-8. They thus contend the notes are discoverable on a showing of substantial need. *Id*. at 8.

Respondents claim they have shown substantial need because they do not know the identity of additional, unidentified witnesses and necessarily do not know what those witnesses will say if called to testify. Reply at 8-10. Among the evidence Respondents have submitted in support of their request are letters they exchanged with the Division. In early September, Respondents' counsel asked the Division to "identify all witnesses" it had interviewed. Reply Ex. D. The Division declined to do so. Reply Ex. E.

On its face, Respondents request is not "unreasonable, oppressive, excessive in scope, or unduly burdensome." The Division does not claim otherwise and bases its opposition on the attorney work product privilege. The scope of protection offered by the attorney work product privilege depends on the material sought. "Fact" work product may be produced if the party

seeking discovery demonstrates "a substantial need for the materials and an undue hardship in acquiring the information any other way." *Dir., Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997). On the other hand, "opinion" work product "is virtually undiscoverable." *Id.*; *see also Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1422 (11th Cir. 1994) ("[O]pinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances." (quoting *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977)), *modified on reh'g on other grounds*, 30 F.3d 1347 (11th Cir. 1994). The inquiry, therefore, is multi-faceted: has the Division shown that the documents are protected by the work-product privilege; if so, are the documents "fact" or "opinion" work product; and if the documents are "fact" work product, have Respondents demonstrated a sufficient need for their production?

The Division bears the burden to show that the privilege applies. *In re Subpoena Duces Tecum Issued to Commodity Futures Trading Comm'n*, 439 F.3d 740, 750 (D.C. Cir. 2006). And the way to do that is to present "evidence 'sufficient . . . to establish the privilege . . . with reasonable certainty.'" *Id*. (quoting *FTC v. TRW, Inc*., 628 F.2d 207, 213 (D.C. Cir. 1980)).

As an initial matter, I reject Respondents' argument that notes taken during witness interviews during the Division's investigation are not made "in anticipation of litigation." Reply at 6-7; *see* Fed. R. Civ. P. 26(b)(3)(A) (protecting from discovery documents "prepared in anticipation of litigation or for trial by or for another party or its representative"). Respondents rely on two unpublished district court decisions but the basis for those decisions has been rejected by the court of appeals for the circuit in which those decisions were issued. *See United States v. Adlman*, 134 F.3d 1194, 1198-1203 (2d Cir. 1998). I thus conclude that, by their nature, the notes and summaries Respondents seek, which were prepared during the Division's investigation, were prepared in anticipation of litigation and are attorney work-product. *See Safecard Services, Inc. v. SEC*, 926 F.2d 1197, 1202-03 (D.C. Cir. 1991); *Kent Corp. v. NLRB*, 530 F.2d 612, 623-24 (5th Cir. 1976).

As to whether the documents constitute fact or opinion work product, an attorney's interview notes *may* be considered opinion work product. *See Dir., Office of Thrift Supervision*, 124 F.3d at 1307-08 (the argument that "a lawyer's interview notes are always opinion work product . . . goes too far"). The problem here is that the Division has not submitted any evidence, such as a declaration, that would allow me to judge whether the opinion work-product privilege applies. Because the Division has not submitted any evidence to support its position, I have no way of knowing what is at issue or whether the documents at issue are entirely covered by the opinion work product privilege or not. And this matters because (1) the opinion work product privilege only protects matters that "reflect[] [an] attorney's focus in a meaningful way"; and (2) a document may conceivably contain both matters that constitute opinion work-product and matters that do not.[1] The Division has thus failed to carry its burden to demonstrate that the documents Respondents seek are subject to categorical protection as opinion work product.

[1] *See FTC v. Boehringer Ingelheim Pharm., Inc*., 778 F.3d 142, 151-52 (D.C. Cir. 2015); *Dir., Office of Thrift Supervision*, 124 F.3d at 1308 ("under certain circumstances purely factual material embedded in attorney notes may not deserve the super-protection afforded to a lawyer's mental impressions"); *In re HealthSouth Corp. Sec. Litig*., 250 F.R.D. 8, 11-12 (D.D.C. 2008).

Accordingly, Respondents may be entitled to production of the documents at issue if they demonstrate "a substantial need for the materials and an undue hardship." *Dir., Office of Thrift Supervision, LLP*, 124 F.3d at 1307. Respondents argue they would suffer an undue hardship without the Division's interview notes because the Division refuses to disclose who it interviewed during the investigation and because the notes are "likely to have relevant information" that could not be obtained via deposition. Reply at 8-9. Without knowing who the Division interviewed, however, Respondents' arguments as to the relevance of the interview notes are speculative and do not demonstrate a compelling need for the production of documents protected by the attorney work product doctrine. As a result, the first request is GRANTED in part and DENIED without prejudice in part. The Division shall produce to Respondents by October 22, 2015, a list of the individuals it interviewed during the investigation. Respondents may then renew their request for interview notes of certain identified individuals, to the extent those notes "do not reflect attorney-opinion work product." Subpoena Request at 3.

2. In their second request, Respondents ask for:

> Documents sufficient to identify all enforcement actions (whether or not in an administrative proceeding) brought by the Commission, other than this proceeding, in which the Commission chose to bring a claim for a violation of Section 15(a) of the Securities Exchange Act of 1934 without also bringing a claim for either securities fraud or violation of Section 5(a) of the Securities Act.

