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ADMINISTRATIVE PROCEEDING
FILE NO. 3-10607

CTFD. NO. _____

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
February 28, 2002

In the Matter of

CHRIS WOESSNER

ORDER DENYING RESPONDENT'S MOTION
TO PRECLUDE THE TESTIMONY OF
CHRISTOPHER P. ROACH; RESPONDENT'S
MOTION FOR ORDERING OF PROOF;
RESPONDENT'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS;
RESPONDENT'S MOTION TO PRECLUDE
TESTIMONY OF LESLIE I. GOLEMBO;
MOTION IN LIMINE TO EXCLUDE ADMISSION
INTO EVIDENCE AN UNAUTHORIZED
PURPORTED COPY OF A LETTER DATED
MARCH 20, 1996; AND MOTION IN LIMINE TO
PRECLUDE OPINION TESTIMONY
REGARDING THE DOLLAR VALUE OF
ANALYTICAL REPORTS PROVIDED TO DUFF
& PHELPS INVESTMENT MANAGEMENT &
CO. BY PERFORMANCE ANALYTICS, INC.

The Securities and Exchange Commission (Commission) issued an Order Instituting Proceedings in this matter on September 28, 2001. The hearing is scheduled for Tuesday, April 9, 2002, at 9:00 a.m. EDT. In anticipation of the hearing, Respondent filed six motions, all dated February 19, 2002: 1) Respondent's Motion to Preclude the Testimony of Christopher P. Roach; 2) Respondent's Motion for Ordering of Proof; 3) Respondent's Motion to Compel Production of Documents; 4) Respondent's Motion to Preclude Testimony of Leslie I. Golembo; 5) Motion in Limine to Exclude Admission into Evidence an Unauthorized Purported Copy of a Letter Dated March 20, 1996; and 6) Motion in Limine to Preclude Opinion Testimony Regarding the Dollar Value of Analytical Reports Provided to Duff & Phelps Investment Management & Co. By Performance Analytics, Inc. The Division of Enforcement (Division) filed a Consolidated Opposition to Respondent's Prehearing Motions on February 26, 2002.

Respondent's Motion to Preclude the Testimony of Christopher P. Roach.

Respondent argues that Christopher P. Roach's background of convictions and his habitual pattern of lying on matters pertinent to this proceeding render him unfit to testify. Respondent's objections, however, are arguments that pertain to the weight to be attached, if

any, to the witness's testimony and the credibility to be afforded, not to the admissibility of the testimony itself.

Respondent's Motion for Ordering of Proof.

Respondent argues that the Division must make a showing of proof that a violation of the federal securities laws occurred within the statute of limitations period of September 28, 1996, to September 28, 2001, before being allowed to present evidence relating to alleged violations predating the period.

Because Respondent's request turns on issues related to the statute of limitations and when the alleged violations occurred, it will be treated in the Initial Decision after the trial is allowed to proceed in an orderly and efficient manner, and after all evidence concerning this issue has been presented.

Respondent's Motion to Compel Production of Documents.

Respondent moves to compel the production of:

[A]ll settlement agreements and plea agreements reached with any department or agency of the United States Government with any witness proposed for testimony by the Division . . . and any other inducements offered, including any writing containing an inducement to testify in this matter; and

[A]ny sentencing memorandum prepared by the Department of Justice in connection with United States v. Roach, United States District Court Northern District of Illinois (N.D. Ill.) (Case No. 00 CR 288), or any other criminal proceeding against Christopher P. Roach.

The Division indicates in its opposition that it has provided "all of the agreements about which it is aware involving prospective witnesses." (emphasis added) Also, the Division indicates that Roach's sentencing memorandum is not "within its custody or control."

Under Rule 230 of the Commission's Rules of Practice, the Division has an obligation to "make available for inspection and copying . . . documents obtained by the Division prior to the instituting of proceedings, in connection with the investigation leading to the Division's recommendation to institute proceedings." 17 C.F.R. § 201.230. Furthermore, the production of documents prepared by the staff may be required under the doctrine of Brady v. Maryland, 373 U.S. 83 (1963), or pursuant to requirements under the Jencks Act made applicable to the Commission pursuant to Rule 231, or by subpoena pursuant to Rule 232 or other procedures. See Comment (a), Rule 230 of the Commission's Rules of Practice, 17 C.F.R. § 201.230.

