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

Administrative Proceedings Rulings
Release No. 6678 / September 17, 2019

Administrative Proceeding
File No. 3-17950

In the Matter of

David Pruitt, CPA

Order on Challenges to Expert Reports

The Division of Enforcement and Respondent David Pruitt have lodged objections to each other's experts' reports. This order resolves those objections.

Discussion

1. Substantive challenges to expert reports

In jury trials in district court, the admissibility of expert testimony is resolved under the gatekeeping framework established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, and reflected in Federal Rule of Evidence 702.[1] A "district court's 'gatekeeping function' under *Daubert* ensures that expert evidence 'submitted *to the jury*' is sufficiently relevant and reliable."[2] Courts have recognized, however, that concerns about unreliable evidence reaching the trier of fact "are not present" during bench trials.[3] This is consistent with

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[1] 509 U.S. 579 (1993); *see Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999); 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").

[2] *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 613 (8th Cir. 2011) (quoting *Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 929 (8th Cir. 2001)); *see Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1291 (11th Cir. 2005).

[3] *Zurn*, 644 F.3d at 613; *see United States v. Flores*, 901 F.3d 1150, 1165 (9th Cir. 2018).

more general principles that during a bench trial, "it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not."[4] Courts have advised administrative agencies to follow a similar course in adjudications conducted by administrative law judges.[5]

The Securities and Exchange Commission has followed this guidance, noting that a district court's gatekeeping responsibility "is largely irrelevant in the context of a bench trial," and explaining that there is no reason an administrative law judge "cannot hear expert testimony (and cross-examination) and then determine what weight to give that testimony."[6]

Nonetheless, evidence presented in Commission proceedings must be relevant, material, and reliable.[7] And an expert's opinion that something is so, simply because she says it is, does not meet this standard.[8] Moreover,

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[4] *Builders Steel Co. v. Comm'r*, 179 F.2d 377, 379 (8th Cir. 1950); *cf. Gulf States Utils. Co. v. Ecodyne Corp.*, 635 F.2d 517, 519 (5th Cir. Unit A Jan. 1981) ("Rule 403 has no logical application to bench trials."); 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, 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.").

[5] *See Multi–Med. Convalescent & Nursing Ctr. of Towson v. NLRB*, 550 F.2d 974, 978 (4th Cir. 1977) ("[W]e strongly advise administrative law judges: if in doubt, let it in."); *cf. Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378, 380 (2d Cir. 1945) ("[W]e … point out the danger always involved in conducting [an administrative] proceeding in [so formal] a spirit, and the absence of any advantage in depriving either the Commission or ourselves of all evidence which can conceivably throw any light upon the controversy.").

[6] *Ralph Calabro*, Securities Act of 1933 Release No. 9798, 2015 WL 3439152, at *11 n.66 (May 29, 2015) (quoting *Deal v. Hamilton Cty. Bd. of Ed.*, 392 F.3d 840, 852 (6th Cir. 2004)); *see City of Anaheim*, Exchange Act Release No. 42140, 1999 WL 1034489, at *2 & nn. 6–8 (Nov. 16, 1999); *cf. In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prod. Liab. Litig. (No II) MDL 2502*, 892 F.3d 624, 631 (4th Cir. 2018) ("[T]he rejection of expert testimony is the exception rather than the rule." (quoting *United States v. Stanley*, 533 F. App'x 325, 327 (4th Cir. 2013))).

[7] 17 C.F.R. § 201.320(a).

[8] *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) ("[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse*

(continued…)

while an expert may describe industry practice, an expert cannot opine about legal standards to apply to the facts of a case or about a party's obligations under a contract.[9] Experts may therefore not offer opinions about whether a person or entity complied with a legal standard.[10] Finally, an expert cannot opine about a person's intent, motive, or state of mind.[11]

Experts are not percipient fact witnesses. Although an expert may rely on facts to form an opinion—and that reliance may be explored on cross-examination[12]—the "expert may not offer testimony that simply 'regurgitates what a party has told him' or constructs 'a factual narrative based on record evidence.'"[13] Such testimony is not helpful; the trier of fact is equally, if not

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dixit of the expert."); *Mid- State Fertilizer Co. v. Exch. Nat'l Bank of Chi.*, 877 F.2d 1333, 1339 (7th Cir. 1989) ("An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process.").

