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UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING

File No. ~~3-15124~~

*3-15918*

In the Matter of

DENNIS J. MALOUF

DIVISION OF ENFORCEMENT'S  
OPPOSITION TO RESPONDENT DENNIS  
MALOUF'S MOTION IN LIMINE TO  
EXCLUDE CERTAIN EVIDENCE AND  
TESTIMONY

## **I. INTRODUCTION**

The Division of Enforcement (“Division”) hereby responds to the motion in limine filed by Respondent Dennis Malouf. Respondent’s motion attempts to exclude from evidence some of the most damning evidence against him, for flawed reasons that do not support exclusion. Respondent objects to several of the Division’s exhibits for reasons that are insufficient to exclude evidence in an administrative proceeding. The Division’s exhibits are relevant and should be admitted.

Respondent also argues that evidence of his bond trades, which underlie this case, should not be admitted because the Division cannot identify which of UASNM’s bonds trades were made by Respondent. Yet Respondent has admitted that at least 60 to 70 percent of the bond trades were his, and that factual basis is more than adequate to support the Division’s case, so Respondent’s argument should be rejected. Respondent further attempts to exclude a portion of the Report of the Division’s expert Gary Gibbons based on the incorrect usage of quotation marks in one sentence, and the assertion that Dr. Gibbons is opining as to a claim that is not a part of this case. However, Dr. Gibbons’ opinions squarely support the Division’s pleaded claims. Respondent argues that Steven McGinnis should be excluded as a witness because the Division did not identify him as an expert witness. But Mr. McGinnis is a fact witness who will testify about the analysis and recommendation he made as an expert in the prior litigation between UASNM and Respondent. And even if he were viewed as an expert in this case, precedent dictates that his testimony should not be excluded. Finally, Respondent for the second time and for the same reasons as before attempts to exclude the prior sworn testimony of Maurice Lamonde, who is deceased. That testimony, which strongly supports the Division’s case, has already been admitted by the Hearing Officer pursuant to the Division’s motion. Thus, all of the arguments in Respondent’s motion in limine should be rejected and the motion should be denied.

## II. ARGUMENT

### A. The Division's Exhibits to which Respondent Objects are Admissible.

Respondent has objected to several of the Division's exhibits, largely on bases that are invalid objections in an administrative proceeding. Rule 320 states: "The Commission or the hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious." Thus, Respondent's objections that do not go to the relevance or materiality of the Division's exhibits should be rejected. Respondent largely attacks the claimed unreliability or hearsay aspects of certain documents, which are not valid objections to admissibility, and at best affect only the weight that should be afforded to evidence. In any case, the documents objected to by Respondent should be admitted for the following summary reasons, upon which the Division is happy to expand at the hearing:

Exhibit	Objections	Reasons to Admit
10	Unreliable, irrelevant, lacks probative value	UASNM marketing piece in use as late as June 2008 according to Kirk Hudson of USNM that contains a biography of Respondent. Description of UASNM business and Respondent's background plainly relevant.
13	Unreliable, irrelevant, lacks probative value, questionable authenticity	UASNM financial statements for relevant time period and summary cover page created by Division pulling numbers directly from financial statements. Financial statements related to UASNM and Respondent plainly relevant.
30, 207	Unreliable, questionable authenticity	UASNM spreadsheet of all bond trades at UASNM during relevant time period, and Division summary of same. UASNM and Respondent's bond trades plainly relevant.
40	Unreliable, hearsay	ACA e-mail from Mike Ciambor indicating that "No one knew that this Malouf was getting money under the table from Raymond James. He repeatedly told us during our reviews that he had completely severed his ties to RJ after he sold his interest in the RJ branch office he previously owned." Respondent's false representations regarding commissions for Maurice Lamonde's bond trades plainly

		relevant.
44, 44A	Expert testimony	Steven McGinnis's testimony about his work on previous litigation and recommendation that UASNM self report to SEC plainly relevant, as detailed in Section II.D., below.
66, 68, 69	Unreliable, irrelevant, not supported by personal knowledge	UASNM historical website from Internet Archive. <sup>1</sup> Representations related to UASNM and Respondent plainly relevant.
67, 112	Irrelevant, probative value outweighed by prejudicial and misleading nature	Division-created summary of Respondent's bond trades. Plainly relevant. Argument that not all trades placed by Respondent addressed in Section II.B., below.
89, 90	Hearsay	E-mails between Lamonde and his wife regarding payments to Respondent and lack of written agreement with Respondent. Plainly relevant to those payments, secret agreement, and Raymond James's discovery of same.
101, 102, 140	Unreliable, irrelevant, hearsay, not supported by personal knowledge	Documents from Raymond James establishing payroll advances to Lamonde. Plainly relevant to those advances being used to pay Respondent commissions.
152	Unreliable, irrelevant, hearsay	Raymond James e-mail regarding Lamonde's payments of commissions to Respondent. Plainly relevant.

