ALJ

ADMINISTRATIVE PROCEEDING
FILE NO. 3-11084

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
October 7, 2003

In the Matter of	:	
	:	ORDER
HARRISON SECURITIES, INC.,	:	
FREDERICK C. BLUMER,	:	
and NEBRISSA SONG	:	
	:	
	:	

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on April 7, 2003. The hearing is scheduled to commence on October 14, 2003, in New York City. To this point, a New York attorney has ably represented all three Respondents.

On October 2, 2003, I received a notice of appearance and a motion to continue the hearing from a California attorney who has had no prior involvement in the case. The notice of appearance was filed on behalf of Respondents Harrison Securities, Inc. (Harrison), and Frederick C. Blumer (Blumer), but not on behalf of Respondent Nebrissa Song (Song). The motion to continue requested the hearing be postponed for "at least" ninety days, so that the California attorney could begin to familiarize himself with the issues.

As grounds for the postponement, the California attorney stated:

> At [my first meeting with Blumer on September 24, 2003], Blumer advised me that his present counsel . . . had advised him of a potential conflict of interest and that he [Blumer] was no longer comfortable with [the New York attorney's] multiple representation of all respondents.
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> Declaration of California attorney at ¶ 2 (emphasis added).
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> All of the respondents in this proceeding had previously been represented by [a New York attorney. That attorney] recently advised the moving Respondents that he believed that there was a significant risk of an actual conflict of interest as a result of his continued representation of all of the respondents in this proceeding. This potential conflict of interest stems from the fact that respondent Song is claiming that in meeting her responsibilities as FINOP for Harrison she relied upon information supplied to her by the moving Respondents. In pursuing this

> defense on behalf of respondent Song, [the New York attorney] would not be free to advance any argument on behalf of the moving Respondents that ran counter to Ms. Song's defense. As a result of this, the moving Respondents do not believe that [the New York attorney] will be able to vigorously advocate their cause to the fullest extent possible.
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> Brief in Support of Motion to Continue at 1-2 (emphasis added).

By letters dated October 2 and 3, 2003, the New York attorney advised that he did not voluntarily withdraw from the representation of Harrison and Blumer; instead, Blumer terminated his engagement. The letter also challenged the assertion that the conflict of interest issue only recently came to his attention. The New York attorney, who continues to represent Respondent Song, did not oppose the California attorney's request to postpone the hearing.

By pleading dated October 3, 2003, the Division of Enforcement (Division) opposed any delay in the start of the hearing. The Division argued that Harrison and Blumer voluntarily chose to replace their prior counsel (who had represented them during the staff's investigation) with the New York attorney, and did so after discussing the conflict of interest issue and explicitly agreeing that it was not a concern. The Division contends that Harrison and Blumer are engaging in dilatory tactics to delay as long as possible a resolution of the allegations against them.

Division counsel stated:

> On March 14, 2003, shortly before the Commission instituted this proceeding against Respondents, [the New York attorney] informed me by telephone that Blumer and Harrison had asked him to represent them, in place of [the law firm of McDermott, Will & Emory]. I inquired of [the New York attorney] in general terms at that time whether his representation of all Respondents posed any potential for a conflict of interest, and [he] responded that he did not believe any conflict existed, as Respondents intended to present a "united front" as a defense.
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> On March 27, 2003, I again spoke with [the New York attorney] by telephone. During that conversation, [the New York attorney] told me that he had discussed the conflict issue with his clients, and that they agreed that there was no conflict. . . . At no time from March 27, 2003, to the present did [the New York attorney] or any of the Respondents ever raise with the Division or the Court any issue as to a potential or actual "conflict of interests" among his clients.
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> Declaration of Division Counsel at ¶¶ 3-4.

On October 6, 2003, Blumer submitted an affidavit in support of the motion for a continuance. Blumer confirmed that he discussed the potential conflict of interest issue with the New York attorney "at the initiation of this matter" (Blumer Declaration at ¶ 2). He also acknowledged that he understood that an actual conflict of interest could arise, but waived any possible conflict because he wanted the New York attorney to represent all three Respondents

(Blumer Declaration at ¶ 2). Blumer explained that he changed his mind as the Respondents proceeded further in the preparation of a defense, once it "became clear that a divergence was developing as to how the respondents might best defend themselves" (Blumer Declaration at ¶ 7). Blumer denied that he intended to delay the proceeding (Blumer Declaration at ¶ 7).

DISCUSSION

The applicable version of Rule 161(b) of the Commission's Rules of Practice provides that a hearing officer may, for good cause shown, postpone the commencement of the hearing for a reasonable period of time. The Rule further provides that the hearing officer shall consider, in addition to any other factors, the length of the proceeding to date; the number of postponements, adjournments, or extensions already granted; the stage of the proceedings at the time of the request; and any other such matters as justice may require.[1]

The length of the proceeding to date. The Commission issued the OIP six months ago. This proceeding is the oldest, untried matter on my docket. Under 17 C.F.R. § 201.900, an Administrative Law Judge's initial decision should be filed within ten months after issuance of the OIP.

