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UNITED STATES OF AMERICA

CTFD. NO. \_\_\_\_\_

Before the  
SECURITIES AND EXCHANGE COMMISSION  
March 8, 2002

In the Matter of	:	
	:	
CLARKE T. BLIZZARD and	:	ORDER DENYING
RUDOLPH ABEL	:	CERTIFICATION

**SUMMARY**

This Order denies a request for certification to the Commission for interlocutory review of the February 28 Prehearing Order that denied the request of the Division of Enforcement (Division) to disqualify Respondent Abel's counsel. It also denies the Division's request to stay the April 2 commencement of the hearing.

**BACKGROUND**

The hearing in this proceeding is scheduled to commence on April 2, 2002, in Boston, Massachusetts.<sup>1</sup> The Securities and Exchange Commission (Commission) instituted this proceeding on September 9, 1999. Thereafter it was stayed for a lengthy period due to the pendency of a parallel criminal proceeding. See Michael J. Rothmeier, Stay Order, 72 SEC Docket 1471 (A.L.J. May 25, 2000). Respondents were associated with Shawmut Investment Advisers (SIA). They are charged with willfully aiding and abetting and causing violations of Sections 206(1) and 206(2) of the Investment Advisers Act of 1940 through their alleged involvement in an alleged improper soft-dollar scheme, which ran from 1993 to May 1996.

The Division intends to call several former SIA employees, whom counsel for Respondent Rudolph Abel (Counsel) also represents, as witnesses at the hearing.<sup>2</sup> On

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<sup>1</sup> The proceeding was originally captioned Michael J. Rothmeier, Clarke T. Blizzard, Rudolph Abel, Donald C. Berry, Christopher P. Roach, Craig Janutol, and East West Institutional Services, Inc. It ended on April 13, 2000, as to Respondents Rothmeier, Berry, and Janutol, who settled, when the Commission issued Orders Making Findings and Imposing Sanctions as to each of them. It ended on February 28, 2002, as to Respondents Roach and East West Institutional Services, Inc., who defaulted, when the undersigned entered an Order Making Findings and Imposing Sanctions by Default as to them.

<sup>2</sup> One of the witnesses, Donald C. Berry, was a Respondent in this proceeding, who settled.

February 27, 2002, the Division filed an Emergency Motion to Disqualify Respondent Abel's Counsel from Representing *Both* Abel and The Witnesses Against Him on the Grounds of Conflict of Interest. The Division argued that Counsel's representation of Abel and the witnesses is unethical and a conflict of interest in violation of Rule 1.7(b) of the American Bar Association Model Rules of Professional Conduct (ABA Model Rules). The Division requested the undersigned to enter an order disqualifying Counsel from continuing to represent Mr. Abel and the witnesses. The matter was addressed at the February 28, 2002, prehearing conference and in the Prehearing Order (February 28 Order) entered pursuant to 17 C.F.R. § 201.221(e).<sup>3</sup>

The motion was denied. As stated in the February 28 Order, the Commission's Rules of Practice, 17 C.F.R. §§ 201.100 – .630, which govern its administrative proceedings, do not authorize an administrative law judge to take such a drastic action. See 17 C.F.R. § 201.102(e) (“The Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after notice and opportunity for hearing in the matter . . . (ii) . . . to have engaged in unethical or improper professional conduct.”) (emphasis added). Only the Commission can institute such a hearing. See 17 C.F.R. § 201.300. Compare 17 C.F.R. § 201.102(e) with 17 C.F.R. § 201.180 (authorizing an administrative law judge to summarily suspend counsel for the duration of a proceeding for “contemptuous conduct” and requiring an adjournment of the hearing to allow the party whom the suspended counsel represented to obtain new counsel).

The Division's motion examined ABA Model Rule 1.7(b) and related cases at some length. It appears, however, that Counsel had complied with his duty under that rule. Counsel represented that all clients had knowingly consented to the representation arrangement. Additionally, while the Division expects that the testimony of the witnesses may conflict with that of Abel, there is no conflict of interest between the witnesses and Abel; no witness faces possible charges arising from the events at issue at SIA. Berry has settled the charges against him, and charges against the others arising from the alleged wrongful scheme that ended in 1996 are time-barred by the five-year statute of limitations. See 28 U.S.C. § 2462 (a statute of general applicability providing a five-year statute of limitations); Johnson v. SEC, 87 F.3d 484 (D.C. Cir. 1996) (holding that 28 U.S.C. § 2462 applies in Commission proceedings).

### **THE REQUEST FOR INTERLOCUTORY REVIEW**

Under consideration is the Division's March 7 Motion Seeking Certification of February 28, 2002, Order for Interlocutory Review and Stay of Commencement of Trial, filed pursuant to 17 C.F.R. § 201.400(c)(2) and .400(d).<sup>4</sup> It requests certification of the order denying its disqualification motion.

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<sup>3</sup> The transcript of the prehearing conference is attached as Attachment A, and the February 28 Order, as Attachment B.

<sup>4</sup> The Division simultaneously filed a similar motion with the Commission.

In pertinent part, 17 C.F.R. § 201.400(c) provides:

A ruling submitted to the Commission for interlocutory review must be certified in writing by the hearing officer [who] shall not certify a ruling unless: . . . (2) . . . [she] is of the opinion that:

- (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.

The Division argues that the ruling involves a controlling question of law as to which there is substantial ground for difference of opinion. The Division argues that whether Counsel should be disqualified from representing Abel and five witnesses called by the Division to testify in its case against Abel is a question of law that has the potential to affect the outcome of the case. That is, in the absence of disqualification, it argues, there is the potential for a reversal on appeal and retrial with different counsel. The Division also argues that Commission administrative law judges are authorized to summarily disqualify counsel from representing multiple parties and witnesses during its administrative proceedings. The Division argues that such authority is found in 17 C.F.R. § 201.111(d) (authorizing the administrative law judge to “regulat[e] the course of a proceeding and the conduct of the parties and their counsel”), Section 556(c) of the Administrative Procedure Act, 5 U.S.C. § 556(c), on which 17 C.F.R. § 201.111(d) is based, and the ABA Model Rules.

For the reasons cited in the February 28 Order, there can be no question that the undersigned does not have authority to disqualify counsel from continuing to appear in a proceeding absent “contemptuous conduct” and the provisions of 17 C.F.R. § 201.180. Under any other circumstance an attorney is entitled to notice and hearing before being denied the privilege of appearing before the Commission.<sup>5</sup>

The Division argues that interlocutory review would advance completion of the proceeding. However, immediate interlocutory review of the February 28 Order is more likely to delay than to materially advance the completion of the proceeding against Respondents Blizzard and Abel.

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<sup>5</sup> Although the Division used such terms as “ethics” and “ethical” at the prehearing conference and in its February 27 and March 7 motions and of violating the ABA Model Rules, it disavows accusing counsel of “unethical or improper professional conduct” within the meaning of 17 C.F.R. § 201.102(e). Nonetheless, that provision affords an attorney notice and opportunity for hearing before being denied the privilege of appearing before the Commission.


## THE STAY REQUEST

The Division also requests an indefinite stay of the commencement of the hearing, pursuant to 17 C.F.R. § 201.400(d). In support of its request, the Division argues that there will be an inability to correct ethical issues if the trial goes forward with Counsel appearing for Abel as well as five witnesses. Consistent with the denial of the certification request, the stay request will be denied. It is also noted that the proceeding has been pending for two and a half years, and the events at issue are six to nine years in the past. With delay, memories become less reliable. Excessive passage of time can even lead to the Commission's dismissing a proceeding for that reason alone. See Warren G. Trepp, 70 SEC Docket 2037 (Sept. 24, 1999) (dismissing proceeding based on the age of the case and declining to intimate a view on the merits). Proceeding with the hearing as scheduled will conserve public and private resources to concentrate on the substantive issues in the case.

## ORDER

IT IS ORDERED that the Motion of the Division of Enforcement for Certification IS DENIED.

IT IS FURTHER ORDERED that Motion of the Division of Enforcement for Stay of Commencement of Trial IS DENIED.



Carol Fox Foelak  
Administrative Law Judge

UNITED STATES SECURITIES AND EXCHANGE COMMISSION  
 In the Matter of: )  
 ) File No. 3-10007  
 MICHAEL J. ROTHMEIER, ET AL. )  
 ADMINISTRATIVE PROCEEDING - TELEPHONE PRE-HEARING CONFERENCE  
 PAGES: 1 through 58  
 PLACE: Securities and Exchange Commission  
 73 Tremont Street, Sixth Floor  
 Boston, Massachusetts  
 DATE: Thursday, February 28, 2002

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 a.m.

BEFORE:

CAROL FOELAK, Administrative Law Judge

APPEARANCES:

On behalf of the Securities and Exchange Commission:

LINDA BRIDGMAN, ESQ.  
 SANDY BAILEY, ESQ.  
 Securities and Exchange Commission  
 73 Tremont Street, Sixth Floor  
 Boston, Massachusetts 02108

On behalf of Respondent Abel:

DANIEL L. SMALL, ESQ.  
 Butters, Brazilian & Small, LLP  
 1 Exeter Plaza  
 Boston, Massachusetts 02199

On behalf of Respondent Blizzard:

MARC B. DORFMAN, ESQ.  
 Freedman, Levy, Kroll & Simonds  
 1025 Connecticut Avenue, N.W.  
 Washington, D.C. 20036

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1 PROCEEDINGS  
 2 JUDGE FOELAK: This is a pre-hearing conference in  
 3 the matter of Michael J. Rothmeier, et al., AP number 3-  
 4 10007. And this pre-hearing conference is being held by  
 5 telephone on February 28, 2002, at 10:00 Eastern Time. And I  
 6 am Judge Foelak, and may I have your appearances for the  
 7 record?  
 8 MS. BRIDGMAN: This is Linda Bridgman and Sandy  
 9 Bailey for the Division of Enforcement.  
 10 MR. SMALL: Dan Small for Respondent Rudy Abel.  
 11 MR. ROACH: Chris Roach for Chris Roach, East Lake  
 12 Institutional Services.  
 13 MR. DORFMAN: Marc Dorfman for Respondent Clarke  
 14 Blizzard.  
 15 MR. BATCHELDER: Richard Batchelder for Ropes and  
 16 Gray.  
 17 JUDGE FOELAK: Thank you. Okay.  
 18 MS. BRIDGMAN: Hello? Hello?  
 19 MALE VOICE: Hello?  
 20 MS. BRIDGMAN: Judge Foelak?  
 21 JUDGE FOELAK: Yes.  
 22 MS. BRIDGMAN: Okay. Good.  
 23 JUDGE FOELAK: Let him identify himself or herself  
 24 so that an accurate record can be made.  
 25 Okay. First may I hear from Mr. Roach? I guess

APPEARANCES (con'd):

Office of Administrative Law Judges

On behalf of Ropes and Gray:

RICHARD BATCHELDER, ESQ.  
 Ropes & Gray  
 1 International Place  
 Boston, Massachusetts 02114

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1 you wanted me to address the pending default matter?  
 2 MR. ROACH: I just want to say that I, after  
 3 exhausting all my opportunities with the SEC, I am currently  
 4 going to take judgment against myself as well as against East  
 5 Lake Institutional Services, and I wanted to put that on the  
 6 record.  
 7 JUDGE FOELAK: Okay. Thank you very much, Mr.  
 8 Roach. We will take account of that.  
 9 Okay. Next, I gather, Mr. Small and Ms. Bridgman,  
 10 that the settlement that you've negotiated, anyway, is not  
 11 operational anymore?  
 12 MS. BRIDGMAN: That is correct, Your Honor.  
 13 MR. SMALL: That's correct, Your Honor. I mean, we  
 14 had -- as I was able to review the transcript in Washington,  
 15 I think I said that we had productive discussions, but there  
 16 was no final -- settlement, and in fact there is no  
 17 settlement.  
 18 JUDGE FOELAK: Okay. The Division has made a  
 19 motion to disqualify Mr. Small, as we know, and Mr. Small has  
 20 requested an extension of time to -- until March 15th to  
 21 answer this motion.  
 22 MS. BRIDGMAN: Your Honor, we object to that  
 23 request for an extension because of the immediate pendency of  
 24 the trial, which is scheduled to commence on March 26th.  
 25 This is an emergency matter. Mr. Small has had since 1996 to

Page 5

1 determine whether he has a conflict and he certainly had  
 2 since November of last year, when we put him on notice that  
 3 we believed there was a possibility of a conflict, for him to  
 4 determine this.

