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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4619/February 22, 2017

ADMINISTRATIVE PROCEEDING
File No. 3-16554

In the Matter of GRAY FINANCIAL GROUP, INC., LAURENCE O. GRAY, and ROBERT C. HUBBARD, IV	ORDER DEEMING ATTORNEY-CLIENT PRIVILEGE WAIVED AND TO SHOW CAUSE

On January 23, 2017, the parties submitted their respective prehearing briefs. On January 27, 2017, following a prehearing conference on January 26 (Prehearing Conference), I ordered the Division of Enforcement to submit a motion addressing whether Respondents waived the attorney-client privilege with respect to advice received from their counsel, Greenberg Traurig, LLP (Greenberg), and addressing potential disqualification of Respondents' counsel. *Gray Fin. Grp.*, Admin. Proc. Rulings Release No. 4562, 2017 SEC LEXIS 285. On January 31, 2017, the Division submitted such a motion attaching various exhibits (hereinafter DX __). Respondents timely submitted an opposition (Opp'n) also attaching various exhibits (hereinafter RX __). The Division timely submitted a reply, attaching additional exhibits, including excerpts of the investigative testimony of Respondent Laurence O. Gray (Gray Testimony) and Respondent Robert C. Hubbard, IV (Hubbard Testimony).

Background

The order instituting proceedings (OIP) alleges, in pertinent part, as follows. Respondents are a registered investment adviser and two of its officers, and in 2012 and 2013 their clients included several Atlanta-area public pension funds. *See* OIP at 2-3. On July 1, 2012, the state of Georgia enacted legislation (the "Georgia Act") that permitted Georgia public pension funds, including some of Respondents' clients, to invest in alternative investments such as funds of funds. *See id.*; Ga. Code Ann. § 47-20-87. The Georgia Act imposes multiple restrictions on Georgia public pension funds' alternative investments, including three restrictions at issue in this proceeding: (1) no single public pension fund may invest more than twenty percent of the capital to be invested in the alternative investment; (2) each alternative investment must have previous or concurrent investments or commitments by at least four other investors not affiliated with the issuer; and (3) the alternative investment must have at least $100 million in assets, including committed capital, at the time the public pension fund initially invests or commits. *See* OIP at 2-4; Ga. Code Ann. § 47-20-87(c).

According to the OIP, in late 2012 Respondents created a fund of funds, GrayCo Alternative Partners II, LP (GrayCo Alt. II), and recommended it to their public pension fund clients, four of which took the recommendation and invested in it. *See* OIP at 2, 4. Although some of the Georgia Act requirements may have been met, none of the four investments satisfied all three of the Georgia Act requirements at issue. *See id.* at 4-5. The OIP also alleges that Respondents made material misrepresentations to one public pension fund client. *See id.* at 5-6. Therefore, Respondents allegedly committed, aided and abetted, and/or caused violations of several provisions of the federal securities laws, including Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Section 206 of the Investment Advisers Act of 1940 and Rule 206(4)-8 thereunder. *See id.* at 6.

In their answer, Respondents assert nine affirmative defenses, including that "Respondents reasonably relied on the advice of counsel that [GrayCo Alt. II] and any related offering to Georgia pensions complied with [the Georgia Act]." Answer at 5. Respondents state that the law firm they relied on was Seward & Kissel LLP (Seward), a firm based in New York City. *See* DX 40, 52. Respondents waived attorney-client privilege as to Seward, and the investigative record contains documents pertinent to Seward's representation. *See* Prehearing Conference Tr. 35.

According to these documents, and other evidence obtained or created after the OIP issued, Respondents engaged Seward on July 15, 2011, to represent them "in connection with the organization of one or more private investment funds." RX 173 at 1. Such representation included the preparation of offering documents, coordination of blue sky filings, "legal advice in connection with the offering of interests," and advice "on regulatory and other matters" for which Respondents requested Seward's assistance. *Id.* Seward had previously worked on an earlier alternative fund created by Respondents named GrayCo Alternative Partners I, LP. *See* RX 319.