[9] *See United States v. Leo*, 941 F.2d 181, 196 (3d Cir. 1991) ("[T]estimony concerning custom and practice was proper so long as the expert did not give his opinions as to legal duties that arose under the law."); *Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 509–10 (2d Cir. 1977) ("The question of interpretation of the contract is for the jury and the question of legal effect is for the judge. In neither case do we permit expert testimony." (quoting *Leob v. Hammond*, 407 F.2d 779 (7th Cir. 1969))); *see also SEC v. Big Apple Consulting USA, Inc.*, 783 F.3d 786, 812 (11th Cir. 2015) (allowing testimony about "industry standards," which did not amount to "a legal conclusion").

[10] *See Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990); *see also Hygh v. Jacobs*, 961 F.2d 359, 363 (2d Cir. 1992) (finding testimony objectionable because it "merely [told] the jury what result to reach" and "communicat[ed] a legal standard").

[11] *Tillman v. C.R. Bard, Inc.*, 96 F. Supp. 3d 1307, 1333 (M.D. Fla. 2015) ("Bard's intent or motivations are 'lay matters which a jury is capable of understanding and deciding without the expert's help.'" (quoting *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 546 (S.D.N.Y. 2004))); *In re Fosamax Prods. Liab. Litig.*, 645 F. Supp. 2d 164, 192 (S.D.N.Y. 2009) (precluding testimony as to "the knowledge, motivations, intent, state of mind, or purposes of" a company and its employees because it "is not a proper subject for expert or even lay testimony").

[12] *See Krys v. Aaron*, 112 F. Supp. 3d 181, 199 (D.N.J. 2015).

[13] *In re Longtop Fin. Techs. Ltd. Sec. Litig.*, 32 F. Supp. 3d 453, 460 (S.D.N.Y. 2014) (quoting *Arista Records LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409, 424 (S.D.N.Y. 2009), and *Highland Capital Mgmt., L.P. v. Schneider*, 379 F. Supp. 2d 461, 469 (S.D.N.Y. 2005)).

more, capable of determining the facts at issue.[14] As a result, although an expert may "give limited testimony on mixed questions of law and fact," the expert's "testimony must remain focused on helping the [trier of fact] understand particular facts in issue."[15]

With the above principles in mind, I resolve the parties' disputes below.[16]

1.1. Division expert Mary Karen Wills

Wills's 53-page report comprises 161 numbered paragraphs divided into nine sections.[17] The substance of her report begins at paragraph 16. Paragraphs 16 through 25 and 27 through 41 of Wills's report consist of background information about government contracting that is potentially relevant and helpful.[18]

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[14] *See In re Trasylol Prods. Liab. Litig.*, 709 F. Supp. 2d 1323, 1346 (S.D. Fla. 2010) (rejecting testimony from an expert who "regurgitates [the facts] and reaches conclusory opinions that are purportedly based on these facts," because the "facts should be presented to the jury directly," which can reach its own inferences based on the facts); *see also Andrews v. Metro N. Commuter R.R. Co.*, 882 F.2d 705, 708 (2d Cir. 1989) (an expert's testimony "must [not] be directed to matters … which a jury is capable of understanding and deciding without the expert's help"); *cf. SEC v. Toure*, 950 F. Supp. 2d 666, 675 (S.D.N.Y. 2013) (holding that an expert's factual narrative is not "traceable to a reliable methodology").

[15] *In re Initial Pub. Offering Sec. Litig.*, 174 F. Supp. 2d 61, 65 (S.D.N.Y. 2001).

[16] In choosing between excluding expert opinions and simply giving objectionable opinions no weight, I will follow Commission guidance and admit the evidence but give it no weight. *See Calabro*, 2015 WL 3439152, at *11 n.66; *cf. SEC v. Guenthner*, 395 F. Supp. 2d 835, 842 n.3 (D. Neb. 2005) (discussing a *Daubert* motion in the context of a bench trial and stating that "'the better course,' is to 'hear the testimony, and continue to sustain objections when appropriate'" (quoting *Easley v. Anheuser–Busch, Inc.*, 758 F.2d 251, 258 (8th Cir. 1985))).

