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

Administrative Proceedings Rulings
Release No. 6624 / July 11, 2019

Administrative Proceeding
File No. 3-17184

In the Matter of

Christopher M. Gibson

Order Following Oral Argument

On July 9, 2019, I ruled on several pending motions at an oral argument attended by counsel for the Division of Enforcement and counsel for Respondent Christopher M. Gibson.

Rulings

(1) The Division moved to exclude Gibson's proposed Exhibits 178, 180, 181, and 186, which are affidavits of Geier International Strategies Fund investors James Hull, John Cates, John Gibson, and Timothy Strelitz, respectively. Securities and Exchange Commission Rule of Practice 235(a) precludes the introduction of a non-party's prior sworn statement unless the declarant is unavailable to testify as a witness or the interests of justice would otherwise warrant its admission.[1] Gibson did not show that any of the makers of the statements are unavailable to testify at the upcoming hearing. In fact, he intends to subpoena three out of the four to testify. I therefore GRANTED the Division's motion. The exhibits may not be introduced unless Gibson demonstrates that the requirements of Rule 235(a) are met.[2]

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[1] 17 C.F.R. § 201.235(a).

[2] During the argument, the Division dropped its objections to summary charts prepared by Gibson (Respondent's proposed exhibits 204, 205, 206, and 226) because his counsel shared with the Division the underlying documents on which the charts were based.

(2) The Division moved to admit proposed Division Exhibits 187 and 188: Gibson's investigative testimony taken on March 19, 2015, and December 21, 2015. During the oral argument, the parties agreed that these exhibits may be admitted if the Division designates the relevant portions of the exhibits on which it intends to rely and Gibson is given the opportunity to cross-designate. By July 17, the Division shall designate the portions of the transcripts it wishes to rely upon. Gibson may make counter-designations by July 24.

(3) Initially, Gibson moved to exclude proposed Division Exhibit 157, which is the transcript of Christopher Gibson's testimony from the hearing held before the prior administrative law judge in 2016.[3] At the close of oral argument, however, the parties agreed that the transcript could be admissible if used for impeachment only. Accordingly, the Division may offer Exhibit 157 for the limited purposes of impeachment.

(4) The Division moved to exclude the reports of Gibson's experts Daniel R. Bystrom (Respondent's proposed Exhibit 228) and Jeffrey M. Smith (Respondent's proposed Exhibit 227). Gibson likewise moved to exclude the Division's experts, namely Dr. Carmen A. Taveras (proposed Division Exhibit 184) and Dr. Gary Gibbons (proposed Division Exhibit 185).

I DENIED the motions as to the reports of Bystrom, Taveras, and Gibbons, although I will not rely on everything in their respective expert reports. For example, there are portions of each report that allege facts or make legal arguments instead of offering opinions based on specialized knowledge.[4] I will also not rely on any parts of a report where an expert

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[3] Gibson had previously moved to exclude several other of the Division's proposed exhibits (8, 158-59, 161-64) on various grounds, and in response, the Division withdrew those exhibits. Div. Opp'n to Resp't's Mot. in Limine to Exclude Certain Exhibits, at 1 (June 21, 2019).

[4] *See* Fed. R. Evid. 702(a) (an expert may testify if "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue"); *Burkhart v. Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1212 (D.C. Cir. 1997) ("Expert testimony that consists of legal conclusions cannot properly assist the trier of fact."); *United States v. Bilzerian*, 926 F.2d 1285, 1295 (2d Cir. 1991) ("Although testimony concerning the ordinary practices in the securities industry may be received . . . testimony encompassing an ultimate legal conclusion based upon the facts of the case is not admissable, and may not be made so simply because it is presented in terms of industry practice."); *Jensen v. Cablevision Sys. Corp.*, 372 F. Supp. 3d 95, 116 (E.D.N.Y. 2019)

(continued…)

appears to opine on matters he or she could not know, such as Gibson's state of mind.

