

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 1827/September 22, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15918

In the Matter of

DENNIS J. MALOUF

ORDER QUASHING IN PART AND
MODIFYING SUBPOENA REQUESTS TO
UASNM, INC., AND ALBUQUERQUE
BUSINESS LAW P.C.

The Securities and Exchange Commission (Commission) commenced this proceeding on June 9, 2014, with an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) pursuant to Section 8A of the Securities Act of 1933 (Securities Act); Sections 15(b), 15C(c), and 21C of the Securities Exchange Act of 1934; Sections 203(f) and 203(k) of the Investment Advisers Act of 1940; and Section 9(b) of the Investment Company Act of 1940. The hearing is scheduled to commence on November 3, 2014.

On August 28, 2014, this Office received Respondent Dennis J. Malouf's (Malouf) Motion for Issuance of Subpoenas Duces Tecum Without Deposition (Motion for Issuance) pursuant to the Commission's Rules of Practice (Rule) 154 and 232. *See* 17 C.F.R. §§ 201.154, .232. The Motion for Issuance included a request for issuance of subpoenas to UASNM, Inc. (UASNM), and Albuquerque Business Law P.C. (ABL), and was not opposed by the Division of Enforcement (Division). Motion for Issuance at 6 & Exs. E, H. On August 28, 2014, I granted the Motion for Issuance as to UASNM and ABL and issued the requested subpoenas (UASNM Subpoena and ABL Subpoena, respectively). *Dennis J. Malouf*, Admin. Proc. Rulings Release No. 1740, 2014 SEC LEXIS 3087. UASNM and ABL have since filed motions to quash the subpoenas.

A party may request the issuance of subpoenas requiring the production of documentary or other tangible evidence. 17 C.F.R. § 201.232(a). However, a subpoena may be quashed or modified "[i]f compliance with the subpoena would be unreasonable, oppressive or unduly burdensome," or excessive in scope. 17 C.F.R. § 201.232(b), (e)(2). Although the Commission sometimes looks to them for general guidance, the Federal Rules of Civil Procedure (FRCPs) do not apply in Commission administrative proceedings. *John Thomas Capital Mgmt. Grp. LLC*, Securities Act Release No. 9492, 2013 SEC LEXIS 3860, at *26 (Dec. 6, 2013); *Clarke T. Blizzard*, 55 S.E.C. 754, 761 n.17 (2002); *Putnam Inv. Mgmt., LLC*, Admin. Proc. Rulings Release No. 614, 2004 SEC LEXIS 865, at *3-4 (Apr. 7, 2004). FRCP 26 permits discovery as

to any matter, not privileged, that is “reasonably calculated to lead to the discovery of admissible evidence.” FRCP 26(b)(1). No such standard appears in Rule 232. *See* 17 C.F.R. § 201.232. Under FRCP 45, issuance of a subpoena is ministerial, and although a subpoena may be quashed or modified on the basis of “undue burden,” it also may be quashed or modified on bases not found in the Rules. *Compare* FRCP 45(a)(3), (d)(3)(A)(iv) *with* 17 C.F.R. § 201.232(b), (e)(2). Indeed, Rule 232 does not even use the term “discovery.” *See* 17 C.F.R. § 201.232. In short, the central issue here – whether and how to modify or quash the subpoenas – is governed by a standard entirely unlike the standards in the FRCPs, and the FRCPs are generally not helpful in resolving it.

UASNM Application

The UASNM Subpoena requests production of twenty-six categories of documents. UASNM Subpoena at Exhibit A. On September 8, 2014, UASNM filed an Application to Quash Subpoena Issued August 28, 2014 to UASNM, Inc. upon Request of Respondent (UASNM Application). UASNM argues, among other things, that the UASNM Subpoena is overly broad because it seeks documents that are not relevant to the OIP, is unreasonable and unduly burdensome because it seeks documents already produced to the Commission during its investigation of UASNM and to Malouf as part of a 2011 state court litigation, and is unreasonable and unduly burdensome because it seeks practically all UASNM business records for the past ten years. UASNM Application at 1. UASNM also requests a hearing, which I construe as a request for oral argument. UASNM Application at 12.

On September 18, 2014, Malouf filed an Opposition to UASNM’s Application (UASNM Opposition), stating that he does not expect UASNM to produce documents already produced to the Commission or during the state court litigation and that he is only looking for additional responsive documents that have not yet been produced. UASNM Opposition at 10, 12. He counters UASNM’s claims that his requests seek irrelevant documents and argues that the scope of relevance extends to both the claims in the OIP and his defenses. *Id.* at 11.

