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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 2271 / February 2, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16047

In the Matter of THE ROBARE GROUP LTD., MARK L. ROBARE, and JACK L. JONES JR.	ORDER ON MOTIONS IN LIMINE

The parties in this matter have filed a number of prehearing briefs. The Division has filed a motion in limine, and Respondents have filed a response to it. The parties have filed objections to documentary evidence and responses to those objections. I address the parties' pleadings below. In doing so, I bear in mind that, as Respondents note, the Federal Rules of Evidence do not apply in the Commission's administrative proceedings. *See City of Anaheim*, Exchange Act Release No. 42140, 1999 SEC LEXIS 2421, at *4 (Nov. 16, 1999) ("The Federal Rules of Evidence are designed for juries and do not apply to administrative adjudications."). Instead, administrative law judges are empowered to "receive relevant evidence" and are directed to "exclude all evidence that is irrelevant, immaterial or unduly repetitious." 17 C.F.R. § 201.320. As used in Rule 320, the term "relevance" is construed much more "broad[ly] than" is the case "under the Federal Rules of Evidence." *City of Anaheim*, 1999 SEC LEXIS 2421 at *4. The Commission's administrative law judges are thus directed to be "inclusive in making evidentiary determinations." *Id.*

1. Evidence the Commission took no action following a 2008 examination. The Order Instituting Proceedings (OIP) concerns allegations that Respondents failed to make certain disclosures to advisory clients in its Form ADV filings. In their Answer, Respondents averred that in 2008, Commission staff "conducted a lengthy examination of [Respondents'] disclosures" and neither "identified" a "deficiency" nor "raised" any "issues" with respect to Form ADV. Answer at 2. Respondents also asserted as an affirmative defense, that they "reasonably and in good faith relied upon others to determine the propriety of [their] disclosures." *Id*. at 14.

The Division of Enforcement responded to the above by filing a motion in limine, seeking to preclude Respondents from asserting a "reliance-on-SEC" defense. Div. Motion in Limine at 6-10. According to the Division, previous inaction by regulators is not relevant and cannot be asserted by Respondents as a defense. *Id*. at 6-8. The Division also asserts that Respondents received a "no-action letter" following the 2008 examination telling them that the

fact the Commission had declined to take action against them "should not be construed as any indication that" they were in compliance with federal securities laws and rules. *Id*. at 4 n.2, 8.

Respondents respond that they are not "attempting to 'shift their duty of compliance' onto the agency" and are not interposing an estoppel or waiver defense. Resp. Response at 8. Instead, they say they intend to show that they acted in good faith. *Id*. Respondents assert that evidence of their "successful SEC exam" will "show why [they] acted without scienter in [the] continued belief [their] disclosures were proper." *Id*.

Respondents correctly concede that they cannot rely on estoppel or waiver. In order to invoke estoppel against the government—assuming estoppel can ever lie against the government, *see Dawkins v. Witt*, 318 F.3d 606, 611 (4th Cir. 2003)—a respondent must show affirmative misconduct by a government official and reasonable reliance. *Robertson-Dewar v. Holder*, 646 F.3d 226, 229 (5th Cir. 2011). Respondents have not alleged affirmative misconduct and would have difficulty demonstrating reasonable reliance after receiving the no-action letter.

As Respondents suggest, the determination of whether they acted in good faith is relevant to the determination of whether they acted with scienter. *See Gebhart v. SEC*, 595 F.3d 1034, 1042 (9th Cir. 2010); *Howard v. SEC*, 376 F.3d 1136, 1147 (D.C. Cir. 2004). Other than asserting it, however, Respondents do not explain how a Commission examination that concludes with a no-action letter could show they acted in good faith. Evidence that Respondents were affirmatively told by Commission staff that they were in compliance would be relevant to this issue, but Respondents do not claim such a representation occurred.

