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.

DIVISION OF ENFORCEMENT'S OPPOSITION TO SBAM'S REQUEST FOR CERTIFICATION AND STAY OF PROCEEDINGS

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Dated: April 15, 2015

The Division of Enforcement ("Division") respectfully submits this Memorandum in Opposition to SBAM's Request for Certification of the Court's April 7, 2015 Order for Interlocutory Review and to Stay Proceedings. For the reasons set forth below, interlocutory review is not appropriate in this case and, in any event, the proceedings should not be stayed as to the three Respondents who are unaffected by the disqualification ruling.

Argument

I. INTERLOCUTORY REVIEW IS NOT APPROPRIATE

SEC Rule of Practice 400 provides in relevant part that a hearing officer "shall not certify a ruling [for interlocutory review] unless . . . the hearing officer is of the opinion that (i) [t]he ruling involves a controlling question of law as to which there is substantial ground for difference of opinion; and (ii) [a]n immediate review of the order may materially advance the completion of the proceeding." SBAM makes no showing that either ground is satisfied.

A. The Court's Ruling Does Not Concern a Controlling Question of Law

The Court's decision disqualifying Kaplan does not present a "controlling issue of law" under Rule 400. First, in order to qualify for certification, the Commission has required that the question presented should be strictly legal; "mixed questions of law and fact [are] inappropriate for certification." Matter of Natural Blue Resources, Inc., No. 3-15974, 2015 WL 470453, at *2-3 & n.11 (S.E.C. Feb. 5, 2015) (internal quotations omitted); see also Matter of Harding Advisory LLC, No. 3-15574, 2014 WL 988532, at *4 (S.E.C. March 4, 2014) (same); Matter of Montford & Co., No. 3-14536, 2011 WL 5434023, at *2 & n.7 (S.E.C. Nov. 9, 2011). The disqualification question before the Court here was one steeped in both law and fact. Indeed, the Court specifically held "before disqualifying counsel, there must be 'concrete evidence' that [Kaplan's] appearance would undermine the integrity of the proceeding." (April 7, 2015 Order

at 4.) The Court's "concrete evidence" analysis was clearly a factual one. It evaluated whether Kelly had, as a matter of fact, waived any conflicts of interest that Kaplan might have in representing all relevant parties here. In support of such analysis, the Court relied on facts provided in both the Declaration of Nancy A. Brown, executed March 12, 2015, submitted by the Division, and the Reply of Respondent Kelly to Kaplan's Response, dated March 10, 2015. (E.g., id. at 5-6 (discussing the August 2013 telephone call between Division staff and Kaplan, Kaplan's representation of Kelly during investigative testimony, Kelly's unawareness of Kaplan's legal strategy at the time he signed the engagement letter, and Kaplan's decision to turn Kelly's voicemails over to the Sands).)

Indeed, the Court's conclusion – that "[t]he totality of the evidence establishes that Kaplan knew at the time he executed the engagement letter that there was a conflict of interest, and he did not disclose that conflict to Kelly" (id. at 6) – makes abundantly clear that the question on which SBAM now seeks certification is not one of pure law, but one that turned on the facts before the Court. Thus, the question SBAM seeks to certify cannot qualify as a purely legal one and is not appropriate for interlocutory appeal.

Second, in the context of interlocutory appeals, an issue of law is "controlling" only if it is material to the outcome of a case. See Matter of City of Anaheim, File No. 3-9739, 1999 WL 1034489, at *1 (S.E.C. Nov. 16, 1999) (rejecting certified order for interlocutory review under Rule 400(c) because "admission of the Division's evidence is not a question of law that controls the outcome of this proceeding"); see also John Thomas Capital Mgmt. Grp. LLC, No. 3-15255, 2013 WL 6384275 (S.E.C. Dec. 6, 2013) (citing Anaheim and upholding denial of certification of questions regarding Division's satisfaction of its disclosure obligations); cf. Chevron Corp. v. Donziger, No. 11 Civ. 0691 (LAK), 2013 WL 98013, at *4 (S.D.N.Y. Jan. 7, 2013) (declining to

certify ruling for interlocutory appeal under 28 U.S.C. § 1292(b) because issue affected only one of party's legal theories and was therefore not "controlling"); EEOC v. Hora, Inc., No. 03-CV-1429, 2005 WL 1745450, at *3 (E.D. Pa. July 22, 2005) (denying certification under 28 U.S.C. § 1292(b) because order did not present a "controlling issue of law" as it was neither "'controlling' nor material to the . . . claims alleged by Plaintiff").

So it is here. The legal standards that the Court applied in connection with Kaplan's disqualification do not bear on the outcome of this case, but rather relate to the effect of Kaplan's continued representation of SBAM on the integrity of this proceeding. Those are not questions of law that control the outcome of this proceeding.

