

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 50695 / November 18, 2004`

Admin. Proc. File No. 3-11626

In the Matter of
JOHN A. CARLEY, et al.
Respondents,
THOMAS A. KAUFMANN,
Movant.

ORDER DENYING MOTION OF THOMAS A. KAUFMANN TO SEVER PROCEEDINGS

On October 22, 2004, Thomas A. Kaufmann, a respondent in this proceeding, moved to sever the charges against him from this proceeding pursuant to Commission Rule of Practice 201(b). 1/ Rule of Practice 201(b) provides in pertinent part that "any proceeding may be severed with respect to some or all parties," and provides further that "[a]ny motion to sever . . . must include a representation that a settlement offer is pending before the Commission or otherwise show good cause." 2/

Because Rule of Practice 201(b) has only recently been adopted, there is no Commission precedent to guide us. We have considered precedent regarding joinder and severance of claims under Rules 20 (Permissive Joinder of Parties) and 21 (Misjoinder and Non-Joinder of Parties) of the Federal Rules of Civil Procedure, that may provide guidance. 3/ There are, however, important differences between Rules 20 and 21 of the Federal Rules and our Rule of Practice 201. Although under the Federal Rules, joinder of claims is appropriate when the claims arise out of the same transaction or occurrence and there is at least one

1/ 69 Fed. Reg. 13177 (March 19, 2004), to be codified at 17 C.F.R. § 201.201(b).

2/ Id.

3/ Fed. R. Civ. P. 20, 21. See, e.g. Disparte v. Corporate Executive Bd. 223 F.R.D. 7 (D.D.C. 2004), and cases cited therein.

common question of law or fact, 4/ joinder before the Commission requires only that there be a common issue of law or fact. 5/

Joinder of all the parties here was proper under the Rules of Practice. The Order Instituting Proceedings charges that all the Respondents were involved in an integrated scheme to distribute unregistered securities. Kaufmann was a registered representative with responsibility for a customer account that allegedly was a conduit for the distribution of the unregistered securities. Kaufmann has been charged with aiding and abetting the violations of the other Respondents. An allegation of aiding and abetting necessarily involves common questions of law and fact with the primary violation. 6/ To establish that Kaufmann aided and abetted the offense, the Division must establish (1) the existence of an independent primary violation; (2) knowledge by Kaufmann of the primary violation and his role in furthering the violation; and (3) substantial assistance by Kaufmann in the commission of the primary violation. 7/ Each of the elements of the case against Kaufmann requires evidence regarding the overall scheme, and to sever Kaufmann's case would be an inefficient use of the Commission's resources. The considerations of adjudicatory economy carry great weight in the analysis of Kaufmann's motion.

We do not believe that Kaufmann has demonstrated that severance here is appropriate, because Kaufmann does not plead either of the two prerequisites to severance specified in Rule of Practice 201(b). Kaufmann does not submit that there is a settlement of the charges pending before the Commission.

Nor does he identify any other good cause in support of the motion. We are not persuaded by Kaufmann's assertion that he will be unfairly prejudiced by the complexity of the case against

4/ Fed. R. Civ. P. 20.

5/ See, e.g., Rule of Practice 201(a) provides "proceedings involving a common question of law or fact may be consolidated for hearing of any or all the matters at issue in such proceedings." 17 C.F.R. § 201.201(a).

6/ Accord, Disparte, 223 F.R.D. at 9 n.6 (discussion of common questions of fact and law in cases alleging a "pattern or practice" of employment discrimination).

7/ SEC v. Fehn, 97 F.3d 1276, 1288 (9th Cir. 1996). See Graham v. SEC, 222 F.3d 994, 1000 (D.C. Cir. 2000).

the other respondents and by their much larger role in the alleged scheme. Neither we nor the administrative law judge is likely to be confused by the complexities of this case, nor to impute improperly any greater role or conduct to Kaufmann than the record will support. There is no reason to sever Kaufmann from these proceedings. Accordingly,

IT IS ORDERED that the motion to sever filed by Thomas A. Kaufmann be, and it hereby is, denied.

By the Commission.

Jonathan G. Katz
Secretary