

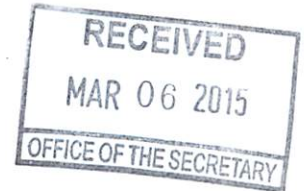
UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING  
File No. 3-16223

In the Matter of

SANDS BROTHERS ASSET  
MANAGEMENT, LLC, STEVEN  
SANDS, MARTIN SANDS AND  
CHRISTOPHER KELLY,

Respondents.



KAPLAN'S RESPONSE TO THE ALJ'S ORDER TO SHOW CAUSE

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES..... ii-iii

PRELIMINARY STATEMENT..... 1

FACTUAL BACKGROUND ..... 2

ARGUMENT..... 3

    I.    Kelly’s Informed Consent Effectively Waived  
        Any Disqualification Under Rule 1.9 .....3

        A. Legal Standard for Disqualification .....3

        B. Kelly’s Informed Consent is Sufficient for Waiver  
            Pursuant to Rule 1.9.....4

        C. The Conflict Waiver in the Instant Matter .....6

        D. The Law as Applied to Kelly’s Conflict Waiver .....7

    II.   Disqualification Based On Confidentiality Is Inappropriate .....9

        A. There Were No Confidences Exchanged  
            Between Kelly and Kaplan..... 9

        B. There was Limited Communication Between  
            Kelly and Kaplan.....10

        C. Kelly’s Engagement Letter Waived confidences.....11

    III.  The Cases Relied on in the ALJ’s Order are  
            Distinguishable from the Instant Matter.....12

    IV.  Concerns Expressed in the ALJ’s Order  
            has been Addressed.....13

CONCLUSION ..... 15

**TABLE OF AUTHORITIES**

Berkowitz v. Estate of Roubicek by Woolfolk, 122 Misc. 2d 322, 332  
(Sup. Ct. Nassau Co. 1983).....9

Butala v. Agashiwala, 95 CIV. 936, 1997 WL 137441,  
(S.D.N.Y. Mar. 25, 1997) .....9

Centennial Ins. v. Apple Builders & Renovators Inc.,  
60 A.D.3d 506 (1st Dep’t 2009) .....7

Develop Don’t Destroy Brooklyn v. Empire State Dev. Corp.,  
31 A.D.3d 144, 153 (1st Dep’t. 2006) .....4

GEM Holdco, LLC v. Changing World Technologies, L.P.,  
46 Misc. 3d 1207(A),(N.Y. Sup. Ct. 2015) .....*passim*

Grovick Properties, LLC v. 83-10 Astoria Blvd. LLC,  
120 A.D.3d 471 (2d Dep’t 2014) .....7-8

In Re Blizzard,Release No. 2032, (Apr. 24, 2002),  
2002 WL 714444 .....12, 13

In the Matter of Morgan Asset Mgmt., Inc., Morgan Keegan & Co., Inc., James G Kelsoe, Jr.,  
& Joseph Thompson Weller, CPA, Release No. 657 (July 19, 2010) .....2

Schneider v. Saiber Schlesinger Satz & Goldstein. LLC,  
260 A.D.2d 321, (1st Dep’t 1999) .....3, 9, 11

Snyder v. Snyder, 57 A.D.3d 1528, 1528-29, (4th Dep’t 2008).....7

St. Barnabas Hosp. v New York City Health & Hosps. Corp.  
7 A.D.3d 83, 84 (1st Dep’t 2004) .....*passim*

Ullmann-Schneider v. Lacher & Lovell-Taylor PC,  
110 A.D.3d 469, (1st Dep’t 2013).....3

U.S. ex rel. Stewart on Behalf of Tineo v. Kelly,  
870 F.2d 854 (2d Cir. 1989).....12-13

United States v. Quest Diagnostics Inc., 734 F.3d 154 (2d Cir. 2013) .....12

Wheat v. United States, 486 U.S. 153, 108 S. Ct. 1692,  
100 L. Ed. 2d 140 (1988) .....13

**RULES AND OTHER AUTHORITIES**

The Association of the Bar of the City of New York Committee on Professional  
and Judicial Ethics, Formal Opinion 2006-1 (Feb. 17, 2006).....5

Former DR 5-105(C).....5

Rules of Professional Conduct, Rule 1.9 .....*passim*

Rules of Professional Conduct, Rule 1.9(a).....4, 11

Rules of Professional Conduct, Rule 1.9(c)..... 11

SEC Rule of Practice 201(b).....2

Martin H. Kaplan, Esq. (“MHK”) of Gusrae Kaplan Nusbaum PLLC (“GKN” together with MHK, “Kaplan”)<sup>1</sup> submits this Memorandum of Law, together with the Affirmation of Martin H. Kaplan (“MHK Aff.”), in response to the Order to Show Cause issued *sue sponte* by the Administrative Law Judge (the “ALJ”) (the “ALJ’s Order”) in this matter, to show cause why Kaplan should not be disqualified as counsel for Respondent Sands Brothers Asset Management, LLC (“Respondent” or “SBAM”).

