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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 3656/March 1, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-16801

In the Matter of BENNETT GROUP FINANCIAL SERVICES, LLC, and DAWN J. BENNETT	ORDER ON RULE 235 MOTION

The Division of Enforcement has moved to admit the prior sworn testimony of Timothy Augustin, John J. Koorey, and Bradley Mascho. For the reasons that follow, the Division's motion is GRANTED.

Background

After the Commission initiated this proceeding in September 2015, Respondents filed an action in district court seeking to enjoin this proceeding. *See Bennett v. SEC*, No. 15-cv-3325, 2015 WL 9183445, at *1 (D. Md. Dec. 17, 2015). Among other arguments, Respondents asserted that the manner in which the Commission's administrative law judges are appointed violates the Constitution's Appointments Clause. *Id*. The district court dismissed for lack of jurisdiction, *id*. at *1, 10, and Respondents appealed, *see Bennett v. SEC*, No. 15-2584 (4th Cir.). Respondents subsequently informed my office and the Division of Enforcement that they would not participate in the hearing in this matter.

On January 13, 2016, the Division filed its witness list, in which it asserted that Respondents' counsel had represented that neither Koorey nor Mascho would appear at the hearing, "despite being subject to subpoenas." List at 6. It added that it expected to offer investigative testimony for some witnesses in lieu of live testimony. *Id*. at 7. I later issued an order stating that if the Division were to offer investigative testimony, "it should be prepared to address how admission of such prior sworn testimony is consistent with Commission Rule of Practice 235."[1] *Bennett Grp. Fin. Servs., LLC*, Admin. Proc. Rulings Release No. 3507, 2016 SEC LEXIS 143 (ALJ Jan. 14, 2016).

The Division subsequently filed a motion to admit the prior sworn testimony of Augustin, Koorey, and Mascho. In its motion, it asserted that Koorey and Mascho are "Bennett Group

[1] Rule 235 concerns the admission of prior sworn testimony. *See* 17 C.F.R. § 201.235.

insiders" and representatives of Bennett Group. Mot. at 2. It also asserted that at the time of his testimony, Augustin was a principal and officer of the Bennett Group. *Id*.

The Division supported its motion with excerpts of its witnesses' investigative testimony. During his testimony, Koorey agreed that from May 2006 to November 2012, he was "essentially the chief operations person at Bennett Group." Mot. Ex. B at 29. He returned to that same position in 2014. *Id*. at 41-44. Mascho testified that, as of the time of his testimony, he was "a minority owner in" the Bennett Group and was a registered representative, financial adviser, and Bennett Group's managing director of research. Mot. Ex. C at 9. Augustin testified that he was Bennett Group's COO. Mot. Ex. E at 38. He was also a financial adviser and a minority owner of the Bennett Group. *Id*. at 39, 53.

The hearing in this proceeding took place on January 27, 2016. Neither Respondents nor their counsel appeared at the hearing. Tr. 9-10. As a result, I found Respondents in default. Tr. 10. During the hearing I asked Division counsel "how [Rule] 235 works with [respect to] corporate insiders." Tr. 13. I also remarked that Rule 235(a)(4) resembles Federal Rule of Civil Procedure 32(a)(4), subparagraph (D) of which contains an implicit reasonable diligence requirement.[2] Tr. 15. In light of that requirement, I asked whether the Division's ability to rely on Rule of Practice 235(a)(4) was limited because it did not attempt to enforce the subpoenas I issued to its witnesses. Tr. 15. Among other things, Division counsel responded to my questions by explaining that Koorey and Mascho are represented by Respondents' counsel, who told the Division that Koorey and Mascho would not appear. Tr. 14-16; *see* Renewed Mot. at 3 n.1.

