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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDING
File No. 3-16339

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| In the Matter of<br><br>JOHN BRINER, ESQ., et al. | MOTION OF RESPONDENTS M&K CPAS, PLLC, JON RIDENOUR, AND MATTHEW MANIS TO SEVER HEARING |

Pursuant to Rule 201(b) of the Commission's Rules of Practice, Respondents M&K CPAS, PLLC ("M&K"), Jon Ridenour, and Matthew Manis (the "M&K Respondents") move the Commission to sever this hearing as to them and also as to Respondent Benjamin Ortego. Respondent Ortego, who was previously a partner at M&K and is now separately represented, is not making this motion, but we do not understand him to oppose it. The M&K Respondents submit to the Commission that good cause exists under Rule 201(b) for such a severance as set forth below.

1. The Allegations Against the M&K Respondents Are Factually Separate from Those Against the Other Respondents.

The Division's allegations begin with Jon Briner, a Canadian attorney. To summarize its case against Briner in a sentence, the Division alleges that he operated a shell factory and misrepresented the ownership and control of a number of companies, as well as the source of their alleged mining assets, and attempted to take them public. The Division has also brought this administrative proceeding against two groups of auditors Briner dealt with on behalf of certain issuers to conduct audits, M&K CPAS,

PLLC ("M&K"), and DeJoya Griffith, LLC. There was no coordination between the firms. M&K audited eleven companies introduced by Briner, and DeJoya Griffith, the other accounting firm in this proceeding, audited a different group of nine companies. The firms had no interaction or overlap in their activities or dealings with each other. The Division has also brought allegations against Diane Dalmy, an attorney whom the Division alleges supplied opinion letters to Briner.

There is no reason to expect Briner, a Canadian citizen and resident, to even appear for hearing in this proceeding. He has been served but has not answered, and the Administrative Law Judge has issued an order to show cause why he should not be defaulted. One would reasonably expect most or all of the Division's evidence against him to be uncontested. To the extent that the Division is entering bank records or corporate records of the issuers relating to its charges against Briner, and to the extent those are relevant to the case against the auditors, the M&K Respondents do not anticipate authenticity or business records objections.

Nor is the Division's case against Respondent Dalmy complicated or related to its allegations against the M&K Respondents and Respondent Ortego. She contends she didn't authorize issuance of the opinion letters at issue, and the Division contends she did. This dispute has nothing to do with the case against M&K. To the extent some of these opinion letters pertain to the issuers that M&K audited, the opinion letters are not an issue in the Division's case against the M&K Respondents or their defense.

We anticipate the most of the testimony and other evidence presented at the hearing would relate to the Division's allegations against the M&K Respondents and Respondent Ortego, on the one hand, and the DeJoya Griffith Respondents on the

other hand, and their respective defenses. Severing the case against the M&K Respondents and Respondent Ortego should not, therefore, lead to any significant amount of duplication of evidence. The factual evidence against the respective firms will relate mostly to what they knew and did not know, and what they did and did not do. What the DeJoya Griffith Respondents knew and did has nothing to do with what the M&K Respondents knew and did, and vice-versa. This case is factually distinct from a failure to supervise case, for example, where the liability of one party is a predicate to establishing the liability of the other. *E.g., In the Matter of Michael Bressner*, SA Rel. No. 9376 (December 18, 2012). Nothing that the DeJoya Griffith Respondents did or didn't do is a predicate for any liability by the M&K Respondents and vice-versa.

The other evidence in the case will consist of expert testimony, and, again, there should not be substantial duplication if the cases against the two accounting firms are severed. While the Division is citing many of the same accounting standards against the two firms, the crux of the expert opinions will depend on how those standards are applied to the respective audits of the two firms, and the facts underlying the two groups of audits are very different. It is one thing for the Division to say, for example, that the two firms' client acceptance procedures were inadequate under GAAS, but whether the Administrative Law Judge would reach that conclusion depends on what exactly those client acceptance procedures were. The Division does not allege, and we have no reason to think, that M&K's and DeJoya Griffith's audit procedures were identical. Also, we note that the Judge has ordered direct expert testimony to be presented by their reports, so, to the extent that there is any overlap in the Division's direct expert testimony, it will be overlap on a word processor and not at a hearing.

Futhermore, the gravamen of the Division's allegations against the M&K Respondents is that they did not comply with GAAS because they did not advert to "red flags" and make investigation sufficient to determine that Briner was a suspect character. Its allegations against the DeJoya Griffith Respondents, by contrast, are that they knew Briner was a bad character with regulatory black marks and failed to take adequate steps in their audit in light of this knowledge.

The Commission has indicated in past orders that while there are some differences in Commission practice and federal court practice, Federal Rules of Civil Procedure 20 and 21 have some persuasive relevance. See *In the Matter of John A. Carley*, SEA Rel. No. 50695 (November 18, 2004). In *Carley,* the Commission noted that, unlike the Federal Rules, its rules on joinder only required a common question of law or fact and not that claims arise out of the same transaction or occurrence. We submit that neither is the case here. The claims against DeJoya and M&K arise out of different transactions, their audits of different companies, and there is no significant common question of law. *See Spaeth v. Mich. State Univ. College of Law, 845 F. Supp. 2d 48* (DDC 2012)(transactions must be logically related under Rule 20, and there was no allegation of concerted action by defendants). Moreover, while the issues against each accounting firm arise in the same area of law, the pertinent legal issues are how GAAS applies to different audit programs and procedures by two different accounting firms, and those are different issues. Claims merely based on the same general theory of law do not pass the test of commonality for joinder under federal jurisprudence.