### PRELIMINARY STATEMENT

It is well-established a client’s right to be represented by the counsel of their choice is “a valued right [and] any restrictions must be carefully scrutinized.”<sup>2</sup> Accordingly, a proponent of disqualification “must meet a heavy burden of showing that disqualification is warranted.”<sup>3</sup>

In the instant matter, Kaplan’s prior representation of Respondent Christopher Kelly (“Kelly”) should not result in Kaplan’s disqualification from their continued representation of SBAM. It is undeniable that Kelly executed an engagement letter (the “Engagement Letter”), which contained a detailed prospective conflict waiver (the “Conflict Waiver”) which clearly advised Kelly of potential conflicts of interest, and wherein he expressly waived the right to seek to disqualify Kaplan from continued representation of any other respondent named in this proceeding, based on any conflict that might arise amongst the jointly represented parties.

Advance conflict waivers, similar to the Conflict Waiver executed by Kelly, have been repeatedly upheld in New York state and federal courts. Kelly, an undeniably sophisticated client, was able to anticipate the potential commencement of the instant matter, and therefore Kelly’s Conflict Waiver cannot be avoided.

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<sup>1</sup> References to Kaplan in this Memorandum of Law should be understood to apply to both MHK and GKN.

<sup>2</sup> See *GEM Holdco, LLC v. Changing World Technologies, L.P.*, 46 Misc. 3d 1207(A), at \*3 (N.Y. Sup. Ct. 2015) (internal citations omitted).

<sup>3</sup> See *Id.* (internal citations omitted).

Significantly, there are no facts supporting any notion that Kelly relayed confidential information to Kaplan. In fact, MHK affirmed that no confidences were exchanged.<sup>4</sup>

Accordingly, the Conflict Waiver should be enforced and disqualification should be found to be inappropriate in the instant matter.<sup>5</sup>

### **FACTUAL BACKGROUND**<sup>6</sup>

The ALJ's Order suggests that disqualification is based on "Kaplan's prior representation of Kelly in the investigation and that SBAM's defense seeks to establish that Kelly was responsible for the alleged violation."<sup>7;8</sup> The ALJ assumes that Kaplan is "likely privy to privileged information regarding Kelly, and it remains to be seen how Kaplan will effectively establish SBAM's defense [and examine Kelly]."<sup>9</sup>

The ALJ's Order is devoid of any facts alleging that Kaplan knew of any conflict between SBAM, Kelly, Martin Sands and Steven Sands (collectively, "Respondents") when they undertook joint representation in February 2014.<sup>10</sup> In fact, the possibility that the Division would commence the instant matter against Respondents stemming from the Commission's investigation was precisely the kind of conflict anticipated by the Conflict Waiver.<sup>11</sup> The

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<sup>4</sup> MHK Aff. at ¶¶ 17, 19.

<sup>5</sup> Pursuant to SEC Rule of Practice 201(b), any proceeding may be severed with respect to one or more parties upon a showing of "good cause." In the present matter, SBAM submits that there is "good cause" for severance because SBAM has acknowledged that the audited financials were distributed beyond the Custody Rule's deadline. The only outstanding issue as to SBAM is a penalty, if any. Moreover, severance would resolve the concerns raised in the ALJ's Order.

<sup>6</sup> Any facts not explicitly referenced in the Factual Background or Argument are set forth in MHK's Affirmation and are incorporated herein by reference.

<sup>7</sup> ALJ's Order at 2.

<sup>8</sup> In In the Matter of Morgan Asset Mgmt., Inc., Morgan Keegan & Co., Inc., James G Kelsoe, Jr., & Joseph Thompson Weller, CPA, Release No. 657 (July 19, 2010), the Division's motion to disqualify counsel in part based on the fact that counsel had represented multiple individuals during the investigation phase which later were going to be called by the Division as witnesses was denied. The Court held that the "Division has not shown an *actual conflict of interest*. As to prospective witness[es] [], the Division *has not shown any conflict* at all. As to prospective witnesses [], the Division has shown a *potential conflict*, but *not a serious potential conflict*." *Id.* at \*8 (emphasis added).

<sup>9</sup> ALJ's Order at 2.

<sup>10</sup> ALJ's Order at 2; *See also*, MHK Aff. at ¶¶ 10, 32.

<sup>11</sup> MHK Aff. At ¶ 12.