5           It is not a matter of reviewing transcripts, it's a  
 6 matter of the -- as we argued in our brief -- the confidences  
 7 that he has -- the attorney confidences -- client confidences  
 8 that he has and divided loyalties that he has with the  
 9 witnesses, between the witnesses who the Division intends to  
 10 call against his client and Mr. Abel. Those issues can be  
 11 addressed promptly. They should be addressed promptly so  
 12 that in the event he is disqualified, or a new counsel is  
 13 needed to do the cross-examination of these witnesses, as we  
 14 suggested in our brief, that that can be done immediately.

15           MR. SMALL: Your Honor, if I may be heard just  
 16 briefly. I haven't seen the SEC's motion. As they well knew  
 17 I was leaving last night to come down to an ABA conference  
 18 today and tomorrow. And I'll be on vacation with my family  
 19 next week. And apparently it was delivered at 4:30 or 5  
 20 o'clock last night to my office. But I have a general sense  
 21 of it from the office.

22           Let me say two things. First of all, there's  
 23 absolutely no emergency here. The only emergency is one that  
 24 the SEC has fabricated. They've -- Ms. Bridgman has, of  
 25 course, flipped it around totally. I don't have any burden

Page 6

1 whatsoever. I have told the SEC repeatedly for months,  
 2 orally and in writing, that there is no conflict. I've  
 3 reviewed the transcripts. I've consulted with my clients. I  
 4 have written consents from my clients. I'm perfectly  
 5 satisfied that I've met my ethical obligations.

6           For the SEC to come in and ask this court to --  
 7 despite all that -- to disqualify me, apparently based upon  
 8 their view of the case, they're the ones who bear the burden.  
 9 I mean, they're the ones who have an extraordinary burden.  
 10 And I have the right to respond to it and responding to it  
 11 means going back to the transcripts themselves.

12           I should say, Your Honor, that this is really  
 13 outrageous. I mean, what the court -- what I think we've  
 14 said to some extent in our motion, is for the past three  
 15 months the SEC has been using this threat of a motion to try  
 16 and force a settlement with Mr. Abel. For the past three  
 17 months I have been consistently saying there is no conflict,  
 18 we've reviewed the transcripts, we've consulted with our  
 19 clients, we've reviewed the law -- both the case law and the  
 20 rules -- we've obtained the appropriate consents. We're  
 21 perfectly satisfied.

22           And the SEC, in fact, has gone forward and had  
 23 lengthy pre-trial meetings with several -- four different  
 24 clients that they now say there are some irrevocable  
 25 conflicts with. And we had consistently said to the SEC if

Page 7

1 you in fact legitimately, in good faith, believe that there  
 2 is some conflict, let us know, because I have an obligation  
 3 then to explore it, to see what you mean, to take your  
 4 information, and to proceed with it. And for three months  
 5 they failed and refused to provide any specifics other than,  
 6 you know, saying that they're -- they believe there is some  
 7 vague conflict.

8           Now here we are four weeks before trial. There is  
 9 no settlement with Abel. There never has been a settlement  
 10 with Abel. And they filed a motion which apparently has no  
 11 specifics, no affidavits, no citations to thousands of pages  
 12 of transcript, but, well, gee, the SEC doesn't like this all  
 13 of a sudden.

14           Well, the SEC has known everything that's in their  
 15 motion for six years, and so the notion that now there is  
 16 some emergency and some real basis for filing a motion is  
 17 outrageous. It's a frivolous motion, it's filed for improper  
 18 reasons, there is no grounds for it, and there certainly is  
 19 no basis for an emergency.

20           JUDGE FOELAK: Okay. Thank you, Ms. Bridgman and  
 21 Mr. Small. I'm going to grant the requested extension of  
 22 time until March 15th for you to answer and oppose it.

23           And one issue I would like you to address is the  
 24 Division is requesting that you be disqualified, you know,  
 25 from appearing at the hearing. And I would like you to

Page 8

1 address whether the SEC's rule authorizes an ALJ to take such  
 2 an action, namely, disqualifying Respondent's attorney from  
 3 appearing at a Commission hearing. So that would --

4           MR. SMALL: Your Honor, if I may, and I'd -- as I  
 5 say, I haven't seen the motion, but I assume, I mean, that  
 6 the -- this is the SEC's motion. The SEC is asking you to  
 7 take what is clearly under the law a very drastic step. I  
 8 assume that they have provided that citation. I mean, if  
 9 they haven't provided any grounds for you to take -- I have  
 10 no clue what would -- what law would allow you to disqualify  
 11 me from representing either Abel or particularly, you know,  
 12 individuals who are not even parties. These witnesses are  
 13 not even parties. They haven't even been subpoenaed yet.  
 14 The SEC has met with them voluntarily at their request and  
 15 gone and met with them. These people haven't even been  
 16 subpoenaed yet.

17           So what rule the SEC has put in its briefs to  
 18 support this court's authority to disqualify me from long-  
 19 standing attorney-client relationships with people who are  
 20 not parties before this court, I don't know. But I'm  
 21 reluctant to be taking a position of guessing, you know, what  
 22 authority they're using, if they don't have it in their  
 23 brief.

24           MS. BRIDGMAN: The authority in our brief is clear.  
 25 It's the rules of ethics and the case law that has

Page 9

1 interpreted those rules of ethics, including decisions by the  
2 U.S. Supreme Court.

3 MR. SMALL: Well, I'm -- I guess I look forward to  
4 reading the brief.

5 MS. BRIDGMAN: I would also like to just clarify a  
6 point. We have requested that Mr. Small be disqualified. We  
7 have suggested a compromise situation which would allow Mr.  
8 Small to go forward to represent Mr. Abel at trial, but  
9 require that Mr. Abel have different counsel to conduct  
10 cross-examination of the witnesses that Mr. Small continues  
11 to represent.

12 MR. SMALL: I mean, I assume then you've included  
13 in there those -- a request to continue the trial, because  
14 someone to cross-examine would have to read, and there are  
15 thousands of pages of transcripts, as you know, and also some  
16 proposition as to who is going to pay for that additional  
17 counsel, because obviously Mr. Abel shouldn't be required to  
18 pay for counsel because the SEC, at the last moment, had some  
19 cockamamie notion of a bifurcated trial.

20 **Q I don't think -- we did not request a continuance,**  
21 **and that's why we filed it as an emergency motion and request**  
22 **that the issue be addressed as quickly as possible.**

23 MR. SMALL: And that's -- then that's an offensive  
24 request.

25 JUDGE FOELAK: Well, you know, now that I've

Page 11

1 professional conduct are identical and, you know, without  
2 commenting on what rules might possibly apply at the SEC,  
3 step one in those rules is for the lawyer to take the  
4 responsibility to resolve the conflict of interest, and so  
5 on. And just on the pleadings that Mr. Small had submitted  
6 this morning and spoken of just now -- apparently he is  
7 asking, you know, he says he's asked himself these questions  
8 and consulted with the clients. And, you know, as of now,  
9 aside from the fact that I don't have any authority to  
10 exclude him from the hearing --

11 MS. BRIDGMAN: Your Honor, I would like to request  
12 the opportunity to address that particular issue. In  
13 particular, I believe you would have authority pursuant to  
14 Rule 111, which gives the hearing officer the authority to do  
15 all things necessary and appropriate to discharge his or her  
16 duties. These powers include, but are not limited to, the  
17 following and in parentheses "d" it says "regulating the  
18 course of a proceeding and the conduct of the parties and  
19 their counsel."

20 We would like -- we point to that rule and we would  
21 like the opportunity to address it in a supplemental brief.

22 MR. SMALL: Well, I think that would be appropriate  
23 and -- as a motion to reconsider, but I think the court is  
24 absolutely right that they have not provided the authority,  
25 number one. And number two, where that the law is very

Page 10

1 listened to you some more, perhaps it would be more efficient  
2 for me to just rule on this motion right away. I -- you  
3 know, upon receiving the Division's motion, I did do some  
4 research and whether or not an individual -- a lawyer  
5 appearing before the Commission, you know, violates some  
6 ethical laws, or not, I see nothing that would -- in the  
7 Commission's rules -- that would authorize an administrative  
8 law judge to take such a drastic step as to exclude him from  
9 representing the client in the hearing. And I know of no  
10 instance, you know, through the history of SEC hearings,  
11 where such a thing has been done.

12 And, therefore, you know, that's really something  
13 that you should know. And, yes, just to give you an example  
14 by way of contrast, there is a Commission rule, Rule 180,  
15 that permits a hearing officer to exclude a person, you know,  
16 including a counsel, for contemptuous conduct during a  
17 hearing and -- you know, but that's, you know, obviously not  
18 what we're talking about here. And also in such a situation,  
19 an adjournment must be ordered so that the person in the  
20 hearing can get a new lawyer.

21 But anyway, the bottom line is I don't have any  
22 authority to take the action that the Division wants.

23 You know, beyond that, I would, you know, comment  
24 generally that the Division has thoroughly illuminated the  
25 model rules and stated that the Massachusetts rules of

Page 12

1 clear -- that this is an ethical responsibility of counsel.  
2 I am very aware, I assure the court, of my ethical  
3 responsibilities.

4 As the SEC knows, I have been involved in numerous  
5 cases with the SEC where I have represented, with their full  
6 consent, multiple witnesses in this type of situation. I  
7 think the largest one, I represented about 30 different  
8 witnesses in a case actually based in Washington. It has  
9 never been a problem.

10 I am well aware, right from the outset, of my  
11 ethical obligations and I assure the court that I follow them  
12 in every case and I have followed them here. And as we've  
13 said to the court, we went to great lengths here, both  
14 because we always do, and then again when the SEC raised the  
15 issue -- after six years -- to make sure that we have done  
16 so.