On June 8, 2012, approximately three weeks prior to the effective date of the Georgia Act, Hubbard sent an email to a Seward attorney, Alexandra Segal, referencing a conversation "several weeks ago about our proceeding with [GrayCo Alt. II]." DX 89 at 338257. Hubbard requested drafts of pertinent offering documents, which he expected would be easy to adapt from the GrayCo Alt. I documents, and requested an interpretation of one of the provisions of the Georgia Act. *See id.* Specifically, he stated that Respondents "cannot seem to interpret" the $100 million in assets requirement, and that Respondents' "preference is for a $75M cover." *Id.* Hubbard attached a copy of the pending bill that eventually became the Georgia Act. *See id.* at 338258-63.

Approximately two hours after Hubbard's email to her, Segal wrote back, opining that under the Georgia Act "an eligible large retirement system may only make an alternative investment in a fund that has at least $100M in assets, including committed capital." DX 90. She also noted that it was unclear whether the $100 million could include the pension fund's investment, and said she would confer with another Seward attorney about it. *See id.* Six days later, on June 14, 2012, Segal sent an email to Hubbard, asking, "[h]ave you determined how you are going to address the $100 million requirement for investment by Georgia large retirement

systems?" DX 91. Hubbard responded four days later, stating that Respondents were "still working locally to determine how best to address this," and that they were "seeking an opinion locally on whether the $100M threshold must have already been cleared prior to a GA Public Fund making its commitment." DX 92.

Seward apparently did not forward any GrayCo Alt. II offering documents in response to Hubbard's initial request, and on June 28, 2012, Hubbard asked Segal to forward the documents that day. *See* DX 103. By July 9, 2012, Seward still had not forwarded any documents, and on that day Hubbard again asked for them, telling Segal that "[w]e are meeting with two prospective investors tomorrow and I was hoping to already have these in presentable form." *Id*. Hubbard did not identify the "two prospective investors." *Id*. Segal forwarded six documents, three "Marked" and three "Clean," to Hubbard later that day. DX 131. Segal noted in her cover email that the documents were "initial drafts." *Id*. The offering memorandum listed GrayCo Alt. II's target aggregate capital in brackets as "[$75 million]," because Segal considered the target amount an "open point." RX 84 at 19668; RX 1362 at 160.

Respondents received legal advice from Seward pertaining to GrayCo Alt. II after July 9, 2012, but not on any issue related to the Georgia Act. *See* RX 1362 at 217-18. As of September 19, 2012, Seward's overdue outstanding invoices to Respondents totaled over $24,000, and Hubbard instructed a colleague, Marc Hardy, to "send our most sincere apologies" to Seward, but not to "let them know that we're changing counsel going forward." DX 93. That new counsel was Greenberg Traurig, LLP, Respondents' present trial counsel, as Hubbard disclosed during his investigative testimony on November 13, 2013. *See* DX A at 157-58. Genna Garver, a Greenberg attorney at the time, was Respondents' predominant point of contact and was present by videoconference during Hubbard's investigative testimony. *Id*. at 3, 158. However, numerous other Greenberg attorneys, including Rachel Cohen-Deano, worked on the engagement. *See* DX 78; RX 1365 at 3; RX 1371.

There is no evidence that Respondents received particularized and explicit advice from either Seward or Greenberg as to whether the four pension plan investments met the $100 million requirement, or whether either of the other two specific requirements of the Georgia Act were met, other than Segal's advice that "an eligible large retirement system may only make an alternative investment in a fund that has at least $100M in assets, including committed capital." DX 90; *see* RX 1362 at 160. Respondents have submitted declarations from multiple present and former Greenberg attorneys stating that Greenberg "was not asked for advice by the clients and did not provide the clients any legal advice, opinion, interpretation or analysis of the Georgia Act provisions at issue" at any relevant time, or words to that effect. *E.g.*, RX 1365 at 3; RX 1370 at 2; *but see* RX 1372 (declaration of former Greenberg associate that omits disclaimer about not providing advice about the Georgia Act). Respondents Gray and Hubbard have likewise submitted declarations stating that they did not seek, receive, or rely on legal advice from Greenberg regarding the Georgia Act. *See* RX 1366 at 2-3; RX 1367 at 3. Hubbard expressly declared that he "did not revisit the $100 million cover issue with Greenberg." RX 1366 at 3.

