UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 3311 / November 9, 2011

Admin. Proc. File No. 3-14536

In the Matter of MONTFORD AND COMPANY, INC. d/b/a MONTFORD ASSOCIATES and ERNEST V. MONTFORD, SR.	ORDER DENYING SUGGESTION FOR INTERLOCUTORY REVIEW

Montford and Company, Inc. and Ernest V. Montford, Sr., respondents in a Commission administrative proceeding, have filed a Suggestion for Commission Interlocutory Review in which they "urge the Commission to exercise its discretionary authority to grant interlocutory review" of the law judge's order denying Respondents' motion to dismiss the order instituting cease-and-desist proceedings ("OIP") issued against them. The Division of Enforcement opposes Respondents' suggestion for interlocutory review. For the reasons below, we see no basis for ordering interlocutory review.

I.

The Commission issued an OIP against Respondents on September 7, 2011 pursuant to Sections 203(e), (f), and (k) of the Investment Advisers Act of 1940. Respondents filed an Answer and a Motion to Dismiss Out-Of-Time OIP the following day. In their motion, Respondents alleged that the Commission failed to issue the OIP within the 180-day time limit established by Section 929U of the Dodd-Frank Wall Street Reform and Consumer Protection Act.[1] Respondents claimed that, because the Commission had provided them with a written

[1] Section 929U of Dodd-Frank, also known as Section 4E of the Securities Exchange Act of 1934 and codified at 15 U.S.C. § 78d-5, provides that "[n]ot later than 180 days after the date on which Commission staff provide a written Wells notification to any person, the (continued...)

Wells notification on March 4, 2011, the 180-day time limit under Section 929U expired on August 31, 2011 – seven days before the Commission issued the OIP. As Respondents explained, Section 929U allows the Director of the Division (or the Director's designee) to extend the 180-day deadline if the Director "determines that a particular enforcement investigation is sufficiently complex such that a determination regarding the filing of an action against a person cannot be completed within the [180-day] deadline . . . after providing notice to the Chairman of the Commission." Respondents claimed that the Division failed to take these steps to obtain such an extension.

The Division opposed Respondents' attempt to dismiss the OIP by arguing that, "[b]ecause the Division Director granted the extension and the OIP was instituted within the extended period, there is no question that the staff complied with the requirements of Section 929U." In support, the Division submitted a declaration by Michael J. Cates, an attorney in the Division who worked on the investigative phase of the proceeding, who declared that (i) Division staff submitted a request for an extension to the 180-day time limit under Section 929U; (ii) the Division Director's staff provided the Commission's Chairman with notice that the Division Director intended to extend the initial 180-day deadline; and (iii) the Division Director approved the extension.

The law judge held a pre-hearing telephonic conference on October 3, 2011, during which the law judge rejected Respondents' assertions that the Division had failed to establish compliance with the 180-day time limit. The law judge issued a subsequent order (the "October 5 Order"), in which she explained that she made her ruling "after the Division clarified that the representations in the Cates Declaration were based on e-mails from Division staff in Atlanta to the Division Director, and physical evidence showing notice to the Commission Chairman that the Director intended to grant the 180-day extension." The law judged added that "the complex nature of the proceeding is demonstrated by the fact that the Commission directed that an Initial Decision be issued within 300 days, the time allowed for deciding the most complex proceedings" under the Commission's Rule of Practice 360.[2]

Respondents applied for a certificate of interlocutory appeal with the law judge on October 13, 2011, arguing that she had confused the deadline for initiating an action under Section 929U of the Dodd-Frank Act with the deadline for issuing an initial decision under Rule

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[1] (...continued)
Commission staff shall either file an action against such person or provide notice to the Director of the Division of Enforcement of its intent to not file an action."

[2] 17 C.F.R. § 201.360(a)(1) (stating that the Commission "will specify a time period in which the hearing officer's initial decision must be filed with the Secretary" of either 120, 210 or 300 days, which shall be determined "in the Commission's discretion, after consideration of the nature, complexity, and urgency of the subject matter, and with due regard for the public interest and the protection of investors").

of Practice 360. The law judge denied Respondents' application for certification, stating that her ruling in the October 5 Order "was based on findings of fact and law" and that Respondents had "not shown that the ruling involves a controlling question of law as to which there is substantial ground for differences of opinion, and the appeal will impede rather than advance resolution of the allegations in the OIP."

