

June 17, 2015

VIA EMAIL (alj@sec.gov) AND FEDEX

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

Re: ***In the Matter of Sands Brothers Asset Management, LLC, et al.
Administrative Proceeding File No. 3-16223***

Dear Judge Elliot:

This firm represents respondent Sands Brothers Asset Management, LLC ("SBAM"). In preparation for this afternoon's hearing, SBAM respectfully submits the enclosed Motion to Stay, Postpone, or Adjourn the Proceeding. As background: this firm was retained by SBAM on June 5, 2015, and filed its notice of appearance on June 8. As we argue in the motion, the grant of a reasonable stay is necessary and in the interest of justice, because SBAM, is essentially starting the case anew, given the disqualification of its long-term counsel. As a result, we, as successor counsel, must not only review and digest the voluminous record (containing over 155,000 pages of documents) in anticipation of a hearing, but must analyze and evaluate whether SBAM should assert other or different defenses in response to the Commission's motion for summary disposition.

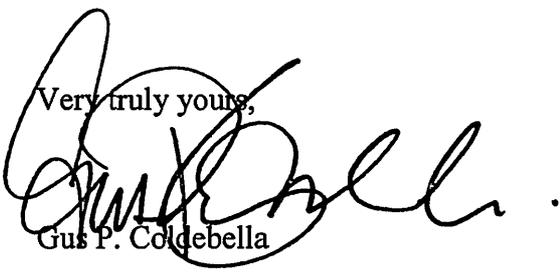
SBAM submits this motion in advance of the parties' telephonic conference with Your Honor, scheduled for 1:00 p.m. today, and following discussions yesterday with the Division and the other respondents with respect to SBAM's need for a stay of the proceeding.

By copy of this letter, we have delivered the original and three copies of the Notice to the Office of the Secretary of the Commission for filing, and we have also sent the Notice to the Secretary by facsimile.

Thank you.

The Honorable Cameron Elliot
June 17, 2015
Page 2

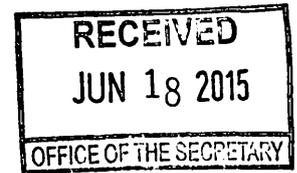
Very truly yours,


Gus P. Coldebella

Enclosure

cc: Office of the Secretary (*via facsimile and FedEx*)
Anthony Bruno
Janna I. Berke, Esq.
Nancy A. Brown, Esq.
Matthew Rossi, Esq.
Christopher Kelly, Esq.
Ariel I. Raphael, Esq.
(*via email*)

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.

**RESPONDENT SANDS BROTHERS ASSET MANAGEMENT, LLC'S
MOTION TO STAY, POSTPONE, OR ADJOURN THE PROCEEDING**

Pursuant to Rule 161 of the Rules of Practice of the U.S. Securities and Exchange Commission, 17 C.F.R. § 201.161, Respondent Sands Brothers Asset Management, LLC ("SBAM") hereby requests that the proceeding be stayed against all respondents for 90 days. This relief is appropriate because all of the work performed so far on SBAM's behalf (and much of the work performed on behalf of respondents Steven and Martin Sands) was the work product of an attorney who has now been disqualified from the case, and the relief is necessary to allow SBAM's new counsel sufficient time to (i) review the voluminous record, containing over 155,000 pages of documents, transcripts, and other materials; (ii) determine whether SBAM should make any additional filings related to summary disposition, as it is allowed to do in these

circumstances; and (iii) prepare for a hearing in this matter.¹ In support of its motion, SBAM states as follows:²

I. FACTUAL AND PROCEDURAL BACKGROUND

On October 29, 2014, the Commission issued an Order Instituting Proceedings (“OIP”) against respondents SBAM, Steven Sands (“S. Sands”), Martin Sands (“M. Sands”), and Christopher Kelly (“Kelly”). The Division of Enforcement (“Division”) alleges that, from 2011 to 2013, SBAM violated Rule 206(4)(2) of the Investment Advisers Act of 1940 (the “Custody Rule”) by distributing audited financial statements to investors more than 120 days after the end of the fiscal years 2010-2012. The Division further alleges that M. Sands, S. Sands, and Kelly aided and abetted and caused those purported violations. Although it does not allege that SBAM harmed any investors by distributing financial statements more than 120 days after the end of the fiscal years, the Division seeks extraordinary, third-tier penalties against all respondents, including the revocation of SBAM’s registration and a permanent industry bar against all other respondents.

According to the pleadings, Martin H. Kaplan of Gusrae Kaplan Nusbaum PLLC (collectively, “Kaplan”) represented SBAM, M. Sands, and S. Sands throughout the Commission’s investigation of the events giving rise to this enforcement action, and represented Kelly (a) in connection with Kelly’s investigative testimony on April 22, 2013, and (b) from February 18, 2014 until April 25, 2014 in anticipation this action. Kaplan filed an Answer on

¹ SBAM notes the recent decision in *SEC v. Hill*, No. 1:15-cv-01801-LMM (N.D. Ga.), and reserves its rights to raise all appropriate objections to these proceedings and seek all appropriate relief during the requested pendency of the requested stay and thereafter.

