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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4141/September 9, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-17184

In the Matter of CHRISTOPHER M. GIBSON	ORDER DENYING MOTION TO EXCLUDE TESTIMONY

The Securities and Exchange Commission instituted this proceeding on March 29, 2016. The hearing in this matter will begin on September 12, 2016, at Commission headquarters in Washington, D.C.

On August 31, 2016, the Division of Enforcement filed a motion in limine to exclude the entire proposed expert testimony of attorneys Thomas S. Harman and Myron T. Steele, consisting of their written reports pre-marked as Respondent's exhibits 148 and 150. The Division argues that this expert testimony should be excluded because it is "inadmissible" legal argument and, thus, unnecessary, irrelevant, and/or cumulative. Specifically, the Division asserts that: (1) Harman's proposed expert testimony is a "legal brief" offering his interpretation of provisions of the Investment Advisers Act of 1940; and (2) Steele's proposed expert testimony relates "solely to Delaware law, and expressly [does] not address any aspect of federal securities law," the basis for the allegations. Motion at 3-6.

On September 6, 2016, Respondent opposed the motion, contending that Harman and Steele should be allowed to rebut assertions by the Division's expert, Dr. Gary Gibbons, a non-lawyer who Respondent asserts will offer legal conclusions as to Respondent's conduct, such as whether Respondent had certain fiduciary obligations. Opp. at 1, 4-6. Respondent further argues that the Division is wrong and Respondent's fiduciary obligations are not solely a matter of federal law and they can be altered or governed by private agreement or state law. *Id.* at 7-9. I will rule on the motion now because the hearing begins in one business day and the parties need to schedule witnesses. 17 C.F.R. § 201.111 (c), (d).

Ruling

The Commission's admissibility standard bars evidence that is irrelevant, immaterial, or unduly repetitious; all other evidence is presumptively admissible. *See* 17 C.F.R. § 201.320. My regular practice is to rule on admissibility at the hearing when evidence is offered because facts and context are important to assess admissibility. *Christopher M. Gibson*, Admin. Proc. Rulings

Release No. 4079, 2016 SEC LEXIS 2867, at *3 (ALJ Aug. 22, 2016). I depart from that practice in this situation to assist the scheduling of witnesses.

A significant consideration is that motions in limine are usually intended to prevent a jury from hearing testimony that one side considers prejudicial to its position. Where, as here, there is no jury, such pretrial motions are usually unnecessary. *See United States v. Heller*, 551 F.3d 1108, 1111-12 (9th Cir. 2009). Even in federal district court where, unlike here, the Federal Rules of Evidence apply, concerns about expert legal testimony are significantly less in the context of a bench trial. *See, e.g.*, *KnightBrook Ins. Co. v. Payless Car Rental Sys., Inc.*, 43 F. Supp. 3d 965, 985 (D. Ariz. 2014); *Crowley v. Chait*, 322 F. Supp. 2d 530, 550 (D.N.J. 2004); *Martin v. Ind. Mich. Power Co.*, 292 F. Supp. 2d 947, 959 (W.D. Mich. 2002); *see also In re Salem*, 465 F.3d 767, 777 (7th Cir. 2006) ("[W]here the factfinder and the gatekeeper are the same, the court does not err in admitting the evidence subject to the ability later to exclude it or disregard it."); *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000) ("Most of the safeguards provided for in *Daubert* are not as essential in a case such as this where a district judge sits as the trier of fact in place of a jury.").

As a former administrative law judge has explained, a party filing a motion in limine faces an uphill battle because the Commission has not been enthusiastic about orders by administrative law judges granting motions in limine. *Pub. Fin. Consultants, Inc.*, Admin. Proc. File No. 3-11465 (ALJ May 27, 2004), https://www.sec.gov/alj/aljorders/2004/3-11465-3.pdf. The Commission's long standing position is that its "law judges should be inclusive in making evidentiary determinations," quoting the proposition "if in doubt, let it in." *City of Anaheim*, Exchange Act Release No. 42140, 1999 SEC LEXIS 2421, at *4 & n.7 (Nov. 16, 1999); *accord Herbert Moskowitz*, Exchange Act Release No. 45609, 2002 SEC LEXIS 693, at *46 n.68 (Mar. 21, 2002); *Alessandrini & Co.*, Exchange Act Release No. 10466, 1973 SEC LEXIS 386, at *24 (Oct. 31, 1973); *Charles P. Lawrence*, Exchange Act Release No. 8213, 1967 SEC LEXIS 568, at *13 (Dec. 19, 1967).

For these reasons, I DENY the Division's motion. Nonetheless, the parties should be mindful that the Commission does not defer to expert testimony on the meaning of the law. *See, e.g.*, *Mohammed Riad*, Exchange Act Release No. 78049A, 2016 SEC LEXIS 2396, at *87 & n.70 (July 7, 2016).

Lastly, the parties have filed numerous objections to exhibits, which I will address at the hearing. Given the liberal standard for admissibility in Commission administrative proceedings and my rulings in this proceeding, the parties could perhaps consider withdrawing some of their objections. As one court has observed on allowing even marginally relevant evidence in an administrative hearing, "the only conceivable interest that can suffer by admitting any evidence is the time lost, which is seldom as much as that inevitably lost by idle bickering about irrelevancy or incompetence." *Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378, 380 (2d Cir. 1945).

Brenda P. Murray
Chief Administrative Law Judge