[17] Pruitt does not question Wills's expertise. *See* Mem. at 1 n.1. His concerns instead relate to what she says. There is therefore no need to recite Wills's qualifications.

[18] *Cf. Leo*, 941 F.2d at 196–97 (permitting government-contracting expert testimony to shed light on what someone in defendant's position would have

(continued…)

Paragraphs 26 and 42 through 86 contain Wills's extended narrative of her view of the facts of this case. Although an expert is permitted to rely on record facts to explain the basis for her opinion, Wills's narrative is extensive and only loosely connected to her opinions. As she is not a percipient witness, I will give no weight to these paragraphs except to the extent they may be relevant as context for Wills's admissible expert opinions.[19] Otherwise, they amount to an impermissible recitation of Wills's view of the facts.[20]

Paragraphs 87 through 147 present a mixture of permissible and impermissible statements. At the outset, in portions of Wills's report containing otherwise permissible statements, I will view her use of the words *false*, *fictitious, or improper* when describing the invoices at issue in this case in the context of her otherwise permissible expert opinions. But I will ultimately decide whether the invoices can be described using these or other adjectives. I will give no weight in these paragraphs to Wills's description of the alleged facts in this case, except insofar as they provide context for her opinions.

As to paragraphs 87 through 147, the following will be given no weight: the last clause of paragraph 87 (factual narrative), the last sentence of paragraph 90 (factual narrative),[21] a portion of the first sentence of paragraph 102 (contract interpretation)[22], the last three sentences of

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known about industry custom, to the extent expert's testimony dealt only with customs and did not speak to legal requirements).

[19] *Cf. Reach Music Pub., Inc. v. Warner Chappell Music, Inc*., 988 F. Supp. 2d 395, 404 (S.D.N.Y. 2013) (overruling objection to expert's factual narrative because it "simply provide[d] the foundation for [the expert's] opinion as to the custom and practice in the industry in the situation he describe[d]").

[20] *See Trasylol*, 709 F. Supp. 2d at 1346. The statements in the last two sentences of paragraph 67 are admissible to the extent they are Wills's opinion about industry practice.

[21] If Wills rephrased this sentence to instead say "*If* Mr. Pruitt directed others to generate false invoices and recognize associated revenue of $17.9 million, that would violate these GAAP requirements," the sentence would unobjectionable.

[22] Although an expert cannot opine about a contract's legal requirements, *Marx,* 550 F.2d at 509–10, testimony about compliance with GAAP is permissible, *Guenthner*, 395 F. Supp. 2d at 847. As a result, the first sentence of paragraph 102 is excluded to the extent it offers an opinion about L3's contract but will be considered insofar as it touches on GAAP compliance.

paragraph 104 (factual narrative), all but the first sentence of paragraph 105 (factual narrative), paragraph 107 (legal conclusion),[23] paragraphs 109 through 121 (factual narrative),[24] paragraphs 126, 128 through 136, and paragraphs 140 through 145 (factual narrative, legal conclusions, contract interpretations). Those portions of paragraphs 87 through 147 not mentioned will be considered and given appropriate weight.

Paragraphs 147 through 159 concern L3's internal controls. Whether Pruitt violated L3's internal controls is a key disputed issue. In deciding Pruitt's motion for a ruling on the pleadings, I noted that one allegedly relevant internal control is seemingly ambiguous and that the ambiguity could be addressed through "testimony about industry and company practice."[25]

Before turning to L3's controls in paragraph 156, Wills offers nine explanatory paragraphs. Paragraph 147 states a legal requirement and will be given no weight except as context for Wills's opinions that follow. Paragraph 148 offers an admissible opinion about Pruitt's responsibility. Paragraph 149 merely provides an acceptable factual background for the opinions that follow.

Paragraphs 150 and 151 contain a recitation of Wills's review of an amendment to one of L3's periodic report. This factual narrative will be given no weight. To the extent paragraphs 152 through 155 contain context for Wills's conclusion, based on her expertise, that Pruitt circumvented certain internal controls and why, they will be considered and given appropriate weight.

