

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 660/November 17, 2010

ADMINISTRATIVE PROCEEDING
File No. 3-13847

In the Matter of	:	
	:	
MORGAN ASSET MANAGEMENT, INC.,	:	ORDER AMENDING JULY 12,
MORGAN KEEGAN & COMPANY, INC.,	:	2010, ORDER ADDRESSING
JAMES C. KELSOE, JR., and	:	ISSUES UNDER RULE OF
JOSEPH THOMPSON WELLER, CPA	:	PRACTICE 230(G)

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on April 7, 2010.¹ Thereafter, on April 15, 2010, the Assistant Regional Director of the Division in the Commission's Atlanta Regional Office, pursuant to delegated authority, instituted a related investigation, Investigation No. A-3211, which is ongoing. This matter originally was assigned to Administrative Law Judge James T. Kelly (Judge Kelly),² who set a hearing for September 13, 2010. On August 27, 2010, the Commission issued an Order staying the September 13th hearing until October 13, 2010, pending its consideration of the Office of Compliance Inspections and Examinations' request for interlocutory review of Judge Kelly's July 20, 2010, Order Granting in Part and Denying in Part Motion to Quash Subpoena. On October 8, 2010, the Commission extended the stay through December 13, 2010.

On July 12, 2010, Judge Kelly entered an Order Addressing Issues under Rule of Practice 230(g) (July 12th Order), wherein he found that Investigation No. A-3211 is a continuation of Investigation No. A-3042 and that Rule 230(g) of the Commission's Rules of Practice (Rule 230(g)) applied to Investigation No. A-3211. He ordered as follows:

Division personnel involved in preparing the present case for hearing shall not participate, directly or indirectly, in Investigation No. A-3211. This prohibition applies to Division counsel of record and to any support staff, including paralegals, who may assist counsel of record. The prohibition shall remain in effect until the end of the hearing and the closing of the record. (First Ordering Paragraph)

¹ The Commission authorized the Division of Enforcement (Division) to begin its investigation of the instant matter, Investigation No. A-3042, on May 8, 2008.

² Judge Kelly retired on September 24, 2010, and the Chief Administrative Law Judge re-assigned this matter to my docket.

During the hearing in this matter, the Division may not examine or cross-examine any witness with testimony or documents obtained by subpoenas issued in Investigation No. A-3211. The Division shall not ask any witness about testimony the witness may have given or documents the Division may have obtained by subpoenas issued in Investigation No. A-3211. The Division may not impeach any witness or refresh the recollection of any witness with evidence obtained by subpoenas issued in Investigation No. A-3211. The Division may not use evidence obtained by subpoenas issued in Investigation No. A-3211 to update or expand the direct written testimony of its proposed expert witness. (Second Ordering Paragraph)

Notwithstanding the requirements of the first two ordering paragraphs, Division personnel conducting Investigation No. A-3211 may share documents and transcripts with Division personnel involved in the present proceeding under the following circumstances. Division personnel involved in Investigation No. A-3211 shall not provide Division personnel involved in preparing the present case for hearing with access to any documents or transcripts from Investigation No. A-3211 unless they provide Respondents with access to the same materials at the same time. If any materials from Investigation No. A-3211 are withheld from Respondents on the grounds that the materials are not relevant to the present proceeding, are privileged, or for any other reason, the withheld materials shall also be withheld from Division personnel involved in preparing the present case for hearing. (Third Ordering Paragraph)

On October 19, 2010, the Division filed a Motion to Amend the July 12th Order (Motion). Respondents filed their Opposition to the Motion (Opposition) on October 27, 2010, and the Division filed its Reply in Support of the Motion (Reply) on October 29, 2010.³

The Division argues that the July 12th Order requires the Division to provide any evidence obtained from Investigation No. A-3211 to Respondents and allows them to use it, but prohibits the Division from doing the same, creating a disadvantage for it and practical problems at the hearing. (Mot. at 1, 6-7; Reply at 1-2.) The Division further represents that it decided to postpone Investigation No. A-3211 in response to the July 12th Order because the hearing in this matter was scheduled only two months later.⁴ (Mot. at 1-2; Reply at 2-3.) Due to the Commission's order staying the proceeding, the hearing is delayed indefinitely and the Division believes that Investigation No. A-3211 cannot wait any longer. (*Id.*) However, the Division contends that the alleged disadvantage created by the July 12th Order prevents it from doing so, and it requests that the July 12th Order be modified in two respects by: (1) removing the restrictions of the Second Ordering Paragraph, preventing the Division from using at the hearing

³ I will cite to the Division's Motion, Respondents' Opposition, and the Division's Reply as "(Mot. at __.);" "(Opp. at __.);" and "(Reply at __.);" respectively.

⁴ The Division was prepared to go to hearing as early as May or June, as well as in September, without the benefit of any documents and transcripts from Investigation No. A-3211. (Division of Enforcement's Notice of Availability for Trial within 60 Days of Service of OIP; June 2, 2010, Prehearing Conf. Tr. at 19; Mot. at 1-2; Reply at 2-3.)

any information obtained by subpoena in Investigation No. A-3211; and (2) creating an exception to the First Ordering Paragraph, allowing the Division staff previously involved in Investigation No. A-3211, but now appearing in this matter, to brief new staff to be assigned to Investigation No. A-3211. (Mot. at 2, 7-8; Reply at 3, 5.)

