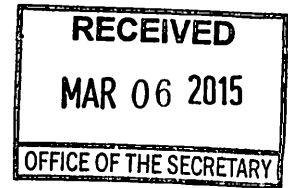


UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-16223

In the Matter of

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

Respondents.

AFFIRMATION OF
MARTIN H. KAPLAN IN SUPPORT OF
SUBMISSION ON ORDER TO SHOW
CAUSE RELATING TO
DISQUALIFICATION OF MARTIN H.
KAPLAN AND GUSRAE KAPLAN
NUSBAUM, PLLC

MARTIN H. KAPLAN, being an attorney duly admitted to the Bar of the State of New York, affirms the truth of the following under penalty of perjury:

1. I am a member of Gusrae Kaplan Nusbaum, PLLC ("GKN"), attorneys for Respondent Sands Brothers Asset Management, LLC ("Respondent" or "SBAM"). I submit this affirmation in support of the submission on behalf of myself and GKN in response to the Order to Show Cause issued *sua sponte* by the Administrative Law Judge (the "ALJ") ("the ALJ's Order") to show cause why I, and/or my firm, should not be disqualified as counsel for SBAM based on our prior representation of Respondent Christopher Kelly ("Kelly").

2. Unless expressly stated otherwise, the matters set forth below are based upon my personal knowledge.

3. There is no legal or factual basis to support disqualification of me and/or my firm from this proceeding.

4. Kelly is a party to a February 2014 engagement letter he executed with my firm (the "Engagement Letter"), wherein he expressly waived the right to seek to disqualify us from continuing to represent any other respondent named in this proceeding, based on any conflict that

might thereafter arise with SBAM or the other individually named respondents in this matter or any other (“Conflict Waiver”). A copy of the Engagement Letter is attached hereto as Exhibit “A.”¹

5. The basis set forth in the ALJ’s Order is “Kaplan’s prior representation of Kelly in the investigation, and that SBAM’s defense [as set forth in its Opposition to the Division of Enforcement’s Motion for Summary Disposition] seeks to establish that Kelly was responsible for the alleged violation.”²

6. The ALJ’s Order raises this issue to ensure the integrity of this proceeding.³

7. The ALJ’s Order assumes that Kaplan is “likely privy to privileged information regarding Kelly, at it remains to be seen how Kaplan will effectively establish SBAM’s defense [and examine Kelly].”⁴

8. Moreover, the AJL’s Order claims that, “nothing in the Engagement Letter and Conflict Waiver] appears to wholly waive conflicts of interest.”⁵

9. Although, Kelly includes vague language in his submissions as to my and GKN’s role as counsel to him and SBAM, Kelly has not alleged a conflict of interest.

10. No claim has been made that I or GKN knew of any conflict between SBAM and Kelly in February 2014, when we undertook the joint representation. In fact, the possibility that SBAM and Kelly [and/or the individual respondents] might have a dispute later on about SBAM’s activities was exactly the kinds of conflict envisioned by the Engagement Letter and the purpose for including the Conflict Waiver. Thus, as set forth in the accompanying Memorandum of Law,

¹ The Engagement Letter attached as Exhibit “A” is for ease of reference for the purpose of this submission, and is the same letter attached identified as Ex. 4 to Nancy Brown’s February Declaration in support of the Division’s Opposition to Motion for Summary Disposition of Christopher Kelly (“Brown’s Feb. Decl.”) ¶ 15.

² ALJ’s Order at p. 2.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

the Conflict Waiver complies with the “informed consent” requirement of Rule 1.9(a) of the N.Y. Rules of Professional Conduct.

11. The Conflict Waiver contains specific warnings relating to the joint representation, sharing of confidential information between the jointly represented parties and the potential conflict and ramifications of same.