17 And I think that that is more than enough for the  
18 court to rule. I think it would save a lot of time and  
19 effort on everybody's part for the court to rule on this now  
20 and let's go forward and get ready for trial.

21 MS. BRIDGMAN: Your Honor, I would like to respond  
22 to that. Mr. Small is not correct. He does not have the  
23 sole responsibility to decide whether or not he has a  
24 conflict. The code of ethics requires the counsel for the  
25 parties -- for the clients in the first instance to

Page 13

1 determine, but if he does not make a reasonable decision, the  
 2 courts are -- take the responsibility of making inquiry and  
 3 the rules further provide that opposing counsel may bring  
 4 forth the issue when the proceeding would be conducted --  
 5 would not be conducted in a fair and efficient manner because  
 6 of the attorney's conflicts and divided loyalties.

7 And we've outlined all of this in our brief. The  
 8 law is very clear on this, that an attorney may not represent  
 9 multiple parties and witnesses at trial when those witnesses  
 10 may be called to testify against the party.

11 MR. SMALL: The law --

12 MS. BRIDGMAN: In addition -- let me please finish.  
 13 In addition -- please let me finish. In addition, Mr. Small  
 14 may have represented many witnesses before the Commission in  
 15 an investigation. It is totally a different circumstance  
 16 when you get to trial, when you are required to cross-  
 17 examine witnesses and there is a situation of divided  
 18 loyalties between the witnesses with whom you have  
 19 confidential confidences and the defendant. It is totally  
 20 different at trial, and we have outlined in our brief -- and  
 21 I think the issues are very clear.

22 MR. SMALL: Your Honor, if I may just briefly --  
 23 Ms. Bridgman is correct, it is not the sole responsibility of  
 24 counsel. I don't think I said that. It is clearly, though,  
 25 the primary responsibility, and the courts are very clear

Page 14

1 that there must be great suspicion that a third party, or an  
 2 opposing party, coming in like this -- even at the beginning  
 3 of the case, never mind three years into the case -- and  
 4 filing a motion. And that they bear an extraordinary burden  
 5 to overcome, and that's a presumption. It's absolutely clear  
 6 that it is the attorney's primary responsibility and they  
 7 have to show not, gee, we think this might be, or, you know,  
 8 we think so and so may testify, but what I've been saying to  
 9 the Division for three months -- show me that every question  
 10 has been asked. There's no mystery here. If Rudy Abel said  
 11 X and Don Barry said not X, you could point that out in the  
 12 transcript.

13 Show it to me. I've read the transcripts; I see no  
 14 such thing. Show it to me and I'll be happy to review it,  
 15 review with my client, respond, and act accordingly. There  
 16 is no such conflict. They know it, so they have fallen back  
 17 on, well, gee, you know, what if he has to cross-examine -- I  
 18 mean, it's nonsense.

19 There is no basis -- I think it's totally  
 20 appropriate for the court to rule now and say to the SEC, if  
 21 you have evidence of real conflict that would overcome this  
 22 extraordinary presumption in favor of, number one, counsel  
 23 being responsible for his own ethical standards, and number  
 24 two, the court looking with great suspicion at a third party  
 25 coming in at the last minute like this and trying to

Page 15

1 interfere with those six-year-long relationships -- then file  
 2 something else.

3 MS. BRIDGMAN: I would like to respond that in our  
 4 brief we have identified the conflicts and, in addition, we  
 5 have cited to a case in which the opposing counsel noted a  
 6 conflict on the eve of trial. The trial court rejected the  
 7 motion to disqualify, and was reversed on appeal. The reason  
 8 for rejecting was because it was -- the trial was imminent.  
 9 The court found that because of the conflict, it was -- it  
 10 could not be overcome, and the case was reversed.

11 So the period of time here is not relevant. The  
 12 issue is whether or not there is a conflict, and we have  
 13 identified those conflicts in our brief.

14 MR. SMALL: It's my understanding, although I  
 15 haven't seen it, but my understanding from my office is that  
 16 despite thousands of pages of transcripts, their  
 17 identification of a conflict doesn't refer to a single  
 18 specific statement by any witness on either side.

19 MS. BRIDGMAN: In fact, the --

20 MR. SMALL: Is that correct, Ms. Bridgman?

21 MS. BRIDGMAN: The brief refers to what we  
 22 anticipate the testimony of Mr. Abel will be and each of the  
 23 witnesses that you assert you represent. We have identified  
 24 what we anticipate that testimony will be, and that is based  
 25 on the previous investigation and also the interviews that we

Page 16

1 have conducted in preparation for trial.

2 MR. SMALL: Your Honor, all I can say is that I'm  
 3 going to have to spend clearly the next two weeks,  
 4 particularly the week after next when I return from vacation,  
 5 you know, focused on this issue. And I will be going through  
 6 the transcripts that apparently I either have not or cannot,  
 7 and responding. I think it's an enormous waste of time that  
 8 will severely impact my ability to prepare for trial, and I  
 9 would encourage the court to rule on it.

10 MS. BRIDGMAN: Well, the issue is not just what is  
 11 in the transcripts, it is what is in Dan Small's head. And  
 12 the Gonzales case, cited in our brief, specifically talks  
 13 about the divided loyalties of an attorney who represents  
 14 multiple parties and witnesses at trial and that there's no  
 15 way that he can meet his responsibilities to all of his  
 16 clients.

17 MR. SMALL: They've asked every question they want  
 18 to ask, Your Honor. There's absolutely no evidence of  
 19 anything in my head that isn't in the thousands and thousands  
 20 of pages of transcripts. In addition, they've had lengthy  
 21 voluntary meetings with four of these witnesses in the last  
 22 month alone with me there, but -- and again, gone through  
 23 every question that they could possibly ask. Some of those  
 24 meetings went on for six or seven hours.

25 MS. BRIDGMAN: That --



1 MR. SMALL: And, you know, this is not a guessing  
2 game. You know, either there is a very clear, specific  
3 conflict as backed up by the transcript, or the court should  
4 rule now and not force me to wait for the next two weeks  
5 dealing with it.

6 MS. BRIDGMAN: I would like to respond that the  
7 interviews were conducted with two principles in mind. One,  
8 we understood that we had reached an agreement to settle the  
9 case with Mr. Abel, that Mr. Abel wanted to settle; and two,  
10 those interviews were conducted with respect -- with a focus  
11 on the evidence as it relates to Mr. Blizzard and did not  
12 review evidence as it relates to Mr. Abel.

13 MR. SMALL: Your Honor, both of those statements --  
14 and I'm requesting that I get a transcript right away,  
15 because both of those statements are absolutely false.  
16 Absolutely false. As to the first one, Ms. Bridgman, in her  
17 own letter, which we I think had provided to the court, was  
18 very clear that there is no settlement. Nothing is final  
19 until the SEC in Washington says so.

20 And that's what happened here. We negotiated back  
21 and forth for several years with the branch office. They  
22 proposed a settlement. We signed it. But they said very  
23 clearly that nothing was final until Washington approves it.  
24 And, in fact, a week or two after we signed their draft, they  
25 informed us that Washington had rejected it, wanted

1 primarily on the basis that I do not have the authority to do  
2 what they ask. And Ms. Bridgman has pointed to Rule 111(d),  
3 you know, which is the general provision of do what else is  
4 necessary in the conduct of a proceeding. This is such an  
5 unusual and drastic thing that I just don't think that it can  
6 fall within that.

7 I would also like to comment that at this point in  
8 time, we have Mr. Small's, you know, representation that he  
9 thought about this and, you know, consulted with his clients,  
10 et cetera, and fully believes that the representation would  
11 not be adversely affected, so an actual conflict has not even  
12 appeared to me.

13 Now Ms. Bridgman has, you know, a very lengthy and  
14 well-researched pleading here, but since Mr. Small doesn't  
15 have it in front of him, I, you know, I wouldn't like to  
16 comment on any of the cases and so on, and I'll just rule  
17 generally.

18 So the posture of this motion, at the moment, is  
19 that it is denied. So that makes Mr. Small's motion for  
20 extension of time --

21 MR. SMALL: Moot.

22 JUDGE FOELAK: Moot.

23 MR. SMALL: Thank you, ma'am.

24 JUDGE FOELAK: So, and I'll put out a pre-hearing  
25 order today that will sort of lay this out so you'll have it

1 additional conditions that we were not willing to go along  
2 with.

3 So the statement -- her statement that there was a  
4 settlement, or we said we would settle, is absolutely false.  
5 And as to the second one, we will provide the court with our  
6 notes, and our lengthy notes, of those meetings and you will  
7 see that they went on, and on, and on showing witnesses  
8 documents that related to Mr. Abel, asking them questions  
9 about Mr. Abel. Absolutely false. Absolutely false.

10 I ask for a transcript as quickly as possible of  
11 this hearing.

12 MS. BRIDGMAN: Mr. Small's statements are  
13 absolutely incorrect. Our focus in the interviews was on Mr.  
14 Blizzard. We did not ask questions about Abel. The  
15 documents necessarily do have Mr. Abel's -- references to Mr.  
16 Abel in the documents, but we were focusing on Mr. Blizzard,  
17 and it is totally inaccurate of Mr. Small to characterize  
18 those interviews otherwise.

19 JUDGE FOELAK: Okay, Ms. Bridgman and Mr. Small,  
20 here's what I'm going to do. I'm going to rule on the  
21 Division's motion and -- yes, just to make things nice and  
22 clear -- and then, you know, if the Division wants to file  
23 some reconsideration or something, that's what the posture  
24 will be.

25 Okay. I'm going to deny the Division's motion,

1 in writing. Okay?

2 Now, what next?

3 MS. BRIDGMAN: With respect to Mr. -- well, I guess  
4 we should continue with respect to issues relating to Mr.  
5 Abel. Mr. Abel has not -- or respondent Abel has not filed  
6 an exhibit list or witness list, which was due on February  
7 25th. In addition, he has not met the deadline. The court  
8 issued an order on December 12th requiring respondent Abel to  
9 provide any exhibits that they intended -- that he intended  
10 to submit as a response to the subpoenas that he had issued.

11 That deadline was January the 4th. He has provided no  
12 exhibits in response to that.

13 In addition, the court required respondent Abel to  
14 identify his proposed witnesses who were unidentified in the  
15 list that he filed in October. And that deadline was January  
16 the 4th. So Mr. Abel, Respondent Abel, has failed to meet  
17 his obligations with respect to identification of his  
18 exhibits and witnesses.