Respondents argue that the Division's Motion is untimely and granting it would allow the Division to abuse its investigative powers. (Opp. at 1, 4-5.) Respondents further contend that the prejudice and practical problems the Division identifies are of its own making. (Opp. at 5.) Respondents oppose the Division's request to brief new staff for Investigation No. A-3211 as "a transparent attempt to allow the personnel involved in the instant proceeding to control [Investigation No. A-3211] and to determine what questions get asked, what documents get subpoenaed, and what evidence gets developed." (Opp. at 6.) Respondents argue that there is no reason the Division cannot conduct Investigation No. A-3211 without using the personnel in this proceeding. (*Id.*) The Division's position is that the relief requested will not completely rescind the July 12th Order; however, Respondents believe that granting such relief "would enable [the Division] to conduct unlimited discovery outside the presence of Respondents and use the information it obtains for any purpose." (Mot. at 2; Opp. at 7.)

Rule 230(g) provides:

The Division of Enforcement shall promptly inform the hearing officer and each party if investigatory subpoenas are issued under the same investigation file number or pursuant to the same order directing private investigation ("formal order") under which the investigation leading to the institution of proceedings was conducted. The hearing officer shall order such steps as necessary and appropriate to assure that the issuance of investigatory subpoenas after the institution of proceedings is not for the purpose of obtaining evidence relevant to the proceedings and that any relevant documents that may be obtained through the use of investigatory subpoenas in a continuing investigation are made available to each respondent for inspection and copying on a timely basis.

Although the Division characterizes its requested relief as modifications to the July 12th Order, the effect of such modifications would achieve results that Rule 230(g) and the July 12th Order seek to prevent.

First, the Division's request to allow the staff previously involved in Investigation No. A-3211, but now appearing in this matter, to brief new staff to be assigned to Investigation No. A-3211 would constitute direct participation in that investigation. The Division has not raised any new arguments as to why such participation is necessary and should be excepted, and the risk that such a briefing would effectively allow the Division staff involved in this matter to plan and control Investigation No. A-3211 is too great, given Judge Kelly's finding "that one of the Division's purposes in issuing subpoenas in A-3211 is to assist itself in preparing for the upcoming hearing." (July 12th Order at 4.) Accordingly, the First Ordering Paragraph in the July 12th Order shall remain in full force and effect.

Second, the July 12th Order does not require the Division to provide Respondents with any evidence obtained from Investigation No. A-3211; rather, the Order states: “Division personnel conducting Investigation No. A-3211 **may** share documents and transcripts with Division personnel involved in the present proceeding,” but it shall not do so “**unless** they provide Respondents with access to the same materials at the same time.” (July 12th Order at 7 (emphasis added).) Therefore, the duty to provide Respondents with materials from Investigation No. A-3211 is triggered only if the Division personnel involved in Investigation No. A-3211 share documents and transcripts with the Division personnel involved in this matter. Conversely, if the Division personnel involved in Investigation No. A-3211 do not share any evidence with the Division personnel involved in this matter, Respondents will not have access to, or the ability to use, such materials, and the disadvantage and practical problems contemplated by the Division will not exist. Given the Division’s ability to present its case-in-chief without any documents and testimony from Investigation No. A-3211, it suffers no prejudice from the restrictions detailed in the Second Ordering Paragraph of the July 12th Order, and that paragraph shall remain in full force and effect.⁵

The July 12th Order satisfies the requirements of Rule 230(g) by effectively precluding the Division from introducing in this proceeding evidence obtained from investigatory subpoenas in Investigation No. A-3211. However, since the July 12th Order specifically contemplates that the Division personnel conducting Investigation No. A-3211 have the discretion to share documents and transcripts obtained in that investigation with the Division personnel and Respondents in this matter, there is a possibility that Respondents will use such evidence during the course of the hearing. In order to guard against any potential prejudice to the Division, the undersigned retains the discretion to modify the restrictions on the Division’s use of documents and testimony from Investigation No. A-3211. See 17 C.F.R. § 201.111(c)-(d). Accordingly, the Third Ordering Paragraph of the July 12th Order is amended as follows:

Notwithstanding the requirements of the first two ordering paragraphs, Division personnel conducting Investigation No. A-3211 may share documents and transcripts with Division personnel involved in the present proceeding under the following circumstances. Division personnel involved in Investigation No. A-3211 shall not provide Division personnel involved in preparing the present case for hearing with access to any documents or transcripts from Investigation No. A-3211 unless they provide Respondents with access to the same materials at the same time. If any materials from Investigation No. A-3211 are withheld from Respondents on the grounds that the materials are not relevant to the present proceeding, are privileged, or for any other reason, the withheld materials shall also be withheld from Division personnel involved in preparing the present case for hearing. **If Respondents introduce in evidence in this hearing any documents or transcripts from Investigation No. A-3211, the Division may request leave to use documents and testimony from Investigation No. A-3211 for the limited purpose of rebutting the evidence introduced by Respondents.**

⁵ As a result, these proceedings have no relevance to any delay in the Division’s pursuit of Investigation No. A-3211.

ORDER

The Division's Motion to modify the First and Second Ordering Paragraphs of the July 12th Order is DENIED;

IT IS FURTHER ORDERED THAT the Third Ordering Paragraph of the July 12th Order is modified as described above; and

IT IS FURTHER ORDERED THAT Respondents shall prepare an exhibit list for all documents obtained from Investigation No. A-3211 and provide it to the Division and the undersigned at least one day before offering the documents in evidence.

Robert G. Mahony
Administrative Law Judge