But Hubbard testified during the investigation that after Respondents shifted counsel to Greenberg, "we, you know, posed the question again" regarding interpretation of the $100 million requirement. DX A at 156-58. I am not persuaded by Respondents' argument that

Hubbard's testimony on this point was "unclear at best." Opp'n at 13-14. Hubbard also testified that he "likely" communicated Segal's interpretation to Gray in June 2012. Hubbard Testimony at 224-25. Gray, by contrast, testified during the investigation that he did not recall seeing Segal's June 8, 2012, email regarding interpretation of the $100 million requirement, or learning about it from Hubbard. *See* Gray Testimony at 401, 411-13. Gray also testified that he was not aware of Respondents seeking a "local opinion" on behalf of GrayCo Alt. II. Gray Testimony at 413.

Greenberg was, in any event, much better situated than Seward to provide advice on the $100 million requirement, and the other two requirements of the Georgia Act, because it represented Respondents during most of the time the pension fund clients were actually investing in or committing to invest in GrayCo Alt. II, while Seward's work on the fund ended in August 2012, before any commitments. *See* RX 1362 at 217 (Seward's last work on GrayCo Alt. II was on August 6, 2012); Segal Deposition (attached to Div. Reply) at 213 (Segal testified that she never discussed with Hubbard "the particular facts under which the Georgia plan may invest, such as timing"). And Respondents otherwise relied on Greenberg's work in essentially the same way they had previously relied on Seward's.

Greenberg was first engaged by Respondents on September 4, 2012, in connection with numerous matters, some unrelated to GrayCo Alt. II, and its first time entries for "revising and completing the then existing GrayCo II fund of funds offering documents" were recorded on September 20, 2012. RX 1365 at 2. On September 14, 2012, Hubbard forwarded "draft docs for [GrayCo Alt. II]" to his colleague Hardy, and requested that he "send [them] to [Greenberg] at your earliest convenience." RX 1369 at 26302. Hubbard highlighted several "[i]mportant items for them to consider," and attached redlined versions of the documents "so that [Greenberg] can see what's changed." *Id*. The GrayCo Alt. II private offering memorandum was one such document. *See id.* at 26378. That memorandum listed "$100,000,000" as the fund's targeted capital commitment, a change made personally by Hubbard on August 13, 2012. *Id*. at 26384; RX 1366 at 2.

On October 16, 2012, Greenberg transmitted two offering documents to Hubbard, "revised as we discussed." DX 78. One revision appears to have been identification of Greenberg, rather than Seward, as Respondents' counsel on the offering documents presented to the four public pension funds at issue in the OIP. *See* DX 1 at 13447; Prehearing Conference Tr. 43. On October 19, 2012, Hubbard told counsel for two of the pension funds that "[w]e still have our counsel standing by and ready to answer any specific questions that you have." DX 151.

On November 14, 2012, at Respondents' request, Greenberg sent them offering documents, individually numbered and tracked, to be distributed to the City of Birmingham Police & Fire Supplemental Fund. DX 71. On December 3, 2012, Hubbard informed a third party by email that GrayCo Alt. II had "two investors so far for $36M," and he expected to "exceed our target of $100M." DX 69. On December 5, 2012, the email chain was copied to Garver, the primary Greenberg attorney on the matter, with certain offering documents attached. *Id*.

Between September 11, 2012 – before Greenberg began working on GrayCo Alt. II – and November 30, 2012, the four public pension clients at issue either committed to investing in GrayCo Alt. II, or authorized a representative to commit to so investing. *See* Resp. Prehearing Br. Ex. 10 at 4; Ex. 11 at 4; Ex. 12 at 5; Ex. 15 at 3. However, the initial commitment by all four pension funds combined was allegedly $77 million, much closer to the $75 million Respondents originally desired; an affiliate of Respondents contributed $1 million, and one of the four pension funds later contributed an additional $5 million, so that the ultimate total funding was $83 million. *See* Division Prehearing Br. at 8.