These obligations, however, do not impose a duty to provide documents that the Division does not possess. Furthermore, Respondent's request for all agreements reached with any department with any witness is overly burdensome and broad. Respondent's ability to impeach potential witnesses is not substantially impaired by not requiring the Division to gather the requested documents.

Respondent's Motion to Preclude Testimony of Leslie I. Golembo.

Respondent argues that he has not received materials concerning Mr. Golembo's January 9, 2001, deposition and other information relating to Mr. Golembo's activities with the Division.

In response, the Division represents that due to the invocation of his Fifth Amendment privilege during the investigative deposition, there is no testimony to provide to the Respondent. Furthermore, the Division states that there have been no inducements extended to Mr. Golembo for his testimony. I credit the representations of the Division.

Motion in Limine to Exclude Admission into Evidence an Unauthorized Purported Copy of a Letter Dated March 20, 1996.

Respondent moves to exclude a copy of a letter dated March 20, 1996, on the basis of Rules 1002 and 1003 of the Federal Rules of Evidence (FRE). Respondent argues that the unsigned copy proposed to be admitted is not the best evidence, rather only a signed original version of the letter is adequate for admission.

The FRE may serve as a guide in determining the admissibility of evidence in administrative proceedings, but they do not strictly apply. See Yanopoulos v. Department of Navy, 796 F.2d 468, 471 (Fed. Cir. 1986); Calhoun v. Bailar, 626 F.2d 145, 148 (9th Cir. 1980). Nevertheless, Respondent's argument is misplaced when held up to the stricter standard of the FRE. There is no error in admitting a copy of an original letter in absence of an argument that the copy is incorrect. See Fed. R. Evid. 1001(4). Respondent provides no such argument.¹

To the extent that such evidence is hearsay, it is admissible in a Commission administrative proceeding if relevant, material and not unduly repetitious. See Rule 320 of the Commission's Rules of Practice, 17 C.F.R. § 201.320, and Section 556(c)(3) and (d) of the Administrative Procedure Act, 5 U.S.C. § 556(c)(3) and (d).

Motion in Limine to Preclude Opinion Testimony Regarding the Dollar Value of Analytical Reports Provided to Duff & Phelps Investment Management & Co. By Performance Analytics, Inc.

¹ Respondent's argument that the letter could be "a draft form of a letter that was never sent" does not pertain to issues of admissibility.

Respondent argues that only an expert witness is qualified to opine on the dollar value of the analytical reports relevant to this administrative proceeding. Accordingly, Respondent moves to preclude any potential opinions stated by Division's prospective witnesses concerning the analytical reports' value.

If the prospective witnesses have knowledge based on facts that are relevant to the proceedings, their lay opinions may be admitted. See Fed. R. Evid. 701. Such testimony is admissible even if it "embraces an ultimate issue to be decided by the trier of fact." Fed. R. Evid. 704. The modern trend is to allow lay opinion as long as it is well founded on personal knowledge and open to specific cross-examination. See Eisenberg v. Gagnon, 766 F.2d 770, 780-81 (3d Cir. 1985) and cases cited therein; see also United States v. Ranney, 719 F.2d 1183, 1189 n. 11 (1st Cir. 1983) (investors in futures could give lay opinion based on their personal knowledge about the value of the investment opportunity).

Accordingly, IT IS ORDERED that:

Respondent's Motion to Preclude the Testimony of Christopher P. Roach is DENIED;

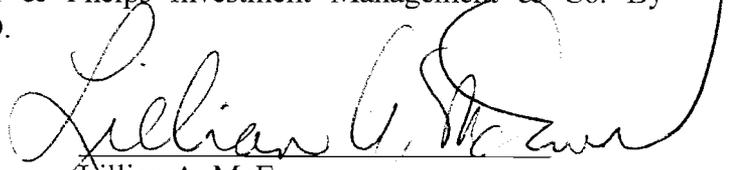
Respondent's Motion for Ordering of Proof is DENIED;

Respondent's Motion to Compel Production of Documents is DENIED;

Respondent's Motion to Preclude Testimony of Leslie I. Golembo is DENIED;

Motion in Limine to Exclude Admission into Evidence an Unauthorized Purported Copy of a Letter Dated March 20, 1996, is DENIED; and

Motion in Limine to Preclude Opinion Testimony Regarding the Dollar Value of Analytical Reports Provided to Duff & Phelps Investment Management & Co. By Performance Analytics, Inc. is DENIED.



Lillian A. McEwen

Administrative Law Judge