Turning to Wills's discussion of the internal controls, she does not address the ambiguity I noted regarding the meaning of a particular internal control. She also does not offer an opinion, based on her experience, as to what someone in her industry would understand certain internal controls to mean. Indeed, she does not explain the meaning of any internal control. Instead, she provides her bare opinion, without explanation or analysis, that Pruitt violated several internal controls. Paragraphs 156 through 159 thus

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[23] To the extent paragraph 107—or any otherwise objectionable paragraph—includes opinions about GAAP compliance it will be considered and given appropriate weight.

[24] In paragraph 112, only the first sentence is given no weight.

[25] *David Pruitt, CPA*, Admin. Proc. Ruling Release No. 6452, 2019 SEC LEXIS 158, at *17 (ALJ Feb. 12, 2019).

contain quoted language from several internal controls and Wills's conclusions, supported only by her factual narrative. Paragraphs 156 through 159 are thus unhelpful and will be given no weight.[26]

Wills also supplied a report rebutting Pruitt's experts, Mitchell S. Friedman and John Riley. In Wills's rebuttal report, I will give no weight to her discussion of what was proper under the L3 contract at the heart of this matter or her discussion of the results of her "detailed analysis" the contract's provisions.[27] As with Wills's initial report, I will give no weight to her opinion about whether Pruitt violated any statute or regulation or her opinion about his state of mind.

Except as context, I will also give no weight to Wills's factual narrative given in the context of her critique of Friedman's and Riley's recitations of the facts or their allegedly misplaced reliance on certain facts.[28] As discussed, except as context, I will give no weight to any expert's factual narrative. And I won't give weight to the experts' dueling views of Pruitt's state of mind.[29]

1.2. Pruitt's expert Mitchell S. Friedman

Friedman, who is a CPA, worked for KPMG from 1981 through 2007.[30] During his last 13 years with KPMG, he served as an audit partner, auditing publicly traded companies. Friedman moved to the Public Company Accounting Oversight Board in 2008 and advanced over the next six years from associate director to global team leader. Among other things, he was responsible for the Board's inspection of a large accounting firm. Since early 2017, Friedman has been a senior managing director with Ankura Consulting Group. In that capacity he has been retained by counsel to provide analysis and interpretation of Board standards.

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[26] *See United States v. Frazier*, 387 F.3d 1244, 1261 (11th Cir. 2004) (en banc); *United States v. Duncan*, 42 F.3d 97, 101 (2d Cir. 1994) ("When an expert undertakes to tell the jury what result to reach, this does not *aid* the jury in making a decision, but rather attempts to substitute the expert's judgment for the jury's.")

[27] Wills's Rebuttal at 8–9; *see Marx,* 550 F.2d at 509–10.

[28] Wills's Rebuttal at 13–20.

[29] *See id*. at 32.

[30] Friedman's background is discussed in Exhibit A attached to his report.

Friedman's report is 20 pages in length, divided into 53 numbered paragraphs. The substance of his report begins at paragraph 18. In contrast with Wills's report, Friedman's factual discussion is restrained and limited to context and background. With exceptions noted below, his report is appropriately limited to his area of expertise, accounting standards, and industry practice.[31]

The following eight paragraphs are objectionable and will be given no weight except to the extent that they provide context for Friedman's opinions. Paragraphs 21 through 23 provide a discussion of statutory requirements that are appropriately left to the parties' briefs and which have been extensively discussed during motions practice.

Paragraphs 33 through 35 contain Friedman's factual narrative. In particular, Friedman says that his personal discussion with Pruitt corroborated certain facts. I will not give independent weight to these paragraphs.

Paragraph 41 is a mixed bag. To the extent it contains a factual narrative, addresses what "L3 did not believe," or declares that L3 complied with a statutory requirement, I will not give it weight. It otherwise contains permissible matters.