Both Gray and Hubbard executed declarations on February 2, 2015, stating that they did not "seek, receive, or rely on" any interpretation of the Georgia Act or associated legal advice or opinion by Greenberg, or any firm other than Seward, prior to January 31, 2013. DX 40, 52. Although these declarations were drafted by the Division, Respondents were represented by Greenberg at the time they signed them, and the Division sent the draft declarations to Respondents' present lead trial counsel. *See* RX 1363. Recently, on February 6, 2017, Gray and Hubbard both executed updated declarations stating that they did not "seek, receive, or rely on" any advice from Greenberg related to the Georgia Act before August 16, 2013. RX 1366 at 3; RX 1367 at 3. In those declarations, Gray and Hubbard also stated that they have executed on behalf of themselves and Gray Financial Group, "informed written waiver[s]" of any conflict of interest "that might exist as a result of Greenberg's role in completing the GrayCo II fund offering documents." RX 1366 at 4; RX 1367 at 4. I take official notice that Respondents filed a malpractice action against Seward in May 2016, which was removed to the U.S. District Court for the Northern District of Georgia, in which they allege that Seward provided "negligent advice and representation" regarding GrayCo Alt. II. *See Gray Fin. Grp. v. Seward & Kissel LLP*, No. 1:16-cv-1956 (N.D. Ga.), Document 1-1 at 12 of 43; Resp. Prehearing Br. Ex. 5 at 9.

Waiver

Actual assertion[1] of reliance on advice of counsel as an affirmative defense is a "quintessential example" of an implied waiver of the attorney-client privilege. *In re Cty. of Erie*, 546 F.3d 222, 228 (2d Cir. 2008). This is because a failure to deem the privilege waived would "deprive [the Division] of information necessary to 'defend' against [Respondents'] affirmative defense." *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975). The implied waiver extends to all communications with counsel relating to the same subject matter, even communications with other counsel on whose advice Respondents claim they did not rely, and, in some instances, even to communications with trial counsel after the initiation of litigation. *See In re Echostar Commc'ns Corp.*, 448 F.3d 1294, 1299 (Fed. Cir. 2006); *Intex Recreation Corp. v. Team Worldwide Corp.*, 439 F. Supp. 2d 46, 52 (D.D.C. 2006). Otherwise, Respondents "could selectively disclose fragments helpful to [their] cause, entomb other (unhelpful) fragments, and in that way kidnap the truth-seeking process," that is, they could use attorney-client privilege as both "a sword and a shield." *In re Keeper of Records*, 348 F.3d 16, 24 (1st Cir. 2003); *see also*

[1] Because Respondents have asserted the defense with vigor in this proceeding, I do not address whether waiver may be implied merely by assertion of reliance on advice of counsel in a respondent's answer. *See* Amendments to the Commission's Rules of Practice, 81 Fed. Reg. 50212, 50220 n.72 (July 29, 2016).

Koch v. Cox, 489 F.3d 384, 390 (D.C. Cir. 2007); *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1417 (11th Cir. 1994).

There is no dispute that Respondents expressly waived attorney-client privilege with respect to communications with Seward during the relevant period that relate to interpretation of the Georgia Act provisions at issue and that they did not so expressly waive privilege with respect to communications with Greenberg. The Division argues that Respondents' assertion of reliance on advice of counsel impliedly waived privilege even as to communications with Greenberg. *See* Mot. at 5. In opposition, Respondents initially took the position that their advice of counsel defense "[did] not automatically waive Respondents' attorney-client privilege with respect to their Greenberg communications." Opp'n at 14. However, on February 14, 2017, Respondents submitted to this office an email (which I have caused to be filed with the Commission's Office of the Secretary) stating that they do not oppose the argument that Respondents waived the attorney-client privilege with respect to otherwise privileged communications with Greenberg concerning the legal work Greenberg "did on the GrayCo II offering and the interpretation of the Georgia Act provisions at issue" between their engagement for the fund offering in September 2012 and August 16, 2013.