Subpoena Request at 3. In their third request, Respondents ask for:

> Documents sufficient to identify all enforcement actions (whether or not in an administrative proceeding) brought by the Commission, other than this proceeding, in which the Commission has alleged that an entity or person violated Section 15(a) of the Securities Exchange Act of 1934 in connection with transactions in securities exempted from registration under Section 3(a)(10) of the Securities Act of 1933.

Id. at 3-4.

The Division objects to these requests, arguing that the information Respondents seek "is publicly available and thus readily available to them." Opp. at 4-5. Respondents reply that it does not matter whether the documents are publicly available because, in a separate proceeding, I granted a similar request. Reply at 15. They also say that "not all Commission documents are in the public domain" and, as an example, cites two decisions on which the Division relies, arguing that the Division has not established where these decisions are publicly available. *Id*. Finally, Respondents opine that the Division can more easily find the information they seek. *Id*. at 15-16.

Respondents' second and third requests are DENIED. The information Respondents seek is publicly and equally available to both parties. Respondents are essentially asking the Division

to do their legal research for them. Indeed, they have not alleged that they have even attempted to locate the information they seek. Instead they seek to bolster their argument by expressing doubt about the public availability of two cases cited by the Division. Both decisions, however, are available online and publicly accessible. The decision in *Raymond James Financial Services* can be found here: http://www.sec.gov/alj/aljorders/2004/3-11692-3.pdf. The decision in *J. Kenneth Alderman* can be found here: http://www.sec.gov/alj/aljorders/2013/ap754ce.pdf. Given the foregoing, I find that it would be unreasonable to require the Division to search for and produce the information Respondents seek.

Respondents are correct that in a previous case, I granted a similar request. Reply at 15 (citing *Charles L. Hill, Jr*., Admin. Proc. Rulings Release No. 2706, 2015 SEC LEXIS 2016 (May 21, 2015)). But in that case, the Commission's Office of General Counsel relied on claims of privilege and did not argue that "Mr. Hill could easily find the requested information himself[] or . . . that the request [was] 'unreasonable, oppressive[,] or unduly burdensome,'" as the Division did here. *Charles L. Hill, Jr*., 2015 SEC LEXIS 2016, at *2 (quoting 17 C.F.R. § 201.232(e)(2)). While it is also true that in *Hill* I noted that the documents in questions were matters of public record, I noted that fact because it belied any claim of privilege. *Id*. at *2.

3. In their fourth request, Respondents ask for:

> All documents and communications that support, or reflect or are related to the allegations made by Lillian McEwen, a former SEC administrative law judge, as reported by the Wall Street Journal on May 6, 2015, that chief administrative law judge Brenda Murray "questioned [her] loyalty to the SEC" as a result of finding too often in favor of defendants and that SEC administrative law judges are expected to work on the assumption that "the burden was on the people who were accused to show that they didn't do what the agency said they did."

Subpoena Request at 4.

The Division objects, arguing that the Commission recently rejected a similar request. Opp. at 5-6 (relying on *Timbervest, LLC*, Investment Advisers Act of 1940 Release No. 4197, 2015 SEC LEXIS 3854, at * 87 (Sept. 17, 2015)). In *Timbervest*, the Commission considered the Wall Street Journal article to which Respondents refer and held that "unsupported 'speculation or inference . . . attempting to link the former ALJ's allegations to [the *Timbervest*] proceeding" were "not enough . . . to demonstrate bias" or "to warrant further factual development as to Respondents' claims." *Timbervest, LLC*, 2015 SEC LEXIS 3854, at * 87.
The Division also argues that if Respondents think I am biased, they should file a recusal motion. Opp. at 6.

Respondents reply that their fourth request relates to their argument that the Commission's administrative proceedings violate their right to due process. Reply at 10. They believe that evidence that "ALJs are routinely pressured to rule in the Division's favor" "partly" supports their argument. *Id*. at 11. Respondents note that I have previously issued a subpoena,

in a separate proceeding, based on the article on which they rely. *Id*. Respondents additionally rely on the article's claims that "the Division wins overwhelmingly in the administrative process." *Id*. at 12. Respondents also argue that *Timbervest* does not apply because they do not assert that I am biased, but that the administrative process is systemically biased. *Id.* at 12-13. Relatedly, they decline to file a recusal motion because they have "no reason" to seek my recusal. *Id*. at 13.

Respondents are doubtlessly correct that the Due Process Clause guarantees them a right to an unbiased adjudicator and a process free from bias. They are also correct that I granted a request in *Hill* similar to their fourth request. *See Charles L. Hill, Jr*., 2015 SEC LEXIS 2016, at *3. In *Hill*, however, the Office of General Counsel did not specifically object to Mr. Hill's request. Instead, it merely offered without further explanation that it was "'difficult to perceive how' the requested documents could be relevant." *Id*. By contrast, the Division in this case mounts a defense. My resolution of this issue in *Hill*, therefore, has no bearing on this case.

The Commission addressed concerns raised by the Wall Street Journal article in *Timbervest* and concluded that attempts to tie the conversation alleged in the Wall Street Journal article to a specific administrative law judge were insufficient to warrant further factual development. *Timbervest*, 2015 SEC LEXIS 3854, at *87. If that is the case for the challenge respondents in *Timbervest* raised against one administrative law judge, it must also be the case where Respondents specifically disclaim any argument that I am biased and instead raise a systemic claim.[2] Respondents' fourth request is therefore DENIED.

In summary, Respondents' first request is partially granted and partially denied in the manner described above. Respondents' second, third, and fourth requests are denied.

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James E. Grimes
Administrative Law Judge

[2] Respondents must therefore raise their concerns, if at all, through a motion for withdrawal. *See* 17 C.F.R. § 201.112(b).