19 MR. SMALL: Your Honor, I've --

20 JUDGE FOELAK: Okay. Well, let's not get too  
21 involved in past history. We have a situation where I am  
22 assuming there was a good faith effort to reach a settlement  
23 by both of you, but headquarters intervened. And let's go  
24 forward. When can you provide these materials? Or when can  
25 your office provide them? You must have some idea who --

Page 21

1 MR. SMALL: Your Honor, we already provided a  
 2 witness list and an exhibit list. We simply adopted the  
 3 SEC's list. We, at this point, have no additional witnesses  
 4 that we're going to call.  
 5 JUDGE FOELAK: Very good. Do you intend to file  
 6 any kind of pre-hearing brief?  
 7 MR. SMALL: That's a good question, Judge. And I  
 8 need -- quite frankly, I need a day or so to think about it  
 9 if I could, if the court would give me that latitude.  
 10 JUDGE FOELAK: Okay.  
 11 MS. BRIDGMAN: Your Honor --  
 12 JUDGE FOELAK: Why not set a date when this brief  
 13 would be filed? I mean, you must -- I mean, you're going to  
 14 have some theory of --  
 15 MS. BRIDGMAN: Your Honor, the brief -- the  
 16 deadline for the brief is on March the 11th. A deadline is  
 17 already set for that.  
 18 MR. SMALL: Then I would ask an additional five  
 19 days. I mean, the same schedule reasons that I put forward  
 20 in our motion. I ask that we be allowed to file it by March  
 21 15th.  
 22 MS. BRIDGMAN: Your Honor, we object to that  
 23 strenuously. Mr. Small has had -- been aware of these  
 24 deadlines since they were set, and he agreed to these  
 25 deadlines. So he is obligated to file his brief at the same

Page 22

1 time that Mr. Dorfman is obligated to file Blizzard's brief,  
 2 and Mr. Dorfman has certainly been in this case a much  
 3 shorter time than Mr. Small. So we strenuously object to any  
 4 extension regarding filing his brief, which is due on March  
 5 the 11th.  
 6 JUDGE FOELAK: Okay. What I'm going to do is grant  
 7 him the extension that he requests. It's only a few days,  
 8 and, you know, his case does come after yours, so you  
 9 shouldn't be unduly -- you know, it's responsive to yours, so  
 10 you shouldn't be unduly discommoded by that.  
 11 Okay. What next?  
 12 MS. BRIDGMAN: Your Honor, I would like to go back  
 13 to the point regarding witnesses.  
 14 JUDGE FOELAK: Yes.  
 15 MS. BRIDGMAN: He identified six or seven brokerage  
 16 houses without identifying who in those brokerage houses he  
 17 intended to call. You directed that he identify those folks  
 18 by January the 4th. There has been no identification of  
 19 anyone from those brokerage houses. If he does not intend to  
 20 call anyone from those brokerage houses, we have no further  
 21 issue. But if he does, he needs to immediately identify  
 22 those folks.  
 23 MR. SMALL: Your Honor, I think I have to pass this  
 24 one off to Mr. Dorfman. As I recall, and the court may  
 25 recall better than I -- but we ended up not actually issuing

Page 23

1 those subpoenas because, in fact, we had signed a settlement  
 2 that we assumed would go through. And I believe Mr. Dorfman  
 3 did issue those subpoenas -- or not those, but there were  
 4 similar subpoenas. So at this point I don't think I have any  
 5 subpoenas outstanding.  
 6 Mr. Dorfman, you might know better than I.  
 7 MS. BRIDGMAN: The issue is not subpoenas and  
 8 documents. I'm talking about identification of witnesses.  
 9 MR. SMALL: If I don't have the subpoenas  
 10 outstanding, then I will go forward to trial without them.  
 11 JUDGE FOELAK: Okay. Very good. Thank you for  
 12 clarifying that.  
 13 MR. SMALL: Thank you.  
 14 JUDGE FOELAK: What next?  
 15 MS. BRIDGMAN: With respect to Respondent Blizzard,  
 16 we have -- he has submitted his witness list, which is  
 17 inadequate to the extent it does not provide contact  
 18 information and occupations of the people he's listed. We  
 19 have talked with him -- with Mr. Dorfman about that and he  
 20 agrees to provide it. We would like to just have agreement  
 21 to provide that information by Monday.  
 22 MR. DORFMAN: I assume that won't be a problem.  
 23 Ms. Bridgman has accurately summarized our conversation. I  
 24 must observe, however, that on Ms. Bridgman's witness list,  
 25 she has just excoriated Mr. Small for not identifying people.

Page 24

1 On the Division's revised witness list dated February 11th,  
 2 2002, there are 12 or 13 entities listed, witnesses 32  
 3 through 44. We don't have -- we have names of various  
 4 companies, but no individuals named and no contact  
 5 information, nor any summary of what they're going to testify  
 6 to.  
 7 So frankly, I was a little surprised at Ms.  
 8 Bridgman's comments, because -- about the witness lists and  
 9 so forth -- because I think this is something that we,  
 10 frankly, don't need the court's help with. I think we can  
 11 just work it out amongst ourselves.  
 12 MS. BRIDGMAN: I -- we are identifying those folks  
 13 as quickly as possible. We will give you the names and  
 14 contact numbers as soon as we have them. And I believe we  
 15 did -- if you would just give me a second.  
 16 MR. DORFMAN: I -- we're also -- for the benefit of  
 17 the court I would like to comment at the least that it is an  
 18 extraordinary burden to impose on an individual respondent  
 19 for the government to list 44 witnesses. I mean, that is  
 20 just an amazing thing for the government to do. Particularly  
 21 since from the perspective that we will, I think, get to a  
 22 trial, what this case is about is not about what 44 different  
 23 people might want to talk about. What this case is about are  
 24 the contents of Form ADV filings by Shawmut Investment  
 25 Advisors. That's the violation that's alleged by the SEC in

1 the order instituting proceedings. Mr. Blizzard and Mr. Abel  
2 are -- assuming he remains in the case -- are charged with  
3 causing or aiding and abetting violations of Sections 206.1  
4 and 206.2, insofar as there was inadequate disclosure on  
5 Shawmut's Form ADV.

6 I must say -- I have now been in the case for still  
7 a short time and not nearly as long as other counsel on this  
8 conference call -- I am absolutely at a loss as to what light  
9 44 witnesses could shed on a couple of ADV forms.

10 JUDGE FOELAK: Okay. Thank you for that thought.  
11 Do you have anything else, Ms. Bridgman, on --

12 MS. BRIDGMAN: Yes. I would like to address the  
13 fact that Blizzard -- Mr. Blizzard, Respondent Blizzard has  
14 identified an expert on his witness list. This is the first  
15 time we've heard in three years that anyone intended to call  
16 an expert. We object to that. First of all, because it's  
17 untimely; second of all, because no expert report has been  
18 provided in connection with that witness; and third, because  
19 we don't believe there is a need for an expert, as Mr.  
20 Dorfman has just discussed and described.

21 The issue here is the lack of disclosure in the ADV  
22 of Shawmut's payment of client commissions for client -- for  
23 client referrals from brokers. There's no dispute that  
24 Shawmut used soft dollars, or client commissions, to pay for  
25 client referrals. There is no dispute that that was not

1 disclosed in the ADV. And Mr. --

2 MR. DORFMAN: Excuse me, there -- this -- there are  
3 disputes about all --

4 MR. SMALL: Absolutely. Absolutely.

5 JUDGE FOELAK: Okay. Let's cut this off. Okay.  
6 You intend to present an expert witness, and certainly the  
7 Division has the right to know more than with a regular  
8 witness. You can either make him available to the Division  
9 to interview him, or else file, you know, a more inclusive  
10 summary of his proposed testimony than just -- you would for  
11 an ordinary witness. You know, sort of a report.

12 MR. DORFMAN: I do have one handicap in dealing  
13 with that, Your Honor, and I certainly will want to review  
14 with Mr. Piccard, who, by the way, is well known to the  
15 Division of Enforcement. I mean, I -- he's -- he has  
16 testified in other proceedings in -- not specifically on this  
17 issue, I don't think, but we'll find -- I guess we'll find  
18 out.

19 But one handicap I have is that I do not yet have  
20 the Division's exhibits, and Ms. Bridgman has promised to get  
21 me a set of the Division's exhibits next week. And then I  
22 can get them, obviously, to my expert, and then he would be  
23 in a position to tell me what he might be able to testify to,  
24 and I certainly will figure out whether it makes more sense  
25 to try and do a report, or to make him available for an

1 interview.

2 JUDGE FOELAK: Okay. When do you think, or let's  
3 put a date -- a date so that, you know, so that they can  
4 be -- everybody can be timely informed.

5 MR. DORFMAN: Well, I would like to know when the  
6 Division is going to get me their exhibits.

7 MS. BRIDGMAN: Well, I would like to interpose  
8 here, Mr. Dorfman, that I believe we agreed to exchange  
9 exhibits, and the agreement was that we would pick a date on  
10 which you had -- you could provide your exhibits as well as  
11 we could provide our exhibits.

12 MR. DORFMAN: That was before you told me that I  
13 had to come up with an expert's report. I mean, this is -- I  
14 mean, I don't object to doing all these things, but the  
15 problem is that, as the court has no doubt observed through  
16 the course of this conference call, and it's my first real  
17 experience in this case with it, there seems to be an awful  
18 lot of hurry on the part of the Division on insisting on  
19 getting things from respondents, but they don't seem to be in  
20 much of a hurry to get things to the respondents.

21 JUDGE FOELAK: Okay. Well, let's focus on the  
22 logistics of this. Obviously, the sooner that Mr. Dorfman  
23 gets the exhibits, the sooner his expert can form his, you  
24 know, whatever opinion he wants. Can you agree between  
25 yourselves on that? And I'll just lay down the ground rules

1 that Mr. Dorfman has to make him available to the Division  
2 either for interview, or else provide the Division -- provide  
3 the Division and the -- you know, and everybody with a  
4 written report of his --

5 MS. BRIDGMAN: Okay. That's fine with us.

6 JUDGE FOELAK: Okay. You know, work it out between  
7 yourselves the actual logistics of this.

8 MS. BRIDGMAN: Yes.

9 MR. DORFMAN: That will be fine, Your Honor.

10 MS. BRIDGMAN: And I would also like to note that  
11 the Commission plans to also -- because we have been  
12 surprised by the issue of having an expert appear, we  
13 immediately will also wish to identify an expert. We are not  
14 in a position to do that today, but we'll be working toward  
15 that as quickly as possible.

16 JUDGE FOELAK: The expert is going to be in the  
17 nature of rebuttal from -- go ahead, were you about to say  
18 something, Mr. Dorfman?

19 MR. DORFMAN: Yes, I was, Your Honor. I mean, the  
20 Division filed its first witness list in 2000, and then they  
21 filed a revised witness list in 2002. They go first. I  
22 mean, I certainly don't have any objection to them coming up  
23 with a rebuttal expert. But I don't think they can put an  
24 expert on in the case in point.

25 MS. BRIDGMAN: Well, our position has been there is

1 no expert needed at all, but given that you intend to call an  
2 expert and the -- Judge Foelak has just allowed that, I  
3 believe it's only equitable to allow the Commission, or the  
4 Division, to have an expert as well.