On the other hand, it may be that Respondents wish to show that Commission staff raised no red flags during or after the 2008 examination. Evidence of this sort could be marginally relevant to negating evidence that they acted in bad faith. Respondents may therefore present evidence of what they were told by Commission staff during or after the 2008 examination *about their disclosures on their Form ADV*. Evidence about the 2008 examination that does not relate to Form ADV is irrelevant and is excluded. I thus GRANT the Division's motion in part, and DENY it in part.

2. Respondents' expert witness. Respondents submitted an expert report of Miriam Lefkowitz (Report). Ms. Lefkowitz is an experienced securities attorney who proposes to testify that: (1) Respondents' disclosures "were accurate and in-line with" those made by other firms; (2) Respondents' disclosures "were not likely to mislead their clients;" and (3) Respondents' efforts met "or exceeded industry standards." Report at 2-4. Ms. Lefkowitz's report is divided into four sections that address what is essentially a historical overview of Form ADV and the Commission's guidance relevant to it, Respondents' disclosures before and after 2010, and her opinion about Respondents' disclosures. *Id*. at 4-12.

The Division moves to exclude Ms. Lefkowitz's testimony, arguing that she does not qualify as an expert because she lacks "technical or specialized knowledge" and because her opinions "are not based on a specific methodology." Div. Motion in Limine at 11. Respondents retort that Ms. Lefkowitz possesses the knowledge and experience necessary to qualify as an expert. Resp. Response at 3-4. Respondents do not specifically explain why they believe Ms.

Lefkowitz's testimony is relevant. Instead, they simply assert that her testimony is relevant and then state the matters about which she will opine. Resp. Response at 2-3, 5. They say she will testify about the disclosure requirements at various time periods, amendments to Form ADV, Commission guidance, industry interpretation of disclosure standards, and whether Respondents complied with regulatory requirements and industry standards. *Id*. at 2-3. Respondents also say Ms. Lefkowitz will testify that Respondents did make proper disclosures and why the Division's position in this matter is mistaken. *Id*. at 5.

Administrative law "judges have broad discretion in determining whether to admit or exclude . . . expert testimony." *Scott G. Monson*, Investment Company Act of 1940 Release No. 28323, 2008 SEC LEXIS 1503, at *22 n.27 (June 30, 2008) (quoting *Pagel, Inc.*, Exchange Act Release No. 22280, 1985 SEC LEXIS 988, at *16 (Aug. 1, 1985)); *see* 17 C.F.R. § 201.111(c). "[I]n securities cases, expert testimony commonly is admitted" with respect to a number of matters, including "industry practice" and "complicated terms and concepts." *SEC v. Johnson*, 525 F. Supp. 2d 70, 77 (D.D.C. 2007); *United States v. Fallon*, 470 F.3d 542, 547 (3d Cir. 2006); *see also Marx & Co., Inc. v. Diners' Club, Inc*., 550 F.2d 505, 508-10 (2d Cir. 1977). In cases governed by the Federal Rules of Evidence, an expert's testimony may "embrace[] an ultimate [factual] issue," Fed. R. Evid. 704(a), but not the ultimate legal issue, *see United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991).

Ms. Lefkowitz qualifies as an expert. The determination of whether a witness qualifies as an expert "depends on his or her educational background, training, and experience in the field" about which she intends to testify. *SEC v. Tourre*, 950 F. Supp. 2d 666, 674 (S.D.N.Y. 2013). Because this inquiry is construed liberally, the witness's relevant education, training, or experience need only be "in a field closely related to the area [of] the proposed testimony." *Id*.

Ms. Lefkowitz's report details her professional experience, which for over ten years has involved acting as a "compliance and regulatory adviser to . . . investment advisers and broker dealers" and has included drafting Forms ADV. Report at 2. This experience is sufficient to qualify Ms. Lefkowitz as an expert for purposes of testifying in this matter. The Division may of course cross-examine Ms. Lefkowitz in regard to her qualifications.

Given the Commission's liberal construction of the term "relevance," Ms. Lefkowitz may testify about the history of Form ADV and its regulations, industry practice, and whether Respondents' disclosures were consistent with industry practice. I will give this testimony the weight it deserves, if any. I will disregard any testimony concerning Ms. Lefkowitz's opinion on the ultimate issue, whether Respondents' disclosures complied with applicable requirements. I thus GRANT the Division's motion in part, and DENY it in part.

