UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	)	
	)	
	)	**Administrative Proceeding**
Judy K. Wolf	)	**File No. 3-16195**
	)	**Judge Cameron Elliot**
Respondent.	)	
	)	

RESPONDENT JUDY K. WOLF'S RESPONSE TO THE DIVISION OF ENFORCEMENT'S OBJECTION TO RESPONDENT'S WITNESS STEVEN M. SALKY

Respondent Judy K. Wolf, through counsel, responds to the Division of Enforcement's (the "Division") Objection to Respondent's Witness Steven M. Salky. The Division's objection is misplaced. Ms. Salky's brief testimony will be both relevant and material. And, contrary to the Division's contention, no ethical rule prohibits Mr. Stalky from testifying. Therefore, this Court should reject the Division's objection and allow Mr. Salky to testify.

I. Mr. Salky Will Present Relevant and Admissible Evidence.

On March 13, 2013, Ms. Wolf provided erroneous testimony in the Division's investigation. She has not disputed that issue in the past, and she will not do so at the hearing. *See, e.g.*, Stipulated Facts ¶¶ 49-52, 58-59. When Ms. Wolf first testified, she was represented by two lawyers, Stephen Young and Philip Toben. *Id.* ¶¶ 46-47. In addition to representing Ms. Wolf, Stephen Young previously had represented Waldyr Prado, a Wells Fargo employee being investigated by the SEC. Mr. Young also represented Wells Fargo, a client with whom he had a longstanding relationship. *Id.* ¶ 46. Mr. Toben, an in-house lawyer at Wells Fargo, represented Wells Fargo at the time, and he would later represent other individuals in the Division's investigation. *Id.* ¶ 47. After Ms. Wolf testified inaccurately, her lawyers perceived a potential

conflict between Ms. Wolf and Wells Fargo and recommended that she obtain new counsel. In other words, following her inaccurate testimony, Ms. Wolf was left without counsel.

On April 10, 2013, Ms. Wolf retained the law firm of Zuckerman Spaeder to represent her. *Id.* ¶ 56. Steven M. Salky was the partner on the matter, and undersigned counsel was the associate on the matter. Shortly after retaining new counsel, Ms. Wolf, after consulting with counsel, authorized her attorneys to proffer to the Division that Ms. Wolf erred during her testimony and to explain the errors. On April 24, 2013, Mr. Salky, with undersigned counsel on the phone, provided the following proffer to David Brown and Megan Bergstrom, the Division attorneys conducting the investigation:

> Judy will correct her testimony that (1) she made all the entries on the review spreadsheet regarding the Burger King insider trading review in September 2010; and (2) she included the excerpt from the spreadsheet regarding the Burger King review in her file in 2010. During her testimony, she made an assumption that she must have entered comments into the spreadsheet when she performed her initial review based on her usual practice and she made an assumption based on her more current practice that she included the spreadsheet in her initial review file. Judy is now unsure that she made all of the entries on the spreadsheet and, if she did, when that occurred. She will testify that it is more likely than not that she made the notes/comments and findings entries in the spreadsheet in 2012 and included the spreadsheet in the review file in 2012, as part of her providing information and materials to her superiors. She will explain the various times in 2012 she was asked for information relating to her Burger King review, but it's too complex for me to cover in this proffer.

Ms. Wolf seeks to call Mr. Salky as a witness to testify to the proffer he made to Division counsel on April 24, 2013.

The Division's objection refers to the proffer with the word "purportedly" to suggest Mr. Salky's description of the proffer will be inaccurate. This assertion is frivolous, as the Division attorneys know that the proffer was made.

The need for, and relevancy of, Mr. Salky's testimony is apparent from the Division's own pleadings, which repeatedly emphasizes the timing of Ms. Wolf's various actions. *See, e.g.*, Brown Decl. ¶ 6 (emphasizing 13 months between Ms. Wolf's original testimony and the correction of her testimony); Division's Objections to Respondent's Witness Steven M. Salky at 2 (stating that Ms. Wolf provided a *post-hoc* explanation for "false testimony"). Mr. Salky's testimony will demonstrate that, at the earliest opportunity available, Ms. Wolf's lawyers corrected her erroneous testimony, and provided an explanation for the errors. Such testimony is both relevant to Ms. Wolf's state of mind – a key contested issue – and to this Court's consideration of punishment, should it need to decide that issue. *See, e.g.*, *In the Matter of Joseph P. Doxey and William J. Daniels*, SEC Release No. 598, 2014 WL 1943919, at *20 (May 15, 2014) ("The appropriateness of any remedial sanction in this proceeding is guided by the public interest factors set forth in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981), namely: the egregiousness of the respondent's actions; the isolated or recurrent nature of the infraction; the degree of scienter involved; the sincerity of the respondent's assurances against future violations; the respondent's recognition of the wrongful nature of his or her conduct; and the likelihood that the respondent's occupation will present opportunities for future violations.").

