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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 1245 / February 18, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15446

In the Matter of J.S. OLIVER CAPITAL MANAGEMENT, L.P., IAN O. MAUSNER, and DOUGLAS F. DRENNAN	ORDER DENYING RESPONDENTS' MOTIONS

The Securities and Exchange Commission (Commission) instituted this proceeding with an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) on August 30, 2013. The hearing was held from January 6 to January 10, 2014. The Division of Enforcement's (Division) initial brief is due February 21, 2014; Respondents' briefs are due March 21, 2014; and the Division's reply brief is due April 11, 2014. An Initial Decision is due by July 7, 2014.

Pending before me are two motions. Respondents Ian O. Mausner (Mausner) and J.S. Oliver Capital Management, L.P. (J.S. Oliver) (collectively, the J.S. Oliver Respondents), move for reconsideration of my decision not to admit Mausner Exhibit E (Exhibit E) into evidence at the hearing (Motion for Reconsideration). Respondent Douglas F. Drennan (Drennan) moves to introduce into the record prior sworn statements of James Donahue (Donahue), who did not testify at the hearing, pursuant to the Commission Rule of Practice (Rule) 235 (Motion to Introduce Prior Sworn Statements or Drennan Motion).

Motion for Reconsideration

In relevant part, the OIP alleges that from June 2008 through November 2009, the J.S. Oliver Respondents disproportionately allocated profitable equity trades to six client accounts to the detriment of three clients, and the favored accounts in this cherry-picking scheme included three affiliated hedge funds: J.S. Oliver Investment Partners I, L.P.; J.S. Oliver Offshore Investments, Ltd.; and J.S. Oliver Investment Partners II, L.P. (collectively, the JS Oliver Funds). OIP at 3-4. Exhibit E consists of December 31, 2008, and December 31, 2009, account profiles of the JS Oliver Funds. At the hearing, Mausner asserted that Exhibit E is a document taken off the website of a third party called Hegdeworks, which he said was J.S. Oliver's administrator and provided reports. Tr. 1365-66. The Division objected to Exhibit E. Tr. 1366. I excluded Exhibit E from the record. Tr. 1365-69. In the Motion for Reconsideraiton filed on January 30,

2014, the J.S. Oliver Respondents reiterate that Exhibit E consists of account statements from Hedgeworks regarding the J.S. Oliver Funds. The J.S. Oliver Respondents argue that Exhibit E confirms that the J.S. Oliver Funds did the same or worse than the alleged disadvantaged accounts and thus proves that no cherry picking occurred.

The points raised in the Motion for Reconsideration were already considered and rejected. As Mausner acknowledged, he just took Exhibit E off a website. Tr. 1368. In excluding Exhibit E, I made clear that Mausner provided no information verifying its reliability or its source, and that its admission would go beyond the bounds of what is fair. Tr. 1368-69. The J.S. Oliver Respondents provide no details about where on the Internet Exhibit E was found or acquired, when the document was found or acquired, who at Hedgeworks allegedly prepared the document, how it was prepared, its intended purpose, or the source of the information and calculations contained in the document. Exhibit E nowhere indicates that it was prepared by Hedgeworks, and the sole contact information on the document pertains to the J.S. Oliver Respondents. Moreover, even if Exhibit E were admitted, I would accord it no weight in the Initial Decision for these same reasons. Reconsideration is denied.

Motion to Introduce Prior Sworn Statements

At the close of the hearing on January 10, 2014, Drennan submitted his Motion to Introduce Prior Sworn Statements, arguing that Donahue's December 15, 2011, investigative testimony (the investigative testimony) should be admitted under Rule 235(a)(4) because, according to Drennan, he was unable to procure Donahue's attendance at the hearing by subpoena. See Drennan Motion. Drennan represents that his counsel served the subpoena on the last known address for Donahue; however, on January 4, 2014, Drennan's counsel received a call from an individual who stated that she received the subpoena, but that there was no James Donahue residing at the address to which the subpoena was sent. Id. at 1. Drennan further represents that both he and counsel called the last available phone number for Donahue multiple times during the week of the hearing, but were unable to reach him or confirm that Donahue still uses that number. Id.