> [W]hen determining whether employment discrimination claims raise common questions of law or fact for purposes of permissive joinder, "courts often consider the circumstances surrounding the [] claims, including the people involved, the location, the time frame, and the defendant's pattern of behavior. "

*Spaeth, supra,* 845 F.Supp. 2d at 54. Similarly, in this case, the Administrative Law Judge will necessarily apply general principles to the specific audit programs and specific actions of two different firms.

2. Trying the case against M&K and DeJoya Griffith would be prejudicial to both M&K and DeJoya Griffith.

The M&K Respondents and Respondent Ortego, on the one hand, and DeJoya Griffith and persons associated with it (collectively the "DeJoya Respondents"), on the other hand, would be prejudiced by having the cases against them tried together. There are signficant differences in the manner in which they conducted their audits, which will be used by the M&K Respondents in their defense. Among other things, M&K had no knowledge of any of Briner's regulatory problems, and the Division has alleged that the DeJoya Respondents did. Also, M&K made the issuers it audited mark their only significant assets, claimed mining interests, down to zero. It is our understanding that DeJoya Griffith did not.

Based on these differences, a joint trial would be prejudicial to both groups of auditors. The M&K Respondents could reasonably expect the Division's presentation of evidence and the Division's experts to lump them together with the DeJoya Griffith Respondents, muddying the distinctions in their respective conduct of audits. DeJoya Griffith would be prejudiced by having M&K defend itself in part by criticizing it. The Division could effectively use M&K's experts to help make its case against DeJoya Griffith. This is not fair to either DeJoya Griffith or M&K.

Under federal court practice, even if joinder of parties is proper, the court "must examine whether permissive joinder would 'comport with the principles of fundamental fairness' or would result in prejudice to either side. *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1296 (9th Cir. 2000). In addition to the prejudice to both groups of auditors described above, there would be substantial additional legal expense to both in making them pay their attorneys and experts to sit through half of a lengthy trial in which the Division is presenting its case against the other auditor and that auditor is presenting its defense. The converse is not true for the Division. Except for any background evidence about Briner, most of which is of public record or unlikely to be contested, its time expended in presenting its case against the two audit firms is simply the sum of presenting the case against each individually. Considerations of fairness and prejudice weigh in favor of severance.

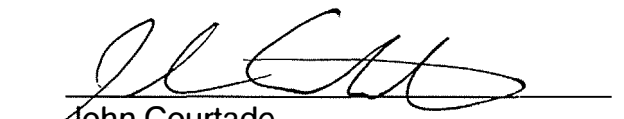
3. Scheduling conflicts.

In addition to the reasons for severance set forth above, there have been serious scheduling conflicts with arranging a hearing on the accelerated schedule provided by the Commission's rules with this number of respondents, many of whom are out of the country or have other unalterable commitments during the summer. The Administrative Law Judge has tried to accommodate these conflicts by scheduling a hearing from May 26 through June 3, continuing on June 29. A severance of the two auditing firms and possibly Ms. Dalmy, whom we also understand to be making a severance motion, would simplify these scheduling problems for all concerned.

4. Conclusion.

Excluding the dispute over Ms. Dalmy's legal opinions, which has little if anything to do with the M&K and DeJoya Griffith, this is a case about auditing practices. There is a modest amount of evidence relating to Mr. Briner, his regulatory history, alleged bogus use of officers and directors and bogus mining claims. This evidence is in large part a matter of public record or otherwise undisputed. Whatever the Division's evidence is about the mining claims, it is irrelevant as to M&K, which made all the issuers in question write their mining assets down to zero. We expect the overwhelming focus at the hearing to concern the knowledge, actions and audit practices of M&K, on the one hand, and the entirely separate knowledge, actions, and audit practices of DeJoya Griffith, on the other. The prejudice to each firm is substantial from such a joinder, and we respectfully submit that there is good cause under Rule 201(b) for the Commision to sever the action between the DeJoya Griffith Respondents and the M&K Respondents and Respondent Ortego.

Respectfully submitted,



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Dated: February 22, 2015

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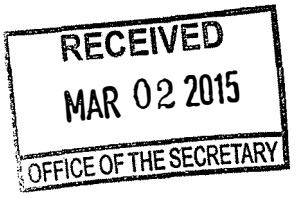


February 22, 2015

By fax--202.772.9324–and by U.S. Mail

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Securities and Exchange Commission
100 F Street, N.E.
Mail Stop 1090–Room 10915
Washington, D.C. 20549

Att'n: Brent J. Fields, Secretary

Re: In the Matter of John Briner, Esq., et al., Admin. Proc. File No. 3-16339

Dear Mr. Fields:

Please find under cover of this letter the Motion of Respondents M&K CPAS, PLLC, Jon Ridenour, and Matthew Manis to Sever Hearing in this administrative proceeding. An original will follow by U.S. Mail. Please note that, pursuant to Commission Rules, this motion is being made to the Commission, not Administrative Law Judge Grimes. If you have any questions, please do not hesitate to contact me.

Very truly yours,

John Courtade

cc: Office of Administrative Law Judges [redacted]
Jason W. Sunshine, Esq. [redacted]
David Stoelting, Esq. [redacted]
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