

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

Administrative Proceedings Rulings
Release No. 6615 / June 28, 2019

Administrative Proceeding
File No. 3-17184

In the Matter of
Christopher M. Gibson

**Order Granting Motion in Limine
to Preclude Testimony by
Current and Former Counsel for
the Division of Enforcement**

In his witness list submitted in May 2019, Respondent Christopher M. Gibson identified three witnesses—George Bagnall, Paul Bohr, and Ricky Sachar—who are or were employed as counsel with the Division of Enforcement. The Division has moved to preclude testimony from its counsel and Gibson opposes the Division’s motion. For the reasons discussed below, the Division’s motion is granted.

Background

The order instituting proceedings (OIP) alleges that Gibson violated the antifraud provisions in the Securities Exchange Act of 1934 and the Investment Advisers Act of 1940.¹ According to the OIP, Gibson served as an investment adviser to a private pooled investment fund.² The fund was allegedly principally invested in the common stock of Tanzanian Royalty Exploration Corporation (“TRX”).³

During its investigation, the Division contacted Timothy F. Strelitz, who invested in the fund.⁴ In December 2014, Bagnall e-mailed Strelitz, with whom Bagnall and Bohr had apparently spoken, and forwarded a declaration

¹ OIP at 9.

² *Id.* at 1.

³ *Id.* at 2.

⁴ *See Opp’n Attach. E.*

summarizing that conversation.⁵ In the declaration, which Strelitz signed in February 2015, he declared that he had invested in the fund but was unaware that in October and November 2011, “Gibson took a short TRX position in” his and his girlfriend’s personal investment accounts.⁶

Later in February 2015, Bagnall and Bohr took testimony from James M. Hull.⁷ Hull was apparently the largest single investor in the fund.⁸ During Hull’s testimony, Bohr defined the term “short position,” as “borrowing stock and selling stock in the hope that the stock’s price will decline.”⁹ Bagnall then asked Hull whether he was aware that in October and November 2011—during the time Gibson served as the fund’s investment adviser—Gibson “took a short position in TRX” in both his and his girlfriend’s personal investment accounts.¹⁰ Hull denied knowing about Gibson’s short positions and affirmed that he would have wanted to know about them so that he could take appropriate action.¹¹ Later in the deposition, Division counsel showed Hull brokerage account statements from Gibson’s and Gibson’s then-girlfriend’s accounts.¹² The statements showed that in October 2011, Gibson purchased TRX put contracts in his and his girlfriend’s personal accounts and then sold the contracts shortly before the fund sold more than five million shares of TRX.¹³

⁵ See Opp’n Attach. E, F.

⁶ Opp’n Attach. F at 1.

⁷ See Mot. Attach. C.

⁸ Opp’n Attach. C at 121 (“I own 80 percent of the fund.”).

⁹ *Id.* at 37.

¹⁰ *Id.* at 43.

¹¹ *Id.* at 43–44.

¹² Mot. Attach. C at 112–20. Attachment C to the Division’s motion and Attachment C to Gibson’s opposition contain excerpts from the same investigative testimony.

¹³ *Id.* at 112–22. While showing Hull the account statements, Bagnall said, “This is what we were describing earlier in the day.” *Id.* at 114. It may be that Bagnall was referring to the earlier discussion about Gibson’s alleged short position in TRX stock, but without the entire transcript, it is not possible to know whether that is what he was referencing.

The Commission issued the OIP in March 2016. Among other allegations, the OIP asserts that shortly before liquidating the fund's investment in TRX in November 2011, Gibson purchased TRX put contracts in his and his then-girlfriend's personal brokerage accounts.¹⁴ According to the OIP, "In effect, the put contracts represented a short position, *i.e.*, a bet that TRX's share price would decline below \$4 before the put contract's November 19, 2011 expiration date."¹⁵

In February 2018, Hull executed a four-page declaration.¹⁶ Hull declared that he was angered to learn from Division counsel that Gibson had shorted TRX stock.¹⁷ He stated that he responded by seeking a tolling agreement from Gibson so that he could pursue "a legal action" against him and by telling other fund investors.¹⁸ But, Hull continued, he had since learned that Division counsel's statements about Gibson's short positions "were inaccurate."¹⁹

The current dispute

This brings us to the current dispute. Gibson submitted his witness list in May 2019 and listed the three referenced current and former Division attorneys as witnesses.²⁰ In his witness list, Gibson states that he expects Bagnall and Bohr to testify about their "representations to James Hull during his investigative testimony regarding short sales and short positions in TRX securities by Christopher Gibson."²¹ Gibson also expects each to

¹⁴ OIP at 2–3.