According to Drennan, the investigative testimony establishes, among other facts, that Drennan was considered a consultant by J.S. Oliver employees and was engaged almost exclusively in research tasks during the 2009 and 2010 period, which he says contradicts the OIP's allegations. Id. at 1-2; see OIP at 7-8 (alleging that Drennan was improperly paid using soft dollars for purported research because he was not an outside research analyst but rather a full-time J.S. Oliver employee, and in January 2009, he returned to J.S. Oliver and essentially resumed his prior duties at the firm). An attached exhibit to the Drennan Motion establishes that on December 20, 2013, I issued a subpoena requiring Donahue's attendance at the hearing, and that on January 3, 2014, Drennan's counsel attempted to serve the subpoena on Donahue by Federal Express to an address in California. Drennan Motion, Ex. A.

On January 17, 2014, the Division filed its Opposition to the Motion to Introduce Prior Sworn Statements (Opposition), arguing, among other issues, that there is no evidence that Drennan made reasonable efforts to serve Donahue with a subpoena. On January 22, 2014, Drennan filed his Reply in Support of the Motion to Introduce Prior Sworn Statements (Reply),

primarily arguing that Donahue's testimony would be vital to his defense because it proves that a key J.S. Oliver employee considered Drennan to be overwhelmingly focused on research activities, and Drennan made "every effort" to procure Donahue's live testimony, which consisted of serving the subpoena to Donahue's most recent address according to J.S. Oliver's files (as checked by Drennan and confirmed by Mausner and his executive assistant) and making multiple telephone calls to a number that he believes is Donahue's current number.[1]

Under Rule 235(a)(4), "[a] motion to introduce a prior sworn statement may be granted if . . . the party offering the prior sworn statement has been unable to procure the attendance of the witness by subpoena." 17 C.F.R. § 201.235(a)(4). Administrative decisions regarding Rule 235 indicate that prior sworn statements may be admitted notwithstanding the opponent's lack of opportunity to cross-examine the witness and accorded less weight, but do not supply further interpretative guidance of Rule 235(a)(4). See, e.g., Robert G. Weeks, Initial Decision Release No. 199 (Feb. 4, 2002), 76 SEC Docket 2609, 2613-15, aff'd, 56 S.E.C. 1297 (2003); MGSI Sec., Inc., Initial Decision Release No. 156 (Jan. 12, 2000), 71 SEC Docket 1307, 1316-17. Courts interpreting Federal Rule of Civil Procedure (FRCP) 32(a)(4)(D), which contains a provision similar to Rule 235(a)(4), hold that for a party to be "unable" to procure a witness's attendance at trial by subpoena, the party is obliged to use reasonable diligence in trying to secure his attendance.[2] See Thomas v. Cook Cnty. Sheriff's Dep't, 604 F.3d 293, 308 (7th Cir. 2010) (citing Griman v. Makousky, 76 F.3d 151, 154 (7th Cir. 1996)); Angelo v. Armstrong World Indus., Inc., 11 F.3d 957, 963 (10th Cir. 1993); Hanson v. Parkside Surgery Ctr., 872 F.2d 745, 750 (6th Cir. 1989); Williams v. Johnson, 278 F.R.D. 1, 5-9 (D.D.C. 2011); cf. 7-32 James WM. Moore et al., Moore's Federal Practice § 32.26[2] (3d ed. 2013).