II.

On October 24, 2011, Respondents filed the present suggestion urging the Commission to exercise its discretionary authority to grant interlocutory review of the law judge's October 5 Order.[3] In their filing, Respondents argue that "the relevant facts are not in dispute: Commission Staff missed the [180-day] Dodd-Frank Deadline and there is no evidence that the Director of Enforcement issued an extension in accordance with Dodd-Frank." Respondents also reiterate their earlier argument that the law judge's October 5 Order confused the deadlines in Section 929U and Rule 360. Respondents assert that the law judge's decision to deny their motion to dismiss was therefore "plainly incorrect, and it would be a grave injustice to force these Respondents through trial."

The Division opposes Respondents' filing, arguing that (i) Respondents' arguments relate to the law judge's factual determinations, which are inappropriate for interlocutory review; (ii) the law judge's October 5 Order is consistent with another administrative ruling, which found that staff representations established compliance with Section 929U;[4] (iii) the Director's determination "is committed to his sound discretion [and] is not subject to challenge by a respondent;" (iv) Section 929U "is an internal deadline that provides no rights to Respondents;" and (v) interlocutory review "will not avoid any litigation time or expense" because the hearing is set to begin on November 7, 2011 and Respondents have not requested a stay.

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[3] Respondents could not file a motion for interlocutory review with the Commission because the law judge declined to certify Respondents' motion for interlocutory appeal. *See* Rule of Practice 400(c) (requiring that a "ruling submitted to the Commission for interlocutory review must be certified in writing by the hearing officer"), 17 C.F.R. § 201.400(c). Even when a law judge certifies a petition for interlocutory review, the Commission will grant such petitions "only in extraordinary circumstances." Rule of Practice 400(a), 17 C.F.R. § 201.400(a).

[4] *See Gualario & Co., LLC*, Admin Proc. Rel. No. 680 (Aug. 11, 2011) (denying respondents' motion for summary disposition because respondents had, in part, "present[ed] no evidence that the required notification [by the Division Director] did not occur" under Section 929U).

III.

We see no basis for the Commission to order interlocutory review. Petitions for interlocutory review "are disfavored,"[5] and here, the law judge declined to certify Respondents' petition for interlocutory review, a certification required by our rules before seeking interlocutory review. We agree with the law judge's conclusion and, for the same reasons, see no basis for the Commission to take the matter up on its own motion.

Rule of Practice 400(c)(2) provides that a hearing officer shall not certify a ruling for interlocutory review unless: "(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."[6] The controlling question here is a mixed one of law and fact: whether the Division took the steps necessary to comply with the requirements in Section 929U for obtaining an extension to the 180-day deadline.[7] Respondents claim that no dispute exists that the Division Director failed to determine that the present investigation was "sufficiently complex such that a determination regarding the filing of an action against a person cannot be completed within the [180-day] deadline." To the contrary, the law judge implicitly found that the Division Director had made the required complexity determination, noting that the Division had asserted that "the Division Director is not required to articulate or memorialize the reason for deciding that an investigation is sufficiently complex."

Respondents may disagree with the law judge's determination, but that is not an issue appropriate for interlocutory review. Generally speaking, once the Commission exercises its prosecutorial discretion to institute a proceeding, "the appropriate remedy for any challenge to that exercise of discretion is to litigate the proceeding to a final decision."[8] That is the proper course here.

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[5] Rule of Practice 400(a), 17 C.F.R. § 201.400(a).

[6] 17 C.F.R. § 201.400(c)(2).

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

[8] *Kevin Hall*, Exchange Act Rel. No. 55987 (June 29, 2007), __ SEC Docket ___ (denying Respondents' Motions for Summary Disposition and Oral Argument).

Accordingly, IT IS ORDERED that the suggestion for interlocutory review of the law judge's order to dismiss the order instituting proceedings in this matter by Montford and Company, Inc. and Ernest V. Montford, Sr., be, and hereby is, denied.

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

Elizabeth M. Murphy
Secretary