UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4083 / May 13, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16223

In the Matter of SANDS BROTHERS ASSET MANAGEMENT, LLC, STEVEN SANDS, MARTIN SANDS, and CHRISTOPHER KELLY	ORDER DENYING PETITION FOR INTERLOCUTORY REVIEW

Pending before a law judge are administrative proceedings against Sands Brothers Asset Management, LLC ("SBAM"), Steven and Martin Sands (together, SBAM's two co-chairmen), and Christopher Kelly (SBAM's Chief Compliance and Chief Operating Officer). On April 30, 2015, SBAM filed the instant petition with the Commission for interlocutory review of the law judge's order disqualifying Martin H. Kaplan, Esq., and Gusrae Kaplan Nusbaum PLLC (together, "Kaplan") from representing SBAM in this matter and to stay the proceedings pending the Commission's consideration of the petition. For the reasons below, SBAM's request is denied.

BACKGROUND

The Commission issued its Order Instituting Proceedings in this case on October 29, 2014.[1] The OIP alleges that, for the fiscal years 2010, 2011, and 2012, SBAM failed to timely distribute audited financial statements to the investors of certain pooled investment vehicles managed by SBAM. The OIP alleges that this violated the custody requirements of Section 206(4) of the Investment Advisers Act of 1940[2] and Rule 206(4)-2 thereunder,[3] and an October 2010 order in which the Commission directed SBAM, Steven Sands, and Martin Sands to cease

[1] *Sands Bros. Asset Mgmt., LLC*, Investment Advisers Act Release No. 3960, 2014 WL 5464813 (Oct. 29, 2014).

[2] 15 U.S.C. § 80b-6(4) (prohibiting a registered investment adviser from engaging in fraudulent, deceptive, or manipulative conduct).

[3] 17 C.F.R. § 275.206(4)-2 (requiring an adviser to take certain steps to safeguard client assets over which it has custody).

and desist from violating or causing any future violations of that rule.[4] The OIP further alleges that the two Sandses and Kelly willfully aided and abetted and caused SBAM's custody rule violations, and ignored the Commission's 2010 cease-and-desist order by failing to implement any procedures or safeguards to ensure compliance.

During at least some of the Division's pre-OIP investigation, Kaplan jointly represented all of the respondents as counsel. But in April 2014, the Division wrote to Kaplan that Commission staff had "serious concerns" that a conflict of interest could prevent Kaplan from representing all, and perhaps any, of the parties in the Division's investigation. The Division stated that Kelly could have interests in the investigation "that are divergent from, and potentially adverse to" those of SBAM and Steven and Martin Sands, noting that Kaplan told the Division that Steven and Martin Sands had relied on Kelly in connection with the late audits, while Kelly told the Division that he was not responsible for the late audits. Kaplan terminated their representation of Kelly sometime thereafter, and Kelly has since been *pro se*.

The law judge held a prehearing conference on December 2, 2014. All the parties except Kelly attended. During this conference, the Division raised its concerns about Kaplan's potential conflict of interest in representing SBAM and Steven and Martin Sands. The Division explained that, because Kaplan had represented all of the respondents during the Division's investigation, there could be "issues of conflict that may permeate these proceedings, particularly if Mr. Kelly were to be called as a witness." The Division added that it would continue to discuss the conflict issue with Kaplan to reach a resolution.

The Division and Kelly subsequently filed motions for summary disposition, after which Kaplan withdrew from representing Steven and Martin Sands but remained as SBAM's counsel. Approximately one week later, SBAM filed an opposition to the Division's motion for summary disposition. In it, SBAM did not dispute that it had failed to timely distribute audited financial statements, but it asserted that Kelly, as the firm's chief compliance officer, was responsible for complying with the applicable rules.

