

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 751 / February 20, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15127

In the Matter of	:	
	:	ORDER DENYING MOTION FOR
J. KENNETH ALDERMAN, CPA,	:	MORE DEFINITE STATEMENT
ET AL.	:	
	:	

Procedural Background

On December 10, 2012, the Securities and Exchange Commission (Commission) initiated this proceeding with an Order Instituting Public Administrative and Cease-and-Desist Proceedings (OIP), pursuant to Sections 9(b) and 9(f) of the Investment Company Act of 1940. The hearing is scheduled to commence April 2, 2013.

Pending before me is the Motion for More Definite Statement and Memorandum in Support of Their Motion for More Definite Statement (Motion) filed on January 3, 2013, by Respondents J. Kenneth Alderman, CPA, and Allen B. Morgan, Jr. (collectively, Inside Directors). On January 7, 2013, Respondents Jack R. Blair, Albert C. Johnson, CPA, James Stillman R. McFadden, W. Randall Pittman, CPA, Mary S. Stone, CPA, and Archie W. Willis III (collectively, Independent Directors) (together with the Inside Directors, the Directors) filed a Motion for More Definite Statement joining the Motion filed by the Inside Directors. The Division of Enforcement (Division) filed a Response to the Motion (Opposition) on January 10, 2013, with two attachments (Div. Ex. A-B), and the Inside Directors filed a Reply in Support of their Motion (Reply), with one exhibit (Dir. Ex. A), on January 15, 2013.¹

¹ Div. Ex. A is a list of 315 fair valued securities at issue in this proceeding; Div. Ex. B is the March 18, 2011, Expert Report of Dr. Cindy W. Ma, Ph.D., in Morgan Asset Mgmt, Inc., Admin. Proc. File No. 3-13847 (Morgan); Dir. Ex. A is the May 18, 2010, Order Denying Motion for a More Definite Statement issued by Judge Kelly in Morgan.

The Directors seek (1) the Committee on Uniform Securities Identification Procedures (CUSIP)² number and other information sufficient to identify the individual securities that the Division intends to prove were materially overstated/mispriced; (2) the dates on which each fair valued security alleged was mispriced; (3) the amount of any alleged mispricing; (4) the basis, source, or methodology utilized by the Division to determine the appropriate fair value; (5) the securities for which the Division alleges that broker confirmations were below the Funds'³ values; (6) the securities whose values remained unchanged; (7) the securities for which the portfolio manager directed Fund Account to step down valuations; (8) the securities for which Fund Accounting accepted marks from the portfolio manager and the specific marks at issue; (9) the securities marked down just before the Funds' annual audits; and (10) the securities for which the independent third party provided lower valuations. Motion, pp. 3, 5; Reply, p. 5.

Arguments of the Parties

In its Opposition, the Division provides some additional details to the Directors, including the identities of 315 different fair valued securities that may be at issue in this proceeding. Div. Ex. A; Opposition, p. 2. The Division states that it has retained Dr. Cindy W. Ma, Ph.D. (Dr. Ma), "to be its valuation expert in the instant proceeding, and it expects much of her report to be substantially similar to the one she submitted" in Morgan. Opposition, p. 6. As such, the Division maintains that "a substantial portion of the Division's valuation-related evidence has already, in effect, been made available to" the Directors in her report. Id., pp. 3, 6. Specifically, the Division asserts that Dr. Ma's report provides the Directors with "a good roadmap of much of the Division's evidence for establishing that the [net asset values] of the Funds were materially misstated" during the relevant period. Id., p. 6. Further, the Division summarizes the methods employed in Dr. Ma's expert report to establish the overvaluation of the securities in the portfolio and sets forth additional ways it intends to demonstrate that the Funds were overvalued. Id., pp. 7-8. The Division maintains that the information available is sufficient to inform the Directors of the nature of the charges against them and sufficient for them to prepare an adequate defense. Id., pp. 2, 6.

The Directors contend that "the list [of securities] is meaningless because it allows the Division to prepare its case-in-chief for a specific set of securities . . . while requiring [the Directors] to prepare responses to hundreds of securities." Reply, p. 2. The Directors also argue that Dr. Ma's expert report provides "little guidance as to which securities will require a specific response in this proceeding" and without "a good faith response providing a more definite statement as to which securities will be at issue and how the misstatements were determined to be material, [the Directors] will . . . be left trying to defend themselves against ever evolving allegations." Id., p. 3.