Conflict Waiver contains detailed warnings related to the joint representation of the Respondents; sharing of confidential information; and the potential conflict and ramifications of same.<sup>12</sup>

Kaplan and Kelly relied on the Conflict Waiver in agreeing to the joint representation of all Respondents.<sup>13</sup> Kaplan was the only attorney representing any of the Respondents from the commencement of the Commission's investigation until Kaplan terminated the representation of Kelly because of Kelly's erratic conduct.<sup>14</sup>

At this stage of the proceeding, Kaplan's disqualification would impose a significant and unfair hardship on SBAM. Kaplan's knowledge and experience would be difficult to replicate since Kaplan has represented SBAM in various matters since 2006 and thus has since acquired special knowledge and experience with respect to representing SBAM.

## ARGUMENT<sup>15</sup>

### I. KELLY'S INFORMED CONSENT EFFECTIVELY WAIVED ANY DISQUALIFICATION UNDER RULE 1.9

#### A. Legal Standard for Disqualification

"A party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged *absent a clear showing that disqualification is warranted*, and the [proponent of disqualification] bears the burden []." <sup>16</sup>

In the instant matter, the ALJ suggests that disqualification may be necessary for a fair

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<sup>12</sup> MHK Aff. at ¶¶ 11, 16.

<sup>13</sup> Through agreeing to the Advance Waiver, Kaplan would represent SBAM, Kelly and the Sands.

<sup>14</sup> MHK Aff. at ¶¶ 33, 41.

<sup>15</sup> See *supra*, footnote 6.

<sup>16</sup> GEM HoldCo, LLC, 46 Misc. 3d 1207(A) at \*4, citing Grovick Properties, LLC v. 83-10 Astoria Boulevard, LLC, 120 A.D.3d 471, 473 (2d Dep't 2014) (emphasis added) (citation omitted); see also Ullmann-Schneider v. Lacher & Lovell-Taylor PC, 110 A.D.3d 469, 470 (1st Dep't 2013) ("the [proponent of disqualification] must meet a heavy burden of showing that disqualification is warranted").

trial due to the appearance of impropriety.<sup>17</sup> The First Department articulated “three basic principles of law on th[e] subject” of the “appearance of impropriety” in the context of disqualification:

[1] if the representation does not violate another ethical or disciplinary rule, there can be no appearance of impropriety [] [2] the mere appearance of impropriety alone is insufficient to warrant disqualification [] and [3] the appearance of impropriety must be balanced against a party’s right to the counsel of its choice [].<sup>18</sup>

In the present matter, Kaplan did not violate any ethical or disciplinary rules. And SBAM’s right to the counsel of its choice significantly outweighs any appearance of impropriety because Kaplan has represented SBAM for nearly a decade and substitute counsel would cause a considerable delay at SBAM’s expense. Accordingly, “the mere appearance of impropriety alone is insufficient to warrant disqualification.”<sup>19</sup>

**B. Kelly’s Informed Consent is Sufficient for Waiver Pursuant to Rule 1.9**

The validity of advance conflict waivers is well established in New York and “[f]or a conflict waiver to be valid, the former client must provide informed consent.”<sup>20</sup> Pursuant to Rule 1.9(a) of the Professional Rules of Conduct:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person’s interests are materially adverse to the interests of the former client *unless the former client gives informed consent, confirmed in writing.*<sup>21</sup>

“It is further undisputed that in the absence of a conflict waiver, Rule 1.9 would prohibit

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<sup>17</sup> ALJ’s Order at 2.

<sup>18</sup> See Develop Don’t Destroy Brooklyn v. Empire State Dev. Corp., 31 A.D.3d 144, 153 (1st Dep’t 2006) (internal citations omitted).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at \*5, citing St. Barnabas, 7 A.D.3d at 9 (internal citations omitted).

<sup>21</sup> See Rules of Professional Conduct, Rule 1.9(a).



[the conflicted attorney] from further representing the [client].”<sup>22</sup> The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics noted that in recent years:

□ an overly broad interpretation of the duty of loyalty can strip even a long-standing client of the right to counsel of its choice, thereby perversely depriving the client of the very benefit of which that ethical duty is designed to secure – the law firm’s loyalty □

*In response, law firms and their clients have increasingly turned to advance waivers, □ so that both the law firm and the client establish clear rules of the road at the inception of the relationship – a time when both sides can determine whether to proceed with the representation.*<sup>23</sup>

Accordingly, the City Bar Opinion found that advance conflict waivers, such as the Conflict Waiver executed by Kelly, should be enforced:

We conclude here that a law firm may ethically request an advance waiver that includes substantially related matters if the following conditions are met: (a) the client is sophisticated; (b) the waiver is not applied to opposite sides of the same litigation or opposite sides in the starkly disputed transactional matter; (c) the law firm is able to ensure that the confidence and secrets of one client are not shared with, or used for the advantage of, another client; (d) the conflict is consentable under the tests of [former rule] DR 5-105(C); and (e) special consideration is given to the other factors described in Formal Opinion 2001-2.<sup>24</sup>

Here, Kelly’s Conflict Waiver conformed with the guidelines set forth by the City Bar Opinion because: (a) Kelly is a highly sophisticated party; (b) the waiver was not given at a time when the parties were on the opposite sides of the same litigation; (c) as explained more thoroughly below, there are no confidences or secrets relating to Kelly that were not shared with SBAM; and (d) the conflict is otherwise consentable. Importantly, the City Bar Opinion provided that, the more sophisticated the client, the less disclosure is required.<sup>25</sup>

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<sup>22</sup> See *GEM HoldCo, LLC*, 46 Misc. 3d 1207(A), at \*4.