Finally, in a portion of paragraph 46, beginning at the bottom of page 17 and continuing on page 18, Friedman attempts to explain how the allegations fail to show that Pruitt "acted to earn a bonus." Friedman is not percipient witness and his expertise does not extend this far.[32]

For its part, the Division offers a host of reasons not to credit Friedman's opinions.[33] It argues that he has never audited a government contractor and has no experience with acquisition regulations.[34] But Friedman has not attempted to offer an opinion about government contracting or acquisitions.[35]

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[31] *See* Friedman Report ¶¶ 25–28.

[32] *See Tillman*, 96 F. Supp. 3d at 1333; *Fosamax*, 645 F. Supp. 2d at 192.

[33] Mot. at 9–14.

[34] Mot. at 4.

[35] Whether he has experience with SAB 104 or the books and records requirements, he can opine about accounting requirements. *Cf. In re Mirena IUD Prods. Liab. Litig.*, 169 F. Supp. 3d 396, 463–64 (S.D.N.Y. 2016) (having related experience and expertise is sufficient to allow expert to testify); *In re*

(continued…)

The Division's remaining arguments, though well-taken, go to the weight I should give Friedman's testimony, not the admissibility of his opinions. For instance, the Division asserts that during his deposition, "Friedman refused to opine on whether, assuming the misstatement was intentional, that would cause the books and records not to be maintained in reasonable detail."[36] Given Pruitt's defense, presented during motions practice, this is an obvious question. If Friedman is unable during the hearing to respond to this question, it may undermine his opinions. But that does not make his report inadmissible.

1.3. Pruitt's expert John Riley

Riley has been a CPA for nearly 40 years.[37] He worked for the Commission from 1984 through 1995, eventually serving as deputy chief accountant and acting chief accountant. Riley left the Commission in 1995 for a position with Arthur Andersen, where he served as an audit practice director from 1998 through 2002. From 2002 through 2017, he was a managing director with Navigant Consulting, where he specialized in "complex financial and SEC reporting matters, litigation consulting, special accounting investigations and audit committee advisory services." Since late 2017, he has been a managing director with AlixPartners. Put simply, he has sufficient corporate accounting experience to offer an opinion, from that perspective, about the recognition of revenue and Commission "accounting requirements."[38]

Zyprexa Prods. Liab. Litig., 489 F. Supp. 2d 230, 282 (E.D.N.Y. 2007) ("If the expert has educational and experiential qualifications in a general field closely related to the subject matter in question, the court will not exclude the testimony solely on the ground that the witness lacks expertise in the specialized areas that are directly pertinent."). The Division is free during cross-examination to demonstrate that any expert lacks the experience necessary to offer an opinion. *See Zyprexa*, 489 F. Supp. 2d at 282 ("Assertions that the witness lacks particular educational or other experiential background, 'go to the weight, not the admissibility, of [the] testimony.'" (quoting *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir. 1995))).

36 Mot. at 10.

37 Riley's background is discussed in Exhibit A attached to his report.

38 Mot. at 6.

Riley's report is 86 pages long and contains 224 numbered paragraphs. Given its length and the comparatively more general nature of the Division's objections, I decline to "parse [it] paragraph-by-paragraph"[39] and will leave it to cross-examination and redirect to determine the weight specific portions of Riley's report should be given. I will give no weight, however, to Riley's recitation of the facts, except to the extent his recitation provides context for his opinions.[40] His opinion about "accounting concepts" is admissible but I will not consider Riley's critique of the allegations or review of legal requirements.[41]

The Division argues that Riley has no expertise regarding government contracts.[42] This appears true, but he is not offered as an expert in government contracts and the Division points to no place where he offers an opinion about that subject.

The Division also argues that Riley contradicts himself in his report.[43] But even if true, this goes to weight and is a proper subject for cross-examination.

The Division argues that Riley opines about Pruitt's state of mind.[44] It is true that an expert cannot opine about a person's state of mind,[45] but the Division doesn't point to any portion of Riley's report in which he opines about Pruitt's state of mind. Instead, the Division points to his deposition testimony, saying that when Riley was asked about Pruitt's state of mind, Riley said that he "he absolutely was comfortable at the time and remains of

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39 *See Liberty Media Corp. v. Vivendi Universal, S.A.*, 874 F. Supp. 2d 169, 174 (S.D.N.Y. 2012) ("declin[ing] to parse" a 120-page report "paragraph-by-paragraph to determine where the report turns from expert analysis to factual narrative").

