

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 1831/September 23, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15918

In the Matter of

DENNIS J. MALOUF

ORDER GRANTING MOTION TO ADMIT
PRIOR SWORN STATEMENT

The Securities and Exchange Commission (Commission) commenced this proceeding on June 9, 2014, with an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) pursuant to Section 8A of the Securities Act of 1933; Sections 15(b), 15C(c), and 21C of the Securities Exchange Act of 1934; Sections 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 is scheduled to commence on November 3, 2014.

On September 16, 2014, the Division of Enforcement (Division) filed a Motion to Admit the Prior Sworn Statement of Maurice L. Lamonde (Lamonde) (Motion). On September 22, 2014, this Office received Respondent Dennis J. Malouf's Opposition to the Motion (Opposition). I have carefully considered the Motion and Opposition, Respondent has been fully heard, and I do not require further briefing; accordingly, the Division need not file a reply brief.

The Division seeks to admit the transcript of sworn investigative testimony Lamonde gave on September 17, 2013. Motion at 1. Lamonde died on April 4, 2014. Motion at 1; Opposition at 7. The Division intends to offer Lamonde's statement for its truth, that is, the offered testimony is hearsay. *See generally* Motion, Ex. B. Lamonde's statement, construed in the light most favorable to the Division, appears to be highly probative of certain vigorously contested issues. *Id.*

Prior sworn testimony of a non-party witness, otherwise admissible in the proceeding, may be admitted if the witness is dead. 17 C.F.R. § 201.235(a)(1). I may also exercise my discretion to admit prior sworn testimony "in the interests of justice." 17 C.F.R. § 201.235(a)(5). The Federal Rules of Evidence are not applicable in this proceeding, and hearsay may be relied on "under appropriate circumstances." *Joseph Abbondante*, 58 S.E.C. 1082, 1101 (2006), *pet. denied*, 209 Fed. Appx. 6 (2d Cir. 2006). In determining whether to rely on hearsay evidence, the Commission considers multiple factors, including its overall reliability, whether it is contradicted by direct testimony, and whether it is corroborated. *Id.* at 1101 & n.50. Procedurally, hearsay is admitted, and it is then evaluated under the Commission's multi-factor

test. *See id.* at 1101; *Frank J. Custable, Jr.*, 51 S.E.C. 855, 861 (1993); *Charles D. Tom*, 50 S.E.C. 1142, 1145 & n.5 (1992). If it fails the multi-factor test, it is deemed “unreliable.” *Mark James Hankoff*, 50 S.E.C. 1009, 1012 (1992); *see Timbervest, LLC*, Initial Decision Release No. 658, 2014 WL 4090371, at *49 n.17 (Aug. 20, 2014).

Admitting Lamonde’s investigative testimony is warranted because of his passing. Respondent nonetheless argues that Lamonde’s testimony is “inherently unreliable.” Opposition at 7-13. This puts the cart before the horse. Whether Lamonde’s testimony is reliable or not must be evaluated in light of the entire record, and the correct procedure is to admit the testimony first and then weigh its reliability. Respondent also argues that he has a right under the Administrative Procedure Act of 1946 to cross-examine Lamonde, and Lamonde’s prior sworn statement is therefore “not otherwise admissible” within the meaning of 17 C.F.R. § 201.235(a). Opposition at 13-14 (citing 5 U.S.C. § 556(d)). However, the Commission’s interpretation of 5 U.S.C. § 556(d), as expressed in its Rules of Practice, is that hearsay (i.e., testimony offered for the truth and not subject to cross-examination) is admissible but not necessarily reliable. *See* 17 C.F.R. § 201.235(a). Thus, if hearsay is “not otherwise admissible,” it cannot be merely because it is hearsay. Lastly, Respondent argues that the matters for which the Division intends to offer Lamonde’s statement may be proven by other evidence. Opposition at 14-15. To be sure, unduly repetitious evidence is inadmissible. 17 C.F.R. § 201.320. However, whether Lamonde’s statement is unduly repetitious cannot yet be determined, nor is it appropriate at this juncture to limit the Division’s manner of presenting its case.

Order

It is ORDERED that the Division of Enforcement’s Motion to Admit the Prior Sworn Statement of Maurice L. Lamonde is GRANTED. The parties shall designate in their respective exhibit lists the portions of the statement they seek to admit.

Cameron Elliot
Administrative Law Judge