The record shows that Respondents impliedly waived privilege. Seward drafted offering documents and forwarded them to Respondents, Respondents sought advice on the $100 million requirement of the Georgia Act, and Seward responded with (limited) advice on that subject. Greenberg modified the offering documents and forwarded them to Respondents, and, according to Hubbard's investigative testimony, Respondents sought advice from Greenberg on the $100 million requirement (although Hubbard disavows seeking any such advice in his declarations). And the crucial events for purposes of this proceeding – the four pension fund clients' investments or commitments in GrayCo Alt. II – allegedly took place entirely after Seward ended its representation and largely after Greenberg began its representation. Seward and Greenberg are not identically situated, but they are similarly situated enough that waiver should be implied to prevent Respondents from abusing the attorney-client privilege.

Waiver is warranted based upon the record, and Respondents do not contest it. The attorney-client privilege between Respondents and Greenberg is therefore deemed waived as to communications concerning the legal work Greenberg did on the GrayCo Alt. II offering and the interpretation of the Georgia Act provisions at issue in this proceeding between September 4, 2012, and August 16, 2013, which is the end of period of conduct charged in the OIP. *See* OIP at 2; Prehearing Tr. 37; Mot. at 3.

Disqualification

A. Legal Standard

Rule of Practice 111 provides the hearing officer with "the authority to do all things necessary and appropriate to discharge his or her duties," including "[r]egulating the course of a proceeding and the conduct of the parties and their counsel." 17 C.F.R. § 201.111(d). Further, Rule of Practice 103 provides that the "Rules of Practice shall be construed and administered to secure the just . . . determination of every proceeding." 17 C.F.R. § 201.103(a). The

Commission has held that "[d]isqualification of counsel under Rule 111(d) would be appropriate if a conflict of interest is of sufficient magnitude to render the proceeding unjust." *Clarke T. Blizzard*, Advisers Act Release No. 2032, 2002 SEC LEXIS 3426, at *5 (Mar. 24, 2002).

In an administrative proceeding, a person is entitled to be represented by or appear through counsel pursuant to the Administrative Procedure Act, from which courts have implied the concomitant right to counsel of one's choice. *See* 5 U.S.C. § 555(b); *SEC v. Csapo*, 533 F.2d 7, 10-11 (D.C. Cir. 1976); *SEC v. Higashi*, 359 F.2d 550, 553 (9th Cir. 1966). However, "respondents in Commission proceedings do not enjoy an absolute right to counsel of their original choosing when[, for example,] a conflict of interest with that attorney threatens the integrity of Commission processes." *Trautman Wasserman & Co., Inc.*, Exchange Act Release No. 55989, 2007 SEC LEXIS 1408, at *15-16 (June 29, 2007). The presumption in favor of a person's chosen counsel "may be overcome not only by a demonstration of actual conflict but also by a showing of a serious potential for conflict." *Wheat v. United States*, 486 U.S. 153, 164 (1988).

The Commission has specifically cautioned:

> We have an obligation to ensure that our administrative proceedings are conducted fairly in furtherance of the search for the truth and a just determination of the outcome. Even the appearance of a lack of integrity could undermine the public confidence in the administrative process upon which our authority ultimately depends.

Clarke T. Blizzard, 2002 SEC LEXIS 3426, at *6. This concern cannot be addressed simply by a client's consent or waiver of conflicts of interest. *Id.* at *6 & n.10. "Rather, the issue is whether the Commission consents to the impact on its adjudicatory processes created by" the conflict. *Id.* at *6. This is consistent with the principle that some conflicts of interest cannot be waived; in other words, my "independent duty to assure a fair [hearing] may override such a waiver." *United States ex rel. Stewart v. Kelly*, 870 F.2d 854, 858 (2d Cir. 1989); *see Wheat*, 486 U.S. at 162-63 (a trial court may refuse waivers of conflicts of interest to ensure the adequacy of representation, to protect the integrity of the court, and to preserve the trial judge's interest to be free from future attacks over the adequacy of the waiver and the fairness of the trial).

Nonetheless, before disqualifying counsel, there must be "concrete evidence" that counsel's representation would undermine the integrity of the proceeding. *Csapo*, 533 F.2d at 11. In *Csapo*, the D.C. Circuit upheld a district court's order conditioning enforcement of a Commission subpoena upon the respondent's right to be accompanied by attorneys of his choice during questioning. *Id.* at 8. The district court found, and the appeals court agreed, that the Commission failed to produce any "concrete evidence" of misconduct to justify excluding counsel. *Id.* The appeals court held that "before the SEC may exclude an attorney from its proceedings, it must come forth . . . with 'concrete evidence' that his presence would obstruct and impede its investigation." *Id.* at 11. Although the conflict at issue in the present proceeding does not relate to obstructing and impeding a Commission investigation, I apply the same "concrete evidence" standard in assessing a conflict that may undermine the integrity of the proceeding.