5 JUDGE FOELAK: Well, I did sort of think that you  
6 meant a rebuttal expert, but perhaps you'll be able to work  
7 this out between yourselves, also. I mean, I gather that you  
8 thought there was need for an expert and you probably still  
9 hold to that opinion, but --

10 MS. BRIDGMAN: Yes, Your Honor. We agree to try to  
11 work this out.

12 JUDGE FOELAK: Okay.

13 MR. ROACH: Your Honor?

14 JUDGE FOELAK: Yes?

15 MR. ROACH: This is Chris Roach. Do I have to  
16 still stay on this call?

17 JUDGE FOELAK: No. You certainly may leave the  
18 call, and thank you for your participation.

19 MR. ROACH: Take your time with it.

20 JUDGE FOELAK: Okay.

21 MR. SMALL: It probably was entertaining for him,  
22 though.

23 MS. BRIDGMAN: And it was probably --

24 JUDGE FOELAK: Okay. All right. Very good.

25 MS. BRIDGMAN: We have one final issue, Your Honor.

1 statement has been provided to everyone as provided by the  
2 rules. And whether or not --

3 MR. DORFMAN: Can I be heard on this, Your Honor,  
4 when Ms. --

5 MS. BRIDGMAN: -- whether or not we intend to ask  
6 him to authenticate that document, we haven't yet determined.  
7 The primary point of Mr. Fee's testimony is to describe the  
8 admissions made to him by Mr. Blizzard during that meeting.

9 JUDGE FOELAK: Mr. Dorfman, were you about to say  
10 something?

11 MR. DORFMAN: Yes, if I may, Your Honor. And I  
12 know that Mr. Batchelder is on the line as well. And if -- I  
13 assume that everyone is aware that Ropes and Gray has filed a  
14 notice of intention to petition for review pursuant to Rule  
15 430, which I don't know what the Commission -- I don't know  
16 for certain what the Commission will do. I believe I  
17 understand what the Commission should do pursuant to its  
18 rules.

19 What we have here is a situation where the court  
20 has ruled on an order on the application to quash the  
21 subpoena. We have a trial coming up a little less than 30  
22 days from now and we -- or we continue to have this satellite  
23 litigation to distract us from preparing for hearing. And we  
24 already had a little bit of that earlier today.

25 Now -- now that the court has ruled on the

1 JUDGE FOELAK: Yes?

2 MS. BRIDGMAN: And that is we are preparing a  
3 motion which I hoped to file today for modification of the  
4 order that you issued on February the 15th regarding the  
5 appearance of Michael Fee at trial. And I just wanted to let  
6 you know that I expect to file that today.

7 JUDGE FOELAK: Okay. Let me just ask you something  
8 just so I have it on the record. The assumption in my  
9 order -- well, I didn't really assume anything one way or the  
10 other, but I asked you do you intend to call Michael Fee to  
11 testify about the interview he undertook on April 19, 1996,  
12 of Respondent Blizzard and to testify as to what Blizzard  
13 said to him?

14 MS. BRIDGMAN: That is correct, Your Honor. The  
15 motion that we're filing today identifies the -- certain  
16 admissions that Mr. Blizzard made during this interview with  
17 Michael Fee, and we intend to call Mr. Fee to testify to  
18 those admissions made by Mr. Blizzard during that interview.

19 JUDGE FOELAK: And you also intend to ask him to  
20 authenticate your Division Exhibit 108, which is a report by  
21 Ropes and Gray about the interview and --

22 MS. BRIDGMAN: We haven't made a decision about  
23 that. We provided the interview notes, Mr. Fee's statement  
24 of the interview, to the parties in this case as a Jencks Act  
25 statement, as provided by the rules. So that's why that

1 application to quash the subpoena, the correct procedural  
2 tack is for the parties to abide the court's order. As I  
3 read the court's order, Mr. Fee has the option of either  
4 testifying, in which case he has to provide his interview  
5 notes -- not a summary that was prepared a year and some  
6 months later -- of the interview in April '96, or if he  
7 believes that Mr. Fee and Ropes and Gray believe that there  
8 was a privilege and they want to -- and they should try and  
9 protect the privilege, he can abide the court's order and  
10 invoke privilege. And then the Division will not be able to,  
11 frankly, use Mr. Fee as a witness. At which point we will  
12 continue with the hearing. The court will take submissions  
13 and then in the ordinary course of events, there will be  
14 review by the Commission of the court's final order.

15 That's the way it works pursuant to the rules. And  
16 to have other satellite litigation and for someone to seek  
17 interlocutory review, gets the -- a question about privilege,  
18 and frankly, I thought that the court's ruling not only was  
19 correct, but was obviously correct. And to continue to have  
20 filings, and pleadings, and motions directed to a rather  
21 simple question that the court has clearly ruled on, is a  
22 distraction; it's a waste of time, a waste of money; and it's  
23 an imposition, once again, by the government on private  
24 litigants.

25 MR. BATCHELDER: Well, this is Richard Batchelder,

Page 33

1 and I am impatient to respond to this representing Ropes and  
2 Gray, and also representing Mr. Fee, my partner.

3 Now with all due respect to Mr. Dorfman about  
4 distractions, I mean, we do have certain rights here. These  
5 are notes that have been maintained as privileged, as an  
6 attorney work product, from day one and not been shown to  
7 anybody.

8 And so, although there is a great deal of  
9 confusion, I'll get to this about how this order would play  
10 out, and we tried to articulate that in our request for  
11 clarification; if we don't get the clarification we think is  
12 appropriate, we do intend to petition for review. Rule 430  
13 addresses this directly. This is not an interlocutory  
14 review. Don't have a right to make an interlocutory review.  
15 We're not a party. So we can't do that procedure.

16 What we do have the right to do under Rule 430 is  
17 we are a person aggrieved by an action potentially, if  
18 there's not the clarification we seek, and we intend to  
19 pursue that. And the rules provide for such a review and,  
20 indeed, require us to go that route before we seek judicial  
21 review. That is what we intend to do if we don't get the  
22 clarification.

23 Why do we need clarification? It's very simple.  
24 The scenario that Mr. Dorfman just described is not the  
25 scenario that will happen. What the Division will do is

Page 35

1 attorney-client privilege, to not answer these questions?

2 MR. BATCHELDER: No.

3 JUDGE FOELAK: Okay. Okay. Then let me just  
4 clarify exactly what my February 5, 2002, order is. All  
5 right? It modified the subpoena that was originally directed  
6 to Ropes and Gray to make it -- not unreasonable, oppressive,  
7 excessive in scope, or unduly burdensome, in my view, such  
8 that it must produce notes redacted of opinion content of the  
9 interview if Mr. Fee testifies about what Blizzard said to  
10 him. So -- said to him in the interview. So, you know,  
11 there you have it.

12 MR. BATCHELDER: Your Honor, respectfully, I don't  
13 understand that. If Mr. Fee is asked about statements he  
14 made in the interview, he answers the question. How do the  
15 notes come into this at all? I don't get that. How are they  
16 all of a sudden not work product and attorney-client  
17 privilege because he's asked about the statements that were  
18 made in the interview? We're talking about two different  
19 things.

20 JUDGE FOELAK: Well, firstly, when it comes to  
21 attorney-client privilege, opinion, you know, I did say  
22 redacted of opinion content. And, you know, by the way, I've  
23 no idea whether we're talking about, you know, a hand-  
24 scrawled sentence or, you know --

25 MR. BATCHELDER: But, Your Honor, this is --

Page 34

1 they'll put Mr. Fee on the stand. He'll be there pursuant to  
2 subpoena. So it's not as if Mr. Fee will have a choice.  
3 He'll be there pursuant to subpoena. Mr. Fee will be asked  
4 questions under oath and will be asked about interviews -- an  
5 interview that he had with Mr. Blizzard back in April of  
6 1996. Mr. Fee will answer the questions asked to the best of  
7 his recollection as he would be required to do under oath.

8 None of that has anything to do with his notes of  
9 the interview. The Commission doesn't have the notes of the  
10 interview. They can't refer to the notes of the interview  
11 and say, well, you know, what about this, what about that in  
12 your notes. They don't have that. The playing field is  
13 absolutely level. Mr. Blizzard has the same information,  
14 Exhibit 108, that the government has. There is absolutely no  
15 need to have this go to the question of what is in the notes.  
16 That will not be the subject matter of his testimony.

17 MR. DORFMAN: Your Honor, I object to rearguing --

18 JUDGE FOELAK: Okay. Let me just cross this off.  
19 Since Mr. Batchelder has spoken up and referenced his request  
20 for clarification of the order, let me just ask him a couple  
21 questions, as I did the Division.

22 When the Division says that they intend to put Mr.  
23 Fee on and ask him about respondent Blizzard's statements in  
24 the April interview, is it your position -- are you going to  
25 instruct him to claim privilege, either work product or

Page 36

1 JUDGE FOELAK: But that's -- it's no concern of  
2 mine. But the point is he has waived those privileges by  
3 testifying about it.

4 MR. BATCHELDER: How has he waived the privileges  
5 as to what's in the notes? He's not testifying as to what's  
6 in the notes, Your Honor. Nobody has the notes to ask him  
7 questions about. They have been protected from day one.  
8 He's not being asked about that. He's being asked, you  
9 know --

10 MR. DORFMAN: Your Honor, this is completely  
11 improper.

12 MR. BATCHELDER: Well, can I finish, Mr. Dorfman?

13 MR. DORFMAN: I also would observe as the Division  
14 earlier was citing the court to the rules governing the  
15 conduct of these proceedings, I would ask the court to take  
16 control of this hearing, because I think what's going on is  
17 completely improper.

18 MR. BATCHELDER: Well, Mr. Dorfman, you know, you  
19 had a chance to speak. I was invited to participate on this  
20 call, I assume, for the purpose of not just listening, but  
21 also being an opportunity to state our position.

22 MR. DORFMAN: I believe the requirements are that  
23 you --

24 MR. BATCHELDER: But, if you want to have --

25 MR. DORFMAN: -- I think I'm in a position with --

1 and show appropriate respect to the court, Mr. Batchelder.  
2 MR. BATCHELDER: I don't believe the court was --  
3 JUDGE FOELAK: Hey, let me just reiterate, that's  
4 what my ruling is, that Ropes and Gray -- the subpoena has  
5 been modified -- now that I know, you know, what the Division  
6 intends to do and what Ropes and Gray intend to do about Mr.  
7 Fee's testimony, the subpoena has been modified to require  
8 Ropes and Gray to provide redacted notes of the interview.  
9 And --

10 MR. BATCHELDER: But that's not what your order  
11 says, Your Honor. You said that the Division should ensure  
12 this material is made available. Your order -- I mean, I  
13 don't understand how that can happen. The Division doesn't  
14 have the material.

15 MS. BRIDGMAN: Your Honor, I would just like to --

16 JUDGE FOELAK: Well, let me just -- perhaps that  
17 was not the most felicitous way of expressing it. I -- or  
18 what -- at that point in time I did not know whether the  
19 Division actually intended to call Mr. Fee and for the  
20 orderly -- not having to adjourn for days, or something like  
21 that, process of the hearing, that was an advisory to the  
22 Division, to use their good offices. But --

23 MR. DORFMAN: Your Honor, may we have a date when  
24 we can have these notes?

25 MS. BRIDGMAN: Your Honor, I would also like to

1 understand it, Your Honor. I just don't understand the basis  
2 for which one party gets to have access to work product and  
3 attorney-client documents that the other party doesn't have  
4 access to on some ground of fairness. I just don't  
5 understand that.