¹⁵ *Id.* at 8.

¹⁶ *See* Opp'n Attach. D.

¹⁷ *Id.* at 1.

¹⁸ *Id.*

¹⁹ *Id.* Hull also provided an extended critique of a decision issued by my predecessor. *Id.* at 2–4. But I'm giving no weight to that decision, *see Pending Admin. Proc.*, Securities Act of 1933 Release No. 10536, 2018 WL 4003609, at *1 (Aug. 22, 2018) ("The assigned ALJ ... shall not give weight to or otherwise presume the correctness of any prior opinions, orders, or rulings issued in the matter."), so there is no need to discuss Hull's criticism of it.

²⁰ Resp't Witness List at 4 (May 10, 2019). Sachar is apparently no longer employed with the Division.

²¹ *Id.*

testify about communications with other fund members about Gibson's TRX short sales and short positions.²² And he expects Sachar to testify about the OIP's allegations about Gibson's short positions in TRX.²³

The Division predictably moves to prevent its attorneys from being required to testify. It argues that their testimony is irrelevant and that counsel did not mislead Hull because they showed him Gibson's account statements which showed that he purchased put contracts.²⁴ It also argues that counsel's testimony is protected by work-product and deliberative-process privileges.²⁵ Finally, the Division argues that Gibson cannot show that testimony from Division counsel is crucial to his case.²⁶

Gibson opposes the Division's motion. As to relevance, he argues that Division counsel have first-hand knowledge of their discussions with Hull, which is relevant to Gibson's "affirmative defense of a denial of due process," although he does not elaborate on what precisely his due process claim entails.²⁷ Much of the rest of the opposition takes issue with the Division's characterization of evidence. For example, Gibson asserts that showing Hull Gibson's account statements did not change the misleading nature of Division's counsel's earlier discussion regarding short TRX positions, and he supports this argument with reference to Hull's later-executed declaration.²⁸ He also references the declaration Division counsel prepared for Strelitz.²⁹

As to the Division's privilege claims, Gibson argues that work-product and deliberative-process privileges do not apply where counsel misrepresented facts to witnesses.³⁰ And he asserts that the question of whether testimony is crucial is irrelevant because he does not seek testimony

²² *Id.*

²³ *Id.*

²⁴ Mot. at 4–7.

²⁵ *Id.* at 8–9.

²⁶ *Id.* at 9–10.

²⁷ Opp'n at 10–11.

²⁸ *Id.* at 12–14.

²⁹ *Id.* at 14–15.

³⁰ *Id.* at 16.

from current trial counsel, but from other Commission staff who were involved in the investigation.³¹ Gibson does not discuss Sachar, who did not take Hull’s investigative testimony,³² in either the facts or argument section of his opposition.

In its reply, the Division reiterates that Gibson has not explained how counsel’s testimony could be relevant.³³ The Division also notes that Gibson could have, but did not, move for a ruling on the pleadings on his due process argument and will be able to present it in prehearing and post-hearing briefing.³⁴ The Division also argues that it did not mislead Hull because buying a put option is a short position and because its counsel showed him Gibson’s brokerage account statements.³⁵

The Division disputes Gibson’s privilege argument, asserting, among other things, that Gibson seeks testimony that implicates time periods during which it “reasonably anticipated litigation.”³⁶ And the Division argues that Gibson is mistaken in arguing that he does not seek testimony from current trial counsel; Bagnall and Bohr are current trial counsel and filed notices of appearances near the outset of the proceeding.³⁷ According to the Division, Gibson’s failure to show that Bagnall’s or Bohr’s testimony is crucial is fatal to his argument.³⁸

Testimony from Bagnall and Bohr is not crucial and there are other viable means to obtain the same evidence.