On February 25, 2015, the law judge ordered Kaplan to show cause why they should not be disqualified as SBAM's counsel. In their response, Kaplan argued that Kelly executed a formal engagement letter with Kaplan in which Kaplan had advised Kelly of potential conflicts of interest. Kaplan argued that Kelly "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." Kaplan further represented that they had not received any confidential information from Kelly during their representation of him that should disqualify Kaplan from representing SBAM. Kaplan added that they had represented SBAM for "nearly a decade" and that it "would cause considerable delay and effort for substitute

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[4] *Sands Bros. Asset Mgmt., LLC*, Advisers Act Release No. 3099, 2010 WL 8609519 (Oct. 22, 2010) (accepting offer of settlement and finding that SBAM and Steven and Martin Sands failed to comply with custody rule, record-keeping, and certain other provisions of the Advisers Act).

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."

On April 7, 2015, the law judge disqualified Kaplan from representing SBAM in this matter and gave SBAM until June 8, 2015, to retain new counsel. The law judge found that there was "concrete evidence" that, before executing the engagement letter, "Kaplan had already colluded with [Steven and Martin] Sands to formulate a defense that would pin the blame on Kelly." The law judge concluded that Martin Kaplan therefore "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." Under such circumstances, the law judge held, "Kaplan's continued appearance in this action undermine[d] the integrity and fairness of this proceeding." The law judge further found that obtaining new counsel would not be "particularly burdensome for SBAM," observing that it was common for respondents in administrative proceedings to change counsel after the investigation had concluded.

A week later, on April 14, 2015, SBAM asked the law judge to certify his disqualification order for interlocutory review and to stay the proceedings pending certification and the Commission's ultimate decision on the issue. SBAM argued that the law judge had failed to use the appropriate standard of law for determining disqualification, which caused a "conflict in the current case law [that] should be rectified by the Commission." The law judge denied SBAM's request for certification on April 22, 2015.

ANALYSIS

I. SBAM's petition for interlocutory review is denied because the law judge did not certify the petition, a ruling that correctly applied the standard for certification.

Commission Rule of Practice 400(a) provides that "'[p]etitions by parties for interlocutory review are disfavored'" and will be granted by the Commission "'only in extraordinary circumstances.'"[5] Under Rule of Practice 400(c), any interlocutory appeal to the Commission first must be certified by the law judge as satisfying certain criteria.[6] As a result, the

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[5] *Warren Lammert*, Exchange Act Release No. 56233, 2007 WL 2296106, at *3 (Aug. 9, 2007) (quoting 17 C.F.R. § 201.400(a)). In adopting this language, the Commission "ma[d]e clear that petitions for interlocutory review . . . rarely will be granted." *Id.* (quoting *Adoption of Amendments to the Rules of Practice and Delegations of Authority of the Commission*, Exchange Act Release No. 49412, 2004 WL 503739, at *12 (Mar. 12, 2004) (hereinafter *Adoption of Amendments to the Rules of Practice*).

[6] 17 C.F.R. § 201.400(c).

Commission "generally does not consider petitions for interlocutory review where," as here, "the law judge has 'declined to certify [the] petition for interlocutory review.'"[7]

And the law judge's decision not to certify his order for interlocutory review was consistent with the applicable standard for certification. Rule of Practice 400(c) states that a law judge "shall not certify a ruling unless," as relevant here, "(i) The ruling involves a controlling question of law as to which there is substantial ground for difference of opinion; and (ii) An immediate review of the order may materially advance the completion of the proceeding."[8] SBAM argues that this standard was met because the law judge applied the wrong standard of law when disqualifying Kaplan. But alleging that the law judge applied the wrong standard for attorney disqualification does not present a "controlling question of law" on the underlying alleged violations. A ruling on the standard for attorney disqualification is collateral to the ultimate outcome of the proceeding.[9] Instead, the law judge's disqualification order can be challenged in an eventual appeal.[10] In addition, any potential benefit gained by the Commission's review of the allegedly erroneous disqualification order is outweighed by the harm of delaying the proceeding to allow a piecemeal appeal.[11]

