

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS  
Release No. 1579/July 2, 2014

ADMINISTRATIVE PROCEEDING  
File No. 3-15737

In the Matter of

THOMAS C. GONNELLA

ORDER ON MOTIONS IN LIMINE

On February 4, 2014, the Securities and Exchange Commission (Commission) issued an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) against Thomas C. Gonnella. Mr. Gonnella was served with the OIP on February 7, 2014, and filed an Answer on March 31, 2014. A hearing in this matter is scheduled to begin on July 7, 2014.

### **Background**

The parties have together filed five motions that are currently pending before me. The Division of Enforcement objects to the admission of Mr. Gonnella's proposed exhibits 1 through 4, asserting that these proposed exhibits are irrelevant and immaterial, and objects to Mr. Gonnella's proposed Exhibit 5 on hearsay grounds. The Division also seeks to bar testimony from "prospective character witnesses," asserting their testimony would be irrelevant and unduly repetitive. Finally, the Division seeks to exclude Mr. Gonnella's expert report, prepared by Richard W. Painter, and to bar testimony by Professor Painter. For his part, Mr. Gonnella seeks to bar testimony from Ryan King, whom the Division has identified as a witness.<sup>1</sup>

### **Principles of Law**

In resolving the parties' motions, I am guided by the following principles:

The Administrative Procedure Act provides that except for "irrelevant, immaterial, or unduly repetitious evidence," "[a]ny oral or documentary evidence may be received" in an administrative hearing. 5 U.S.C. § 556(d). Consistent with this provision, the Commission's Rules of Practice (Rules) provide for the exclusion of evidence that is "irrelevant, immaterial, or

---

<sup>1</sup> In addition to these recent motions, Mr. Gonnella has also recently informed me that Professor Painter is only able to appear for the hearing on July 10 or 11, 2014, and that the Division has no objection to accommodating Professor Painter's schedule. I also have no issue with Professor Painter's scheduling constraints.

unduly repetitious.” 17 C.F.R. § 201.320. There is no per se bar to the admission of hearsay evidence in the Commission’s administrative proceedings. See, e.g., Guy P. Riordan, Securities Act of 1933 (Securities Act) Release No. 9085 (Dec. 11, 2009), 97 SEC Docket 23445, 23469, pet. denied 627 F.3d 1230 (D.C. Cir. 2010); Edgar B. Alacan, 57 S.E.C. 715, 729 (2004). Rather, that evidence constitutes hearsay goes to its weight, not its admissibility. Guy P. Riordan, 97 SEC Docket at 23469 (“In evaluating the probative value and reliability of hearsay evidence, as well as the fairness of its use, we consider a number of factors, including the possible bias of the declarant, the type of hearsay at issue, whether the statements are signed and sworn to rather than anonymous, oral, or unsworn, whether the statements are contradicted by direct testimony, whether the declarant was available to testify, and whether the hearsay is corroborated.” (internal quotation marks omitted)).

The Commission has directed that administrative law judges “should be inclusive in making evidentiary determinations.” City of Anaheim, 54 S.E.C. 452, 454 (1999). When “in doubt,” the evidence should be admitted. Id. at 454 n.7.

Administrative law judges retain “broad discretion in determining whether to admit or exclude . . . expert testimony.” Scott G. Monson, Investment Company Act of 1940 Release No. 28323 (June 30, 2008), 93 SEC Docket 7517, 7526 n.27 (citations omitted); see 17 C.F.R. § 201.111(c). “[I]n securities cases, expert testimony commonly is admitted” with respect to a number of matters, including “industry practice” and “complicated terms and concepts.” SEC v. Johnson, 525 F. Supp. 2d 70, 77 (D.D.C. 2007). Although the Rules of Evidence do not apply in the Commission’s administrative proceedings, see City of Anaheim, 54 S.E.C. at 454 (“The Federal Rules of Evidence are designed for juries and do not apply to administrative adjudications.”); M.V. Gray Investments, Inc., 44 S.E.C. 567, 573 n.13 (1971) (“in administrative proceedings . . . rules of evidence are more liberal”), in cases governed by the Federal Rules of Evidence, an expert’s testimony may “embrace[] an ultimate [factual] issue,” Fed. R. Evid. 704(a), but not the ultimate legal issue, see Montgomery v. Aetna Cas. & Sur. Co., 898 F.2d 1537, 1541 (11th Cir. 1990).

## **Ruling**

With the principles discussed above in mind, I resolve the parties’ motions as follows:

1. The Division’s motion to exclude Mr. Gonnella’s proposed exhibits 1 through 4 is DENIED WITHOUT PREJUDICE and may be renewed during the hearing. In response to the Division’s motion, Mr. Gonnella states that he prospectively identified exhibits 1 through 4 but does not know whether he will offer them into evidence. Gonnella Opp. at 6 (filed June 24, 2014). The Division’s motion is thus premature. Additionally, because I am required to err on the side of inclusiveness and the relevance, or irrelevance, of exhibits 1 through 4 cannot be fully ascertained prior to the hearing, I would in any event defer ruling on the admission of these exhibits until they are offered at the hearing.