B. Discussion

Respondents contend that the various declarations from Respondents and Greenberg personnel "negate every conceivable area where there could potentially be a conflict." Opp'n at 18. The Division, while noting that the severity of any conflict is unclear, points out that advice from Greenberg consistent with what Respondents received from Seward "would put Greenberg in the same position as Seward (being sued)." Mot. at 8-9 & n.5. Respondents' briefing on this issue is thin, but the record suggest not only that Greenberg may suffer from two actual conflicts of interest but also that Greenberg may have already acted to promote its own interests to its clients' detriment.

On January 18, 2017, I issued an order denying the Division's request for testimonial subpoenas directed to Garver and Cohen-Deano. *See Gray Fin. Grp.*, Admin. Proc. Rulings Release No. 4530, 2017 SEC LEXIS 160. That order assumed, as represented by the parties, that Respondents had "disclaimed reliance on the advice of Cohen-Deano or Garver, or of Greenburg Traurig." *Id*. at *1. It also assumed, for purposes of the ruling and without explicitly saying so, that Respondents' advice of counsel defense was based on actual advice sought, received, and relied upon.

It is now plain that Respondents' advice of counsel defense is really based not on Seward's advice, but on Seward's failure to explicitly provide advice. *See* Opp'n at 8 (Segal "felt that providing the offering documents precisely as she drafted them was sufficient"). As Respondents' prehearing brief puts it, it was "reasonable for Gray to conclude that Seward & Kissel had created Fund II in compliance with all Georgia and other applicable law," based on Segal's provision of the GrayCo Alt. II documents on July 9, 2012, "without any caveat or reservation." Resp. Prehearing Br. at 25. Respondents' expert, Philip A. Feigin, likewise advances this theory throughout his report. *See* Feigin Expert Report at 13-16. And this advice of counsel theory – that Seward provided only documents, but otherwise stayed silent – is also the basis of Respondent's malpractice action against Seward. *See* Resp. Prehearing Br. Ex. 5 at 9.

As a result, Respondents' disavowal of reliance on Greenberg's advice raises multiple questions that bear upon the advice of counsel defense. *See* Reply at 8-9. For example, it is unclear why Respondents relied on Seward's silence, but did not rely on Greenberg's silence. It is unclear what prompted Hubbard to change the target capital amount in the GrayCo Alt. II offering memorandum from $75 million to $100 million. It is unclear what response, if any, Respondents received when they "posed the question again" to Greenberg regarding the $100 million requirement, if that indeed occurred. *See* DX A at 156-58. And as discussed further below, it is unclear why Hubbard apparently changed his position that Respondents "posed the question again" after Respondents' present lead trial counsel began representing him. The answers to these questions, among others, are potentially important to resolving Respondents' advice of counsel defense.

Had Respondents retained counsel other than Greenberg to handle the present proceeding and the investigation leading to it, uncovering the answers to these questions would not

necessarily implicate a conflict of interest. Communications between Respondent and Greenberg would be waived, and the hearing would proceed with Respondents' hearing counsel examining Greenberg attorneys and otherwise introducing evidence bearing on Greenberg's advice (or silence) with no incentive to protect hearing counsel's own interests. Retaining separate counsel for this purpose is not required, but it is sometimes the best practice. *See Celerity, Inc. v. Ultra Clean Holding, Inc.*, 476 F. Supp. 2d 1159, 1167 (N.D. Cal. 2007) ("[T]he hiring of the same firm as both trial counsel and opinion counsel . . . does seem risky . . . ."); *Genentech, Inc. v. Insmed Inc.*, 442 F. Supp. 2d 838, 843 (N.D. Cal. 2006) ("[H]ir[ing] opinion counsel and trial counsel from the same firm entailed a certain amount of risk."). Potential conflicts of interest are foreseeable whenever a law firm represents a client in litigation where one of the issues is its own advice to that same client. *See Novartis Pharm. Corp. v. EON Labs Mfg., Inc.*, 206 F.R.D. 396, 399 (D. Del. 2002) (referencing "the unconventional and risky arrangement of having opinion and trial counsel from the same law firm"); *see also AKEVA LLC v. Mizuno Corp.*, 243 F. Supp. 2d 418, 424 (M.D.N.C. 2003) ("[W]here the opinion counsel is trial counsel . . . there is a greater need to make sure the opinion is not tainted by bias or other influences."). The potential is heightened here because the client has demonstrated its willingness to sue Seward for malpractice.