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[7] *Eric David Wagner*, Exchange Act Release No. 66678, 2012 WL 1037682, at *2 (Mar. 29, 2012) (quoting *Montford & Co.*, Advisers Act Release No. 3311, 2011 WL 5434023, at *2 (Nov. 9, 2011)); *see also John Thomas Capital Mgmt. Group LLC*, Exchange Act Release No. 71415, 2014 WL 294551, at *1 (Jan. 28, 2014) (denying petition for interlocutory review where respondents had not obtained certification from the law judge); *Vincent Poliseno*, Exchange Act Release No. 38770, 1997 WL 346154, at *1 (June 25, 1997) (same). Even when a law judge certifies a petition for interlocutory review, the Commission will grant such petitions "only in extraordinary circumstances." 17 C.F.R. § 201.400(a).

[8] 17 C.F.R. § 201.400(c). Rule 400(c) also provides that a law judge may certify a ruling if "[h]is or her ruling would compel testimony of Commission members, officers or employees or the production of documentary evidence in their custody." *Id.*

[9] *City of Anaheim*, Exchange Act Release No. 42140, 1999 WL 1034489, at *1 (Nov. 16, 1999) (denying petition for interlocutory review because the law judge's ruling did not involve a "question of law that controls the outcome of this proceeding").

[10] *Cf. Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 435 (1985) (holding that orders disqualifying counsel are not subject to interlocutory review because, in part, "if the client obtains an unsatisfactory judgment with substitute counsel, the disqualification ruling may be challenged on appeal of a final judgment"); *In re Bushkin Assocs.*, 864 F.2d 241, 243 (1st Cir. 1989) (observing that "[t]he Supreme Court has expressly forbidden interlocutory appeals of disqualification orders").

[11] *Cf. Richardson-Merrell*, 472 U.S. at 434 ("We do not think that the delay resulting from the occasionally erroneous disqualification outweighs the delay that would result from allowing piecemeal appeal of every order disqualifying counsel."); *infra* note 15 and accompanying text (noting the Commission's "emphatic preference" to avoid piecemeal appeals).

Further, this ruling involved "mixed [questions] of law and fact" that were inappropriate for certification.[12] As the Supreme Court has stated, "[t]he decision whether to disqualify an attorney ordinarily turns on the particular factual situation of the case then at hand, and the order embodying such a decision will rarely, if ever, represent a final rejection of a claim of fundamental right that cannot effectively be reviewed following judgment on the merits."[13] Although SBAM describes the law judge's alleged error as a legal one, both SBAM's petition for interlocutory review and the law judge's disqualification order turn on questions of fact. For example, the law judge's order rested on his examination of the record and 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."

II. SBAM's challenge to the law judge's disqualification order does not warrant interlocutory review on the Commission's own motion.

The Commission declines to review the law judge's disqualification order on its own motion.[14] The Commission's "emphatic preference—which embodies the 'general rule' disfavoring piecemeal, interlocutory appeals—is that claims should be presented in a single petition for review after 'the entire record [has been] developed' and 'after issuance by the law

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[12] *Montford & Co.*, 2011 WL 5434023, at *2; *accord Century Pac., Inc. v. Hilton Hotels Corp.*, 574 F. Supp. 2d 369, 371 (S.D.N.Y. 2008) (finding that a "'question of law' certified for interlocutory appeal 'must refer to a "pure" question of law that the reviewing court "could decide quickly and cleanly without having to study the record"'" (quoting *In re WorldCom, Inc.*, No. M-47 HB, 2003 WL 21498904, at *10 (S.D.N.Y. 2003))); *SEC v. First Jersey Sec.*, 587 F. Supp. 535, 536 (S.D.N.Y. 1984) (holding that, although "an immediate interlocutory appeal would advance the ultimate termination of this litigation," an appeal "would necessarily present a mixed question of law and fact, not a controlling issue of pure law," and the district court's order was therefore "not appropriate for certification").

[13] *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981) (holding that a trial court order denying a motion to disqualify counsel was not subject to immediate appeal); *see also Richardson-Merrell*, 472 U.S. at 440 (concluding that "orders disqualifying counsel in civil cases, as a class, are not sufficiently separable from the merits to qualify for interlocutory appeal").

