

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4712/March 28, 2017

ADMINISTRATIVE PROCEEDING
File No. 3-17313

In the Matter of

WILLIAM TIRRELL

ORDER FOLLOWING IN CAMERA REVIEW
OF INTERVIEW NOTES

Respondent William Tirrell moved for *in camera* review of witness interview notes compiled by the Division of Enforcement. Specifically, Tirrell asked that I review under Rule of Practice 231(a), 17 C.F.R. § 201.231(a), the Division's notes concerning Eric Levine, Jonathan Lebow, and Michael Macchiaroli.¹ On March 22, 2017, I ordered the Division to produce its notes or file an opposition by March 24, 2017. *William Tirrell*, Admin. Proc. Rulings Release No. 4703, 2017 SEC LEXIS 884.

The Division filed a timely response. It disclosed to Respondent notes from two interviews of Levine "in an abundance of caution" without conceding that they were subject to the Jencks Act, supplied for *in camera* review other notes from its interviews of Levine, Lebow, and Macchiaroli, and opposed Tirrell's motion to the extent he sought *in camera* review of the Division's notes relating to every other witness its attorneys interviewed. Because I do not read Tirrell's motion as applying to any witnesses other than Levine, Lebow, and Macchiaroli, there is no need to address the Division's opposition to *in camera* review of witness interview notes concerning other witnesses. *See* Resp't Mot. at 1 (identifying Levine, Lebow, and Macchiaroli as Respondent's intended deponents).

The Division must disclose its interview notes if the notes contain:

- (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
- (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an

¹ Rule 231(a) provides that on request of a respondent, the Division must produce witness statements if those statements meet the definition of the term "statement" found in the Jencks Act, 18 U.S.C. § 3500(e). 17 C.F.R. § 201.231(a).

oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

18 U.S.C. § 3500(e); *see* 17 C.F.R. § 201.231(a). I have reviewed the Division's notes. They do not contain anything made, signed, adopted in any way, or approved by Levine, Lebow, Macchiaroli, or any other witness. They also do not contain a "substantially verbatim recital" of any witness's oral statement.² Finally, the notes do not concern statements made during testimony before a grand jury. In short, the Division's notes do not fall within the terms of the definition found at 18 U.S.C. § 3500(e).

Because the Division's notes do not meet the definition in 18 U.S.C. § 3500(e), I decline to order their disclosure to Tirrell. *See* 17 C.F.R. § 201.231(a).

James E. Grimes
Administrative Law Judge

² Some of the notes summarize witness statements and include what may be isolated quotations of witnesses. Such isolated quotations are not Jencks material, however. *United States v. Jordan*, 316 F.3d 1215, 1255 (11th Cir. 2003) ("As used in the Jencks Act, 'substantially verbatim' means using the nearly exact wording or phrasing the witness uttered during the interview; if only some of the exact wording is used, it is not Jencks material."); *United States v. Gross*, 961 F.2d 1097, 1105 (3d Cir. 1992) ("Although . . . the notes may occasionally reflect precise phrases used by the witness, the presence of such brief quotations is inadequate to qualify the notes as Jencks material.").