3. Division Exhibits 51 and 54. Respondents claim Division Exhibits 51 and 54 contain privileged communications between Respondents and their counsel. The Division disputes Respondents' argument, saying the exhibits were produced by a third party to whom Respondents forwarded the communications. Accordingly, the Division asserts that Respondents waived any claim of privilege. Respondents argue that the third party that produced the document was a compliance consultant, and that attorney-client privilege is not waived by sharing a privileged document with a consultant.

I defer ruling on this objection until the Division offers Exhibits 51 and 54. At that time, the Division shall explain its assertions that the communications in Exhibits 51 and 54 were obtained from a third party, and Respondents shall explain the nature of the third party's relationship with the client and attorney.

4. Division Exhibit 84. Respondents object to Division Exhibit 84 as lacking a proper foundation, being misleading, and being irrelevant. The Division says this exhibit is demonstrative and only intended to be used in rebuttal. This motion is premature. I OVERRULE this objection without prejudice to renewal when and if the Division offers Exhibit 84 into evidence.

5. Division Exhibit 85. On relevance grounds, Respondents object to the admission of Division Exhibit 85, which purportedly contains twenty-one Forms ADV filed by a separate entity. The Division responds that it only intends to offer Exhibit 85 to rebut Ms. Lefkowitz's testimony that Respondent's disclosures were consistent with those made by other firms in the industry. Accepting the Division's response, Respondents' objection to Exhibit 85 is OVERRULED. The Division may introduce Exhibit 85 to rebut Ms. Lefkowitz's testimony. The decision to admit Exhibit 85 should not be construed as an indication that I will give any weight to it. Respondents may present whatever argument or evidence they deem appropriate relating to the weight, if any, I should give this exhibit.

6. Proposed rebuttal expert testimony of John Farinacci. By order dated October 7, 2014, I set the prehearing schedule in this matter. *Robare Grp. Ltd.*, Admin. Proc. Rulings Release No. 1895, 2014 SEC LEXIS 3784. In that order, I set January 13, 2015, as the date for the parties to exchange and file witness lists and expert reports. I also provided that "[e]xpert reports should be as specific and detailed as those presented in federal district court pursuant to Federal Rule of Civil Procedure 26." Although Rule 26 distinguishes between initial expert reports and rebuttal expert reports, Fed. R. Civ. P. 26(a)(2)(D), I did not distinguish between initial and rebuttal reports. Commission Rule of Practice 222(b) likewise makes no such distinction.

After I issued the prehearing schedule, Respondents submitted their witness list and Ms. Lefkowitz's expert report. The Division submitted its witness list but no expert report. Among its listed witnesses is John Farinacci. *See* Div. Witness List at 2. Among other matters, the Division proposed that "Mr. Farinacci may provide expert testimony, if necessary, to rebut expert testimony offered by Respondents." *Id.* The Division has not since filed an expert report for Mr. Farinacci nor sought leave to do so.

Respondents object to allowing Mr. Farinacci to testify as an expert because they believe his testimony relates not to rebuttal, but to the Division's affirmative case. They also protest that the Division has not served them with Mr. Farinacci's proposed testimony or provided sufficient information about his background. The Division responds that having reviewed Ms. Lefkowitz's report, it "does not believe it will need to ask Mr. Farinacci to provide expert testimony."

I GRANT Respondents' motion to exclude expert testimony of Mr. Farinacci. Because the Division's response is equivocal, Respondents' objection is not moot. As to the merits, with

regard to presenting expert witnesses, the Division has not complied with the prehearing order or Rule 222(b). It also has not sought leave to file an untimely expert report. The Division therefore may not call Mr. Farinacci as an expert.

7. Division objections to Respondents' exhibits. The Division has registered various, general objections to a number of the Respondents' exhibits. I defer ruling on these objections until such time as the evidence in question is presented during the hearing in this matter and the Division renews its objections.

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James E. Grimes
Administrative Law Judge