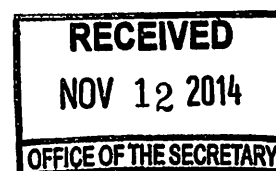


UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION



In the Matter of \_\_\_\_\_ )  
 )  
DENNIS J. MALOUF, )  
 )  
Respondent. )  
\_\_\_\_\_ )

ADMINISTRATIVE PROCEEDING  
File No. 3-15918

**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**

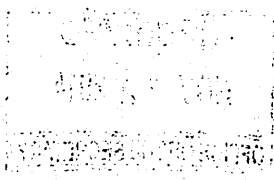
Respondent, Dennis Malouf, by and through the undersigned counsel, hereby files this Opposition to The Division of Enforcement's Motion to Quash Subpoenas Issued to Securities and Exchange Commission Attorneys and to Issue a Protective Order (the "Motion to Quash"). The Division objects to Respondent's subpoenas requiring the appearance and testimony of John H. Mulhern and Kurt L. Gottschall at the hearing in this case.<sup>1</sup> 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.

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<sup>1</sup> 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.



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**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 be 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

The first part of the document discusses the general principles of the law of contract, which are based on the idea of freedom of contract. This means that individuals are free to enter into agreements with each other, provided that the agreements are made voluntarily and without any legal impediment. The law of contract is designed to enforce these agreements and to provide a remedy in the event of a breach.

The second part of the document deals with the formation of a contract. A contract is formed when two or more parties agree to be bound by certain terms. The agreement must be made with the intention of creating legal relations. There are three essential elements of a contract: offer, acceptance, and consideration. An offer is a promise to do or not to do something, which is intended to be binding. Acceptance is the agreement to the terms of the offer. Consideration is something of value that is exchanged between the parties.

The third part of the document discusses the discharge of a contract. A contract can be discharged in a number of ways, including by agreement, by operation of law, or by breach. Breach of contract occurs when one party fails to perform its obligations under the contract. The law provides remedies for breach of contract, including damages and specific performance.

The fourth part of the document deals with the law of tort. Tort is a civil wrong that causes harm to an individual. The law of tort is designed to provide a remedy for the victim of a tort. There are three essential elements of a tort: duty of care, breach of duty, and damage. A duty of care is a legal obligation to avoid causing harm to others. A breach of duty occurs when a person fails to meet this obligation. Damage is the harm that is caused by the breach of duty.

The fifth part of the document discusses the law of negligence. Negligence is a type of tort that occurs when a person fails to exercise reasonable care, resulting in harm to another person. The law of negligence is designed to provide a remedy for the victim of a negligent act. There are three essential elements of negligence: duty of care, breach of duty, and damage.

IN THE MATTER OF THE ESTATE OF [Name]  
Testamentary Trust

The following is a list of the assets and liabilities of the estate of [Name], as of the date of his death on [Date]. The assets and liabilities are listed in accordance with the provisions of the will of [Name], dated [Date].

The assets of the estate are as follows:

- Real Estate: [List of properties]
- Personal Property: [List of items]
- Bank Accounts: [List of accounts]
- Investments: [List of investments]
- Other Assets: [List of other assets]

The liabilities of the estate are as follows:

- Debts: [List of debts]
- Taxes: [List of taxes]
- Other Liabilities: [List of other liabilities]

The net assets of the estate are [Amount].

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

The first part of the document discusses the importance of maintaining accurate records of all transactions and activities. It emphasizes that this is essential for ensuring transparency and accountability in the organization's operations. The text also highlights the need for regular audits and reviews to identify any discrepancies or areas for improvement.

In the second section, the author outlines the various roles and responsibilities of the staff members involved in the project. It is noted that each team member should have a clear understanding of their own duties and how they contribute to the overall success of the organization. The text also mentions the importance of communication and collaboration between different departments to ensure that everyone is working towards the same goals.

The third part of the document focuses on the financial aspects of the organization. It provides a detailed overview of the budget and how it is being managed. The author explains that the budget is a key tool for planning and controlling the organization's resources, and that it is essential to monitor it closely to ensure that the organization is staying within its financial limits. The text also discusses the importance of accurate financial reporting and the role of the accounting department in this process.

In the final section, the author discusses the future plans for the organization. It is noted that the organization is committed to continuous improvement and growth, and that it will be exploring new opportunities and initiatives in the coming years. The text also mentions the importance of staying up-to-date with the latest trends and technologies in the industry, and the need for ongoing training and development for the staff members.

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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ATTORNEYS FOR RESPONDENT  
DENNIS J. MALOUF

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 6<sup>th</sup> day of November, 2014:

Securities and Exchange Commission  
Lynn M. Powalski, Deputy Secretary  
100 F Street, N.E. Mail  
Stop 1090  
Washington, D.C. 20549  
Fax: 703-813-9793  
(Original and three copies via U.S. Mail)

Honorable Jason S. Patil  
Administrative Law Judge  
100 F Street, N .E. Mail  
Stop 2582  
Washington, D.C. 20549  
(Courtesy copy by E-Mail)

Stephen C. McKenna  
*Attorney for Division*  
Securities and Exchange Commission  
Byron G. Rodgers Federal Building  
1961 Stout Street, Suite 1700  
Denver, CO 80294-1961  
(303) 844-1000  
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(Copy by E-Mail and U.S. Mail)

  
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Attorney