Previous extensions granted. This is the fourth extension of time that Respondents have sought. Respondents first requested an additional thirty days to answer the OIP (Motion dated April 29, 2003). I granted that motion in part, but only to the extent that the Division did not oppose it (Order of April 30, 2003) (nine-day extension granted). Respondents next requested an additional four days beyond the time allowed to identify their expert witness (Motion dated July 21, 2003). I granted that request, which the Division did not oppose. The third extension involved Respondents' request for an additional two weeks to file the direct testimony of their designated expert witness (Motion dated Aug. 26, 2003). I granted that request, which the Division did not oppose (Order of Aug. 27, 2003). However, the extended deadline came and went without Respondents filing any expert testimony.[2]

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[1] The Division takes the position that this matter is not subject to the revisions of the Commission's Rules of Practice that became effective on July 17, 2003 (Prehearing Conference of Sept. 5, 2003, at 4; Letter from Richard G. Primoff, dated Sept. 8, 2003). The revised Rules of Practice impose strict deadlines on the length of time an Administrative Law Judge may take to complete a hearing and issue an initial decision. The prior Rules of Practice contained guidelines, but not deadlines.

[2] At the start of the proceeding, Respondents stated that the hearing was likely to be a battle of the opposing experts (Prehearing Conference of May 12, 2003, at 19-20). However, on September 12, 2003, the day Respondents were required to submit the written direct testimony of their designated expert, the New York attorney confirmed that Respondents would not be submitting any such testimony (Declaration of Division Counsel at ¶ 5).

One of the more surprising statements in support of the Motion to Continue is the assertion that the California attorney needs ninety days so that he might "consult with an expert

Viewed individually, each of these previous extension requests was reasonable at the time it was sought. Viewed collectively, however, a pattern emerges: Respondents Harrison and Blumer are not especially eager to have their day in court.

Previous attorneys. The California attorney will be the third lawyer to represent Harrison and Blumer in this matter. During the early stages of the staff's investigation, the law firm of McDermott, Will & Emery represented Harrison and Blumer, and the New York attorney represented Song (Declaration of Division Counsel at ¶ 2). During the later stages of the staff's investigation and for the first six months of this proceeding, the New York attorney represented Harrison, Blumer, and Song. From this point forward, the California attorney will represent Harrison and Blumer, and the New York attorney will return to representing only Song.

Such other matters as justice may require. The Commission's Order in Clarke T. Blizzard, 77 SEC Docket 1515 (Apr. 24, 2002), is relevant here. In Blizzard, a single attorney represented a respondent, a former respondent, and several individuals whom the Division intended to call as witnesses during an administrative hearing. The Division anticipated possible conflicts between the respondent's testimony, on the one hand, and the testimony of the former respondent and the other witnesses represented by the attorney, on the other hand. The attorney had obtained written consents from his clients to the joint representation, waiving any alleged conflict. Nonetheless, the Division persuaded the Commission to disqualify the attorney from the multiple representations.

The Commission's overriding concern was the integrity of the administrative proceeding. Among other things, the Commission stated:

> We have an obligation to ensure that our administrative proceedings are conducted fairly in furtherance of the search for the truth and a just determination of the outcome. Even the appearance of a lack of integrity could undermine the public confidence in the administrative process upon which our authority ultimately depends. This concern cannot be addressed by the consent of [the attorney's] clients to his representation of them. Rather, the issue is whether the Commission consents to the impact on its adjudicatory processes created by [the attorney's] multiple representation. . . .
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> It does not alter our conclusion that an actual conflict has not yet been established. . . . We need not wait until an actual conflict taints the "adversarial presentation of evidence" where the nature of the multiple representation presents such a serious potential for conflict.
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> We are also aware that our decision will necessitate further delay in a matter that has already been the subject of lengthy delay. Indeed, [the attorney representing multiple clients] accuses the Division of having moved to disqualify him "solely

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witness to rebut the evidence offered by the Division's expert witness" (Brief in Support of Motion to Continue at 2). This claim is suspect in light of what has already transpired.

> to harass and as a dilatory tactic." In that regard, we find it difficult to understand why this issue was raised so late in the proceeding. . . . Leaving the matter so late in the process compounds the necessary delay and repetition of effort as new counsel prepares for representation of [new clients], which could have been avoided by addressing this matter earlier. While we are mindful of these unfortunate consequences, however, we nonetheless must maintain the integrity of the proceedings we are empowered to conduct.
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> Blizzard, 77 SEC Docket at 1517-20 (footnotes omitted).

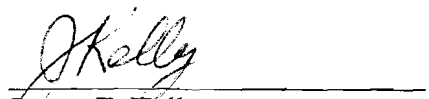
The Division may well be correct that Blumer is engaging in dilatory tactics here by first granting his consent to the multiple representations, and then strategically withdrawing it on the eve of hearing. However, the situation here is not all that different from the situation in Blizzard, where the respondent accused the Division of last-minute dilatory tactics.

The Commission's Order in Blizzard makes it clear that, at least where multiple representations are involved, a serious potential for prejudice to the integrity of the administrative proceeding outweighs any concerns about dilatory tactics and resulting delays. Blizzard is very broadly worded, and the Division has offered no principled basis for interpreting it narrowly here. Because the potential for prejudice is great, the substitution of counsel is appropriate. Accordingly, the California attorney should have a reasonable opportunity to become familiar with the issues before the hearing starts.

ORDER

IT IS ORDERED THAT the motion of Respondents Harrison Securities, Inc., and Frederick C. Blumer to postpone the hearing is granted pursuant to Rule 161(b) of the Commission's Rules of Practice.

IT IS FURTHER ORDERED THAT the telephonic prehearing conference set for October 9, 2003, at 2 p.m. Eastern time will be held as scheduled. The parties should be prepared to set a new hearing date at that conference.



James T. Kelly
Administrative Law Judge