UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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In the Matter of	)	
	)	
DENNIS J. MALOUF,	)	ADMINISTRATIVE PROCEEDING
	)	File No. 3-15918
Respondent.	)	
	)	

RESPONDENT DENNIS MALOUF'S OPPOSITION TO DIVISION OF ENFORCEMENT'S MOTION TO QUASH SUBPOENAS ISSUED TO SECURITIES AND EXCHANGE COMMISSION ATTORNEYS AND TO ISSUE A PROTECTIVE ORDER

Respondent, Dennis Malouf, by and through the undersigned counsel, hereby files this Opposition to The Division of Enforcement's Motion to Quash Subpoenas Issued to Securities and Exchange Commission Attorneys and to Issue a Protective Order (the "**Motion to Quash**"). The Division objects to Respondent's subpoenas requiring the appearance and testimony of John H. Mulhern and Kurt L. Gottschall at the hearing in this case.[1] For the reasons stated below, the Motion to Quash should be denied because it fails to assert a compelling reason why Respondent should not be able to seek testimony from Mr. Mulhern

I. Mr. Mulhern's testimony will be relevant, material, and crucial to the case

The Division objects to Mr. Mulhern testifying because it asserts that any testimony he could give would be immaterial to any fact at issue and because he has no personal knowledge of the conduct at issue. However, as admitted by the Division, Mr. Mulhern was the attorney who led the investigation that led to this action. Therefore, he does have personal knowledge of facts and events that led to this action being instituted, and which are relevant to Respondent's defense.

[1] Respondent is willing to release Mr. Gottschall from the subpoena issued to him and only seek testimony from Mr. Mulhern in light of the fact that their testimony would likely be duplicative.

A. Mr. LaMonde's testimony

Mr. Mulhern was the lead attorney who questioned Mr. LaMonde during the course of his sworn testimony. Mr. Mulhern also interviewed Mr. LaMonde prior to taking his testimony. Respondent was not given an opportunity to attend Mr. LaMonde's testimony nor was he able to cross-examine Mr. LaMonde, and Mr. LaMonde was unrepresented by counsel while giving his testimony. Mr. LaMonde is now deceased and the Division seeks to use portions of his testimony to prove its case. Mr. Mulhern is one of only two people (the other being Mr. Gottschall) who can testify regarding the substance of his telephone interview with Mr. LaMonde or provide any context for Mr. LaMonde's sworn testimony. Respondent has already questioned the admissibility and reliability of Mr. LaMonde's testimony in light of the circumstances under which it was given, and he should allowed to elicit testimony from Mr. Mulhern which would impact the weight, if any, that Mr. LaMonde's testimony is to be given.

B. Discussions with counsel for UASNM, Kopczynski, and Hudson

A separate administrative proceeding was brought against UASNM based upon the same purported conduct at issue here. UASNM provided an offer of settlement to the Division which was accepted and led to an agreed order being entered against UASNM. Mr. Mulhern had multiple discussions with counsel for UASNM, Joseph Kopczynski, and Kirk Hudson (collectively "**counsel**") in the course of agreeing to the offer of settlement and the agreed order. Though Respondent has been provided with e-mails related to these discussions as part of the Division's investigative file, the e-mails indicate that there were also numerous related telephone calls between Mr. Mulhern and counsel. Based upon the multiple revisions to the offer of settlement and agreed order, and the terms contained in the final documents, it is likely that Mr. Mulhern's telephone conversations with counsel involved discussions regarding: (1) the

cooperation that Kopczynski, Hudson, and UASNM provided to the Division in the course of its investigation; (2) favorable treatment afforded to Kopczynski, Hudson, and UASNM due to their cooperation; (3) what remedial efforts would be required from UASNM; and (4) the calculation of purported "excess commissions" that were to be paid back to UASNM customers. Respondent should be allowed to elicit testimony from Mr. Mulhern regarding these conversations because it will bear on the credibility of Kopczynski and Hudson as witnesses. It will also bear on the propriety of remedies the Division is expected to seek against Respondent that are based upon purported commissions received and their alleged excessiveness. These issues are relevant and crucial to Respondent's defense in this action.