B. Immediate Review of the Court's April 7, 2015 Order Will Not Materially Advance Completion of the Proceeding

Nor can SBAM satisfy Rule 400(c)'s other prong – that interlocutory review will "materially advance the completion of the proceeding." SBAM argues obliquely that it will because "Kaplan represented SBAM for nearly a decade and is familiar with SBAM's complex business structure and the facts and circumstances of the instant matter." (SBAM Br. at 3.) This argument fails. The claims raised in the OIP are not so complicated that new counsel for SBAM could not easily be brought up to speed, as has presumably happened for new counsel for SBAM's principals, Steven Sands and Martin Sands. SBAM's claim that its "complex business structure" makes Kaplan uniquely qualified to represent it is both new and unsupported by any factual showing.[1] Nowhere has SBAM previously raised its complex business structure in support of its defense.

[1] In fact, throughout the relevant period, SBAM employed at most 12 people, including a company driver and the principals' mother. (See Division's Reply Memorandum in Further Support of its Motion for Summary Disposition, dated February 23, 2015, at 6 n.4.)

There is no reason to believe that immediate review will advance, rather than hinder, the completion of the proceedings. To the contrary, an interlocutory appeal is more likely to delay these proceedings than to advance them. "Immediate review of every trial court ruling, while permitting more prompt correction of erroneous decisions, would impose unreasonable disruption, delay and expense." Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 430 (1985).

C. No "Extraordinary Circumstances" Are Presented Here

Rule of Practice 400(a), which governs the availability of interlocutory review by the Commission, cautions that the Commission will review interlocutory orders (even those certified by the Hearing Officer) only in "extraordinary circumstances." But the allegedly "extraordinary circumstances" SBAM cites in its brief are either illusory or not extraordinary.

1. Orders Granting Disqualification Are Not Extraordinary

Orders disqualifying counsel in civil cases present no special, let alone "extraordinary," circumstances that would justify an exception to the rule that appeals may only be taken from final judgments. Richardson-Merrell, Inc., 472 U.S. at 440 ("We hold that orders disqualifying counsel in civil cases, . . . are not collateral orders subject to appeal as "final judgments" with the meaning of 28 U.S.C. § 1291.") As the Supreme Court had noted in an earlier appeal from an order disqualifying criminal counsel, disqualification orders are like any other pretrial ruling. "Nothing about a disqualification order distinguishes it from the run of pretrial judicial decisions that affect the rights of criminal defendants yet must await completion of trial-court proceedings for review." Flanagan v. United States, 465 U.S. 259, 270 (1984); cf. Matter of Blizzard, No. 3-10007, 2002 WL 714444 (S.E.C. 2002) (granting interlocutory review as to whether hearing officers have the authority to disqualify counsel and then subsequently disqualifying counsel, rather than remanding to the court below, because of delay in proceedings).

2. The ALJ's Opinion in Morgan Keegan Is Not Controlling

In trying to manufacture extraordinary circumstances, SBAM claims that the Court ignored the binding authority of Matter of Morgan Keegan Asset Mgmt., Inc., No. 3-13847, 2010 WL 7765366 (ALJ Order July 19, 2010). (E.g., SBAM Br. at 2 ("The ALJ's ruling is premised on the Csapo and Blizzard decisions, which are not controlling law as in 2010 the Morgan Keegan case significantly altered the standard of law for determining disqualification.").) But SBAM is wrong. Whatever its merit, Morgan Keegan is not binding on this Court. Indeed, Blizzard, on which this Court relied, *is* binding, as the Morgan Keegan court itself recognized. Morgan Keegan, 2010 WL 7765366, at *10 ("The Division correctly observes that Blizzard is binding precedent."). Thus, to the extent that this Court disagreed with anything in Morgan Keegan, it was free to do so.[2]

This Court properly relied on Blizzard and SEC v. Csapo, 533 F.2d 7 (D.C. Cir. 1976), and Morgan Keegan does not (and could not) mandate otherwise.

3. The Court's Power to Control the Proceedings Necessarily Includes the Power to Ensure that Their Integrity Is Preserved

SBAM also "questions the authority of the ALJ to move *sua sponte* to disqualify counsel." (SBAM Br. at 3.) As a starting point, SBAM's complaint is inaccurate. The Court did not "move to disqualify counsel." It issued an Order to Show Cause, seeking the position of

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[2] In any event, the disqualification order is not at odds with Morgan Keegan. The Morgan Keegan Court addressed the Division's argument about whether prospective conflict waivers were per se prohibited under Blizzard, and concluded that they were not. 2010 WL 7765366 at *5. The April 7, 2015 Order is not inconsistent with that ruling. Morgan Keegan further addressed the effect on the integrity of the proceedings when former clients of respondents' counsel *might* give testimony inconsistent with their current clients' interests. Id. at *6-9. That is not the case here, where an actual conflict has already materialized between Kaplan's current client SBAM and Kelly. (April 7, 2015 Order at 5.) Most importantly, Morgan Keegan did not examine the central question presented here – whether a former client had given informed consent to a conflicts waiver when he was not apprised that an actual conflict already existed.

all parties on the various questions about possible conflicts that the parties' summary disposition briefing had revealed.[3] (Feb. 25, 2015 Order to Show Cause, at 4.) In doing so, the Court was fulfilling its responsibility to guard the integrity of the proceedings. Blizzard, 2002 WL 714444, at * 2 ("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.").