² SBAM has consulted with the Division and with counsel for respondents S. Sands, M. Sands, and Kelly. Counsel for M. Sands and S. Sands consents to this request.

behalf of SBAM, M. Sands, and S. Sands on November 17, 2014. On December 1, 2014, this tribunal issued an order staying the proceeding as to Kelly, who had been negotiating a settlement *pro se* with the Division. By letter dated December 19, 2014, the Division communicated that no settlement had been reached with Kelly and requested that the stay be lifted, which this tribunal did by Order dated December 24, 2014.

On January 15 and 16, 2015, respectively, Kelly and the Division filed Motions for Summary Disposition (the “SD Motions”). Soon after the filing of the SD Motions, on February 6, 2015, Kaplan withdrew from representing M. Sands and S. Sands, but continued to serve as counsel to SBAM. M. Sands and S. Sands retained new counsel. Kelly opposed the Commission’s SD Motion on February 10, 2015. On February 13, 2015, (i) Kaplan filed an opposition to the SD Motion on SBAM’s behalf; (ii) counsel for the Sands brothers opposed the SD Motion on their behalf; and (iii) the Division filed its opposition to Kelly’s SD Motion. The Division and Kelly subsequently filed reply briefs.

On February 25, 2015, Judge Elliot issued an Order to Show Cause why Kaplan should not be disqualified from representing SBAM on the ground that Kaplan had a conflict of interest arising from his prior joint representation of Kelly, SBAM, and the Sands. Kaplan and SBAM opposed disqualification, while Kelly and the Division argued strongly in its favor. Judge Elliot issued an order on April 7, 2015, disqualifying Kaplan as counsel to SBAM and directing SBAM to retain new counsel by June 8, 2015 (the “Disqualification Order”). On April 13, 2015, SBAM filed a motion seeking certification of the Disqualification Order for interlocutory review, and to stay the proceedings, which Judge Elliot denied on April 22, 2015.

On April 30, 2015, SBAM requested that the Commission grant interlocutory review of the Disqualification Order and stay these proceedings. By Order dated May 13, 2015, the

Commission denied SBAM's request. SBAM engaged undersigned counsel on June 5, 2015 and counsel filed their Notice of Appearance on the following business day, June 8, 2015.

The initial conference between Judge Elliot, the Division, and all respondents has been scheduled for Wednesday, June 17, 2015 at 1:00 p.m. (the "June 17 Conference").

II. ARGUMENT

a. DISQUALIFICATION AND REPLACEMENT OF SBAM'S COUNSEL REQUIRES A STAY

In light of the serious allegations against SBAM—and the severe remedies sought by the Division—SBAM's very existence is at stake. As a result of Kaplan's disqualification, SBAM is back at square one: new counsel must consider whether to raise any previously unasserted defenses, and in order to do so, counsel must analyze the record and the allegations against SBAM, including those related to historical misconduct set forth in the OIP. Due to the sheer volume of the record, and the technical requirements for processing and hosting a significant amount of electronic data, counsel for SBAM has not even received the full record of the current proceedings—over 155,000 pages of documents—let alone has counsel been able to review the vast majority of it. Counsel requires, at a minimum, sufficient time to review the record and formulate strategy.

This necessary delay was anticipated by the Division in its briefing. Fully aware of the delay that would undoubtedly result from SBAM's being forced to retain new counsel at this stage of the proceeding, the Division argued that disqualification was, nonetheless, appropriate:

Although Kaplan claims that if he is disqualified, SBAM will suffer prejudice, imposing 'a significant and unfair hardship on SBAM,' owing to Kaplan's extensive knowledge and experience derived from his representation of SBAM since 2006 . . . those concerns cannot trump the interests of the integrity in the process and Kelly's right to a fair proceeding.

Div. Resp. at 16.

b. **A STAY OF THE ENTIRE MATTER SHOULD BE GRANTED TO PREVENT SEVERE PREJUDICE TO SBAM**

The OIP requires that this tribunal issue an initial decision no later than 300 days from service of the OIP, *i.e.*, August 28, 2015. For good cause and in the interest of justice, however, this tribunal may request that the Chief Administrative Law Judge seek an extension from the Commission. Pursuant to SEC Rule of Practice 360:

Under the 300-day timeline, the hearing officer shall issue an order providing that there shall be approximately 4 months from the order instituting the proceeding to the hearing, approximately 2 months for the parties to obtain the transcript and submit briefs, and approximately 4 months after briefing for the hearing officer to issue an initial decision.