12. Kelly is a highly sophisticated individual. He practiced law for many years advising investment advisers on compliance and regulatory matters. As the Chief Compliance Officer and Chief Operating Officer of SBAM for many years Kelly has experience in communicating with the SEC staff relating to examinations.⁶ As set forth in the Division’s Motion, such responses by Kelly resulted in a Commission Order, on consent, relating to violations of Rule 206(4)-2 under the Investment Advisers Act of 1940 (the “Custody Rule”) which was signed by Kelly.⁷ As a result of same, Kelly understood at the time he signed the Engagement Letter that there was a possibility of conflict with SBAM and/or the individual respondents as to (a) the quality of the compliance programs created and enforced by Kelly at SBAM, (b) potential violations relating to SBAM’s compliance with rules and regulations and (c) who would be responsible for potential compliance failures at SBAM. These issues are the substance of the claims the Division is now asserting in this proceeding.

13. Kelly’s role at SBAM as CCO and COO, is a matter of record based on Kelly’s testimony, admissions in his submissions, and acknowledge by the Division.⁸

⁶ The Division of Enforcement’s Opposition to Christopher Kelly’s Motion for Summary Disposition (“Division’s Opposition”) sets forth Kelly’s direct involvement in providing documents to SEC staff in connection with a 2009 examination of by the Office of Compliance and Examinations relating to the Custody Rule. *See* Division’s Motion at p. 5, internal citations omitted.

⁷ Division’s Motion at p. 5, (internal citations omitted).

⁸ Division’s Motion at p. 4 citing Jana Berke, Esq’s Declaration dated Jan. 15, 2015 and Ex. 8 thereto, Kelly’s Wells Submission, at p. 6

14. Kelly's responsibilities are set forth in SBAM's Written Supervisory Procedures, a document Kelly admits he drafted in 2008, which emphasizes his responsibility for SBAM's compliance with the Custody Rule.⁹

15. SBAM's defense that it relied on Kelly as CCO and COO, for compliance with rules and regulations is exactly the situation that could potentially arise as a dispute. Thus, the Conflict Waiver meets the standards set forth in the opinion of the Association of the Bar of the City of New York.¹⁰

16. The Conflict Waiver comprehensively advises the potential for conflict of interests amongst the joint representation parties. Kelly's execution of the Engagement Letter resulted in his acceptance of the following terms:

In all matters where there is more than one entity or individual involved, there is undoubtedly some degree of conflict between the specific interests of the various parties. (See Exhibit "A" at p. 1)

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].* (See Exhibits "A" at p.2)(Emphasis added.)

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

⁹ Division's Motion at p. 4 citing Jana Berke, Esq.'s Declaration dated Jan. 15, 2015 and Ex. 8 thereto (Kelly's Wells Submission). See also and Ex. 39 to Jana Berke, Esq.'s Declaration dated Jan. 15, 2015 (Nov. 15, 2009 Compliance Manual) at 1, 18-19.

¹⁰ The association of the Bar of the City of New York Committee on Profession and Judicial Ethics, Formal Opinion 2006-1 (Feb. 17, 2006) at 3-4. (A waiver is effective if a disinterested lawyer reviewing the matter now would not conclude that that the actual conflict is materially different from the conflict envisioned by the waiver.)

joint representation parties]. You explicitly agree that you will not seek to disqualify this firm []. (See Exhibits "A" at p.2)

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]. (See Exhibits "A" at p. 3)

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) []. (See Exhibits "A" at p. 3)

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. (See Exhibits "A" at p. 3)

17. I did not receive any confidential information from Kelly that was not also disclosed to SBAM and the other individual respondents during the joint representation. The Conflict Waiver expressly contains language providing for the sharing of information amongst the jointly represented parties.

18. SBAM was the original client, and Kelly was taken on based on his role as an employee at SBAM. It made economic and practical sense to have one counsel represent everyone, and it was not proscribed by law.

19. This firm spoke with Kelly infrequently and primarily engaged with Martin Sands and Steven Sands, SBAM's co-CEOs. Kelly has never provided me or my firm with any information that could not have been obtained from another SBAM employee. At no time, did Kelly ever tell me anything confidential about himself personally. At no time, did I or my firm conduct any analysis or review of Kelly's performance of his responsibilities at SBAM. Neither myself nor this firm possesses any confidential information about Kelly that SBAM did not already

know and provide to my firm or that Kelly did not testify about during the Commission staff's On-the-record examination or in papers file or acts taken by Kelly.