40 *See* Riley Report at 11–15.

41 *See id.* at 20–34. Riley also submitted a rebuttal report. Although the Division has not specifically objected to anything in Riley's rebuttal report, I will apply the standards discussed above in deciding what weight, if any, to give the opinions in Riley's rebuttal.

42 Mot. at 5.

43 *Id.* at 6–8.

44 *Id.* at 8.

45 *Fosamax*, 645 F. Supp. 2d at 192.

the belief that revenue recognition was appropriate under GAAP in the December 2013 timeframe."[46] I was unable to locate this testimony in the cited location but if Riley testified about L3's GAAP compliance, his testimony would be an appropriate matter for an expert of his experience to discuss.[47]

2. Remaining expert issues

2.1. The Division has not shown that Riley should disqualified due to a conflict of interest

The Division argues that Riley should be disqualified. It asserts "Riley is a managing director at Alix Partners, an accounting and consulting firm that previously provided services to L3 in connection with this matter and therefore is a conflict of interest."[48] The Division does not explain the nature of this conflict or the "services" Riley's firm provided or when it provided them. Instead Division counsel says Riley did not know about those services prior to being engaged to offer an expert opinion in this matter.[49] The

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[46] Mot. at 8 (citing Riley Tr. 108:7–11).

[47] *See Guenthner*, 395 F. Supp. 2d at 847. In his report, Riley says Pruitt told him that Pruitt "'absolutely' believe[d]" that "revenue recognition in December 2013 was proper." Riley Report at 58. Riley opines that "Pruitt had a reasonable basis for his belief" and goes on to say that he "find[s] no credible basis to conclude that [Pruitt] intentionally directed the misstatement of L3's financial statements for the year ended December 31, 2013." *Id*. If Riley's opinion, based on his accounting experience, is that a person in Pruitt's position could have had a reasonable basis to believe that the revenue recognition was proper, that opinion is unobjectionable. But his opinion about Pruitt's state of mind will be given no weight. *See United States v. Beavers*, 756 F.3d 1044, 1054–55 (7th Cir. 2014) (upholding a decision that an expert could not base his opinion on what the defendant told the expert about the defendant's state of mind).

[48] Mot. at 9.

[49] *Id*. The Division does not cite a source to support its assertions. "[F]actual assertions in … legal memoranda are not evidence and do not establish material facts." *Jupiter v. Ashcroft*, 396 F.3d 487, 491 (1st Cir. 2005); *see Keith L. Mohn*, Exchange Act Release No. 42144, 1999 WL 1036827, at *4 n.16 (Nov. 16, 1999).

Division offers, however, that Pruitt's counsel asked Riley "to stay on" and that Riley reached "an arrangement" with AlixPartners.[50]

As the Division notes, some courts have employed a three-part test to determine whether an expert should be disqualified due to a conflict of interest due to a relationship with an adverse party.[51] As the movant, the Division bears the burden to show disqualification is warranted.[52] It must therefore show: (1) "it [is] objectively reasonable for" L3 "to conclude that a confidential relationship existed" with AlixPartners; (2) "confidential or privileged information [was] disclosed by [L3] to" Riley; and (3) "the public ha[s] an interest in … not allowing [Riley] to testify."[53]

Bearing in mind that expert disqualification based on a conflict is rare,[54] it is notable that although it has raised disqualification and cited the relevant standard, the Division does not attempt to address the factors described in *Grioli*. Indeed, there is reason to question whether Pruitt and L3 can be considered adverse parties.[55] But even crediting the Division's assertions, it appears that AlixPartners provided services to L3 before Riley began working with AlixPartners in 2017. So there is no basis to conclude that L3 had a relationship with Riley. And even imputing AlixPartners's relationship to Riley, as might be the case with a law firm,[56] I have no basis to know whether L3 concluded it and AlixPartners had a confidential relationship or whether

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50 Mot. at 9.