6 MR. DORFMAN: Your Honor. Once again, I've been  
7 doing this for 25 years. I have never before heard a lawyer  
8 address a court in this manner.

9 JUDGE FOELAK: Okay, counsel. Let me explain. He  
10 needs the notes to cross-examine. To impeach him. Mr. Fee  
11 cannot just halfway waive the privilege and talk about the  
12 statements and not give over the notes. And that's my  
13 position. So, you know, let's move on.

14 Okay. Do we have anything else?

15 MR. BATCHELDER: Your honor, we have -- we will --  
16 we will take this matter, as we've indicated, to the  
17 Commission and will seek review of your order with the  
18 Commission and, depending on the outcome of that, intend to  
19 seek judicial review of it if -- depending on what the  
20 Commission orders. And because of the nature of your order,  
21 we would obviously be seeking a stay of any requirements to  
22 produce the notes because, of course, once produced, they're  
23 out there and any arguments we can make after that, the notes  
24 would already be out there.

25 So we will ask and I assume you would agree that

1 again state that we plan to file a motion today for  
2 modification of the order to provide that Mr. Fee may  
3 testify, because the Commission has -- or the Division has  
4 met all of its obligations to produce what it was -- it's  
5 required to produce under the rules. And in the absence of  
6 allowing Mr. Fee to testify, for the court to permit us to  
7 make a proffer pursuant to the rules, which allow that, by  
8 having Mr. Fee testify. I believe that's Rule 321, which  
9 would allow the Division to make a proffer of Mr. Fee's  
10 testimony, and we would like to file that motion today in an  
11 effort to have the court address it after our brief is filed.

12 JUDGE FOELAK: Well, I've given some thought to  
13 this matter prior to -- prior to this pre-hearing conference,  
14 and perhaps I can shortcut this a bit. I don't think -- it  
15 would not be consistent with Commission precedent to bar Mr.  
16 Fee from testifying. It is a problem for Mr. Dorfman -- not  
17 a problem -- he has a justifiable complaint if he can't get  
18 these notes before he cross-examines.

19 MR. BATCHELDER: But, Your Honor, as to that issue,  
20 I just don't understand that, because Mr. -- the SEC doesn't  
21 have these notes, so why would Mr. Dorfman get the notes? I  
22 don't get it.

23 JUDGE FOELAK: Okay. I'm telling you what my  
24 ruling was on the subpoena.

25 MR. BATCHELDER: I know. I'm just trying to

1 this issue, until it's resolved, that the notes would not  
2 need to be produced.

3 MR. DORFMAN: Your Honor, this is Marc Dorfman --

4 JUDGE FOELAK: Counsel, if you desire to appeal  
5 this to the Commission, et cetera, you can ask the Commission  
6 for a stay, but I am -- and that's the way it is.

7 MR. DORFMAN: May we have a date when these notes  
8 will be produced? The sooner the better, Your Honor. We  
9 have a trial to prepare for. I'd like them next week.

10 JUDGE FOELAK: Okay. Then let me put, you know, a  
11 clarification of the -- okay, what date? What date would be  
12 good? I'll put down a date of a week from today? Then it  
13 will be down in black and white, which is the 4th? Third?

14 MR. DORFMAN: I believe a week from --

15 JUDGE FOELAK: March, March. Okay, I'm sorry.  
16 March -- okay. Let me see.

17 MR. BATCHELDER: Your Honor, this is Richard  
18 Batchelder again, directing the court and the parties'  
19 attention to Rule 431(e), the delegated action, which is what  
20 you have now done in ordering the production of the notes, is  
21 stayed automatically on our petition to review. So I think,  
22 you know, that was what I was getting at in terms of the  
23 stay. It's automatic.

24 MR. DORFMAN: Your Honor, with all due respect, I  
25 don't believe you're ruling on -- pursuant to delegated

1 authority.  
 2 JUDGE FOELAK: Well, that's not for me to decide.  
 3 I mean, it's -- if he's going to take this appeal pursuant to  
 4 a rule that's in the rule book and it doesn't apply, or the  
 5 Commission decides it doesn't want to apply and it wants  
 6 to -- well, the Commission can do whatever it wants to.  
 7 But I will put down the date of March 6th for  
 8 turning over the notes, just so it's down in black and white.  
 9 MR. BATCHELDER: Your Honor, we've already filed  
 10 the petition for review.  
 11 JUDGE FOELAK: You filed a notion of -- well --  
 12 MR. BATCHELDER: The ruling says upon filing with  
 13 the Commission of the notice of intention to petition for  
 14 review, an action made pursuant to delegated authority shall  
 15 be stayed. So it -- I'm telling you that that's what the  
 16 rule provides. I don't think there's any dispute that  
 17 obviously you were acting on delegated authority. You  
 18 weren't just doing this on your own. It was pursuant to the  
 19 delegated authority to you to handle this hearing. So, I  
 20 mean, the stay's in effect.  
 21 JUDGE FOELAK: Okay, very good. Nonetheless, I'll  
 22 put the date down so we have a date. Okay. Is there  
 23 anything else?  
 24 MR. BATCHELDER: Well, Your Honor, again, I don't -  
 25 - you have a date down, but it's stayed. I'd like to have

1 only talks about initial decisions. It doesn't actually talk  
 2 about subpoenas. So --  
 3 MR. BATCHELDER: No, that's not true, Your Honor.  
 4 It talks about everything that you do. It's -- if you look  
 5 at 200 -- Rule 200.30-9, it talks about all the proceedings  
 6 that you were given the authority to do. I mean, it couldn't  
 7 simply just be the initial decision, because we're not  
 8 affected by your initial decision, right? If your reading  
 9 were correct then a party in our -- a non-party in our  
 10 position would have no opportunity to have any review. That  
 11 obviously is not the case.  
 12 JUDGE FOELAK: Well, I mean, actually -- actually a  
 13 non-party in your position does have the opportunity for  
 14 review in an enforcement, you know. And if an action were  
 15 taken against you to enforce this subpoena, then you would  
 16 have an opportunity to get a different result that was more  
 17 satisfactory to you.  
 18 MR. BATCHELDER: But that's not how the rules --  
 19 Your Honor, respectfully, I think the rule is quite clear  
 20 that you've taken an action, that action aggrieves a person,  
 21 namely Ropes and Gray, and that the rule provides a procedure  
 22 for a notice of intention to petition for review, a filing of  
 23 a petition for review, Commission action, and then judicial  
 24 review of that Commission action under the Administrative  
 25 Procedure Act. It's all set forth in the rule.

1 that reflected in the order that there is this automatic  
 2 stay. I mean, you know, it's right in Rule 431(e).  
 3 JUDGE FOELAK: Okay. Nonetheless, I am not  
 4 completely convinced that this will apply to this type of  
 5 proceeding. So, you know, perhaps you can make an argument  
 6 that it does, but I'm putting down the date of March 6th.  
 7 And you can, you know, argue whatever you feel is the most  
 8 appropriate to the Commission.  
 9 MR. BATCHELDER: Well, I am going to be doing it  
 10 based on the record of this call, in part, and, you know,  
 11 delegated authority -- you have delegated authority to make  
 12 the action that you've made. That authority comes from  
 13 Section 200.30-1-18. That much is clear. You're doing this  
 14 pursuant to authority that has been delegated to you. That's  
 15 how you're able to make the order.  
 16 And then, once you make the order, it -- because we  
 17 filed a notice of intention to petition for review -- and I  
 18 just want that reflected, because that's what should happen.  
 19 I mean, we shouldn't be subject to providing documents when  
 20 the order to produce the documents is on automatic stay. To  
 21 argue that to somebody, that should be the application of the  
 22 rule.  
 23 JUDGE FOELAK: Okay. Of course, the particular  
 24 rule that you are citing to -- that delegates authority to an  
 25 administrative hearing officer, an administrative law judge,

1 And as part of that, there is the automatic stay.  
 2 You know, I don't think you have to wait till the sheriff's  
 3 at your door looking for the documents before you have a  
 4 right to have review of the decision.  
 5 JUDGE FOELAK: Well, you have only five days to  
 6 file the petition, anyway, right?  
 7 MR. BATCHELDER: Yes, Your Honor, we are going to  
 8 have to file it. But the point is that during the pendency  
 9 there's the automatic stay. And I just want that reflected  
 10 on the record. I want that clear so that, you know, our  
 11 obligations to respond to your order are clear and it's noted  
 12 that such obligations are stayed during the pendency of this  
 13 review process, as reflected in the rule.  
 14 MR. DORFMAN: Your Honor, all I can say is that if  
 15 we're not going to get access to those notes, I think that  
 16 the court's not going to have the choice but to put the  
 17 hearing off, and I say that reluctantly. This is -- this  
 18 is -- I -- this is a problem, frankly, of the Division's  
 19 making insofar as they want to call a witness who wants to  
 20 cooperate with the Division, but with all due respect to Mr.  
 21 Batchelder and Mr. Fee, they really want to have their cake  
 22 and eat it, too, as to privilege. They want to testify, but  
 23 then they want to claim privilege as to the underlying  
 24 records.  
 25 JUDGE FOELAK: Let's cut this short. I'm, you

Page 45

1 know, somewhat -- was somewhat blind-sided by this concept of  
2 the automatic stay and Mr. Batchelder's extreme desire to  
3 have this thought incorporated in my order. So I'll put out  
4 the order, and I will reference Mr. Batchelder's argument in  
5 it.

6 Okay. Is there anything else?

7 MS. BRIDGMAN: Your Honor, I --

8 JUDGE FOELAK: And we will, you know, fax a copy of  
9 the order to him as well as to the parties of the  
10 proceedings.

11 Okay. Is there anything else?

12 MS. BRIDGMAN: Your Honor, I just want

13 clarification. I believe you stated earlier that under the  
14 rules -- under the Commission's rules -- Mr. Fee would not be  
15 barred from testifying.

16 JUDGE FOELAK: That is correct. That is correct.

17 The Commission's rulings are, on evidentiary matters, are  
18 that administrative law judges should be inclusive, and  
19 anyway, he would not be barred from testifying. It's -- and

20 Mr. Blizzard would perhaps have grounds for --

21 MR. DORFMAN: If we don't have his notes, I'm going  
22 to ask that his testimony be stricken and disregarded.

23 JUDGE FOELAK: Well, anyway, what I was trying to  
24 get at is Mr. Blizzard would end up with a grounds -- I won't  
25 say a grievance -- a grounds for appeal, or taking -- or

Page 46

1 actually, perhaps he should look into subpoena enforcement  
2 action sooner rather than later.

3 MS. BRIDGMAN: Your Honor, we have nothing further.

4 JUDGE FOELAK: Okay. Let me get to some, you know,  
5 more minor logistical issues. Okay. This hearing was set  
6 for March 26th, which is a Tuesday. Now it's -- you know, as  
7 I've previously indicated, I would not be holding hearings on  
8 Friday and the following Monday -- it's Easter weekend -- and  
9 we would be adjourning early on Thursday. That leaves two-  
10 and-a-half or three days the first week.

11 And I want to explore whether it might be better to  
12 start on Monday, the 25th, or start on Tuesday, April 2nd, to  
13 like make more progress in the beginning. I don't know if,  
14 you know, if that's too sudden. That's one question.