Drennan's efforts to procure Donahue's attendance by subpoena lacked reasonable diligence. The January 6, 2014, hearing date was set at the October 3, 2013, prehearing conference. Prehr'g Tr. 20-21; J.S. Oliver Capital Mgmt., L.P., Admin. Proc. Rulings Release

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[1] I reject Drennan's alternate argument that his Motion to Introduce Prior Sworn Statements should be granted because the Division purportedly filed its Opposition two days late, contrary to Rule 154(b), 17 C.F.R. § 201.154(b). Neither that rule nor Rule 235 provides that a motion to introduce prior sworn statements of a witness into the record may be granted simply due to a late opposition. Rule 155 permits a default if a party fails to respond to a dispositive motion within the time provided; the Motion to Introduce Prior Sworn Statements is not a dispositive motion. And a sanction under Rule 180 is unwarranted in these circumstances.

[2] Although the FRCP do not govern Commission administrative proceedings, they may provide guidance on issues not directly addressed by prior Commission opinions or its Rules of Practice. See Clarke T. Blizzard, Investment Advisers Act of 1940 Release No. 2030 (Apr. 23, 2002), 77 SEC Docket 1505, 1510-11 nn.17, 19; Jaycee James, Admin. Proc. Rulings Release No. 649 (Apr. 2, 2010), 98 SEC Docket 27227, 27230. FRCP 32(a)(4)(D) provides that in a federal court proceeding, "[a] party may use for any purpose the deposition of a witness, whether or not a party, if the court finds . . . that the party offering the deposition could not procure the witness's attendance by subpoena[.]" This rule, formerly FRCP 32(a)(3)(D), was reorganized and its language amended for stylistic purposes in 2007. See FRCP 32(a)(4)(D), Advisory Committee Notes, 2007 Amendment.

No. 942, 2013 SEC LEXIS 3127 (Oct. 8, 2013). "Once a trial date has been set, a party should promptly and diligently make efforts to subpoena witnesses if their attendance is not readily procured through other means." Williams, 278 F.R.D. at 9. And as Drennan contends that Donahue's testimony would be vital to his defense, it is apparent that he was aware in advance of the hearing that he intended to call Donahue as a witness.

Drennan requested the issuance of subpoenas requiring the attendance of witnesses, including Donahue, on December 19, 2013, and I issued the subpoenas the next day. Drennan then did not attempt to serve Donahue with the subpoena until January 3, 2014—the Friday before the hearing began.[3] Drennan Motion, Ex. A. He was notified on January 4, 2014, that Donahue did not reside at the address to which the subpoena was sent. From January 4, 2014, until the conclusion of the hearing on January 10, 2014, Drennan's followup efforts consisted of making phone calls to a single phone number. Cf. Williams, 278 F.R.D. at 6 (although "informal attempts to secure a witness's voluntary attendance at trial may be an appropriate consideration in evaluating the reasonableness of the proponent's efforts to secure the witness's attendance, . . . the focus of [FRCP] 32(a)(4)(D) remains [on] the proponent's attempts to procure the witness's attendance by formal process," i.e., by subpoena).

Drennan does not deny that he received a copy of Donahue's investigative questionnaire from the Division, in which Donahue provided his social security number, prior addresses and telephone numbers, and names and addresses of former employers. See Opposition at 2; Reply. He also does not deny that he made no attempts based on such information to locate Donahue and serve him by subpoena. See generally Reply.

Lastly, to the extent that Drennan's argument may be construed as arising under Rule 235(a)(5), which permits the hearing officer to allow prior sworn statements to be used in the interests of justice, Drennan has failed to overcome the "presumption that witnesses will testify orally in an open hearing." 17 C.F.R. § 201.235(a)(5).

Order

For these reasons, I ORDER that the Motion for Reconsideration and Motion to Introduce Prior Sworn Statements are DENIED.

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Brenda P. Murray
Chief Administrative Law Judge

[3] Rule 232 requires service of subpoenas pursuant to Rule 150, which requires service by the parties. See 17 C.F.R. §§ 201.150, .232(a), (c). To the extent Drennan's counsel may have waited until the eleventh hour to determine his responsibility for service of subpoenas, that does not excuse the lack of diligence.