The Division subsequently filed a renewed motion. In it, the Division first argues that Rule 235 does not apply because all three witnesses are an "officer, director, managing agent, or designee" of Respondent Bennett Group. Renewed Mot. at 4-6 (relying on Fed. R. Civ. P. 32(a)(3)). Alternatively, the Division argues that the witnesses' investigative testimony should be admitted because the testimony qualifies under Federal Rule of Evidence 801(d)(2)(D) as a statement made by a party's agent or employee on a matter within the scope of that relationship and while it existed. *Id*. at 6-7. Finally, the Division argues that if Rule 235 were to apply, the witnesses' testimony would be admissible under Rule 235(a)(4) or (5). *Id*. at 7-8.

The renewed motion is principally supported by three exhibits, comprising relevant portions of the witnesses' testimony. Exhibit C contains Mascho's testimony during which he explained that he, Bennett, and Augustin were Bennett Group's three officers. Renewed Mot. Ex. C at 206.

[2] Rule 32(a)(4)(D) permits a party to "use" a witness's deposition if "the party offering the deposition could not procure the witness's attendance by subpoena." Courts have held that the rule implicitly requires reasonable diligence in attempting to secure a witness's presence before a party may rely on the rule. *See Williams v. Johnson*, 278 F.R.D. 1, 5 (D.D.C. 2011), *aff'd*, 776 F.3d 865 (D.C. Cir. 2015).

Discussion

The Commission's Rules of Practice do not bar the admission of hearsay and instead provide for the exclusion of "evidence that is irrelevant, immaterial or unduly repetitious." 17 C.F.R. § 201.320; *see Del Mar Fin. Servs., Inc.*, Securities Act of 1933 Release No. 8314, 2003 WL 22425516, at *8 (Oct. 24, 2003). Rule 235 provides an exception to the general rule that relevant evidence is admissible. 17 C.F.R. § 201.235. It bars the admission of a non-party's prior sworn statement unless one of five exceptions applies. As is relevant to this order, a non-party's prior sworn statement may be admitted if:

> (4) the party offering the prior sworn statement has been unable to procure the attendance of the witness by subpoena; or,
>
> (5) in the discretion of the Commission or the hearing officer, it would be desirable, in the interests of justice, to allow the prior sworn statement to be used.[3]

17 C.F.R. § 201.235(a)(4), (5).

As noted, the Division argues that Rule 235 does not apply and that even if it does, the subject testimony is admissible under Rule 235(a)(4) or (5). Renewed Mot. at 4-8. By voluntarily failing to appear at the hearing or respond to the Division's motion, Respondents have waived the opportunity to object to the admission of the Division's evidence.[4] I therefore admit the prior sworn testimony of Augustin, Koorey, and Mascho.

Moreover, even absent waiver, I would admit the statements at issue. Rule 235 appears to have been modeled on Federal Rule of Civil Procedure 32(a). *Compare* Rule 235(a), *with* Fed R. Civ. P. 32(a)(4). Although the Federal Rules of Civil Procedure do not apply in the Commission's administrative proceedings, it is appropriate to look to those rules for guidance, especially if the Commission rule at issue is modeled after a rule of civil procedure.[5]

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[3] "In making [the] determination" that the interests of justice favor admission of a prior sworn statement, "due regard shall be given to the presumption that witnesses will testify orally in an open hearing." 17 C.F.R. § 201.235(a)(5).

[4] *See Guy P. Riordan*, Securities Act Release No. 9085, 2009 SEC LEXIS 4166, at *60 n.72 (Dec. 11, 2009) (Respondent waived his right to object to an exhibit by failing to do so at the hearing); *see also Bankcard Am., Inc. v. Universal Bancard Sys., Inc.*, 203 F.3d 477, 481 (7th Cir. 2000) ("Bankcard waived its objection to 21 of the 24 exhibits by failing to object at the time [the district court] was making [its] decision—the time when the problem could have been avoided."); *BFS Retail & Commercial Operations, LLC v. Harrelson*, 701 F. Supp. 2d 1369, 1377 (S.D. Ga. 2009) ("Generally, when a party does not object to the admission of certain evidence at trial, that party waives his right to complain about such admissions later.").