Rule 360(a)(2). These steps are essential to the fairness and integrity of the proceeding and cannot be rushed. In *In the Matter of Lawrence M. LaBine*, Chief Administrative Law Judge Brenda P. Murray recently sought, and the Commission granted, under Rule 360(a)(3), a 300-day extension of the initial decision due date. See *Lawrence M. LaBine*, Order Granting Extension, Rel. No. 4077, 2015 SEC LEXIS 1768 (May 6, 2015) at *2. Chief Judge Murray sought the extension based on her conclusion that, “the proceeding will now start essentially anew” after being stayed after its inception due to settlement discussions. *Lawrence M. LaBine*, Motion to the Commission for Extension, Rel. No. 2515, 2015 SEC LEXIS 1301 (Apr. 8, 2015) at *2. Although the delay in this proceeding is attributable to the disqualification of an attorney who had previously represented all respondents, as opposed to a stay pending the Commission’s consideration of a settlement offer, the effect is the same: SBAM and its counsel must now determine whether to assert new defenses, whether to make any additional filings related to summary disposition, and to prepare for a hearing in which the Commission is seeking severe penalties.

An apt analogy is to defendants in criminal matters who are initially represented jointly by counsel and are then forced to obtain new counsel following attorney disqualification due to a conflict of interest. Federal courts frequently recognize the need for such defendants to reevaluate whether to pursue pending motions, or to add new—or change previously asserted—defenses. For example, in *United States v. Pavlock*, 2010 U.S. Dist. LEXIS 32304 at *1, *6 (N.D. W.Va. Apr. 1, 2010), the court determined that conflicts of interest disqualified counsel from continuing to represent two defendants. As a result, the court tolled the speedy trial clock and “held in abeyance all motions filed in the case so that future counsel may evaluate whether they intend to pursue the pending motion to dismiss the indictment, or in the alternative, motion for a bill of particulars.” *Id.* at *7. Similarly, in *United States v. May*, 493 F. Supp. 2d 942, 949 (S.D. Ohio 2004)—a criminal case alleging perjury and obstruction of justice in relation to a civil securities fraud proceeding initiated by the Commission—the court, at the government’s urging, disqualified counsel from further representation of either of the two criminal defendants. The court based its decision on defendants’ conflicting interests and “the possibility that [counsel] would be forced to cross-examine a former client.” The court then allowed defendants thirty days to obtain successor counsel and continued the previously set trial date, which would be rescheduled after successor counsel had entered their appearances. *Id.* at 950. According to the docket, the trial was delayed for roughly six months following the appointment of new counsel.

Here, a stay of the proceedings against all respondents³ for 90 days is reasonable and necessary to prevent irreparable prejudice and unfairness to SBAM.

³ During this stay, in the interests of efficiency, it would make sense for the case not to proceed against the other respondents until the primary violation against SBAM is adjudicated.

c. **THE DIVISION SHOULD BE ESTOPPED FROM OPPOSING A REASONABLE EXTENSION IN THIS MATTER**

The Division may argue against the requested postponement. However, as noted earlier, the Division itself advocated for the disqualification of Kaplan, and admitted that any delay to cure the prejudice of removing SBAM's counsel would be the lesser of two evils. The Division stated that "concerns [of prejudice to SBAM] cannot trump the interests of the integrity in the process and Kelly's right to a fair proceeding."⁴ Div. Resp. at 16. Moreover, in its March 12, 2015 Response to the Court's Order to Show Cause, the Division asserted that because "Kaplan formerly represented Kelly in the matter . . . and . . . Kelly's interests are materially adverse to the interests of" SBAM, Kaplan's disqualification was imperative. Div. Resp. at 2. The Division then argued that Kaplan failed to demonstrate that Kelly's consent was either informed or voluntary. Div. Resp. at 6-9. The Division further advocated for Kaplan's disqualification on two additional grounds (1) the possibility that Kelly might assert "an advice of counsel defense," which would likely result in Kaplan's being called as a witness in this proceeding, and (2) the impropriety of Kaplan potentially cross-examining his former client, Kelly. Div. Resp. at 14. For all of these reasons, the Division should be estopped from opposing the grant of a reasonable stay.

⁴ SBAM strongly objects to the Division's statement that "Kaplan's prediction of prejudice appears overstated" based on SBAM's so-called concession that "the only matters left with regard to it in this action are remedies." Div. Resp. at 16. As stated *supra*, SBAM, through new counsel, is currently assessing its defense strategy including whether to assert any additional defenses. By no means does SBAM concede liability.

CONCLUSION

In light of the foregoing, and in the interest of justice, SBAM respectfully requests that this tribunal grant this Motion pursuant to Rule 161.

Respectfully submitted,



Gus P. Coldebella (MA BBO No. 566918)
Ariel I. Raphael (MA BBO No. 670788)
FISH & RICHARDSON P.C.
One Marina Park Drive
Boston, Massachusetts 02110
Tel: (617) 542-7050
coldebella@fr.com
raphael@fr.com

Dated: June 17, 2015