20. As set forth in the accompanying Memorandum of Law, the recordings of telephone calls and voicemails between Kelly and the SEC staff are not confidential. Thus, it cannot be argued that the disclosure of same to SBAM and the other parties of the joint representation was a breach of confidentiality or privilege.

21. Since 2006, GKN has represented SBAM on different matters including, but not limited to the investigation giving rise to this proceeding.

22. In or around 2009, SBAM entered into a Stipulation and Agreement with the Connecticut Department of Banking relating to various regulatory matters. I was involved in reaching this result.¹¹

23. In or around 2010, SBAM, Kelly and the other individual respondents entered into a Cease and Desist Order with the SEC relating to failures to comply with the Commissions Custody Rule.¹²

24. Until approximately February 5, 2015, this firm was the only attorney representing any of the respondents at any phase (this excludes Kelly's decision to act pro se.) Having been the attorneys for SBAM for many years, I and the other attorneys at GKN have spent significant time becoming familiar with the facts and law relating to the matters at issue herein. My law firm's disqualification would result in substantial harm to SBAM.

¹¹ See Ex. 11 to the Declaration of Nancy Brown dated January 2015.

¹² See Ex. 15 to the Declaration of Nancy Brown dated January 2015.

25. From at least May 2012, the Commission investigated SBAM in connection with the Custody Rule.¹³ My firm was involved in producing responsive documents to the Commission staff in response to subpoenas. Upon information and belief, simultaneously with my representation of SBAM, Kelly directly submitted responsive documentation to the Commission staff.

26. In or around October 2011 and throughout the next three years, the Commission staff took testimony of various employees of SBAM. I represented all employees called to give testimony including, but not limited to Kelly.

27. My meetings with Kelly prior to his testimony at the Commission were limited. I did not direct Kelly on the substance of his testimony at the Commission except to tell Kelly the obvious; he was required to tell the truth.

28. On or about October 29, 2014, the Commission filed its Order Instituting Administrative Cease-and-Desist Proceedings Pursuant to Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940 (the "OIP").

29. At the time the OIP was filed, all respondents had a unified defense. All of the respondents were in agreement with this. Thus, at this time I concluded there was no conflict of interest in representing these parties.

30. On or about February 25, 2014, Kelly executed the Engagement Letter containing the Conflict Waiver.

31. Kelly executed the Engagement Letter. If I had known there would be a question as to the ability of my firm to represent SBAM, I would not have jointly represented them and

¹³ Division's Motion at p. 23.

would have insisted at the outset that each respondent have separate counsel. I and my firm relied on the written acceptance by Kelly of the Conflict Waiver.¹⁴

32. The joint representation of SBAM and Kelly did not raise any conflicts during the investigation phase as: a) Kelly had very little communication with me or my firm; b) Kelly provided SBAM internal records for production in response to subpoenas, c) there was no personal information provided to me or my firm about Kelly, d) there was no evaluation by me or my firm of Kelly's competence in executing his roles as CCO and COO of SBAM, and e) presumptively, Kelly testified truthfully before the Commission staff as to his role as CCO and COO at SBAM.

33. I decided to cease acting as counsel to Kelly as a result of his confusing and erratic conduct. As set forth in the Division's submissions, Kelly directly contacted the Division staff on numerous occasions beginning in or around February 11, 2014.¹⁵ At no time prior to or during the time of such communications did Kelly raise issues or concerns with me about my representation of him or that he intended to talk with the Commission staff. In fact, the Division refused to continue to discuss this proceeding with Kelly until he confirmed he was no longer represented by me and my firm.¹⁶

34. At the time I received from the Division copies of the voicemails left by Kelly for the Division staff, Kelly was still part of the joint representation. Thus, my sharing of the voicemails with the other parties of the joint representation was proper pursuant to the terms of the Conflict Waiver.