2. The Division’s motion to exclude Mr. Gonnella’s proposed exhibit 5 is DENIED, because hearsay evidence that is relevant is admissible in administrative proceedings. I will give

exhibit 5 the weight I find it deserves, consistent with Commission precedent relevant to the evaluation of hearsay evidence.

3. The Division's motion to exclude character witnesses is DENIED IN PART. In response to the Division's motion, Mr. Gonnella states that he intends only to call one or two witnesses to testify as to his character. Gonnella Opp. at 1. This serves to moot the Division's objection that the testimony of character witnesses would be "unduly repetitious." See Div. Reply at 7 (filed June 26, 2014) ("[T]his reply will treat as moot [the motion's] request that . . . the number of witnesses on this subject should be limited.").

As the Rules of Evidence, and specifically Rule 404 regarding character evidence, do not apply in this proceeding, Mr. Gonnella may present character testimony. Cf. United States v. Yarbrough, 527 F.3d 1092, 1101-02 (10th Cir. 2008); In re Sealed Case, 352 F.3d 409, 412 (D.C. Cir. 2003). Character witness testimony is at least minimally relevant, as the Division here alleges that Mr. Gonnella "lied" to his superiors and engaged in a scheme to defraud his employer. See Div. Prehearing Brief at 15-18 (filed June 16, 2014). Moreover, character evidence may be relevant to a sanction determination if liability is found. See Harold F. Harris, 58 S.E.C. 1118, 1128 n.20 (2006); Murray A. Kivitz, 44 S.E.C. 600, 611 (1971), rev'd on other grounds, 475 F.2d 956 (D.C. Cir. 1973). To the extent the testimony of any character witness concerns matters that I ultimately find irrelevant, however, I will give no weight to that portion of the witness's testimony. See 17 C.F.R. §§ 201.111(c), .320.

4. The Division's motion to exclude Professor Painter's report and to bar his testimony is DENIED IN PART. Professor Painter's report is admitted except to the extent his report addresses legal conclusions, such as whether a particular alleged act or admission constitutes a securities violation. See, e.g., Painter Report at 2, 16 ("The conduct might have been material to compensation decisions and perhaps even whether to fire Mr. Gonnella, but it was not material to an investment decision."). To the extent his report contains a discussion of legal precedent, that discussion is not particularly helpful at this stage and is more appropriately left to post-hearing briefing. See, e.g., id. at 7-9 & n. 3 (analyzing legal construction of stock parking). Professor Painter, therefore, may not testify about legal precedent. Professor Painter may not opine during his testimony as to whether a particular act or omission constitutes a securities violation or testify about the state of the law or relevant precedent. Absent relevant Commission Rule or precedent on the matter, I find that the Division's objection related to Professor Painter's qualifications to testify as an expert goes to the weight to be given his testimony. Professor Painter's qualifications are thus a proper subject for cross-examination.

5. Mr. Gonnella's motion to exclude testimony of Ryan King is DENIED. Mr. Gonnella offers what amounts to a policy argument. He appears to first argue that because a witness in Mr. King's shoes in a criminal trial would be required to plead guilty before testifying, the same procedure should apply herein. See Gonnella Mot. at 4-5 (filed June 18, 2014). He also argues that separation of powers issues are implicated by allowing the Division to use a witness who has entered into a cooperation agreement. Id. at 5.

The former argument proceeds from the false premise that the government prosecutes every cooperating witness and assumes, without support, that the procedures employed in

criminal prosecutions must be employed in the administrative setting. Furthermore, Mr. Gonnella's arguments amount to an attack on the exercise of prosecutorial discretion and, more broadly, an attack on the administrative framework in which his case is being pursued. Neither basis to attack the Division's use of Mr. King's testimony has merit. See Heckler v. Chaney, 470 U.S. 821, 832 (1985) (discussing an agency's prosecutorial discretion); Porter County Chapter of Izaak Walton League of America, Inc. v. Nuclear Regulatory Comm'n, 606 F.2d 1363, 1371 (D.C. Cir. 1979) ("Even as to adjudications, the combination in one administrative body of adjudicative with other functions violates constitutional guarantees only when the combination 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'") (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)); see also The Stuart-James Co., 50 S.E.C. 468 (1991) (opinion and concurring opinion discuss combined administrative and adjudicatory functions of the Commission).

Absent a legal impediment to Mr. King's testimony, the reasons Mr. Gonnella gives for excluding Mr. King's testimony amount to arguments about the weight I should give that testimony. The weight to be given Mr. King's testimony, however, will depend on a number of factors, which are best addressed in post-hearing briefs. See 17 C.F.R. § 201.340.

SO ORDERED.

---

James E. Grimes  
Administrative Law Judge