

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4079/August 22, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-17184

In the Matter of

CHRISTOPHER M. GIBSON

ORDER ON MOTION IN LIMINE

The Securities and Exchange Commission issued an order instituting proceedings on March 29, 2016. The hearing will begin on September 12, 2016. *Christopher M. Gibson*, Admin. Proc. Rulings Release No. 3866, 2016 SEC LEXIS 1844, at *2 (ALJ May 25, 2016). On August 8, 2016, the Division of Enforcement filed a motion in limine with exhibits A-D, requesting that at the hearing I bar Respondent from: (1) arguing that that he relied on the advice of counsel regarding the conduct at issue; and (2) offering evidence regarding the substance of any communications with counsel. The basis for the Division's motion is its claim that Respondent "withheld all information regarding the substance of his communications with his attorneys" during the investigation so he should not now be permitted to argue "that he relied on the advice of counsel, to testify about communications with counsel, or to offer into evidence documents relating to such communications." Motion at 1.

On August 16, 2016, Respondent submitted an opposition arguing that he has not asserted a reliance on counsel defense and has not indicated that he will do so, thus, the Division has not stated a basis for the ruling it requests. Opp. at 1, 4-5.

Ruling

The Division is asking that I prohibit some things which might, or might not, happen at the hearing. The Division cites an order in *Edgar R. Page*, Admin. Proc. Rulings Release No. 2262, 2015 SEC LEXIS 307 (ALJ Jan. 27, 2015), as support for its position. Motion at 12. That order requires context, however. In a prior order in the same case, the administrative law judge granted the Division's motion in limine to preclude the respondents from offering evidence to establish an advice of counsel defense because they had waived that defense, but allowed the respondents to brief whether a lesser engagement of counsel defense should be recognized. *Edgar R. Page*, Admin. Proc. Rulings Release No. 2239, 2015 SEC LEXIS 231 (ALJ Jan. 21, 2015). Then, in the order cited by the Division, the law judge simply said that he "would be disinclined to recognize an engagement of counsel defense as relevant to issues of good faith, mental state, or scienter," but allowed the respondents to rely on documentary evidence

discussing engagement of counsel for some other proper purpose. *Edgar R. Page*, 2015 SEC LEXIS 307, at *1-2. The order advised that “any testimony about the specific nature and extent of counsel’s involvement would be an unfair attempt to access the advice of counsel defense.” *Id.* at *3. The *Page* order, therefore, does not support the ruling requested by the Division.

It is difficult to make evidentiary rulings in a vacuum. The public hearing ordered by the Commission is to determine whether the allegations put forward by the Division are true and to afford Respondent an opportunity to establish any defenses to such allegations. OIP at 10. The case will be decided based on the pleadings and the evidence adduced at the hearing. What occurred during the investigative phase is not evidence unless it is admitted as such in this proceeding. At the hearing, I will rule on objections to testimony and exhibits when they are offered. At this stage, I do not have sufficient information to find that the ruling requested by the Division is justified under the Commission’s Rules of Practice. *See* 17 C.F.R. § 201.320 (standard governing admissibility of evidence); *City of Anaheim*, Exchange Act Release No. 42140, 1999 SEC LEXIS 2421, at *4 & n.7 (Nov. 16, 1999). The motion is DENIED.

The Division is free to renew the motion during the hearing. However, in the absence of clear authority from the Commission requiring a respondent’s disclosure of attorney-client communications during the investigation in anticipation of an advice of counsel defense during any administrative proceeding that may follow, the Division’s position is not well taken.

Brenda P. Murray
Chief Administrative Law Judge