<sup>23</sup> The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Opinion 2006-1 (Feb. 17, 2006) at 2-2, herein referred to as the “City Bar Opinion.”

<sup>24</sup> *Id.* at 3-4.

<sup>25</sup> *Id.* at 4. “[f]or the sophisticated clients □, blanket or open-ended advance waivers that are accompanied by relatively limited disclosure about the prospective conflicting matters should nevertheless be enforceable.”

It is of significant relevance that the original client in the instant matter is SBAM.<sup>26</sup> As longstanding counsel to SBAM, Kaplan agreed to represent Kelly, as an employee of SBAM.<sup>27</sup> As part of Kaplan's representation of each of the individual Respondents, Kelly executed Engagement Letters, which contained the Conflict Waiver and the individual Respondents expressly agreed that they would share confidential information with each other and SBAM.<sup>28</sup>

**C. The Conflict Waiver in the Instant Matter**

The Conflict Waiver comprehensively advises of the potential for conflicts of interest amongst the Respondents.<sup>29</sup> Kelly's execution of the Engagement Letter resulted in his acceptance of the following terms:

Based upon our review of the file to date, we have not found any apparent conflict of interest that would serve to prevent us from undertaking such representation. *You must be aware, however, that there is no guarantee that a conflict will not arise in the future, or that facts will not come to light which would give rise to an actual or potential conflict between your position, [or others].*

\* \* \*

If we are representing you and if there is an actual conflict between this firm's representation of you, [the other joint representation parties], we may be forced to withdraw as your counsel and to continue our representation with the [other joint representation parties]. Further, if for any other reason you decide to retain other counsel to represent you in connection with the Matter [], we may continue to represent [the other joint representation parties]. *You explicitly agree that you will not seek to disqualify this firm [].*

\* \* \*

In the context of this joint representation, however, you agree that any information you provide to us may be made available to [the other joint representation parties].

\* \* \*

*You should also be aware that if it is ultimately found that you violated any of the securities laws, rules or regulations, you might be penalized for such violation(s) [].*

\* \* \*

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<sup>26</sup> MHK Aff. at ¶ 18.

<sup>27</sup> MHK Aff. at ¶ 18.

<sup>28</sup> MHK Aff. at ¶ 16.

<sup>29</sup> MHK Aff. at ¶¶ 10, 11 and 16.

By signing this document, you acknowledge that we have previously disused the potential conflict of interest relating to this firm representing [the joint representation parties] in this matter and that you sufficiently understand and accept such potential conflicts of interest.<sup>30</sup>

**D. The Law as Applied to Kelly's Conflict Waiver**

Advance conflict waivers, such as the Conflict Waiver executed by Kelly, have been routinely enforced.<sup>31</sup>

In August of 2014, the Second Department, in Grovick Properties, LLC, reversed the trial court's disqualification where "[t]he waiver fully informed the [former clients] of the potential conflict of interest and, by executing the waiver, the[y] consented to have [the attorney] represent them notwithstanding that conflict."<sup>32</sup> Similarly, in April of 2004, the First Department, in St. Barnabas, reversed the trial court's disqualification, and denied the motion for disqualification.<sup>33</sup>

Most recently, in January of 2015, a New York trial court, in GEM HoldCo, LLC, held that a law firm that jointly represented two clients, whose interests later became adverse, was not disqualified from representing one of the clients because the conflicts waiver in the retainer agreements was effective and provided informed consent.<sup>34</sup> The parties seeking disqualification in GEM HoldCo, LLC, argued that "the sort of confidential information shared with an attorney in a joint representation inherently gives rise to the very unfair advantages that Rule 1.9 seeks to

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<sup>30</sup> *Id.* (emphasis added).

<sup>31</sup> St. Barnabas, 7 A.D.3d at 84. Numerous holdings of the Appellate Division have cited St. Barnabas and enforced advance conflict waivers, similar to Kelly's Conflict Waiver, and denied disqualification. *See infra* footnote 36; *see also*, Centennial Ins. v. Apple Builders & Renovators Inc., 60 A.D.3d 506, 506 (1st Dep't 2009) (disqualification motion "properly denied" where former client "had executed a written waiver in its retainer agreement with the same law firm specifically waiving any conflict of interest that might arise from the firm's [joint] representation"); Snyder v. Snyder, 57 A.D.3d 1528, 1528-29, (4th Dep't 2008) ("defendant established as a matter of law that plaintiff is not entitled to disqualify the law firm hired by defendant to represent her" where, consenting in advance to a potential law firm merger, plaintiff had "agreed to waive any conflict of interest resulting from that merger").