² The CUSIP number consists of nine characters (numbers and letters) that uniquely identify a company or issuer and the type of security.

³ The Funds consist of five registered investment companies: (1) RMK High Income Fund, Inc.; (2) RMK Multi-Sector High Income Fund, Inc.; (3) RMK Strategic Income Fund, Inc.; (4) RMK Advantage Income Fund, Inc.; and (5) Morgan Keegan Select Fund, Inc. OIP, p. 3.

Both the Directors and the Division cite to Administrative Law Judge Kelly's May 18, 2010, Order Denying Motion for a More Definite Statement (Order) in Morgan; the Division for the proposition that the Inside Directors' attorneys represented a party in that proceeding and filed a substantially similar motion for more definite statement which was denied by Judge Kelly, in part, because the Division is not required to produce its evidence in advance of trial. Opposition, p. 2, n.1. The Directors rely on the Order as support for their request that the Division be required to affirm "which securities and marks it actually intends to place at issue . . . so that [the Directors] have a fair opportunity to prepare for the hearing." Reply, pp. 3-4.

Discussion & Conclusions of Law

It is well-established that respondents in administrative proceedings are entitled to be sufficiently informed of the charges against them so that they may adequately prepare their defense; however, respondents are not entitled to a disclosure of evidence in advance of the hearing. See Charles M. Weber, 35 S.E.C. 79 (1953); see also M.J. Reiter Co., 39 S.E.C. 484 (1959). This has been called the "distinction between allegations and evidence." Western Pac. Capital Mgmt., LLC, Administrative Proceedings Rulings Release No. 691 (Feb. 7, 2012). Rule 200(b) of the Commission's Rules of Practice states that the OIP "shall set forth the factual and legal basis alleged therefor in such detail as will permit a specific response thereto." 17 C.F.R. § 201.200(b).

Although not factually identical, I see no principled distinction between Judge Kelly's case and this case as to the request for a more definite statement. Information beyond a sufficient understanding, by a respondent, of the allegations is considered evidence to which they are not entitled prior to the hearing. Western Pac., Release No. 691.

The Directors are seeking information beyond that which will allow them to respond and prepare an adequate defense to the allegations set forth in the OIP. The alleged misconduct occurred over a relatively short period (eight months) and the Division provided a list specifying 315 securities that may be at issue in this proceeding. Dr. Ma's expert report and the Division's Opposition contain substantial information relating to the Division's case, essentially providing a 'roadmap' of its case-in-chief. While it does not set forth which specific securities will be evaluated by Dr. Ma, the Division states that they have retained Dr. Ma for this proceeding and that they anticipate her report in this proceeding will be substantially similar to her report in Morgan, including its use of various valuation methodologies. The identity of the specific securities that will be evaluated by its expert and in its case-in-chief goes beyond that required to provide a response and prepare an adequate defense.

Consistent with Rule 200(b) of the Commission's Rules of Practice, I find that the Directors have sufficient detail relating to the factual and legal basis of the allegations against them such that they may respond and prepare an adequate defense to the allegations. Additionally, applying the Commission's distinction between allegations and evidence, and in light of the information available to the Directors in Dr. Ma's expert report filed in Morgan and the Division's Opposition, I conclude that requiring the production of the information sought by the Directors in their Motion and Reply is contrary to Commission precedent as it would require the disclosure of evidence prior to trial.

Ruling

Accordingly, it is ORDERED that the Motion for More Definite Statement filed by J. Kenneth Alderman, CPA, and Allen B. Morgan, Jr., and joined by Jack R. Blair, Albert C. Johnson, CPA, James Stillman R. McFadden, W. Randall Pittman, CPA, Mary S. Stone, CPA, and Archie W. Willis III is DENIED; and

It is further ORDERED that the Motion for More Definite Statement filed by Jack R. Blair, Albert C. Johnson, CPA, James Stillman R. McFadden, W. Randall Pittman, CPA, Mary S. Stone, CPA, and Archie W. Willis III is DENIED.

Cameron Elliot
Administrative Law Judge