In sum, because Greenberg represents Respondents in this proceeding and Greenberg's advice (or lack thereof) is at issue because of the advice of counsel defense, Greenberg must defend not only Respondents, but also its advice to Respondents, all while under the threat that Respondents may sue Greenberg based on the same failure to provide advice that led them to sue Seward. This appears to constitute a conflict of interest. *See* Georgia Rule of Professional Conduct 1.7(a) (2016) (a lawyer shall not represent a client if "there is a significant risk that the lawyer's own interests . . . will materially and adversely affect the representation of the client"). The record suggests two areas where this apparent conflict may have already undermined the integrity of this proceeding.

First, advice of counsel is clearly an important component of Respondents' case. Respondents devote a substantial portion of their prehearing brief to the issue. *See generally* Resp. Prehearing Br. at 21, 22-25. But Respondents' disavowal of seeking, receiving, or relying on any advice from Greenberg regarding the Georgia Act makes it more difficult to make out an advice of counsel defense, because if Seward's silence supports an advice of counsel defense, then Greenberg's silence would as well. If Respondents were represented by separate hearing counsel, the separate hearing counsel would have no reason to avoid relying on the silence of both Seward and Greenberg to support Respondents' advice of counsel defense. As hearing counsel, however, Greenberg has a potential incentive to present Respondents' case so as to minimize its own potential malpractice liability. Respondents' disavowal of reliance on Greenberg's silence potentially undermines any claim of malpractice against Greenberg because it tends to show that any negligence by Greenberg was not the proximate cause of Respondents' injury. *See Roberts v. Langdale*, 363 S.E.2d 591, 592 (Ga. Ct. App. 1987). Greenberg thereby potentially benefits by Respondents' disavowal, at Respondents' potential expense.

Second, Hubbard gave apparently inconsistent sworn statements regarding the defense while represented by Greenberg. *Compare* DX A at 156-58 (Respondents "posed the question again" to Greenberg after switching from Seward), *with* RX 1366 at 3 (Hubbard expressly

declared that he "did not revisit the $100 million cover issue with Greenberg") *and* DX 52. Greenberg represented Hubbard at his investigative testimony, Respondents' lead trial counsel (a Greenberg attorney) received the Division's draft declaration of non-reliance for Hubbard's signature (which Hubbard ultimately signed), and Greenberg has now solicited another declaration of non-reliance from Hubbard. *See* RX 1363, 1366. Hubbard's inconsistent statements simultaneously tend to erode his overall credibility and weaken any claim by Respondents that Greenberg committed legal malpractice. As with Respondents' disavowal of reliance on Greenberg's advice, Hubbard's apparent change of testimony seemingly works to Greenberg's advantage and Respondents' disadvantage.

There is also evidence that Gray and Hubbard possess conflicting interests that, at minimum, might render it impossible for them to be represented by the same counsel. *See* Georgia Rule of Professional Conduct 1.7(a) (2016) (a lawyer shall not represent a client if "there is a significant risk that . . . the lawyer's duties to another client . . . will materially and adversely affect the representation of the client"). Specifically, Hubbard testified that he likely communicated Segal's interpretation of the $100 million requirement to Gray, and Gray testified that he could not recall learning of Segal's interpretation. *Compare* Hubbard Testimony at 224-25 *with* Gray Testimony at 401, 411-13. Gray therefore has an incentive to blame Hubbard for failing to communicate that advice, and Respondents' counsel may be forced to cross-examine and discredit Hubbard for the benefit of Gray, or vice versa. And Greenberg may be unable to represent either Gray or Hubbard in this proceeding. *See Sands Bros. Asset Mgmt., LLC*, Admin. Proc. Rulings Release No. 2503, 2015 SEC LEXIS 1250, at *11, *16-*17 (Apr. 7, 2015). Because these issues were apparently first raised in the Division's Reply, however, further briefing would be helpful.