[5] *See AMS Homecare, Inc.*, Exchange Act Release No. 68506, 2012 WL 6642540, at *2 n.19 (Dec. 20, 2012) (relying on precedent relevant to a federal rule of civil procedure because

Rule 32 permits a party to "use for any purpose the deposition of . . . anyone who, *when deposed*, was [an adverse] party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4)." Fed. R. Civ. P. 32(a)(3); *see* 7 James Wm. Moore, *Moore's Federal Practice*, § 32.21[2][a] (3d ed. 2015). At the time he was deposed, Augustin was Bennett Group's COO and one of its three officers. Mot. Ex. E at 38; Renewed Mot. Ex. C at 206. Mascho was also an officer. Renewed Mot. Ex. C at 206. Because they were each an officer of Bennett Group, Augustin and Mascho fall within the ambit of Rule 32(a)(3). Using Rule 32(a)(3) as a guide, I find that it is appropriate to admit the statements of Augustin and Mascho. *See* Moore, *supra*, at § 32.21[2][a].

Because Koorey is not an officer or director, the question is whether he could be considered a "managing agent." *See* Fed. R. Civ. P. 32(a)(3). Determining whether a witness is a managing agent is largely a fact-specific endeavor[6] which is dependent on a number of factors.[7]

There is little doubt that Koorey's interests align with those of the Bennett Group. He is employed by it and is represented by the same counsel who represent the Bennett Group. Indeed, it was Bennett Group's counsel who informed the Division that Koorey would not appear at the hearing. And he functions as the "chief operations person" or "operations manager." Mot. Ex. B at 29, 44. But what being the chief operations person or manager means is not clear. Additionally, it would appear that Augustin and Bennett are persons who were in higher authority regarding the matters at issue. In fact, Koorey was ignorant as to a number of relevant matters. *See id*. at 121-22. Weighing these factors as a whole, there is not enough evidence to support the conclusion that Koorey is a managing agent.[8] As a result, Rule 235 applies.

Rule 235(a)(5) permits me to admit prior sworn testimony if doing so would be "in the interests of justice." 17 C.F.R. § 201.235(a)(5). Respondents decided that it was in their best interest not to appear at the hearing in this matter. Given that Koorey's interests align with Respondents and that he is represented by their counsel, it is plain that Koorey's decision not to

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the relevant Commission rule was "modeled" on the civil rule); *Robert M. Ryerson*, Exchange Act Release No. 57839, 2008 WL 2117161, at *5 (May 20, 2008).

[6] *See Founding Church of Scientology of Washington, D.C., Inc. v. Webster*, 802 F.2d 1448, 1452 (D.C. Cir. 1986).

[7] *See* Moore, supra, at § 32.21[2][a]; *see also Crimm v. Missouri Pac. R.R. Co*., 750 F.2d 703, 708 (8th Cir. 1984); *Young & Assocs. Pub. Relations, LLC v. Delta Air Lines, Inc*., 216 F.R.D. 521, 523 (D. Utah 2003).

[8] In *Bays Exploration., Inc. v. Pensa, Inc*., the court concluded that an operations manager qualified as a managing agent. No. 07-754, 2012 WL 122313, at *2 (W.D. Okla. Jan. 12, 2012). The evidence in that case, however, revealed that the witness had "direct involvement in major decisions made by the company, . . . had decision-making authority[,] and was directly involved in decisions regarding [the company's] operations." *Id*. The Division has not pointed to evidence of this nature regarding Koorey.

appear furthers Respondents' interests and was influenced by his connection to Respondents. Respondents are not in a position to complain about the use of the prior sworn testimony of a witness whose absence they influenced, despite his being subject to a subpoena. Allowing Respondents to benefit from Koorey's absence would not serve the interests of justice. I therefore hold that it is in the interest of justice to admit Koorey's prior sworn testimony.[9]

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James E. Grimes
Administrative Law Judge

[9] I have given "due regard . . . to the presumption that witnesses will testify orally in an open hearing." 17 C.F.R. § 201.235(a)(5). In light of Respondent's litigation decisions, the interests of justice related to admitting Koorey's testimony outweigh the presumption in favor of live testimony.