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

Administrative Proceedings Rulings
Release No. 6579 / May 17, 2019

Administrative Proceeding
File No. 3-17849

In the Matter of

Angel Oak Capital Partners, LLC,
Peraza Capital & Investment, LLC,
Sreeniwas Prabhu, and
David W. Wells

Order Denying the Division of Enforcement's Motion to Exclude a Witness

The parties exchanged witness lists in April 2019. The list provided by Respondent Peraza Capital & Investment, LLC, includes James D. Sallah, whom Peraza expects will "testify as to the arrangement between Peraza and Angel Oak Capital Partners, LLC."[1] The record reflects that Sallah was Peraza's counsel in this proceeding until he withdrew, effective April 10, 2018.[2]

The Division of Enforcement moves to exclude Sallah's testimony. Based on its "understanding," the Division argues that although Sallah represented Peraza during the Division's investigation, he "was not involved in th[e] arrangement" between Angel Oak and Peraza "when it was set up, and did not participate in its operation."[3] It thus asserts that Sallah "is not a percipient witness" and will only offer hearsay or legal argument.[4]

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1 Mot. Ex. 1 at 2.

2 *See Angel Oak Cap. Partners, LLC*, Admin. Proc. Rulings Release No. 5670, 2018 SEC LEXIS 840, at *1 (ALJ Apr. 4, 2018).

3 Mot. at 2.

4 *Id.*

Peraza opposes the Division's motion, observing that the Division's motion is based on "raw speculation" without supporting legal authority.[5] It counters, also without supporting legal authority, that Sallah's testimony "will be proper," the Division will have the chance to object, and the Division's effort to completely exclude Sallah's testimony "is improper."[6]

Discussion

The Division supports its factual assertion—that Sallah had no involvement with Peraza's arrangement with Angel Oak and thus is not a percipient witness— with evidence that Kevin Carreno was Peraza's counsel during the relevant time period.[7] But the Division does not explain how evidence that Carreno represented Peraza means that Sallah had no involvement in Peraza's arrangement with Angel Oak and did not participate in the arrangement's operation. The Division has therefore failed to carry its burden.

Sallah's testimony, however, must be relevant, material, reliable, and not unduly repetitious.[8] His *legal* opinion on an ultimate issue is neither material nor probative and will not be considered.[9]

If Peraza elicits hearsay from Sallah—which can be admissible under the Securities and Exchange Commission's Rules of Practice—the weight, if any, given to that evidence will vary depending on the fairness of its use, its probative value, and its reliability.[10] And those matters will be judged based

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[5] Opp'n at 2.

[6] *Id.*

[7] *See* Mot. at 2 & Ex. 3.

[8] 17 C.F.R. § 201.320(a).

[9] *Cf.* Fed. R. Evid. 701(c) (a lay witness may not offer testimony "based on scientific, technical, or other specialized knowledge"); *United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991) ("As a general rule an expert's testimony on issues of law is inadmissible."); *Color Leasing 3, LP v. FDIC*, 975 F. Supp. 177, 191 (D.R.I. 1997) (the legal conclusions of a non-expert witness "are clearly inadmissible"). Had Sallah been offered as an expert in another area, such as industry practice, the result might be different. *See Ralph Calabro*, Securities Act of 1933 Release No. 9798, 2015 WL 3439152, at *11 n.66 (May 29, 2015).

[10] *See* 17 C.F.R. § 201.320(b); *Keith Springer*, Securities Exchange Act of 1934 Release No. 45439, 2002 WL 220611, at *6 (Feb. 13, 2002).

on a number of factors, including whether the declarant is available to testify, whether the statements are corroborated or contradicted by other evidence, the declarant's credibility, the declarant's independence or possible bias, the type of hearsay involved, and whether circumstances provide additional guarantees of trustworthiness.[11] This means that although hearsay is not per se inadmissible, parties may register hearsay-based objections and those objections will be considered in evaluating the weight, if any, to be given hearsay testimony.[12]

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James E. Grimes
Administrative Law Judge

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[11] *See Calhoun v. Bailar*, 626 F.2d 145, 149 (9th Cir. 1980); *Charles D. Tom*, Exchange Act Release No. 31081, 1992 WL 213845, at *3 & nn. 6–7 (Aug. 24, 1992) (relying on *Calhoun*).

[12] Consistent with precedent applicable to federal bench trials, the Commission has held that administrative "law judges should be inclusive in making evidentiary determinations," *City of Anaheim*, Exchange Act Release No. 42140, 1999 WL 1034489, at *2 (Nov. 16, 1999), "normally" admitting "all evidence which 'can conceivably throw any light upon the controversy,'" *Charles P. Lawrence*, Exchange Act Release No. 8213, 1967 WL 86382, at *4 (Dec. 19, 1967) (quoting *Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378, 380 (2d Cir. 1945)). *See SEC v. Guenthner*, 395 F. Supp. 2d 835, 843 n.3 (D. Neb. 2005) (citing cases and explaining that "in bench trials evidence should be admitted and then sifted when the district court makes its findings of fact and conclusions of law"); 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2885 (3d ed. Apr. 2019 update) ("In nonjury cases the district court can commit reversible error by excluding evidence but it is almost impossible for it to do so by admitting evidence."); *see also Multi-Med. Convalescent & Nursing Ctr. of Towson v. NLRB*, 550 F.2d 974, 978 (4th Cir. 1977) ("strongly advis[ing] administrative law judges: if in doubt, let it in").