Based on Malouf’s and UASNM’s representations, UASNM’s documents are very likely to be useful to Malouf in preparing his defense. That said, several of UASNM’s objections are meritorious, and the UASNM Subpoena will be modified. UASNM need not produce any documents that have already been produced to the Commission during its investigation or to Malouf in the state court proceeding. UASNM need not produce any privileged document or attorney work product, but should produce a privilege log. In view of the estimated costs cited in the Affidavit of Kirk Hudson (Hudson), which is attached to the UASNM Application as Exhibit 4, Malouf will be required to pay UASNM’s costs. UASNM Application at Ex. 4. Additional argument on the UASNM Application is unnecessary, and UASNM’s request for oral argument is denied. UASNM will be required to complete production by October 3, 2014.

I have reviewed each of the twenty-six requests in the UASNM Subpoena under the standard of Rule 232(e)(2) and in light of UASNM’s other objections. *See* 17 C.F.R. § 201.232(e)(2). I have quashed or modified requests seeking irrelevant evidence. *See David F. Bandimere*, Admin. Proc. Rulings Release No. 746, 2013 SEC LEXIS 399, at *12-13 (Feb. 5, 2013). As a general matter, Malouf may resubmit requests that are quashed or modified due to

relevance and reasonableness at a later date if he can articulate with more particularity why his requests are appropriate.

- Requests one, two, and three seek securities and bond transactions data. I will limit the temporal scope of these requests to the period January 1, 2007, through December 31, 2012. This should be sufficient to meet Malouf's needs without being unduly burdensome to UASNM.
- Requests four and five seek Forms ADV and all documents, correspondence, or communications related to these filings and the development, publication, and/or approval of UASNM's website and its contents. This request is reasonable and will not be modified or quashed.
- Requests six, seven, eight, and nine seek various correspondence or communications without a limit on subject matter. This request is overbroad and unreasonable and will be quashed.
- Requests ten and eleven seek all documents, correspondence, or communications regarding the state court litigation and the Commission investigation of UASNM. This request is reasonable and will not be modified or quashed.
- Request twelve seeks documents, correspondence, or communications exchanged between UASNM and any third party retained by UASNM to assist in responding to the Commission investigation. The relevance of this request is unclear without additional explanation and it will be quashed as unreasonable.
- Request thirteen seeks all privilege logs created in connection with the Commission investigation. This request is reasonable and will not be modified or quashed.
- Request fourteen seeks all documents regarding payments of any kind made to UASNM and certain of its employees by Raymond James Financial Services, Inc. (Raymond James); National Advisors Trust Company, FSB; Fidelity Brokerage Services, LLC; and/or Charles Schwab & Co., Inc. This request is overbroad and unreasonable and will be quashed.
- Request fifteen seeks documents regarding UASNM's best execution practices. This request is reasonable and will not be modified or quashed.
- Request sixteen seeks documents, correspondence, or communications relating to UASNM's supervision of various UASNM employees. This request is unduly vague and will be quashed as unreasonable.
- Request seventeen seeks documents, correspondence, or communications relating to Malouf's sale of the Raymond James branch office. This request is reasonable and will not be modified or quashed.

- Request eighteen seeks documents, correspondence, or communications relating to Hudson and Malouf's purchase of the precursor to UASNM. The relevance of this request is unclear without additional explanation and it will be quashed as unreasonable.
- Request nineteen seeks documents, correspondence, or communications relating to UASNM's employment and/or termination of Malouf. This request is unduly vague and will be quashed as unreasonable.
- Request twenty seeks documents, correspondence, or communications regarding any UASNM client complaints about Malouf, bond transactions, fees, commission, and/or account losses. This request is reasonable and will not be modified or quashed.
- Requests twenty-one, twenty-two, and twenty-three seek documents relating to the duties and responsibilities of Joseph Kopczynski, Hudson, and Matthew Keller in their respective UASNM positions. This request is unduly vague and will be quashed as unreasonable.
- Request twenty-four seeks UASNM marketing materials. I will limit the temporal scope of this request to the period January 1, 2007, through December 31, 2012. This should be sufficient to meet Malouf's needs without being unduly burdensome to UASNM.
- Request twenty-five seeks documents regarding each UASNM employee, representative, or shareholder/owner's salary, bonus, earnings payout, or other forms of compensation. This request is reasonable and will not be modified or quashed.
- Request twenty-six seeks documents, correspondence, or communications regarding any investigation or examination of UASNM by the Commission and/or Charles H. Chaney. I will limit the temporal scope of this request to the period January 1, 2011, through the present. The relevance of anything earlier than this date is not yet apparent.

ABL Motion

The ABL Subpoena requests production of six categories of documents. ABL Subpoena at Ex. A. On September 9, 2014, ABL filed a Motion to Quash Multiple Subpoenas Issued August 28, 2014 or in the Alternative, Motion to Modify Subpoenas and Prayer for a Protective Order and Motion for Confidentiality of Documents and Hearings (ABL Motion).¹ ABL

¹ This Order deals only with ABL's motion to quash or modify. I previously ruled on ABL's request for a protective order. *See Dennis J. Malouf*, Admin. Proc. Rulings Release No. 1780, 2014 SEC LEXIS 3248, at *3-4 (Sept. 9, 2014).

represents that it contacted counsel for Malouf, requested an extension of time to comply, and discussed the scope of the items sought, but no acceptable resolution was reached. ABL Motion at 3.