The Court's exercise of its responsibilities was particularly appropriate given the presence of Kelly, a pro se respondent. Because Kaplan's conflict was raised by Kelly in his Memorandum of Law in Support of his Motion for Summary Disposition, dated January 14, 2015 (at 2, 3), the Court appropriately construed Kelly's claims liberally and determined that the alleged conflict might infect the proceedings as to him. Thus, the Court's responsibility to ensure "a just determination," particularly for an unrepresented party, made further inquiry appropriate, and in conducting that inquiry, the Court correctly sought the parties' positions.[4]

4. SBAM Has No Constitutional Right to Counsel of its Choosing

SBAM's claim to a constitutional right to Kaplan's representation is also meritless. SBAM argues that it has been deprived of "its constitutional right to counsel of its choice." (SBAM Br. at 2.) But even the cases that SBAM cites make clear that there is no constitutional right to counsel of one's choosing in administrative proceedings. See Morgan Keegan, 2010 WL 7765366, at *2 (discussing a statutory – not constitutional – right to counsel which is "not absolute" and must give way when the integrity of the proceedings are jeopardized); see

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[3] Although invited to, the Sands submitted no response to the Court's Order to Show Cause, indicating at the very least that they may not share SBAM's view of Kaplan's importance to the defenseof SBAM, the Investment Adviser they control.

[4] The Division had also raised the issue, even before Kelly did, but because it hoped to negotiate a resolution of it with Kaplan, the Division did not move to disqualify him. (See Initial Pre-Hearing Conference Transcript, at 8:13-9:7.)

generally Matter of Trautman Wasserman & Co., No. 3-12559, 2007 WL 1892138, at *4 (S.E.C. June 29, 2007) ("[R]espondents in Commission proceedings do not enjoy an absolute right to counsel of their original choosing when a conflict of interest with that attorney threatens the integrity of Commission processes.").[5]

II. THE PROCEEDINGS AS TO THE INDIVIDUAL RESPONDENTS SHOULD NOT BE STAYED PENDING DETERMINATION OF INTERLOCUTORY REVIEW

Even if the Court were to grant certification for interlocutory review, for reasons Kaplan himself argued last month, the proceedings should not be stayed as to the Sands and Kelly.

In its Response to the ALJ's Order to Show Cause, dated March 5, 2015 ("Response"), SBAM argued that there was "'good cause'" for severance of the proceedings against SBAM from those against Kaplan's former clients, the Sands and Kelly, because "[t]he only outstanding issue as to SBAM is a penalty, if any."[6] (SBAM Response at 2 n.5.)[7] In so arguing, SBAM acknowledged that no stay would be necessary or appropriate in this situation either. If it were appropriate in SBAM's view for the proceedings to continue on separate tracks for SBAM and the individual Respondents, it cannot now be heard to complain if they do so.

Nor would SBAM be able to point to any prejudice if the proceedings against the individual Respondents were allowed to proceed in any event. Because a corporate respondent can only act through its managers, whatever remedies should be imposed on SBAM as a result of

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[5] SBAM further claims that its "due process rights" have been "impinged" because SBAM was not afforded oral argument on this issue. (SBAM Br. at 2 n.4.) But SBAM cites no authority for the proposition that it was entitled to oral argument as a constitutional right.

[6] In fact, the Division has also sought a cease-and-desist order, if appropriate, and to rescind SBAM's registration. But to the extent SBAM means that all that remains to be decided are the appropriate remedies, the Division and SBAM are in agreement.

[7] Pursuant to Rule of Practice 201(b), only the Commission can grant a motion for severance, although the Hearing Officer may grant or deny a motion for a stay as part of his determination of a motion for certification. Rule of Practice 400(d).

its violations will necessarily turn on the conduct of the Sands and Kelly, Respondents whom Kaplan no longer represents. Matter of John Thomas Capital Mgmt. Grp. LLC, No. 3-15255, 2014 WL 5304908, at *25 (Initial Decision Oct. 17, 2014), review granted, Rel. No. 3978, 2014 WL 6985130 (Dec. 11, 2014). There is no "good cause" to delay a determination of the Division's claims of aiding and abetting SBAM's violations by the Sands or Kelly. Thus, no stay of these proceedings should be granted against the individual Respondents.

CONCLUSION

For the reasons stated above, the Division respectfully requests that SBAM's request for certification of interlocutory review and stay be denied.

Dated: New York, New York
April 15, 2015

Respectfully submitted,

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