[14] The "discretion to grant interlocutory review" exists even when the law judge declines to certify the ruling in question. *Wagner*, 2012 WL 1037682, at *2; *see also City of Anaheim*, 1999 WL 1034489, at *1 n.3 (explaining that Rule 400 "in no way limits the Commission's discretion to direct that matters be submitted to it"); 17 C.F.R. § 201.400(a) (stating that the Commission may "at any time, on its own motion, direct that any matter be submitted to it for review"); *Adoption of Amendments to the Rules of Practice*, 2004 WL 503739, at *12 (stating that the Commission "retains discretion to undertake such [interlocutory] review on its own motion at any time").

judge of an initial decision.'"[15] That a party "may disagree with the law judge's determination" does not make a ruling appropriate for interlocutory review.[16]

SBAM nevertheless contends that that this case presents "extraordinary circumstances" that warrant immediate review, claiming that the law judge created a conflict in the Commission's case law by relying on two cases that are no longer "controlling law"—*SEC v. Csapo*[17] and *Clarke T. Blizzard*.[18] SBAM contends that those cases were "significantly altered" by a law judge's 2010 order in *Morgan Asset Management, Inc.*[19] SBAM argues that the law judge's reliance on outdated legal standards has "far reaching implications" that "should be rectified by the Commission."

We disagree. Any alleged conflict between the order in *Morgan Asset Management* and the *Csapo* and *Blizzard* cases could not have had the effect of upending established precedent or controlling law. As the law judge noted, an order issued by a law judge is not binding on the Commission or on other law judges.[20] Nor can an order issued by a law judge have any effect on the D.C. Circuit's decisions.[21] Therefore, the law judge's reliance on *Blizzard* and *Csapo* appears to have been entirely appropriate. SBAM may disagree with the law judge's interpretation of those cases, but that is not a basis for interlocutory review.

In any event, SBAM fails to identify any conflict between these cases, other than to assert vaguely that the law judge applied an "overly broad interpretation of the duty of loyalty [that] resulted in an inappropriate interference with the attorney-client relationship." This general allusion to errors does not establish extraordinary circumstances that would warrant the

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[15] *John Thomas Capital Mgmt. Group LLC*, Exchange Act Release No. 71021, 2013 WL 6384275, at *2 (Dec. 6, 2013) (footnotes and citations omitted).

[16] *Montford & Co.*, 2011 WL 5434023, at *3.

[17] 533 F.2d 7 (D.C. Cir. 1976).

[18] Advisers Act Release No. 2032, 55 SEC 754, 2002 WL 714444 (Apr. 23, 2002).

[19] Admin. Proc. Rulings Release No. 657, 2010 WL 7765366 (July 19, 2010).

[20] *Cf. Rapoport v. SEC*, 682 F.3d 98, 105 (D.C. Cir. 2012) (recognizing that "ALJ order[s]" are "not . . . binding" on the Commission); *Absolute Potential, Inc.*, Exchange Act Release No. 71866, 2014 WL 1338256, at *8 n.48 (Apr. 4, 2014) (stating that the Commission is not bound by law judge decisions).

[21] *Cf. Tice v. Bristol-Myers Squibb Co.*, 325 F. App'x 114, 120 (3d Cir. 2009) (stating that "according preclusive effect to underlying agency decisions would eviscerate the ultimate responsibility that Congress placed with the judiciary by depriving aggrieved parties of a federal forum").