15 And then on -- Ms. Bridgman was going to undertake  
16 to find a hearing site, I believe, and --

17 MS. BRIDGMAN: Yes. With respect to the hearing  
18 site, we have located a trial -- a courtroom. I will provide  
19 the details of the location of that immediately.

20 JUDGE FOELAK: Okay.

21 MS. BRIDGMAN: And with respect to your question  
22 about commencement of trial, we would be happy to commence  
23 trial on the 25th.

24 MR. DORFMAN: Your Honor, I can't do it. I have --  
25 I -- that's not possible.

Page 47

1 JUDGE FOELAK: Okay. Okay.

2 MR. DORFMAN: But I -- I had not heard before -- I  
3 was aware of the April 1st problem. I had not heard before  
4 about the 29th problem. I perhaps misunderstood, because --  
5 Ms. Bridgman and I have spoken frequently. I might have  
6 missed it.

7 MS. BRIDGMAN: Well, I was not aware of the 29th,  
8 either.

9 JUDGE FOELAK: Well, there's --

10 MR. DORFMAN: I mean, that's all --

11 JUDGE FOELAK: That there was some mis-  
12 communication -- it was passed on, you know, informally.  
13 But --

14 MR. DORFMAN: I understand. But now that that's  
15 come to our attention, I do share the court's concern that we  
16 shouldn't convene a hearing for two-and-a-half days. I mean,  
17 that's an awful lot of travel expense. And I see no reason  
18 to not just start it on April 2nd.

19 MS. BRIDGMAN: I --

20 JUDGE FOELAK: I tell you what, we'll leave it at  
21 the 25th. And Ms. Bridgman, and Mr. Dorfman, and Mr. Small,  
22 perhaps you might confer among yourselves and see whether  
23 maybe, you know, this is evidently taking you by surprise --  
24 see if whether maybe April 2nd might be better. And could  
25 you get back -- when do you think you can get back to, you

Page 48

1 know, in a day or so?

2 MR. DORFMAN: I fearlessly predict that we won't  
3 agree, Your Honor, but I know the Division is loathe to give  
4 up as early a trial date as possible.

5 JUDGE FOELAK: Well --

6 MR. SMALL: Yeah, I would -- I don't feel strongly  
7 one way or the other, but I think it would be -- the court is  
8 correct. It would make a lot more sense to start fresh on  
9 April 2nd.

10 MS. BRIDGMAN: Your Honor, we object to delaying  
11 the trial. We will certainly talk with counsel, but we  
12 object to delaying the trial. We would be happy to begin on  
13 the 25th. If we begin on the 26th, that's three days of  
14 trial, not two-and-a-half as Mr. Dorfman states.

15 MR. DORFMAN: I -- then you'll have to start the  
16 trial without me and my client. I mean, that doesn't seem  
17 fair.

18 MS. BRIDGMAN: No, I mean, if we start on the --

19 JUDGE FOELAK: Wait a minute, we're not -- okay, if  
20 he can't. I mean, the date has been the 26th, so, you know,  
21 we legitimately plan not to be there on the 25th, so  
22 apparently the 26th -- the 25th, excuse me, is not a  
23 possibility.

24 MR. DORFMAN: And now that we're -- and, you know,  
25 things come up in life. Now we -- let's make believe that



1 someone just found out that they've got an emergency they  
 2 have to attend to on the 29th. I think it would make much  
 3 more sense to start on the 2nd. And if -- I so move.  
 4 MS. BRIDGMAN: Your Honor, we object to that. We  
 5 wish --  
 6 MR. DORFMAN: May -- it's -- I mean --  
 7 MR. SMALL: I would join in the motion, Your Honor.  
 8 I just think it makes perfect sense. I can't imagine what  
 9 difference it would make to the -- what substantive  
 10 difference it would make to --  
 11 JUDGE FOELAK: Hey, let me just ask you something.  
 12 You know, you are surprised by this, apparently, and I am  
 13 sorry that the word about Good Friday didn't get through.  
 14 But is there, you know, certainly delay is a bad thing. We  
 15 are talking about a delay -- essentially a delay of three  
 16 days. There may be some reason why that's, you know, really  
 17 bad, or why that we're going to run into some difficulty,  
 18 but --  
 19 MR. SMALL: I can't imagine what the problem --  
 20 JUDGE FOELAK: Well, there may be a reason. Are  
 21 you able to think of any such reason, you know, really -- bad  
 22 reason?  
 23 MS. BRIDGMAN: Your Honor, the Division lawyers  
 24 have commitments for the -- in mid-April which are -- were  
 25 scheduled on the basis of the trial date beginning on the

1 26th. And that trial date has been scheduled and -- since  
 2 our January conference.  
 3 MR. DORFMAN: That still leaves us with quite a few  
 4 trial days. I mean, and the real logistical problems of  
 5 getting to -- getting set up and then having to leave the  
 6 courtroom and leave our exhibits and everything for an  
 7 extended period and then coming back again just -- I mean,  
 8 everyone on this call is an experienced traveler. We --  
 9 everybody knows what's involved. I hesitate to use the word  
 10 "silly," but it does seem a bit silly to insist that we start  
 11 on the --  
 12 MS. BRIDGMAN: I -- Your Honor, we have  
 13 commitments, also. We have got the courtroom scheduled for  
 14 these dates. I don't know -- this is -- I don't know that we  
 15 can change them. I -- we have --  
 16 MR. SMALL: We certainly can surrender dates. And  
 17 I would, once again, I mean, this imposes the expense on  
 18 private parties to have lawyers and everything put in a place  
 19 and to then only be able to get a little bit done. I mean --  
 20 JUDGE FOELAK: Well, it's three days of trial.  
 21 We're talking about three days of trial.  
 22 MR. SMALL: Two-and-a-half, and we've already  
 23 described the fact that we need to leave -- to stop early on  
 24 the 27th because it's the first night of Passover, as well.  
 25 I would certainly just -- I don't want to belabor the point,

1 but it seems obvious and reasonable that given the scheduling  
 2 circumstances, that we should just start on April 2nd when we  
 3 can just take consecutive days. And if people have  
 4 scheduling commitments, obviously the court should  
 5 accommodate the scheduling commitments. I'm certainly not  
 6 going to hope -- no one is going to be held prisoner.  
 7 JUDGE FOELAK: Okay. Here's what I'm going to do.  
 8 The Division, of course, is not traveling, although, of  
 9 course, it may be paying for witnesses to travel, and of  
 10 course the government is paying for me to travel and other  
 11 people are paying. And I think it would just waste less  
 12 resources if we start on April 2nd. So that's -- and that  
 13 way we'll get at least almost a whole week instead of two-  
 14 and-a-half days. And I am sorry that the word about Good  
 15 Friday had not percolated through.  
 16 Okay. Is there anything else?  
 17 MS. BRIDGMAN: Your Honor, we have to check with  
 18 the court to find out whether -- what trial dates are  
 19 available. It may be that we would have to truncate or  
 20 bifurcate the trial. In other words, go for two weeks and  
 21 then reconvene at a later time. Can we keep that proposal in  
 22 mind?  
 23 JUDGE FOELAK: Okay. We'll keep that in mind. And  
 24 let me add -- I've asked this question before, but now the  
 25 posture of the trial has changed. There have been various

1 estimates as to, you know, like between two and twelve weeks.  
 2 I guess, starting with Ms. Bridgman, could you just  
 3 give a guesstimate as to how long you think your case would  
 4 last, and even a guesstimate as to how long the whole case  
 5 would last.  
 6 MS. BRIDGMAN: Well, Mr. Dorfman -- up until Monday  
 7 of this week, we were under the impression, or had the  
 8 understanding, that the primary defendant -- the only  
 9 defendant -- going to trial was Respondent Blizzard. And Mr.  
 10 Dorfman and I have been trying to make arrangements to  
 11 exchange exhibits and enter into various stipulations which I  
 12 believed would -- we both believed would shorten the trial.  
 13 JUDGE FOELAK: Yes.  
 14 MS. BRIDGMAN: Now that Mr. -- Respondent Abel is  
 15 back in the case, I don't really have any idea. Mr. Small  
 16 has from day one refused to engage in discussion of  
 17 stipulations, so --  
 18 MR. SMALL: That's simply not true. I sent you a  
 19 proposed list of stipulations.  
 20 MS. BRIDGMAN: Yes.  
 21 JUDGE FOELAK: Well, let's not --  
 22 MR. SMALL: It's simply not true.  
 23 JUDGE FOELAK: But I just want to begin -- Ms.  
 24 Bridgman. you're not really able to estimate?  
 25 MS. BRIDGMAN: I -- no, I expected that the trial

Page 53

1 with Respondent Blizzard would last two to three weeks. With  
 2 respect to Respondent Abel being back in the case, I don't  
 3 know.  
 4 MR. SMALL: Let me just say, Your Honor, first,  
 5 Respondent Abel obviously was never out of the case, and  
 6 second, her statement is simply untrue. And I'll be happy to  
 7 provide the court -- we exchanged stipulations. I provided  
 8 them with a proposed list of stipulations. You know, we've  
 9 been through all this.  
 10 I -- Rudy Abel left Shawmut Investment Advisors  
 11 before 90 percent of what happened here occurred.  
 12 JUDGE FOELAK: Okay.  
 13 MR. SMALL: So he doesn't add much to the case.  
 14 JUDGE FOELAK: Okay. Very good, Mr. Small. So  
 15 perhaps if we just double the estimate of two to three weeks,  
 16 to get an outside estimate of two to six weeks, does that  
 17 sound like an outside estimate?  
 18 MS. BRIDGMAN: Yes, Your Honor.  
 19 JUDGE FOELAK: Okay. I'm just sort of trying to  
 20 get a feel for it. Okay. Is there anything else?  
 21 MR. BATCHELDER: Your Honor, Richard Batchelder. I  
 22 just have a couple of questions. You made a suggestion that  
 23 perhaps Mr. Dorfman should consider a subpoena enforcement  
 24 proceeding, but my comment on that is also to add and  
 25 reiterate that the reason -- given that comment, why it's

Page 54

1 critical to have in this order a reflection of the rule and  
 2 the stay, if that's not going to be in the order, I think it  
 3 would be helpful to know what authority you are making the  
 4 order pursuant to? If it's not the authority covered in  
 5 Sections 200.30-1 to 200.30-18?  
 6 JUDGE FOELAK: Generally speaking, the Commission's  
 7 authority -- my authority from the Commission comes in from  
 8 Section 201 and various rules to follow. More so, those --  
 9 the rules in that section are basically what the rules on  
 10 authority of administrative law judges in the Commission  
 11 comes from.  
 12 For example, Section 201.111, Hearing Officer  
 13 Authority, gives, you know, text section B, issuing subpoenas  
 14 authorized by law and revoking, quashing, or modifying any  
 15 such subpoena. So that is -- and then you look at that  
 16 together with 201.232, that is the authority. And again, I  
 17 mean, the Commission adopted all the rules in 201 and so the  
 18 specific -- the specific rules in the delegation section are  
 19 relevant.  
 20 MR. BATCHELDER: Again, I reiterate that this is a  
 21 ruling made in connection with your hearing that you're going  
 22 to be conducting relating to a witness that's going to be  
 23 appearing at that hearing. I think it's clear that that is a  
 24 delegated authority to you that give us rights as an  
 25 aggrieved party -- person, rather -- to seek judicial review