<sup>32</sup> *See* Grovick Properties, LLC v. 83-10 Astoria Blvd. LLC, 120 A.D.3d 471, 473-474 (2d Dep't 2014), *citing to* St. Barnabas, 7 A.D.3d at 90-91.

<sup>33</sup> *See* St. Barnabas, 7 A.D.3d at 84.

<sup>34</sup> *See generally* GEM HoldCo, LLC, 46 Misc. 3d 1207(A). On January 22, 2015, the GEM court denied a motion to reargue the Court's decision, which denied disqualification.

prohibit [and] [t]his concern, [] warrants disqualification.”<sup>35</sup> The GEM HoldCo, LLC court reasoned that “[i]f the transmission of confidential information in a joint representation vitiated the validity of a conflict waiver, notwithstanding the Retainer Letter’s disclaimers to the contrary, virtually all conflict waivers would be ineffectual.”<sup>36</sup>

Under the Grovick, St. Barnabas and GEM HoldCo, LLC holdings, Kelly’s Conflict Waiver should be enforced because Kelly is undeniably a sophisticated party.<sup>37</sup> In the instant matter, when an advanced conflict waiver is given by a “sophisticated, [], and one obviously well-versed in dealing with attorneys,” there can be “no doubt” that it “constitutes an informed consent.”<sup>38</sup>

SBAM, Kelly, and the other individual respondents specifically contemplated the potential conflicts addressed by the ALJ.<sup>39</sup> The Conflict Waiver provided that if such conflicts were to arise, Kaplan would withdraw from representing Kelly and would continue to represent their longstanding client, SBAM.<sup>40</sup> Furthermore, when Kelly executed the Engagement Letter, Kelly was aware that the Division may commence an action against Respondents stemming from the Commission’s ongoing investigation which, sought information relating to SBAM’s compliance system and procedures. As a result it was foreseeable that such investigation may include findings that Kelly may have violated federal securities laws and regulations.<sup>41</sup>

In addition to the fact that Kelly provided informed consent and expressly waived any

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<sup>35</sup> *Id.* at \*5.

<sup>36</sup> *Id.*

<sup>37</sup> Specifically, Kelly practiced law for many years advising investment advisors on compliance and regulatory matters and as SBAM’s CCO and COO, Kelly was experienced in communicating the Commission’s Staff directly as related to examinations and responding to subpoenas. MHK Aff. at ¶¶ 12, 25. Additionally, Kelly’s responsibilities as CCO and COO as a matter of record based on Kelly’s admissions in his submissions to the ALJ and articulated in SBAM’s Written Supervisory Procedures. *Id.* at ¶¶ 13, 14. (*internal citations omitted.*)

<sup>38</sup> See St. Barnabas, 7 A.D.3d at 93; See also, GEM HoldCo, LLC, 46 Misc. 3d 1207(A) at \*7.

<sup>39</sup> MHK Aff. at ¶ 12.

<sup>40</sup> *Id.* at ¶ 16.

<sup>41</sup> *Id.*

future conflicts, there are also significant equitable considerations. Kaplan has represented SBAM for nearly a decade.<sup>42</sup> At SBAM's request, Kaplan agreed to represent Kelly as an employee of SBAM.<sup>43</sup> From the commencement of the Commission's investigation in or around 2012 through the filing of the OIP on or about August 2014, Kaplan was the only counsel for all Respondents.<sup>44</sup> It would cause a considerable delay and effort for substitute counsel to understand and master the facts and circumstances at issue in this matter—and such effort by a substitute counsel would be taken at SBAM's expense. Under these circumstances, and given the specificity of the Conflict Waiver, SBAM is entitled to the attorney of its choice.

## II. DISQUALIFICATION BASED ON CONFIDENTIALITY IS INAPPROPRIATE

### A. There Were no Confidences Exchanged between Kelly and Kaplan

The ALJ's Order, Kelly's Submissions and the Division's submissions in this matter are devoid of any facts to support a showing that confidential information was *actually* received by Kaplan.<sup>45</sup> Kelly did not relay any confidential information to Kaplan and any of the information relayed by Kelly to Kaplan related to SBAM.<sup>46</sup> At no time, did Kaplan learn anything specific related to Kelly in either a personal or profession capacity.<sup>47</sup> At no time, did Kaplan conduct any analysis or review of Kelly's performance of his responsibilities at SBAM.<sup>48;49</sup>

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<sup>42</sup> MHK Aff. at ¶ 21.