Commission's review on its own motion. And further examination of these cases does not identify any basis for Commission review.[22]

We also reject SBAM's arguments that Commission review is warranted because the law judge's order affects the firm's constitutional rights and will cause it irreparable harm. Although SBAM claims that the law judge's order "fundamentally impacts" its constitutional right to choose counsel, respondents "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."[23] Courts and the Commission also have held that parties are not entitled to an interlocutory appeal merely because their claims are premised on a constitutional right or guarantee.[24] And although SBAM claims that it will be "irreparably prejudiced by the disqualification of its counsel[,] which has represented it for over a decade," determining whether SBAM is prejudiced by disqualification of its counsel can be established only after the law judge's initial decision. As the Supreme Court has explained: "If respondent were to proceed to trial and there receive as effective or better assistance from substitute counsel than the disqualified attorney could provide, any subsequent appeal of the disqualification ruling would fail."[25]

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[22] Indeed, the law judge in *Morgan Asset Management* recognized that *Blizzard* was binding precedent on his decision. 2010 WL 7765366, at *10 ("The Division correctly observes that *Blizzard* is binding precedent.").

[23] *Trautman Wasserman & Co., Inc.*, Exchange Act Release No. 55989, 2007 WL 1892138, at *4 (June 29, 2007) (citing *Blizzard*, 2002 WL 714444, at *3 ("[W]e are sensitive to the rights of individuals to be represented by the attorney of their choice. However, this is not an absolute right. Here, the right to counsel of one's choice is outweighed by the necessity of ensuring that our administrative proceeding is conducted with a scrupulous regard for the propriety and integrity of the process." (citing *Wheat v. United States*, 486 U.S. 153, 164 (1988)))).

[24] *E.g.*, *Flanagan v. United States*, 465 U.S. 259, 266–67 (1984) (holding that a claim "based on the Due Process Clause of the Fifth Amendment" was not subject to interlocutory review); *United States v. Wampler*, 624 F.3d 1330, 1338 (10th Cir. 2010) (stating that "Fourth or Sixth Amendment violations . . . have long been held unamenable to interlocutory appellate review"); *Gregory M. Dearlove*, Admin. Proc. Release No. 12064, 58 SEC 1077, 2006 SEC LEXIS 3191, at *5 (Jan. 6, 2006) (denying petition for interlocutory review notwithstanding respondent's argument that the "matter at hand presents extraordinary circumstances with due process implications").

[25] *Richardson-Merrell*, 472 U.S. at 439 (concluding that attorney disqualification rulings are "inextricably tied up in the merits"); *cf. John Thomas Capital Mgmt. Group LLC*, Exchange Act Release No. 74345, 2015 WL 728006, at *4 (Feb. 20, 2015) (observing that "the Supreme Court long has recognized the 'expense and disruption of defending . . . [a] protracted adjudicatory proceeding[]' does not constitute irreparable harm" (quoting *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980))).

Finally, we reject SBAM's contention that interlocutory review would materially advance the proceedings by providing "general guidance" as to the appropriate standard for whether to disqualify counsel. As explained above, the law judge appears to have applied existing D.C. Circuit and Commission precedent. Therefore, calling this matter up for interim review is unnecessary and likely to delay the proceedings further. If the law judge's disqualification of SBAM's counsel is incorrect, that decision can '"be effectively reviewed post-judgment'" by vacatur and remand.[26]

Accordingly, it is ORDERED that SBAM's petition for interlocutory review is denied.[27]

For the Commission, by the Office of the General Counsel, pursuant to delegated authority.

Brent J. Fields
Secretary

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[26] *Dearlove*, 2006 SEC LEXIS 3191, at *6 n.7 (quoting *United States v. Breeden*, 366 F.3d 369, 375 (4th Cir. 2004)); *see also Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009) (determining that, even though a ruling "may burden litigants in ways that are only imperfectly reparable by appellate reversal," that possibility "has never sufficed" to warrant immediate interlocutory review (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 872 (1994))); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1172 (D.C. Cir. 1985) (observing that review of "[o]rders relating to discovery matters . . . must usually wait until a final judgment is entered").

[27] SBAM's request for a stay is moot in light of the disposition of its petition. *See John Thomas Capital Mgmt.*, 2014 WL 294551, at *3 n.26. The Division's motion for leave to file an opposition to SBAM's petition for interlocutory review and the Division's opposition to SBAM's stay request, which were filed on May 5, 2015, are similarly moot.