¹⁴ At the time, GKN also received conflict letters from the other individual respondents, Martin Sands and Steven Sands.

¹⁵ Division's Motion at p. 19.

¹⁶ The Division's Motion sets forth the details of the numerous voicemails and conversations the Division staff had with Kelly during the period of February 11, 2014 through March 4, 2014. The Division acknowledges that Kelly executed the Engagement Letter with the Conflict Waiver on February 26, 2014, subsequent to his first unsolicited communication with the Division Staff but prior to the cessation of the relationship with me and my firm. See the Division's Motion at pp. 19-22.

35. As the Division set forth extensively in its submissions to the ALJ, there is no confidentiality that can be attributed to communications with the Division staff.¹⁷

36. Moreover, since the voicemails are not protected by any privilege or confidentiality, the voicemails were subject to production in the discovery phase of this proceeding.

37. As a practical matter, I learned very little information relating to SBAM and the subject matter of this proceeding from Kelly. Such is evidenced by the lack of written communications or other documents with Kelly and this firm.

38. To the extent there may have been disagreements between Kelly and other respondents, I and my firm were not advised of such until the cessation of the representation of Kelly.

39. Significantly, SBAM's defense is predicated on information and documentation belonging to SBAM including, but not limited to its Written Supervisory Procedures drafted by Kelly. Moreover, Kelly's admissions in his testimony before the Commission as well as those contained in the submissions in this proceeding are consistent with SBAM's defense that Kelly was the CCO and COO at SBAM and was responsible for the firm's compliance system and compliance with the Custody Rule. Moreover, any failure to distribute the audited financial statements under the Custody Rule was the result of a good faith belief that the delay in distribution was appropriate, as the information needed to complete the audited financial statements was not available from the sources of such financial information.

¹⁷ See Division's Motion at pp. 22-23.

40. Any argument relating to allocating responsibility for compliance with the Custody Rule is not a matter that involves SBAM, and thus GKN should not be disqualified on the basis of an argument it will not raise.

41. Until approximately February 5, 2015, this firm was the only attorney representing any of the respondents at any phase (this excludes Kelly's decision to act pro se.) Having been the attorneys for SBAM for many years, I and the other attorneys at GKN have spent significant time becoming familiar with the facts and law relating to the matters at issue herein. My law firm's disqualification would result in substantial harm to SBAM.

42. Based on the foregoing, I respectfully request I and my firm continue to represent SBAM in this proceeding.

Dated: New York, New York
March 5, 2015



Martin H. Kaplan, Esq.

EXHIBIT A

13 APR 1983

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**PRIVILEGED and CONFIDENTIAL
ATTORNEY/CLIENT COMMUNICATION**

February 18, 2014

Christopher Kelly
c/o Sands Brothers Asset Management
15 Valley Drive
Greenwich, CT 06831

Re: In the Matter of SBAM Venture Capital Funds, SEC File No. (NY-08127)

Dear Mr. Kelly:

This firm has agreed to represent you in connection with the above-referenced pending SEC Enforcement Action (the "Matter"). This representation will relate to any testimony, document production, responses and litigation concerning the Matter and further investigation by the SEC. This firm has represented Sands Brothers Asset Management ("SBAM"), and various of its affiliated entities, Martin Sands and Steven Sands (the "Sands Entities") in the past and may represent the Sands Entities, and/or you in the future. Furthermore, this firm has also agreed to represent Martin Sands and Steven Sands (the "Individuals") in their individual capacity in connection with the Matter, and this firm may also represent other individuals in the Matter (the "Individuals"). Upon the conditions hereinafter stated, this letter sets forth the terms and conditions of this firm's representation of you in connection with the Matter as it concerns the past and/or future representation of the Sands Entities and/or the Individuals and/or you. This agreement, as well as our Retainer Agreement with SBAM, supersedes any prior agreement concerning representation and embodies the entire agreement in connection with this firm's representation of you and Sands Entities and/or the Individuals in connection with the Matter.