<sup>43</sup> *Id.* at ¶ 18.

<sup>44</sup> *Id.* at ¶ 41.

<sup>45</sup> See Schneider v. Saiber Schlesinger Satz & Goldstein, LLC, 260 A.D.2d 321, 321 (1st Dep't 1999) ("apart from this waiver, disqualification should be denied for failure to show the nature and substance of the confidential information plaintiff imparted to the attorneys").

<sup>46</sup> MHK Aff. at ¶¶ 17, 19.

<sup>47</sup> *Id.* at ¶ 32.

<sup>48</sup> *Id.*

<sup>49</sup> Pursuant to New York law, MHK's Affirmation is sufficient to rebut any presumption of shared confidential information in the instant matter. See generally Berkowitz v. Estate of Roubicek by Woolfolk, 122 Misc. 2d 322, 332 (Sup. Ct. Nassau Co. 1983) (the "rebuttable presumption" that confidential information is received by attorney during representation "has been overcome by [attorney's] uncontroverted disclaimer of receiving any communications from the [former clients]"); Butala v. Agashiwala, 95 CIV. 936, 1997 WL 137441,

The only potential issues raised by the ALJ and/or the Division pertaining to confidentiality involve the records of voicemails and/or telephone calls between Kelly and the SEC Staff (the "Tapes").<sup>50</sup> The Tapes, in and of themselves, are not confidential as acknowledged by the Division.<sup>51</sup>

The ALJ's Order expressed concerns that Kelly wanted Tapes to be deemed confidential, and thus a conflict was present. As discussed herein, the Conflict Waiver expressly stated that confidential information would be made available to other jointly represented parties, and thus disclosure of the Tapes was not an ethical violation. Significantly, Kelly never terminated Kaplan. Kaplan terminated representation of Kelly based on concerns of conflicts based on Kelly's conduct in communicating directly with the Division while represented by Kaplan. If Kelly had been so concerned about disclosure of the Tapes to the other jointly represented parties, then Kelly could have, and should, have terminated Kaplan's representation.

Accordingly, since there was no confidential information exchanged, Kaplan cannot be disqualified on this basis.

**B. There was Limited Communication between Kelly and Kaplan**

Notwithstanding the fact that there were no confidences exchanged, Kelly's communication with Kaplan was limited.<sup>52</sup> Kaplan's information about the instant matter, including information about Kelly's role as CCO and COO, came from SBAM's business records provided by Kelly and other SBAM employees.<sup>53</sup>

Throughout the course of representation, Kelly disclosed very little information to

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\*1-2 (S.D.N.Y. Mar. 25, 1997) (denying disqualification where affidavits submitted in opposition "have rebutted any presumption" of shared confidential information).

<sup>50</sup> ALJ's Order at 2.

<sup>51</sup> MHK Aff. at ¶¶ 20, 35, 36 (*internal citations omitted*)

<sup>52</sup> *Id.* at ¶¶ 19, 27, 37.

<sup>53</sup> *Id.* at ¶19.

Kaplan.<sup>54</sup> MHK primarily reported to SBAM's Co-CEO's.<sup>55</sup> Accordingly, conversations with Kelly were infrequent and limited; as a result, no confidential information was divulged by Kelly to Kaplan.

**C. Kelly's Engagement Letter Waived Confidences**

Assuming *arguendo* that there were confidences provided by Kelly to Kaplan, such were waived. The Conflict Waiver prevails because Kelly is a sophisticated individual and understood the potential for conflict and the sharing of confidential information.

Kelly is qualified as sophisticated, based on his own admissions.<sup>56</sup> Kelly's Submission contain internal citations to Kelly's Wells submissions wherein Kelly recites his employment history as being CCO and General Counsel to broker-dealers and/or investment advisors for various banks, as well as a corporate and regulatory attorney in private practice.<sup>57</sup>

Kelly knew the Commission was investigating SBAM's compliance system and agreed in advance that Kaplan could continue representing SBAM in the event of a conflict. Kelly, through executing the Engagement Letter, explicitly authorized Kaplan to employ any confidences, if there were any, previously learned from Kelly during the joint representation.<sup>58</sup> Accordingly, Kelly's Conflict Waiver complied with Rule 1.9(a) and resolved any issue under Rule 1.9(c).<sup>59</sup>

Based on the foregoing analysis, disqualification in the instant matter is inappropriate.

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<sup>54</sup> *Id.* at ¶¶19, 27, 37.

<sup>55</sup> *Id.* at ¶19.

<sup>56</sup> *Id.* at ¶12.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at ¶ 16.