The Commission has said that although in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[5] the Supreme Court recognized that a trial judge has a gatekeeping role before expert evidence is presented, the gatekeeping function is "'designed to protect juries and is largely irrelevant in the context of a bench trial'" or administrative hearing where there is no jury that could potentially be misled.[6] The Commission, therefore, sees "no reason why a law judge, if he deems it appropriate, cannot hear expert testimony (and cross-examination) and then determine what weight to give that testimony."[7] At the hearing, the Division may offer proposed Exhibits 184 and 185, and Gibson may offer proposed Exhibit 228. When reaching a decision, I will give each of these expert reports and the testimony of its author the weight it deserves.[8]

I GRANTED, however, the Division's motion to exclude Smith's testimony and his expert report because his report lacks any expert opinions. Smith opines that the Division violated the Commission's Enforcement

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("an expert may not use his or her report to construct a factual narrative based upon record evidence"); *SEC v. Tourre*, 950 F. Supp. 2d 666, 675 (S.D.N.Y. 2013) ("Acting simply as a narrator of the facts does not convey opinions based on an expert's knowledge and expertise; nor is such a narration traceable to a reliable methodology.").

5 509 U.S. 579 (1993).

6 *Ralph Calabro*, Securities Act of 1933 Release No. 9798, 2015 WL 3439152, at *11 n.66 (May 29, 2015) (quoting *Deal v. Hamilton County Bd. of Ed.*, 392 F.3d 840, 852 (6th Cir. 2004)).

7 *Calabro*, 2015 WL 3439152, at *11 n.66; *see City of Anaheim*, Securities Exchange Act of 1934 Release No. 42140, 1999 WL 1034489, at *2 (Nov. 16, 1999) ("Administrative agencies such as the Commission are more expert fact-finders, less prone to undue prejudice, and better able to weigh complex and potentially misleading evidence than are juries."); *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604, 613 (8th Cir. 2011) ("there is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself") (citation and internal alteration omitted).

8 *See SEC v. Guenthner*, 395 F.Supp.2d 835, 843 n. 3 (D. Neb. 2005) ("Where the court has assumed the role of fact-finder in a bench trial, 'the better course' is to 'hear the testimony, and continue to sustain objections when appropriate.'").

Manual and the American Bar Association's Model Rules of Professional Conduct. He reaches his conclusion by quoting at length from the Enforcement Manual and the Model Rules and then mechanically applying the cited language to an alleged set of facts.[9] Thus, Smith's report is essentially a legal brief and will not help me in resolving the case.[10]

(5) I GRANTED the Division's oral motion to allow it to treat Christopher Gibson as an adverse witness. I reserved ruling on whether the Division could treat Hull as an adverse witness.

Summary

To ensure the clarity of the administrative record, I note that the rulings above constitute the following dispositions of the written motions filed with the Office of the Secretary: (1) The Division's June 14 motion in limine is GRANTED IN PART AND DENIED IN PART; (2) Gibson's June 14 motion in limine is DENIED except that Christopher Gibson's prior hearing testimony may only be used for impeachment; (3) The Division's June 21 motion to admit investigative testimony is GRANTED subject to the required designations; (4) The Division's June 28 motion to exclude Gibson's expert Jeffrey Smith is GRANTED.

Other Matters

Gibson must respond to the Division's outstanding subpoena for documents by July 12.

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[9] The Commission's Enforcement Manual contains the disclaimer that it "is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal." SEC Div. of Enforcement, Enforcement Manual, at 1 (Nov. 28, 2017) available at www.sec.gov/divisions/enforce/enforcementmanual.pdf. Given this language, the Manual is a non-binding internal agency policy document that does not give rise to rights on which Gibson can rely. *See United States v. Lee*, 274 F.3d 485, 492–93 (8th Cir. 2001) (construing identical language in the U.S. Attorneys Manual); *United States v. Manafort*, 312 F. Supp. 3d 60, 75–76 (D.D.C. 2018) (construing identical language in the special counsel regulations).

[10] *See* Fed. R. Evid. 702(a); *Burkhart*, 112 F.3d at 1212; *Marx & Co. v. Diners' Club Inc.*, 550 F.2d 505, 510 (2d Cir. 1977) (finding that the trial court erred in allowing a lawyer to testify about the law because, "[t]he special legal knowledge of the judge makes the witness' testimony superfluous").

Subpoenas for the attendance of witnesses at the hearing are due by July 12.

Any stipulations should be filed by July 22.

A final telephonic prehearing conference is scheduled for July 23 at 11:00 a.m. EDT. The Division shall obtain a court reporter and circulate a dial-in number ahead of the conference.

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James E. Grimes
Administrative Law Judge