Page 55

1 and then that carries with it an automatic stay. I mean, if  
 2 I --  
 3 JUDGE FOELAK: I think, Mr. Batchelder, that your  
 4 concerns will be reflected in my order, of which you will  
 5 have a copy.  
 6 MR. BATCHELDER: I appreciate that. Thank you.  
 7 MR. DORFMAN: You know, I -- Your Honor, I, too,  
 8 however, am -- I share Mr. Batchelder's puzzlement on the  
 9 need to initiate subpoena enforcement proceedings. The  
 10 court's ruled on a subpoena. I -- and either -- I believe  
 11 the court -- but I -- and I'm not following what the court  
 12 might be suggesting.  
 13 JUDGE FOELAK: Well, the Commission does not have  
 14 the authority to enforce its own subpoenas like a court does.  
 15 That is what I was referring to.  
 16 MR. DORFMAN: Yes, but the court has the authority  
 17 to regulate the proceedings before it, and that's all I'm  
 18 asking for. I mean, I don't -- I personally don't care  
 19 whether Mr. Fee testifies or not. In fact, I would be happy  
 20 if he elected not to.  
 21 MR. BATCHELDER: But he doesn't have an election if  
 22 he's subpoenaed. I mean, I mean, this idea that Mr. Fee  
 23 wants to do this or that -- if he gets a subpoena, he's got  
 24 to comply with it. If he doesn't get a subpoena, he's not  
 25 going to be showing up in the courtroom and saying, "I love

Page 56

1 to be here."  
 2 MR. DORFMAN: Yes, but he either can waive the  
 3 privilege or not.  
 4 JUDGE FOELAK: Exactly. Okay. Is there anything  
 5 else?  
 6 MS. BRIDGMAN: We have nothing further, Your Honor.  
 7 JUDGE FOELAK: Okay. Thank you, Ms. Bridgman.  
 8 Anything else, Mr. Dorfman?  
 9 MR. DORFMAN: No, thank you very much, Your Honor.  
 10 Thank you.  
 11 JUDGE FOELAK: And Mr. Small?  
 12 MR. SMALL: No, thank you very much, Your Honor.  
 13 JUDGE FOELAK: All right. And Mr. Batchelder?  
 14 MR. BATCHELDER: Thank you, Your Honor.  
 15 JUDGE FOELAK: Okay. In that case, I will be  
 16 putting out an order today that, you know, reflects  
 17 everything that transpired, and everyone will be faxed a  
 18 copy, including Mr. Batchelder.  
 19 So anyway, the pre-hearing conference is closed,  
 20 and thank you for participating.  
 21 (Whereupon, at 11:25 a.m., the conference was  
 22 concluded.)  
 23 \* \* \* \* \*  
 24  
 25

1 PROOFREADER'S CERTIFICATE

2

3 In the Matter of: MICHAEL J. ROTHMEIER, ET AL.

4 ADMINISTRATIVE PROCEEDING - TELEPHONE PRE-HEARING CONFERENCE

5 File Number: 3-10007

6 Date: Thursday, February 28, 2002

7 Location: Boston, Massachusetts

8

9

10 This is to certify that I, David W. Baker (the

11 undersigned), do hereby swear and affirm that the attached

12 proceedings before the U.S. Securities and Exchange

13 Commission were held according to the record and that this is

14 the original, complete, true and accurate transcript that has

15 been compared to the reporting or recording accomplished at

16 the hearing.

17

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21 \_\_\_\_\_  
(Proofreader's Name) (Date)

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ADMINISTRATIVE PROCEEDING  
FILE NO. 3-10007UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION  
February 28, 2001

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In the Matter of :  
:  
CLARK T. BLIZZARD, :  
RUDOLPH ABEL, : PREHEARING ORDER  
CHRISTOPHER P. ROACH, and :  
EAST WEST INSTITUTIONAL SERVICES, INC. :

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The hearing in this proceeding was scheduled to commence March 26, 2002, in Boston, Massachusetts.<sup>1</sup> A prehearing conference was held today. The following parties appeared: the Division of Enforcement (Division) by Linda B. Bridgman and Sandra J. Bailey, Esqs.; Clarke T. Blizzard by Marc B. Dorfman, Esq., of Foley & Lardner; Rudolph Abel by Daniel I. Small, Esq., of Butters, Brazilian & Small; and Christopher P. Roach, pro se, and on behalf of East West Institutional Services, Inc. (East West). Additionally, Richard D. Batchelder, Jr., Esq., of Ropes & Gray appeared concerning a subpoena directed to the law firm.

Respondents Roach and East West

On February 6, 2002, the Division filed a Motion for Default as to Respondents Roach and East West, pursuant to 17 C.F.R. § 201.155(a). On February 20 the undersigned ordered them to show cause by February 27 why they should not be held in default and why specified sanctions requested by the Division should not be imposed against them. At today's prehearing conference Mr. Roach stated that he would accept the default against himself and East West.

Respondent Abel

Previously, the Division and Respondent Abel had reached agreement in principle on a settlement. The settlement recently failed, however, necessitating some adjustment in the prehearing schedule as to Respondent Abel. His prehearing brief will be due March 15.

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<sup>1</sup> The proceeding was originally captioned Michael J. Rothmeier, Clarke T. Blizzard, Rudolph Abel, Donald C. Berry, Christopher P. Roach, Craig Janutol, and East West Institutional Services, Inc. It has ended as to Respondents Rothmeier, Berry, and Janutol, who settled. The Commission issued Orders Making Findings and Imposing Sanctions as to each of them on April 13, 2000.

On February 27, 2002, the Division filed an Emergency Motion to Disqualify Respondent Abel's Counsel from Representing *Both* Abel and The Witnesses Against Him on the Grounds of Conflict of Interest. The Division argued that counsel's representation of Mr. Abel and several witnesses whom the Division intends to call to testify at the hearing is unethical and a conflict of interest in violation of Rule 1.7(b) of the American Bar Association Model Rules of Professional Conduct (ABA Model Rule 1.7(b)). The Division requested the undersigned to enter an order disqualifying counsel from continuing to represent Mr. Abel and the witnesses.

The motion was denied. The Securities and Exchange Commission's (Commission) Rules of Practice, 17 C.F.R. §§ 201.100 - .630, which govern Commission administrative proceedings, do not authorize an administrative law judge to take such a drastic action. See 17 C.F.R. § 201.102(e) ("The Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after notice and opportunity for hearing in the matter . . . (ii) . . . to have engaged in unethical or improper professional conduct.") (emphasis added). Only the Commission can institute such a hearing. See 17 C.F.R. § 201.300. Compare 17 C.F.R. § 201.102(e) with 17 C.F.R. § 201.180 (authorizing an administrative law judge to summarily suspend counsel for the duration of a proceeding for "contemptuous conduct" and requiring an adjournment of the hearing to allow the party whom the suspended counsel represented to obtain new counsel).

The Division's motion examined ABA Model Rule 1.7(b) and related cases at some length. It appears, however, that counsel had complied with his duty under that rule. Finally, since the Division's motion was denied, counsel's motion to extend the time to respond to it is moot.

#### Respondent Blizzard and Ropes & Gray

Respondents in this proceeding were associated with the predecessor to Fleet Investment Advisors, Inc. (FIA). FIA questioned practices that it discovered and retained the law firm of Ropes & Gray to investigate. FIA also advised the Commission, which commenced its own investigation, which led to this proceeding. During the course of Ropes & Gray's investigation, Michael Fee, a member of the firm, interviewed Respondent Blizzard on April 19, 1996. The Division intends to call Mr. Fee as a witness in the hearing to testify about Respondent Blizzard's statements in the interview. It may also seek to introduce Ropes & Gray's May 2, 1997, report about the interview, as Exhibit 108.

The February 15, 2002, Order on Application to Quash Subpoena (February 15 Order) modified a subpoena directed to Ropes & Gray, issued pursuant to 17 C.F.R. § 201.232, at the request of Respondent Blizzard. The subpoena was modified in response to Ropes & Gray's Application to Quash and numerous responsive pleadings, which thoroughly discussed issues of attorney-client and work-product privileges and waiver of the privileges. As modified, the

subpoena sought production of contemporaneous notes and memoranda, redacted of opinion, of the April 19, 1996 interview if Mr. Fee testifies, so that Respondent Blizzard may cross-examine effectively.

At the request of Ropes & Gray, the undersigned clarified the ruling in the February 15 Order. At the prehearing conference the Division confirmed that it intends to call Mr. Fee to testify about Respondent Blizzard's statements at the interview. Mr. Batchelder represented that Mr. Fee would not claim the attorney-client or work-product privilege when asked about Respondent Blizzard's statements at the April 19, 1996 interview. Thus, as the February 15 Order held, he will waive the privileges as to notes, redacted of opinion, as well. This resolution reduces the burden on Ropes & Gray to the greatest extent possible, consistent with Respondent Blizzard's need for the notes to cross-examine effectively. The date for the notes to be produced is March 6, 2002.

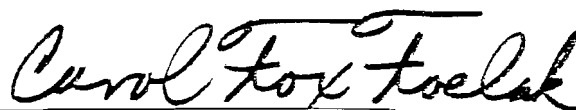
Mr. Batchelder noted that on February 25, 2002, Ropes & Gray provided Notice of Intention to Petition for Review of the February 15 Order on Application to Quash, pursuant to 17 C.F.R. § 201.430. He argued that there is an automatic stay of the subpoena return date, citing 17 C.F.R. §§ 201.430(a), .430(b) and .431(e). As he agreed, that argument assumes that the administrative law judge's authority to issue subpoenas derives from 17 C.F.R. § 200.30-9. The administrative law judge's authority to issue subpoenas derives from 17 C.F.R. §§ 201.111 and .232, however. See also 17 C.F.R. § 201.431(e) Revision Comment (e), 60 Fed. Reg. 32738, 32778 (June 23, 1995). If Ropes & Gray does not comply with the subpoena, conflict over the production of the notes may be resolved in the federal courts if Respondent Blizzard applies to a person authorized to seek enforcement through an ex rel. proceeding. See Section 209(c) of the Investment Advisers Act of 1940.

The undersigned confirmed that Mr. Fee will be permitted to testify whether or not Respondent Blizzard obtains the notes. To rule otherwise would be inconsistent with the Commission's Rules of Practice and precedent. See Civ. of Anaheim, 71 SEC Docket 191, 193-94 & nn. 4-8 (Nov. 16, 1999) (holding that administrative law judges should be inclusive in making evidentiary determinations in its proceedings).

#### Hearing Date

Finally, the hearing was postponed to commence April 2, 2002, in light of religious holidays, and to avoid waste of public and private resources, consistent with 17 C.F.R. §§ 201.161 and .200(c).

IT IS SO ORDERED.



Carol Fox Foelak  
Administrative Law Judge