<sup>59</sup> *See generally* St. Barnabas, 7 A.D.3d at 90 (“In this case” there is no need for a “detailed factual showing to rebut the presumption” that the law firm received confidential information from the former client because “St. Barnabas has waived, with knowledge of all the relevant facts, any objection to the Rosenman firm’s adverse representation of HHC”); *see also* Schneider, 260 A.D.2d 321 (denying disqualification based on potential disclosure of confidential information in the face of “a clear and effective [advance] waiver”); *See also*, *See* Rules of Professional Conduct, Rule 1.9(a), (c).

### III. The Cases Relied on in the ALJ's Order are Distinguishable from the Instant Matter

The ALJ relies on—United States v. Quest Diagnostics Inc., 734 F.3d 154 (2d Cir. 2013); U.S. ex rel. Stewart on Behalf of Tineo v. Kelly, 870 F.2d 854, 857 (2d Cir. 1989); and In Re Blizzard, Release No. 2032, (Apr. 24, 2002), 2002 WL 714444—to support disqualification. These cases are distinguishable from the instant matter.

In Quest Diagnostics Inc., the Second Circuit stated:

[w]e have...previously found it necessary to dismiss counsel who had themselves committed no ethical violation, on the basis that confidences...*could have* been revealed to them that would prejudice a party in litigation.<sup>60</sup>

It is significant that in Quest Diagnostics Inc., there *were ethical violations* concerning confidences. Here, there *were no ethical violations*, nor any facts to support the notion that there could have been ethical violations. Quest Diagnostics Inc. is also distinguishable from the present matter, because: Kaplan affirmed that no confidences were exchanged,<sup>61</sup> and the ALJ's Order and Kelly's Submissions are devoid of facts to support a showing that "confidences...*could have* been revealed to them that would prejudice a party in litigation."

In Stewart, the Second Circuit held that a *serious potential conflict of interest* existed where "[t]here was no guarantee that [the client's] interests could be served without vigorous cross-examination of [a former client of that attorney] in a manner wholly inconsistent with the [former client's interests]."<sup>62</sup> The ALJ's concerns regarding a "vigorous cross-examination" of Kelly is a moot point because Kaplan's knowledge of facts related to Kelly are a matter of record

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<sup>60</sup> See Quest Diagnostics Inc., 734 F.3d at 167-168 (emphasis added). See also, ALJ's Order at 3.

<sup>61</sup> See *supra*, footnote 52.

<sup>62</sup> See U.S. ex rel. Stewart on Behalf of Tineo v. Kelly, 870 F.2d 854 at 857 (internal citations omitted). See also, ALJ's Order at 3.



and established in SBAM's business records and Kelly's Submissions.<sup>63</sup> The ALJ's Order also argued that:

[a]lthough the [Conflict Waiver] may preclude Kelly from moving to disqualify Kaplan in this proceeding, nothing in the letter appears to wholly waive conflicts of interest." But even if [Christopher] Kelly did waive any conflict, [the ALJ's] "independent duty to assure a fair [hearing] may override such waiver."<sup>64</sup>

The instant matter is distinguishable because Kelly, a sophisticated individual, provided informed consent and thus, Kelly "wholly waive[d] conflicts of interest" in accordance with Rule 1.9. A fair hearing is ensured and there is no risk of a *serious potential of conflict interest* because Kaplan's knowledge is limited to and derived from the record which included SBAM's business records, Kelly's Submissions and Kelly's testimony. Kaplan has also affirmed that there were no confidences exchanged that are not "public" based on the investigative record developed by the Commission staff.

In In Re Blizzard, the ALJ held that "[e]ven the appearance of a lack of integrity could undermine the public confidence in the administrative process upon which our authority ultimately depends."<sup>65</sup> The instant matter is distinguishable because In Re Blizzard was decided on specific facts establishing a conflict and accordingly, In Re Blizzard should not be broadly applied.

#### IV. Concerns Expressed in the ALJ's Order has been Addressed

The ALJ's Order identified various concerns regarding Kaplan's continued representation of SBAM. Based on the foregoing analysis, Kaplan has addressed all concerns expressed by the ALJ's Order have been satisfied because: Kelly's Engagement Letter actually waived any

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<sup>63</sup> MHK Aff. at ¶¶ 13, 14.

<sup>64</sup> Stewart, 870 F.2d at 854; *cf. Wheat v. United Wheat v. United States*, 486 U.S. 153, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988)

<sup>65</sup> See ALJ's Order at 3.

conflicts of interest; Kaplan affirmed that there were no confidences exchanged between Kaplan and Kelly, additionally, there are no facts support the notion that Kaplan is privy to confidential information; assuming, *arguendo*, that Kaplan was privy to confidential information, the Conflict Waiver prevails; SBAM's defense and Kaplan's cross-examination and examination of Kelly is limited and derived from Kelly's Submissions, which are a matter of record; Kaplan's duties in representing SBAM are not impacted because Kaplan's knowledge with respect to Kelly is based on the record. Kelly and other's investigative testimony and Kelly's submissions in this matter are the basis of any future examination or cross-examination of Kelly. Clearly Kelly, an attorney and professional, understood his obligation under oath to tell the truth during his investigative testimony.