The Commission’s Rules of Practice do not prohibit a respondent from calling Division counsel to testify. But trying to obtain “trial testimony from

³¹ *Id.* at 17.

³² *See id.* at 4 n.1 (Bohr and Bagnall conducted Hull’s examination); Mot. Attach. C at 2.

³³ Reply at 2.

³⁴ *Id.* at 3.

³⁵ *Id.* at 3–4.

³⁶ *Id.* at 9.

³⁷ *Id.* at 9–10.

³⁸ *Id.* at 10.

opposing counsel is generally disfavored.”³⁹ Among the factors courts consider in deciding whether to require trial testimony from opposing counsel are:

whether ... [i] there are other viable means to obtain the same evidence, and [ii] to what extent the information sought is relevant, nonprivileged, and crucial to the moving party’s case.⁴⁰

Considering these factors, the Division’s motion is granted because testimony from Division counsel is not crucial to Gibson’s case and there are other viable means to obtain the same evidence. Gibson wants testimony from Bagnall and Bohr about what they told Hull and other fund investors about Gibson’s alleged short position in TRX stock. But Gibson plainly has other sources for this same information: Hull, the transcript of Hull’s testimony, and the fund’s other investors. Indeed, the fact that Gibson submitted a declaration from Hull shows that he has access to investors. Notably, Gibson does not claim otherwise.

There is no basis to conclude that Sachar’s testimony is relevant.

Gibson also wants testimony from Sachar about the short-position allegations in the OIP. Because Sachar is apparently no longer employed by the Division,⁴¹ the analysis regarding trial counsel testimony in *Bogosian* does not apply.

This leaves the questions of whether Sachar’s testimony is privileged or irrelevant. Because the parties’ briefing provides no information about Sachar other than the fact he is no longer employed by the Commission, I have no basis to conclude that his testimony would be privileged.

As to relevance, Sachar was not present during Hull’s testimony⁴² and Gibson does not claim that Sachar spoke with any witness. There is also no

³⁹ *Bogosian v. Woloohojian Realty Corp.*, 323 F.3d 55, 66 (1st Cir. 2003).

⁴⁰ *Id.*; see *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986) (considering similar factors as to an effort to depose opposing counsel); see also *United States v. Dack*, 747 F.2d 1172, 1176 n.5 (7th Cir. 1984) (“Where evidence is easily available from other sources and absent ‘extraordinary circumstances’ or ‘compelling reasons,’ an attorney who participates in the case should not be called as a witness.”).

⁴¹ See Mot. at 1, 5.

⁴² See Mot. Attach. C at 2.

indication—at least from the parties’ briefing—that Sachar has had any involvement in this case or, if he did, what that involvement might have been. Although Gibson stated in his witness list that Sachar would testify about the OIP’s allegations, on its face it is less than clear why such testimony would be relevant.

For his part, Gibson leaves me to guess why he believes that Sachar’s testimony could be relevant. Although Gibson presents an extended criticism of the Division’s relevance arguments,⁴³ he makes no mention of Sachar in the facts section of his opposition and his attack on the Division’s relevance argument focuses on Bagnall and Bohr. Gibson mentions Sachar only in the conclusion to his opposition, almost as an afterthought.⁴⁴ And Gibson’s failure to respond to the Division’s argument that Sachar’s testimony is irrelevant is reason to grant the Division’s motion.⁴⁵ Further, the only possible relevance Gibson mentions as to any of the Division’s counsel is his passing reference to his “affirmative defense of a denial of due process.”⁴⁶ But he provides no additional explanation of this defense or how testimony from Sachar—whose alleged involvement in this case remains unexplained—could relate to it.⁴⁷ Gibson has thus provided no basis to dispute the Division’s argument that Sachar’s testimony is irrelevant.

Order

I GRANT the Division’s motion.

James E. Grimes
Administrative Law Judge

⁴³ Opp’n at 10–15.

⁴⁴ *Id.* at 17.

⁴⁵ *Cf. Boogaard v. NHL*, 891 F.3d 289, 295 (7th Cir. 2018) (“[A] district court may hold a claim forfeited if a plaintiff fails to respond to the substance of the defendant’s motion to dismiss.”).

⁴⁶ Opp’n at 11.

⁴⁷ *Id.* at 10–15.