**B. Evidence of Respondent's Bond Trades is Admissible.**

Respondent argues that because the Division cannot identify the particular bond trades that Respondent directed to Lamonde (as opposed to the trades directed by other UASNM personnel),

<sup>1</sup> See *Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey*, 497 F. Supp. 2d 627, 631 (E.D. Pa. 2007) ("By way of background, the Internet Archive is a nonprofit organization that has created an online library of digital media in an effort to preserve digital content for future reference. Its digital database is equivalent to a paper library, but is filled with digital media like websites instead of books. The library includes a collection of chronological records of various websites which Internet Archive makes available at no cost to the public via the Wayback Machine. The library's records include more than 85 billion screenshots of web pages which are stored on a computer database in California. Internet Archive's database provides users with the ability to study websites that may have been changed or no longer exist."); see also <http://archive.org/legal/faq.php> (Internet Archive FAQ).

evidence of any bond trades is inadmissible. Respondent essentially asks the Hearing Officer to ignore Respondent's own admission that at least 60 to 70 percent of the bond trades were his. (Malouf Tr. 298:11-299:1) Respondent also stipulated to the fact that he "was primarily the person at UASNM who identified which bonds should be purchased for UASNM customers." Stipulation No. 8. Furthermore, Lamonde testified that "probably 90 percent" of UASNM's bond trades directed to him were from Malouf, while Joseph Kopczynski and Kirk Hudson testified that the majority or great majority of them were. (Lamonde Tr. 244:22-245:3; Kopczynski Tr. 94:19-22; Hudson Tr. 250:10-20) The Division's case is based on the fact that of UASNM's bond trades submitted to Lamonde, Respondent submitted the vast majority of them, and committed a variety of violation of the securities laws by doing so and receiving over \$1,000,000 in transaction-based compensation for those trades. The Division's case in no way assumes that Respondent is responsible for 100% of the bond trades. Thus, Respondent's motion in limine should be denied on this point.<sup>2</sup>

**C. Section 5.E of the Gibbons Report, Related Figure A5-13, and Testimony Regarding Those Topics, are Admissible.**

In Section 5.E of his Report, Dr. Gibbons opines that, contrary to Respondent's testimony, he engaged in trades that were not beneficial to his clients, and there existed a conflict of interest. Respondent attempts to exclude Section 5.E of the Gibbons Report because Dr. Gibbons erroneously included quotation marks around a portion of his Report that summarizes Mr.

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<sup>2</sup> Additionally, Respondent now belatedly moves to exclude exhibits 160, 178, and 202-206. But Respondent failed to object to those exhibits on October 24, 2014, when such objections were due. His motion as to these exhibits should be denied for this reason as well.

Malouf's testimony rather than quote it directly.<sup>3</sup> This minor error in attribution, given that his summary is substantively correct, is no reason to exclude an entire portion of Dr. Gibbons' Report.

Respondent also claims that in this portion of the Report, Dr. Gibbons is opining that Respondent engaged in churning. But he is not. There is no claim for churning in this case. Rather, what Dr. Gibbons colloquially refers to as "churning" is Respondent's repeated buying and selling of securities at a loss for clients, which supports the facts alleged in paragraph 15 of the OIP: "Malouf's conflict of interest led him to execute bond trades through Branch Manager and Broker-Dealer even where this may not have been in the best interest of UASNM clients."

Furthermore, Section 5.E of the Gibbons Report supports the Division's fraudulent scheme claim. The scheme and fraudulent course of business was Respondent's undisclosed secret agreement with Lamonde to receive substantially all the commissions from UASNM's bond trading executed through Respondent's former Raymond James branch. Respondent's frequent trading in and out of what are typically long-term holdings, while not supporting a churning claim here, show that Respondent's bond trading decisions were *not* always in his clients' best interest and support a finding of scienter. Thus, Respondent's motion in limine should be denied as to this argument, and Dr. Gibbons' Report and related testimony should be admitted.

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<sup>3</sup> Compare "In Malouf's deposition (Malouf 0263 12), he claims that his 'trades were all beneficial for his clients and that in no instance did they lose money as a result of his trading activity.'" (Gibbons Report Section 5.E) to "As far as the -- you can say what you want about the commission, whatever, but the point is the bond trades themselves stand on their own. Look at any one of them and see if they were not in line, meet the client's investment objective, and whether or not they lost one dime in that transaction. If they were not better off for being in that investment, did it add value to the fixed income piece that was paying 1/2 percent in a mutual fund versus 2-1/2 percent to 3 percent actual yield so the client literally had a return on their money instead of no return?" (Malouf Tr. 263:23-264:10)

**D. The Analysis, Charts, Tables, Exhibits, and Testimony of Steven McGinnis Should be Admitted.**

Respondent argues that the testimony and documents of Mr. McGinnis should be excluded because they constitute undisclosed expert testimony. This is simply not the case. First and foremost, Mr. McGinnis is a fact witness. Respondent's core defense in this matter is that Joseph Kopczynski orchestrated a coup to eject Respondent from UASNM because Respondent cheated on his wife – Mr. Kopczynski's daughter – and that UASNM's termination of Respondent and its self report to the Commission were driven by this personal dispute, as detailed in Respondent's

Answer:

“The action stems from animosity Kopczynski holds toward Malouf due to a highly charged personal dispute.” Answer at 1.