*Remainder of page intentionally left blank.*

**CONCLUSION**

For the reasons set forth above, we request that Kaplan not be disqualified from representing SBAM.

Dated: New York, New York  
March 5, 2015

Respectfully submitted,  
**GUSRAE KAPLAN NEISBAUM PLLC**

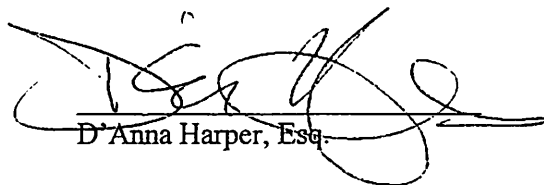
By: 

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 5, 2015 I caused the following parties to be served with Kaplan's Response to the ALJ's Order to Show Cause, by forwarding same in the manner indicated below:

<p><b><u>VIA FEDERAL EXPRESS</u></b></p> <p>U.S. Securities and Exchange Commission Office of the Secretary 100 F. Street NE Suite 1090 Washington, DC 20549 <i>Original and 3 copies</i></p>	<p><b><u>VIA FEDERAL EXPRESS</u></b></p> <p>Honorable Cameron Elliot Administrative Law Judge Securities and Exchange Commission 100 F. Street NE Washington, DC 20549-2557</p> <p>Courtesy copy via email to Anthony Bruno at <a href="mailto:BrunoA@sec.gov">BrunoA@sec.gov</a></p>
<p><b><u>VIA EMAIL to <a href="mailto:BerkeJ@sec.gov">BerkeJ@sec.gov</a> and FEDERAL EXPRESS</u></b></p> <p>Janna I. Berke, Esq. New York Regional Office Securities and Exchange Commission 200 Vesey Street, Suite 400 New York, NY 10281</p>	<p><b><u>VIA EMAIL to <a href="mailto:BrownN@sec.gov">BrownN@sec.gov</a> and FEDERAL EXPRESS</u></b></p> <p>Nancy A. Brown, Esq. New York Regional Office Securities and Exchange Commission 200 Vesey Street, Suite 400 New York, NY 10281</p>
<p><b><u>VIA EMAIL to [REDACTED] and FEDERAL EXPRESS</u></b></p> <p>Christopher Kelly, Esq. [REDACTED]</p>	<p><b><u>VIA EMAIL <a href="mailto:mrossi@mayerbrown.com">mrossi@mayerbrown.com</a> and FEDERAL EXPRESS</u></b></p> <p>Matthew Rossi, Esq. Mayer Brown, LLP 1999 K Street, N.W. Washington, D.C. 20006 <i>Counsel for Martin Sands and Steven Sands</i></p>

  
D'Anna Harper, Esq.

**CERTIFICATE OF SERVICE**

I hereby certify that on March 6, 2015 I caused the following parties to be served with Kaplan's Response to the ALJ's Order to Show Cause, by forwarding same in the manner indicated below:

<b><u>VIA HAND-DELIVERY (4 COPIES)</u></b> U.S. Securities and Exchange Commission Office of the Secretary 100 F. Street NE Suite 1090 Washington, DC 20549	<b><u>VIA HAND-DELIVERY</u></b> Honorable Cameron Elliot Administrative Law Judge Securities and Exchange Commission 100 F. Street NE Washington, DC 20549-2557
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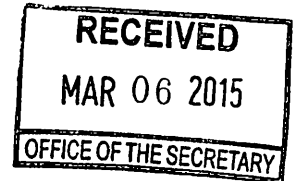
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March 5, 2015

VIA FEDERAL EXPRESS

The Honorable Cameron Elliot  
Administrative Law Judge  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549

VIA FEDERAL EXPRESS

U.S. Securities and Exchange Commission  
Office of the Secretary  
100 F. Street NE  
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Washington, DC 20549

Re: Administrative Proceeding File No. 3-16223

Dear Hon. Cameron Elliot,

This firm represents Respondents Sands Brothers Asset Management, LLC ("SBAM") in the above-referenced matter. Enclosed herewith for filing is an original and three (3) copies of Kaplan's Response to the ALJ's Order to Show Cause.

Should you have any questions please contact me or in my absence, my associate Robyn D. Paster, Esq.

Very truly yours,

*Martin H. Kaplan* / DH  
Martin H. Kaplan

Encl.

cc: Jana I. Berke, Esq. (via email and Federal Express)  
Nancy A. Brown, Esq. (via email and Federal Express)  
Christopher Kelly, Esq. (via email and Federal Express)  
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