Lastly, Respondents assert that Gray Financial Group was recently acquired by another investment firm, and that Gray and Hubbard are no longer Gray Financial Group's control persons. *See* Resp. Motion to Stay at 4 (Feb. 17, 2017). This may be relevant to evaluating the validity of Gray Financial Group's conflict waiver, among other issues.

Remedy

To be sure, there are countervailing factors. Respondents possess a right to counsel of their choice, and Respondents have proffered reasons why disqualification would prejudice them. *See Csapo*, 533 F.2d at 10-11; RX 1366 at 4; RX 1367 at 3-4. Respondents' disavowal of reliance on Greenberg's silence may be entirely sincere, and Hubbard's apparently inconsistent statements may have an innocent explanation, or may not be inconsistent at all. Gray's memory of Segal's June 8, 2012, email might be refreshed, or Hubbard may convincingly change his position regarding what he communicated to Gray. And the Division seeks a deposition of Garver, among other inquiries, to better develop the record regarding the need for disqualification. *See* Mot. at 9; Reply at 9.

But I am obliged to ensure that this proceeding is "conducted with a scrupulous regard for the propriety and integrity of the process," whether or not the Division seeks disqualification. *See Clarke T. Blizzard*, 2002 SEC LEXIS 3426, at *11. The right to counsel of one's choice is not absolute, and must be balanced against the Commission's interest in maintaining the integrity

of its proceedings. *See id.* The evidence of a potentially disqualifying conflict of interest does not need to be conclusive, it just needs to be concrete, and it is possible to alleviate the prejudice to Respondents arising from disqualification. *See Csapo*, 533 F.2d at 11; *see generally* 17 C.F.R. § 201.180(a)(3) (discussing the possibility of an adjournment to allow for the retention of new counsel). And the Division's proposed deposition of Garver may clarify certain issues, but it does not seem likely to cure any conflict of interest.

Additional briefing is warranted, especially on the potential conflict between Gray and Hubbard, and in any case, if Respondents' counsel is to be disqualified, Respondents should be given another opportunity to explain why it should not be ordered. In particular, Respondents should brief: (1) whether their conflict waivers cover the potential conflicts outlined above; (2) whether the conflicts outlined above are waivable at all; (3) whether any conflict would be nullified by Respondents' withdrawal of their advice of counsel defense; (4) the differences, if any, between the scope of Greenberg's engagement by Respondents and Seward's engagement by Respondents; (5) whether depositions of selected attorneys (by consent, because depositions as of right are not available) and other prehearing discovery might effectively address the issues raised in this order; (6) any additional mitigating circumstances weighing against disqualification; and (7) the effect, if any, of Gray Financial Group's change in ownership. Respondents should attach any pertinent evidence; I am especially interested in reviewing Greenberg's engagement letter and Respondents' written conflict waivers.

The possible disqualification of Respondents' counsel must be addressed with care. The hearing currently scheduled to commence March 6, 2017, will therefore be postponed again so that Respondents may focus their efforts on responding to this show cause order.

Order

It is therefore ORDERED that the attorney-client privilege is deemed waived as to otherwise privileged communications between any Respondent and Greenberg Traurig concerning the legal work Greenberg Traurig did on the GrayCo Alternative Partners II, LP, offering and the interpretation of the Georgia Act provisions at issue in this proceeding between September 4, 2012, and August 16, 2013.

It is further ORDERED that Respondents shall SHOW CAUSE why Greenberg Traurig should not be disqualified from further representing them in this proceeding. Respondents shall file a response to this order no later than Friday, March 3, 2017. The Division shall not file a response without further order.

It is further ORDERED that the hearing in this proceeding, currently set to commence on March 6, 2017, is CANCELED.

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Cameron Elliot
Administrative Law Judge