On September 15, 2014, this Office received Malouf's Opposition to the ABL Motion (ABL Opposition). Malouf disputes ABL's representation of the scope of discussions between counsel and represents that the parties reached a compromise regarding both the production of responsive documents and an extension of the deadline to respond to the subpoena. ABL Opposition at 3-5. Malouf states that the parties conferred by telephone on September 8, 2014, to discuss an extension of time to comply and two objections that ABL had to the requests. *Id.* at 4. ABL objected to the third request to the extent that it did not specify that it sought "non-privileged" documents and potentially sought documents that ABL believed were subject to attorney-client privilege. *Id.* ABL's second objection was a claim of attorney-client privilege as to documents exchanged with ACA Compliance Group Holdings, LLC (ACA Holdings), which ABL maintained had been retained as experts by UASNM in connection with the state court action and Commission investigation.² *Id.* Malouf characterizes the agreement reached with ABL as follows: ABL agreed to produce non-privileged, responsive documents on a rolling basis starting September 8, 2014; and to resolve ABL's two objections, Malouf proposed, and ABL agreed, that ABL need only produce non-privileged documents and a privilege log. ABL Opposition at 4-5 and Ex. A. Malouf also attached to the ABL Opposition a September 8, 2014, email chain between Malouf's counsel and ABL, documenting the production agreement discussed on an earlier phone call (Exhibit A).

I applaud counsels' meet-and-confer efforts. I find the potential agreement described by Malouf and documented in Exhibit A to the ABL Opposition to be a reasonable compromise and I will order that the described agreement be followed. In view of ABL's retention as litigation counsel for UASNM, it seems very unlikely that ABL would have a substantial number of documents that are not privileged or covered by the work product doctrine. Additionally, I will not require ABL to produce documents it knows to have been produced to either the Commission or Malouf during the state court litigation. As a result, it is reasonable to assume that the volume of documents to be produced (responsive, non-privileged, and non-duplicative) is small. Malouf does not contradict ABL's claim that its "files in this matter were opened pursuant to the 2011 state-court litigation," meaning that the temporal scope of responsive documents is likely to be limited. ABL Motion at 9; *see* ABL Opposition at 10. Therefore, production of documents will not be unduly burdensome, ABL will be required to complete production by September 30, 2014, and Malouf will not be required to pay costs.

To the extent that ABL is concerned with potential privilege and work product issues as to ACA Holdings; Peltier, Gustafson & Miller, P.A.; and Capital Forensics, Inc., it should consult with those entities as part of those entities' privilege review.

² Malouf noted that he advised ABL that regardless of this expert relationship, any documents that were previously exchanged between UASNM and ACA Holdings in the course of the compliance and regulatory relationship were not privileged and should be produced. ABL Opposition at 4.

Order

It is ORDERED that UASNM, Inc.'s Application to Quash Subpoena Issued August 28, 2014 to UASNM, Inc. Upon Request of Respondent is GRANTED IN PART as set forth above.

It is further ORDERED that Respondent's Subpoena Duces Tecum Without Deposition, issued to UASNM, Inc., is MODIFIED as follows and otherwise QUASHED: UASNM, Inc., shall produce responsive, non-privileged, and non-duplicative documents no later than close of business on October 3, 2014, for requests four, five, ten, eleven, thirteen, fifteen, seventeen, twenty, and twenty-five as fully described in Respondent's Subpoena, and for requests one, two, three, twenty-four, and twenty-six as modified above. Respondent shall pay UASNM, Inc.'s expenses incurred in its production. Upon receipt, Respondent shall promptly make the produced documents available to the Division of Enforcement for inspection and copying.

It is further ORDERED that UASNM, Inc.'s request for oral argument is DENIED.

It is further ORDERED that Albuquerque Business Law P.C.'s Motion to Quash Multiple Subpoenas Issued August 28, 2014 or in the Alternative, Motion to Modify Subpoenas and Prayer for a Protective Order and Motion for Confidentiality of Documents and Hearings is GRANTED IN PART as set forth above.

It is further ORDERED that Respondent's Subpoena Duces Tecum Without Deposition, issued to Albuquerque Business Law P.C., is MODIFIED as follows: Albuquerque Business Law P.C. shall produce responsive, non-privileged, and non-duplicative documents no later than close of business on September 30, 2014. Upon receipt, Respondent shall promptly make the produced documents available to the Division of Enforcement for inspection and copying.

Cameron Elliot
Administrative Law Judge