

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 658/July 20, 2010

ADMINISTRATIVE PROCEEDING
File No. 3-13847

In the Matter of	:	
	:	
MORGAN ASSET MANAGEMENT, INC.,	:	ORDER GRANTING IN PART
MORGAN KEEGAN & COMPANY, INC.,	:	AND DENYING IN PART
JAMES C. KELSOE, JR., and	:	MOTION TO QUASH SUBPOENA
JOSEPH THOMPSON WELLER, CPA	:	

The Securities and Exchange Commission (Commission or SEC) issued an Order Instituting Proceedings (OIP) in this matter on April 7, 2010. The schedule calls for Respondents to file a list of their prospective witnesses and the direct written testimony of their proposed experts on July 27, 2010. The hearing is to begin on September 13, 2010.

On June 1, 2010, Respondents served a subpoena duces tecum on the Commission's Office of Compliance Inspections and Examinations (OCIE). The subpoena contains four requests: (1) examination or inspection reports for Respondents and the Funds at issue in this proceeding from 2002 to the present; (2) documents related to OCIE's examination or review of fair value procedures of the same entities during the same period; (3) documents pertaining to the pricing or valuation of the 389 securities at issue in this proceeding; and (4) materials relating to a sweep discussed by a senior Commission official in a newspaper article.

On June 16, 2010, OCIE moved to quash the subpoena. On June 25, 2010, OCIE filed a supplemental memorandum of law, clarifying its position on certain issues in the motion to quash. On July 7, 2010, Respondents filed their opposition to the motion to quash. On July 14, 2010, OCIE filed a reply to Respondents' opposition. See Rule 232 of the Commission's Rules of Practice.

Discussion and Conclusions

With respect to Request Nos. 1 and 2, the motion to quash is granted in part. OCIE need not produce reports dealing with anti-money laundering compliance or with an examination of the Montgomery, Alabama, branch office which focused on suitability and excessive and unauthorized trading in customer accounts. In addition, OCIE need not produce the two

documents it prepared for and provided to the members of the Commission. In all other respects, the motion to quash Request Nos. 1 and 2 is denied.

OCIE's narrow definition of relevance and its claims of privilege are rejected as to Request Nos. 1 and 2. I note that, until 2004, Commission Rule of Practice 230(a)(1)(vi) required the Division of Enforcement (Division) to make available for inspection and copying by any party any final examination or inspection reports prepared by OCIE that had been obtained by the Division prior to the institution of proceedings. Comment (a) to former Rule 230 explained: "Final inspection or examination reports prepared by [OCIE] . . . may be attorney work product, and other privileges may apply to such reports. Nonetheless, the Commission has determined as a general matter that these final reports will be made available, but only to named Respondents in Commission-initiated adjudicative proceedings."

I find that Request No. 3 is unduly burdensome and I grant the motion to quash it. I accept OCIE's explanation that there is no computerized or other system that would permit it to determine which examinations covered the valuation of specific securities.

In response to Request No. 4, OCIE initially asserted that it had no records of any examination or examination sweep matching the description in a newspaper article provided by Respondents. OCIE acknowledged that it conducted a sweep examination of ten fund groups focusing on pricing/valuation of certain "difficult to value" securities in May 2008. At a June 24, 2010, meeting with Respondents, OCIE clarified its earlier statements. It explained that the May 2008 sweep covered the period beginning in January 2007, the starting date of the violations alleged in the OIP.

OCIE prepared two memoranda for the Commission related to this examination sweep. I agree with OCIE's claim of privilege and quash the subpoena as to these two documents. I reject OCIE's claim that the remainder of the documents responsive to Request No. 4 are not relevant to the present proceeding. I also reject OCIE's claims of undue burden and its blanket claims of attorney-client and deliberative process privileges for the responsive documents. OCIE has not properly invoked the law enforcement privilege and the time for doing so has passed. There is no such thing as an SEC examination privilege. Moreover, a motion to quash a subpoena is not the appropriate venue for OCIE to persuade the Commission to create one. Finally, to the extent that documents responsive to Request No. 4 may contain confidential business information relating to third parties, Respondents are willing to enter into a protective order restricting their use of the confidential business information. No more is required. I now impose a protective order and direct that Respondents shall use any documents produced in response to Request No. 4 only for purposes of the present proceeding.

OCIE requests that, to the extent that its motion to quash is not granted, it should be allowed to preserve the opportunity to raise privileges and additional issues on a document-by-document basis in the future. The request is denied. It has already been seven weeks since Respondents delivered the subpoena to OCIE. To the best of my knowledge, OCIE has not yet produced a single responsive document.

Respondents argue that the responsive documents are important to their defense and that delay in producing them will threaten their right to a fair hearing. It would be unfair to require Respondents to file their witness list or their expert testimony until they have had an opportunity to conduct a thorough review of all responsive documents from OCIE. I will not allow OCIE to delay production until it is no longer of any value to Respondents, i.e., to run out the clock. Accordingly, I modify the prehearing schedule and postpone the due date for Respondents' witness list and expert testimony until August 10, 2010. If delays in production by OCIE continue, I will consider any reasonable motion from Respondents for an additional postponement of the due date beyond August 10, 2010.

ORDER

IT IS ORDERED THAT the motion to quash is granted in part and denied in part, as discussed above; and

IT IS FURTHER ORDERED THAT the due date for Respondents to file their list of proposed hearing witnesses and the direct written testimony of their proposed expert witnesses is postponed until August 10, 2010.

James T. Kelly
Administrative Law Judge