51 *Id.* (citing *Grioli v. Delta Int'l Mach. Corp.*, 395 F. Supp. 2d 11, 14 (E.D.N.Y. 2005)).

52 *Koch Ref. Co. v. Jennifer L. Boudreaux M/V*, 85 F.3d 1178, 1181 (5th Cir. 1996).

53 *Grioli*, 395 F. Supp. 2d at 13–14.

54 *Koch*, 85 F.3d at 1181.

55 *See Grioli*, 395 F. Supp. 2d at 13 (stating that disqualification questions arise as to "expert[s] who formerly had a relationship with an adverse party"). The Division does not claim that it hired AlixPartners and then Riley went to work for Pruitt.

56 *But see English Feedlot, Inc. v. Norden Labs., Inc.*, 833 F. Supp. 1498, 1501 (D. Colo. 1993) ("Because experts and attorneys perform different functions in litigation, the standards and presumptions applicable to the attorney-client relationship have no bearing on [an expert's] disqualification.").

it would have been reasonable for it to reach such a conclusion. I also have no way to know whether confidential or privileged information was disclosed. Finally, the Division says nothing about the public interest. The Division has therefore failed to carry its burden to show that I should disqualify Riley based on a conflict of interest.

2.2. Wills must supplement her report

Pruitt's counsel deposed Wills in July 2019.[57] During her deposition, Wills said that the list of "documents considered" in Appendix B of her report is "a subset" of "everything" the Division provided to her.[58] She testified, however, that she listed "the key documents that were important in forming [her] opinions,"[59] noting that "[t]here was a huge volume of documents."[60] She also affirmed that she "read documents outside" those she listed and "considered [more] than just what" she listed.[61] Wills further admitted that it was "possible" that some additional, unlisted documents were "important to [her] report."[62]

Based on Wills's admission that she did not include with her report all the materials she considered, Pruitt moves to exclude Wills's testimony.[63] The Division responds that Wills identified all "significant" "materials" and, because she considered a large volume of information, she did not "need to list" insignificant materials.[64] The Division also posits that even if Wills erred, that alleged error was "substantially justified" and harmless.[65]

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57 *See* Allen Decl. (Aug. 23, 2019), ex. C.

58 *Id.* at 16.

59 *Id.*; *see id.* at 17 ("These were ones that I considered to be significant in reaching my conclusions.").

60 *Id.* at 20.

61 *Id.* at 16–17, 20.

62 *Id.* at 17.

63 Mem. at 14–17.

64 Opp'n at 8.

65 *Id.* at 8–9; *see* Fed. R. Civ. P. 37(c)(1) (providing sanctions for failure to supply information required by Rule 26(a), unless the failure is "substantially justified or … harmless").

Rule of Practice 222(b) deals with expert witnesses and the reports they must provide.[66] The requirements in Rule 222(b) are consistent with those found in Federal Rule of Civil Procedure 26(a)(2)(B), from which the language of Rule 222(b) is largely drawn.[67] Both rules require that an expert's report "contain … [t]he facts or data considered by the witness in forming" the witness's opinions.[68] In light of the Commission's decision to incorporate the language from Rule 26(a)(2)(B), it is appropriate to rely on precedent interpreting that rule in determining what Rule 222(b) requires.[69]

The advisory committee note concerning Rule 26(a)(2)(B) explains that the phrase *facts or data* should "be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients."[70] The note makes clear that the Rule's requirement extends to anything "'considered' by the expert," and is not limited to materials on which the expert relied.[71]

In construing Rule 26(a)(2)(B)(ii), courts have concluded that materials *considered* include those materials an expert "has read or reviewed … in connection with formulating his or her opinion," without regard to whether

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66 17 C.F.R. § 201.222(b).

67 *Compare* 17 C.F.R. § 201.222(b)(1), *with* Fed. R. Civ. P. 26(a)(2)(B). *See* Amendments to the Commission's Rules of Practice, 81 Fed. Reg. 50,212, 50,221 (July 29, 2016) (noting that the revisions to Rule 222(b) were "[c]onsistent with the requirements for expert witness disclosures and expert reports in the Federal Rules of Civil Procedure").

