ADMINISTRATIVE PROCEEDING
FILE NO. 3-13847

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 7, 2010

In the Matter of	:	
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MORGAN ASSET MANAGEMENT, INC.,	:	ORDER ADDRESSING THE
MORGAN KEEGAN & COMPANY, INC.,	:	DIVISION OF ENFORCEMENT'S
JAMES C. KELSOE, JR., and	:	RENEWED MOTION IN LIMINE
JOSEPH THOMPSON WELLER, CPA	:	

Respondents initially designated five individuals to testify as expert witnesses in this proceeding. The Division of Enforcement (Division) contended that Respondents' multiple experts would opine on the same subject areas, which would result in the impermissible generation of cumulative and repetitive evidence. Accordingly, the Division moved in limine to exclude testimony from Respondents' expert witnesses or, in the alternative, to limit Respondents' experts to subject matters that are non-duplicative and non-cumulative in nature. On July 12, 2010, I denied the Division's motion as premature. I granted the Division leave to renew its motion after Respondents filed the direct written testimony of their proposed experts.

On August 10, 2010, Respondents filed the direct written testimony of four proposed experts: Bruce G. Leto, Mark L. Zyla, Anthony M. Lendez (Lendez), and Z. Christopher Mercer (Mercer). At the same time, Respondents also filed a short cover letter explaining how the testimony of each proposed expert differs from the testimony of the other proposed experts.

On August 24, 2010, the Division renewed its motion in limine, seeking to exclude the testimony of Lendez and Mercer. On August 31, Respondents opposed the Division's renewed motion in limine. On September 3, 2010, the Division filed a reply in support of its renewed motion in limine.

Rule 320 of the Securities and Exchange Commission's (Commission) Rules of Practice provides that an Administrative Law Judge (ALJ) "may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious." "[J]udges have broad discretion in determining whether to admit or exclude evidence, and 'this is particularly true in the case of expert testimony.'" Pagel, Inc., 48 S.E.C. 223, 230 & n.20 (1985) (collecting cases), aff'd, 803 F.2d 942 (8th Cir. 1986); see Scott G. Monson, 93 SEC Docket 7517, 7526 n.27 (June 30, 2008) (upholding an ALJ's decision to limit the Division to one expert witness).

The federal courts follow the same approach. See F.H. Krear & Co. v. Nineteen Named Trustees, 810 F.2d 1250, 1258 (2d Cir. 1987) (affirming the district court's exclusion of expert testimony as cumulative where at least four other witnesses testified on the same subject);

Highland Capital Mgmt., L.P. v. Schneider, 551 F. Supp. 2d 173, 183-84 (S.D.N.Y. 2008) (holding that it "would be a waste of time for [seven] experts to opine on the same subjects"), rev'd and remanded on other grounds, 607 F.3d 322 (2d Cir. 2010); Fed. R. Evid. 403 (court may exclude evidence to avoid "needless presentation of cumulative evidence").

The purpose of a motion in limine is to allow the trial court to rule in advance of trial on the admissibility and relevance of certain forecasted evidence. See Luce v. United States, 469 U.S. 38, 41 n.4 (1984) (noting that, "[a]lthough the Federal Rules of Evidence do not explicitly authorize in limine rulings, the practice has developed pursuant to the district court's inherent authority to manage the course of trials"); see also Palmieri v. Defaria, 88 F.3d 136, 141 (2d Cir. 1996); Nat'l Union Fire Ins. Co. v. L.E. Myers Co. Group, 937 F. Supp 276, 283 (S.D.N.Y. 1996). "Evidence should be excluded on a motion in limine only when the evidence is clearly inadmissible on all potential grounds." SEC v. U.S. Envtl., Inc., 2002 U.S. Dist LEXIS 19701, at *5-6 (S.D.N.Y. Oct. 16, 2002) (citation omitted). Courts considering a motion in limine may reserve judgment until trial, so that the motion is placed in the appropriate factual context. See Nat'l Union, 937 F. Supp. at 287. Further, a court's ruling regarding a motion in limine is "subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the . . . proffer." Luce, 469 U.S. at 41.

The Commission has not been enthusiastic about orders by ALJs granting motions in limine. See City of Anaheim, 54 S.E.C. 452 (1999) (vacating an ALJ's order granting a motion in limine). However, the Commission has emphasized that ALJs retain flexibility in ruling on matters of relevance during the hearing. Id. at 455 ("We . . . wish to make clear that the [ALJ] conducting the hearing may make such rulings with respect to particular evidence as it is introduced as the [ALJ] deems appropriate.").

ORDER

Insofar as the Division's renewed motion in limine seeks to exclude the direct written testimony of proposed witnesses Lendez and Mercer in advance of the hearing, it is denied. Respondents may offer the direct written testimony of both witnesses during the hearing, subject to cross-examination by the Division. Thereafter, the Division's arguments for giving reduced weight or no weight to the testimony of Lendez and Mercer will be addressed in the Initial Decision. Cf. Richmark Capital Corp., 77 SEC Docket 621, 651 (Mar. 18, 2002) (Initial Decision).

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James T. Kelly
Administrative Law Judge