C. Exculpatory evidence not disclosed

The Division asserts that it has already disclosed exculpatory information in its August 27, 2014 *Brady* letter to Respondent. However, based upon Respondent's review of the Division's investigatory file, Respondent believes that the file contains additional exculpatory information that was not disclosed in the *Brady* letter. Respondent should be able to elicit testimony from Mr. Mulhern regarding additional exculpatory evidence in the Division's file and whether, as lead investigative attorney, he was aware of or considered such documents before this action was instituted. Testimony regarding such exculpatory evidence is relevant and crucial to Respondent's defense in this action.

II. Respondent does not intend to seek testimony regarding any matters protected by attorney-client privilege or work product doctrine

None of the subject matters referenced above would require Mr. Mulhern to provide testimony regarding any matters protected by attorney-client privilege or work product doctrine. Although Respondent is still preparing for the hearing and may determine that he wishes to elicit testimony from Mr. Mulhern regarding other subject matters not addressed here, Respondent

does not anticipate or intend to seek any testimony that would be protected by attorney-client privilege, work product doctrine, or as intra-governmental communications.

III. Respondent has no other means to present the relevant testimony

With respect to the subject matters discussed in sections I.A and I.C *supra*, Mr. Mulhern is one of two people who can present the testimony desired. The other is Mr. Gottschall, who the Division has also objected to and who Respondent has offered to release from his subpoena to avoid unnecessarily repetitious testimony. With respect to the subject matter discussed in section I.B *supra*, the only other people who could testify are counsel for UASNM, Kopczynski, and Hudson, and it is uncertain whether all of them participated in every conversation. On the other hand, Mr. Mulhern is believed to have participated in every conversation and would therefore have the most comprehensive knowledge of those conversations. Therefore, Mr. Mulhern is either the only witness who can present the relevant testimony, or is the most efficient way of presenting the relevant testimony.

IV. Respondent's request is not "tactical."

Respondent seeks testimony from Mr. Mulhern on substantial issues that are relevant and important to his defense. He does not seek a tactical advantage. Both Mr. Mulhern and Mr. Gottschall participated in the investigation, and the Division describes them both as having "extensive" factual familiarity with the case. Respondent has no objection to Mr. Gottschall participating in the hearing, giving the Division three lawyers who are fully familiar with the issues. There is irony in the Division's expression of concerns about any "tactical advantage" that Respondent might be gain by reducing the Division's team from four knowledgeable and experienced lawyers to three. In its mission to impose a lifetime bar on Respondent, at age 55, from the only industry he has known in his thirty-year career, the Division has had a three year

head start in investigating this case, interviewing and taking unopposed depositions of unrepresented parties (some of whom were unrepresented), analyzing and refining its factual and legal theories well in advance of initiating this proceeding, and reviewing the 160,000 pages of documents at its leisure. In contrast, Respondent has had roughly 150 days to process this voluminous information, review and analyze over 2,000 pages of testimony transcript, interview witnesses, formulate its factual and legal theories, and prepare for trial, all the while fending off extreme opposition by UASNM and its affiliated parties to Respondent's reasonable discovery efforts.

Respondent is nonetheless agreeable to accommodating Mr. Mulhern's travel schedule by taking his testimony out of sequence.

WHEREFORE, because the Motion to Quash fails to assert a compelling reason why Respondent should not be able to seek testimony from Mr. Mulhern, and because the testimony sought will be relevant, crucial, and not available from any other source, the Motion to Quash should be denied and Respondent should be permitted to seek testimony from Mr. Mulhern at the hearing in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served via E-Mail and/or U.S. Mail to the following this 6th day of November, 2014:

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