“In reality, what UASNM has self-reported to the Commission is a carefully spun, but incorrect version of the facts intended to benefit Kopczynski at Malouf's expense.” *Id.* at 2.

“Kopczynski then spun his own version of past events, self-reported them, and threw UASNM to the mercy of the Commission while pointing a finger at Malouf.” *Id.* at 4.

“The alleged conduct UASNM reported to the Commission has been carefully crafted in hindsight to benefit Kopczynski and sink Malouf.” *Id.* at 5.

Respondent then doubled down on this same core defense in his pre-hearing brief. *See* Respondent's Pre-Hearing Brief at 1, 10-11.

But Respondent's version of the facts surrounding his termination and UASNM's self report to the Commission is inaccurate, and the testimony of Mr. McGinnis will provide strong evidence of that. UASNM retained Mr. McGinnis as an expert witness in its litigation against Respondent. *See* Exh. 44. Mr. McGinnis has over 40 years of experience in the securities industry, dealing with compliance issues for both broker dealers and investment advisers. *See id.* UASNM

“retained [Mr. McGinnis] to look at the evidence that was derived from the discovery and from testimony and to render an opinion as to what [he] thought would be the compliance response to that evidence. . . .” *Id.* at Tr. 53:4-11. Mr. McGinnis will testify at this proceeding as a foundational matter regarding his personal background and experience and the analysis he performed concerning Respondent’s bond trades, then most importantly that as a result of his analysis, Mr. McGinnis recommended that UASNM self report to the Commission. *Id.* at Tr. 49:2-22. Mr. McGinnis will further testify that he advised UASNM that by self reporting to the Commission, and by having already rightly terminated Respondent for his improper actions, which are now the subject of this case, the Commission would likely allow UASNM to continue to operate, but not doing so would threaten the continued existence of UASNM. *Id.* at Tr. 49:23-51:11. Thus, Mr. McGinnis should be allowed to testify as a fact witness as to his analysis and resulting recommendation in the UASNM v. Malouf litigation.

To the extent that any part of Mr. McGinnis’s testimony could be viewed as expert testimony, such testimony would still be admissible. The recent District Court case of *Kinetic Concepts, Inc. v. Wake Forest University Health Sciences*, No. SA-11-CV-163, 2014 WL 2767070, (W.D. Tex. June 18, 2014), allowed an expert to testify where he had submitted a report in a prior litigation regarding the same patents at issue in that current litigation. The Court reasoned that the opposing party was aware of the expert’s prior opinions, and the purpose of expert disclosure rules is to prevent unfair surprise. The prior disclosure satisfied the requirements of Rule 26, and the expert was allowed to testify. Likewise here, Respondent was a party to the prior litigation involving Mr. McGinnis as an expert, and the Division has provided all of the documents from that litigation regarding Mr. McGinnis’s opinions to Respondent. *See* Exhs. 44 and 44A. Nor is Rule 222(b) a bar to the testimony of Mr. McGinnis. The Division does not intend to call him as an



expert witness, so the Rule does not apply, but in any case the Division has disclosed all documents in its possession regarding Mr. McGinnis. The purposes of the expert disclosure rules have therefore been satisfied, so Mr. McGinnis should be allowed to testify even if some of his testimony were to constitute expert testimony. This is especially true in light of the broad discretion afforded to the Hearing Officer and the broad admissibility of evidence directed by the Commission's Rules of Practice.

**E. The Testimony of Lamonde Should be Admitted.**

Respondent now improperly attempts to reargue that the testimony of Lamonde should be excluded. The prior Hearing Officer already rejected the same arguments in the September 23, 2014 Order Granting Motion to Admit Prior Sworn Statement. In that Order the prior Hearing Officer granted the Division's request to admit the sworn testimony of Lamonde, given his subsequent death. Respondent opposed the motion on bases including that Lamonde's testimony was contradictory and obtained through improper coercion from the Division, the *exact same* arguments he makes now. *See* Respondent's September 22, 2014 Opposition to Motion to Admit Prior Sworn Statement at 8-13. The prior Hearing Officer properly ruled that the testimony should be admitted, and that any arguments about the reliability of the testimony "must be evaluated in light of the entire record[.]" September 23, 2014 Order at 2. Remarkably, Respondent argues that it would be "wholly inappropriate" for the Hearing Officer to determine the facts of this case based upon Lamonde's testimony, yet that is the precise role of a fact finder. Thus, Respondent's attempt to reargue the same position that was already rejected should itself be rejected.

**III. CONCLUSION**

Respondent's motion in limine should be denied.

Respectfully submitted this 10th day of November, 2014.

/s/Dugan Bliss

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SERVICE LIST

On November 10, 2014, the foregoing **DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENT DENNIS MALOUF'S MOTION IN LIMINE TO EXCLUDE CERTAIN EVIDENCE AND TESTIMONY** was sent to the following parties and other persons entitled to notice:

Brent Fields, Secretary  
Office of the Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549  
(Original and three copies by UPS)

Honorable Jason S. Patil  
Administrative Law Judge  
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