68 17 C.F.R. § 201.222(b)(1)(ii); Fed. R. Civ. P. 26(a)(2)(B)(ii).

69 *See Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) ("When a statutory term is 'obviously transplanted from another legal source,' it 'brings the old soil with it.'" (citations omitted)); *AMS Homecare, Inc.*, Exchange Act Release No. 68506, 2012 WL 6642540, at *2 n.19 (Dec. 20, 2012) (relying on precedent relevant to a rule of civil procedure because the relevant Commission rule was "modeled" on that rule); *cf. Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006) ("[W]hen 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its … judicial interpretations as well.'" (citations omitted)).

70 Fed. R. Civ. P. 26, advisory committee's note to 2010 amendment.

71 *Id.*

she "actually rel[ied] on the material[s] as a basis for [her] opinions."[72] And courts have declined to inquire into what materials the expert subjectively determined were important, instead embracing an objective standard that requires disclosure of "anything received, reviewed, read, or authored by the expert, before or in connection with the forming of his opinion, if the subject matter relates to the facts or opinions expressed."[73]

Here, Wills's report does not comply with the requirements of Rule 26(a)(2)(B)(ii), and thus Rule of Practice 222(b)(1)(ii). Indeed, Wills candidly admitted that she failed to list all the materials she was provided by the Division and failed to list everything she considered.[74] Worse, she admitted that it was "possible" that she failed to list some documents that were "important to [her] report."[75]

A district-court litigant who fails to comply with Rule 26's expert-disclosure requirements may be barred from relying on the litigant's expert unless the party shows the failure was substantially justified or harmless to the litigant's opponent.[76] Implicitly acknowledging this possibility, the Division asserts that Wills explained during her deposition that she was substantially justified in not listing everything she considered.[77] Maybe this is a reference to Wills's testimony that she was given a large volume of information. But the Division cites no precedent that might support the proposition that Rule 26(a)(2)(B)(ii)—and by extension, Rule of Practice

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[72] *In re Commercial Money Ctr., Inc., Equip. Lease Litig.*, 248 F.R.D. 532, 536–37 (N.D. Ohio 2008) (construing former mandate to disclose "the data or other information *considered* by the witness in forming the opinions" (emphasis added)) (citations omitted); *see Reg'l Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 716 (6th Cir. 2006) ("[W]e read Rule 26(a)(2) as requiring disclosure of *all* information provided to testifying experts."); *Lewert v. Boiron, Inc.*, 212 F. Supp. 3d 917, 931 (C.D. Cal. 2016), *aff'd*, 742 F. App'x 282 (9th Cir. 2018); *Yeda Research & Dev. Co. v. Abbott GmbH & Co. KG*, 292 F.R.D. 97, 105 (D.D.C. 2013).

[73] *In re Mirena IUD Prods. Liab. Litig.*, 169 F. Supp. 3d 396, 470 (S.D.N.Y. 2016); *see Yeda Research*, 292 F.R.D. at 105; *Johnson v. Gmeinder*, 191 F.R.D. 638, 649 (D. Kan. 2000)).

[74] *See* Allen Decl., ex. C at 16–17, 20.

[75] *Id.* at 17.

[76] *Mirena*, 169 F. Supp. 3d at 470–71; *see* Fed. R. Civ. P. 37(c)(1).

[77] Opp'n at 8–9.

222(b)(1)(ii)—does not apply when an expert considers a large volume of information. Further, the Division does not claim that Wills has since rectified her omission or that it has arranged for her to be re-deposed about the materials she omitted.[78]

The Division also argues that Wills's omission is harmless because of her extensive recitation of the significant materials she relied upon. But the Division has not yet rectified Wills's omission; it has not submitted a supplement to her report showing all that she considered. There is therefore no basis to know whether Wills's omission is harmless.

The parties should be prepared to discuss an appropriate sanction during the prehearing conference on September 27, 2019. In the interim, Wills must disclose all materials she considered.

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James E. Grimes
Administrative Law Judge

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[78] *See Lewert*, 212 F. Supp. 3d at 932 (declining to exclude a party's primary expert because the expert's "failure of disclosure may be corrected via supplementation and a limited deposition").