In all matters where there is more than one entity or individual involved, there is undoubtedly some degree of conflict between the specific interests of the various parties. The Code of Professional Responsibility for Lawyers, as adopted by the American Bar Association and the Bars of the various states, permits a lawyer to undertake the joint representation of

GUSRAE KAPLAN NUSBAUM PLLC

Christopher Kelly
February 18, 2013
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multiple clients if the lawyer believes that he or she can adequately represent the interests of each client and each client knowingly consents to that joint representation.

At this time, we believe that this firm can adequately represent you, the Sands Entities and/or the Individuals in the Matter. We further believe, that this firm can adequately represent the Sands Entities and/or the Individuals and/or you in the future regardless of its representation of you and the other individual or entities in connection with the Matter. 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, that of the Sands Entities' and/or the Individuals.

Furthermore, if in the future we undertake to represent you and you believe it advisable to invoke your constitutional privilege against self-incrimination or you refuse to cooperate with any regulatory authority, there may be a conflict of interest between you, the Sands Entities and/or the Individuals.

If we determine during the course of our representation of you, the Sands Entities and/or the Individuals in connection with the Matter that a conflict of interest potentially exists between you, the Sands Entities and/or the Individuals, and if we are representing you at that time, we will notify you of this fact and of your right to employ other counsel to represent you. If we are representing you and if at any time you become aware of any conflict or potential conflict of interest between you, the Sands Entities and/or the Individuals, we ask that you immediately call the fact to our attention so that we can consider whether we can continue to represent you, the Sands Entities and/or the Individuals. You always have the right to obtain your own counsel at your own expense. Of course, either party at any time has the right to determine that they shall proceed independently of the other, upon written notice to the other party.

We reserve our right to potentially bill you if such becomes necessary. You may, of course, terminate our services to you at any time.

If we are representing you and if there is an actual conflict between this firm's representation of you, the Sands Entities and the Individuals, we may be forced to withdraw as your counsel and to continue our representation with the Sands Entities and/or the Individuals. Further, if for any other reason you decided to retain other counsel to represent you in connection with the Matter at some later date, we may continue to represent, the Sands Entities and/or the Individuals. You explicitly agree that you will not seek to disqualify this firm from continuing to represent the Sands Entities, and/or the Individuals, should any conflict of interest develop or should it become necessary or desirable for you to obtain other counsel.

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As in the ordinary attorney-client relationship, any information given by you in confidence to us is privileged information and may not be disclosed without your consent. In the context of this joint representation, however, you expressly agree that any information you provide to us is and may be made available to the Sands Entities and/or the Individuals. To the extent any privileged information provided by you prior to today has been shared with the Sands Entities and/or the Individuals prior to today, you agree that you will not assert such sharing of information as a basis for the disqualification of this firm.

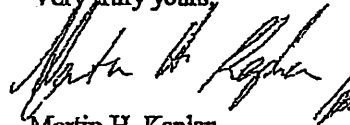
You should also be aware that if it is ultimately found that you violated any of the securities laws, rules or regulations, you might be penalized for such violation(s) and that such penalty may impact negatively upon your standing with federal, state authorities and self-regulatory agencies.

Please read this document carefully and seek immediate clarification of anything that you do not understand, either from counsel of your choosing or from this firm. If, after reading this document and seeking any clarification you may need from your counsel or this firm, you decide that you want this firm to represent you, please sign below, date your signature and return to me the signed and dated original of the letter.

By signing this document, you are acknowledging that you have read it, that you understand its terms, and that you accept the conditions contained herein.

By signing this document, you acknowledge that we have previously discussed the potential conflict of interest relating to this firm representing the Sands Entities and/or the Individuals in relation to the Matter and that you sufficiently understand and accept such potential conflicts of interest.

Very truly yours,


Martin H. Kaplan

ACKNOWLEDGED AND ACCEPTED:


Christopher Kelly

February 26, 2014