

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

ADMINISTRATIVE PROCEEDINGS RULINGS

Release No. 6619/July 1, 2019

ADMINISTRATIVE PROCEEDING

File No. 3-19024

In the Matter of

ASCENSION ASSET MANAGEMENT, LLC, and : ORDER
GRENVILLE M. GOODER, JR. :
:

The Securities and Exchange Commission instituted this proceeding with an Order Instituting Proceedings on March 7, 2019, pursuant to Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940 and Section 9(b) of the Investment Company Act of 1940. The hearing, expected to last one week or less, is scheduled to commence on September 9, 2019, in Washington, DC, and a procedural schedule has been set, with the agreement of the parties and the possibility of mutually agreed deviations. *Ascension Asset Mgmt., LLC*, Advisers Act Release No. 5230, 2019 SEC LEXIS 1055 (May 7, 2019); Admin. Proc. Rulings Release No. 6583, 2019 SEC LEXIS 1199 (A.L.J. May 21, 2019). The procedural schedule calls for the parties to exchange and file witness lists, exhibit lists, and stipulations on August 19, 2019.

Under consideration is Respondents' June 10, 2019, Request for Early Disclosure of Jencks Material and responsive filings. Respondents request early production of Jencks material required by 17 C.F.R. § 201.231 to prepare for the hearing, including "any relevant interview notes, . . . to be able to identify witnesses with testimony supporting [their] defense and to prepare to cross-examine the Division's witnesses." Reply at 2. The Division states that it has already produced Jencks material in the form of investigative testimony transcripts when it produced material from its investigative file in compliance with 17 C.F.R. § 201.230. It represents that it will promptly turn over any additional statements made by potential witnesses in advance of the hearing but not before the August 19 date for disclosure of witnesses. Opp. at 2 & n.2. Respondents urge that the material should be produced no later than that date. Reply at 2-3.

Pursuant to 17 C.F.R. § 201.231(a), a respondent may move that the Division "produce for inspection and copying any statement of any person called or to be called as a witness by [the Division] that pertains, or is expected to pertain, to his or her direct testimony and that would be required to be produced pursuant to the Jencks Act, 18 U.S.C. 3500." The term "statement" is defined under the Jencks Act as:

- (1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

18 U.S.C. § 3500(e). Only those statements which can properly be called the witness's own words are required to be produced. *Palermo v. United States*, 360 U.S. 343, 352-53 (1959); *see also United States v. Sasso*, 59 F.3d 341, 351 (2d Cir. 1995) (“The statute does not . . . require the government to divulge even verbatim statements by the witness if the writer ‘merely select[ed] portions, albeit accurately, from a lengthy oral recital.’” (quoting *Palermo*, 360 U.S. at 352) (alteration in original)).

Mere speculation that the Division's interview notes might contain Jencks material does not suffice to require the Division to produce the notes or to submit them for *in camera* review. Respondents have not shown that their requests are anything other than a “fishing expedition,” which the Commission and the courts frown upon. *See, e.g., United States v. Delgado*, 56 F.3d 1357, 1364 (11th Cir. 1995); *United States v. Boyd*, 53 F.3d 631, 634-35 (4th Cir. 1995); *United States v. Nickell*, 552 F.2d 684, 689-90 (6th Cir. 1977); *United States v. Graves*, 428 F.2d 196, 199 (5th Cir. 1970); *Orlando Joseph Jett*, 1996 SEC LEXIS 1683 (June 17, 1996), at *1-2 (frowning on “fishing expeditions” in the context of *Brady* material). An indication that Respondents are engaged in a “fishing expedition” is that they request early production “to be able to identify witnesses with testimony supporting [their] defense” as well as to prepare for cross-examination. However, Jencks Act material is to be produced for the purpose of cross-examination. *See* 18 U.S.C. § 3500(b); *Palermo*, 360 U.S. 343 at 345-46.

Accordingly, the Division should produce to Respondents by August 19, 2019, the date on which it will identify its witnesses, any statement that it has not already produced of any witness that pertains, or is expected to pertain, to his or her direct testimony and that would be required to be produced pursuant to the Jencks Act. Any additional witness statements obtained after that date should be produced as soon as possible and before the witness testifies at the hearing.

/S/ Carol Fox Foelak
Carol Fox Foelak
Administrative Law Judge