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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4588/February 6, 2017

ADMINISTRATIVE PROCEEDING
File No. 3-17313

In the Matter of WILLIAM TIRRELL	ORDER DENYING DIVISION'S MOTION IN LIMINE

The Division of Enforcement moves in limine to preclude Respondent William Tirrell from asserting an advice-of-counsel defense. Tirrell opposes, denying he is attempting to present such a defense. Because Tirrell has the better of this dispute, the Division's motion is denied.

Background

In his answer to the order instituting proceedings (OIP), Respondent William Tirrell listed eighteen affirmative defenses. His fifteenth affirmative defense is that:

> The claims alleged in the OIP are barred, in whole or in part, because Mr. Tirrell relied in good faith upon the *judgment* of professionals, including ML's and Bank of America's in-house counsel, outside counsel, compliance and accounting professionals, and legal consultants as to matters that he reasonably believed were within such persons' professional or expert competence.

Answer at 24 (emphasis added). In a letter from Tirrell's counsel to the Division during the pendency of this matter, counsel explained that "Tirrell does not intend to rely" in presenting this defense "on documents that have been withheld by Bank of America[1] or any other party as privileged. Mr. Tirrell does not hold, and is not asserting, a personal privilege over any documents." Mot. Ex. D, Letter from Steven M. Witzel to Michael D. Birnbaum (Nov. 15, 2016).

[1] The charges in this matter concern events during Tirrell's employment with Merrill Lynch relating to what the parties refer to as a "leveraged conversion trade." Bank of America acquired Merrill Lynch in 2009.

The Division responded to the foregoing by moving in limine to preclude Tirrell from asserting a reliance defense. It says that after receiving counsel's letter, it contacted Bank of America and learned that the latter would rely on privilege and instruct any inside or outside counsel not to answer any questions about any legal advice given to Bank of America personnel regarding the allegations in the OIP. Mot. at 3. The Division asserts that Tirrell is improperly attempting to assert an advice-of-counsel defense "while shielding such advice and any communications relating thereto from disclosure." *Id*. at 4. Noting that Tirrell cannot establish the elements of an advice-of-counsel defense, *id*., and relying on *United States v. Wells Fargo Bank, N.A.*, 132 F. Supp. 3d 558 (S.D.N.Y. 2015), it argues I should bar Tirrell's reliance defense, *id*. at 6-7.[2]

Tirrell responds that the Division misunderstands the nature of his defense. He does not intend to rely on "any . . . communications [with counsel] to rebut the Division's claims." Opp'n at 2.

Tirrell explains that he was aware that, in addition to his own involvement with the leveraged conversion trade, other "professionals from various disciplines" reviewed aspects of the trade. *Id*. at 7. Tirrell argues that he "relied on" those other professionals and certain "external advisers to do their jobs and determine whether the trade was appropriate based on their areas of expertise." *Id*. He thus asserts that he "relied on those professionals to carry out their responsibilities appropriately and reasonably took comfort from knowing that Merrill Lynch thoroughly reviewed the . . . trade." *Id*. at 9. And he says that he "relied on the business unit to accurately and fully describe the structure and purpose of the . . . Trade as part of his assessment of" it. *Id*. at 10.

The Division replies that Tirrell is trying to exploit Bank of America's assertion of the attorney-client privilege while "arguing that the presence of these attorneys and other professionals and their communications exonerate him." Reply at 7. The Division argues that Tirrell is actually trying to present an advice-of-counsel defense without meeting the requirements of the defense. *Id*. Finally, the Division argues that Tirrell's defense prejudices the Division because it cannot "examin[e] [the] communications that bear upon the defense." *Id*. at 10.

Discussion

As Tirrell argues, the Division's argument that he cannot establish the elements of advice-of-counsel defense misses the point. He "is not making that argument." Opp'n at 10. Tirrell has specifically disclaimed reliance on any communication or advice from counsel. *Id.* at 2-3. Indeed, he argues that he did not rely on what lawyers and other professionals advised or told him; rather he relied on the fact lawyers and other professionals approved or did not object—apparently based on their professional judgment—to the leveraged conversion trade as it related to their fields of expertise. *Id*. at 9-10.

[2] The court in *Wells Fargo* held that a litigant cannot rely on an "advice-of-counsel defense that requires disclosure of his employer's privileged communications where the employer will not waive the privilege." 132 F. Supp. 3d at 561, 566.

Whatever the strength or relevance of Tirrell's proposed defense might be, matters that I am not currently in a position to determine, the defense does not depend on advice Tirrell received from counsel.[3] Given Tirrell's express waiver, however, he will not be permitted to rely on the assertion that he took action or refrained from taking action based on advice, from counsel or any other professional, that his action or inaction would be lawful. If Tirrell testifies during the hearing that he relied on a previously undisclosed communication with any counsel or professional or previously undisclosed advice from any counsel or professional, I will entertain an appropriate motion from the Division regarding that testimony.

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James E. Grimes
Administrative Law Judge

[3] Concerns about confusion or undue prejudice in relation to a jury trial, *see SEC v. Tourre*, 950 F. Supp. 2d 666, 684 (S.D.N.Y. 2013) (cited in Division's reply), do not apply in this proceeding, *see Multi-Med. Convalescent & Nursing Ctr. of Towson v. NLRB*, 550 F.2d 974, 978 (4th Cir. 1977); *Charles P. Lawrence*, Securities Exchange Act of 1934 Release No. 8213, 1967 WL 86382, at *4 (Dec. 19, 1967); *cf. LiButti v. United States*, 107 F.3d 110, 124 (2d Cir. 1997) ("many of the . . . problems which a trial court invariably has to wrestle with in order to guard against unfair prejudice [by the jury] . . . simply do not exist in the context of a bench trial."); *Builders Steel Co. v. Comm'r*, 179 F.2d 377, 379 (8th Cir. 1950) ("In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not.").