II. The Division's Arguments Regarding Mr. Salky's Testimony's Inadmissibility Are Wrong.

A. Ms. Wolf's Testimony Will Not Render Mr. Salky's Testimony Irrelevant or Cumulative.

As the Division contends, Ms. Wolf can explain why she erred during her testimony. She already has done so, in testimony she gave on April 14, 2014. Stipulated Facts ¶¶ 58-59. That does not render Mr. Salky's testimony irrelevant, or cumulative. While the Court will determine the veracity of Ms. Wolf's explanation (to the extent such a determination is relevant to this proceeding) based on her testimony, Mr. Salky's testimony will establish how quickly Ms. Wolf corrected her erroneous testimony.

B. Wells Fargo's Provision of Information Does Render the Proffer Irrelevant.

The Division argues that Ms. Wolf only corrected her testimony after the "cat was out of the bag," and, therefore, any proffer offered by Mr. Salky, on Ms. Wolf's behalf, is irrelevant. Assuming the Division's assessment of the facts is correct, which it is not, Mr. Salky's testimony still is relevant for the reasons discussed above. The Division can argue the "cat was out of the bag," but that is just an argument about how this Court should weigh relevant evidence.

C. Hearsay Evidence is Admissible and, in any Event, Mr. Salky's Testimony Does Not Constitute Hearsay.

The Division elected to proceed in this forum, but it does not want to adhere to the Securities and Exchange Commission's Rules of Practice. 17 C.F.R. § 201.320 (discussing admissibility of evidence); *In the Matter of Jerry W. Anderson and Robert M. Kerns*, SEC Release No. 166, 2000 WL 796088, at *10 (May 31, 2000) ("Respondents have reluctantly acknowledged that the Federal Rules of Evidence do not apply to administrative adjudications The Commission has cautioned its Administrative Law Judges to be inclusive in making evidentiary determinations.") (citations omitted); *see also In the Matter of Russo Securities, Inc.*,

SEC Release No. 42115, 1999 WL 1012303, at *2 (Nov. 9, 1999) ("Commission Rule of Practice 320 permits the Commission to receive all relevant evidence and [to] exclude all evidence that is irrelevant, immaterial or unduly repetitious. The notion of 'relevance' embodied in Rule 320 is broader than that concept under the Federal Rules of Evidence. The Federal Rules of Evidence are designed for juries and do not apply to administrative adjudications. 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.") (internal quotations omitted). In an administrative proceeding, no rule prohibits the admission of hearsay evidence. *See* 17 C.F.R. § 201.320; *In the Matter of Thomas C. Gonnella*, Administrative Proceeding File No. 3-15737, at 2 (Order on Motions in Limine), *available at* https://www.sec.gov/alj/aljorders/2014/ap-1579.pdf (denying Division of Enforcement motion in limine because "hearsay evidence that is relevant is admissible in administrative proceedings"); *see also* General Prehearing Order ¶ 6 ("There is no general prohibition on hearsay evidence in Commission administrative proceedings."); *id.* ¶ 7 ("Evidence that is not irrelevant, immaterial, or unduly repetitious is inadmissible; *all other evidence is presumptively admissible.*") (emphasis added). For this reason, the Division's hearsay objections are misplaced.

In any event, Mr. Salky's testimony will not be hearsay. For one thing, it is being offered for the timing and substance of the proffer, not the truth of the matters asserted during the proffer. *See* Fed. R. Evid. 801.

III. The Witness Advocate Rule Does Not Bar Mr. Salky's Testimony

The Division asserts, with no analysis, that Mr. Salky may not testify in this matter, because Rule 3.7 of the American Bar Association Model Rules of Professional Conduct constrains him from doing so. The Division is incorrect. As an overarching matter, the hearing

will be a bench trial, which will obviate the risks of confusion to the fact finder or prejudice to the opposing party that form the basis for the rule. Ex. A, Comment [2]. Even without referring to the rationale behind the rule, however, it does not apply here for several reasons.

First, Rule 3.7(b) states that a lawyer "*may* act as an advocate in a trial in which another lawyer in the firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9." Ex. A (emphasis added). At the hearing, Mr. Salky will sit at counsel's table, but he will not present argument. Undersigned counsel, another lawyer in Mr. Salky's firm, will do so, and will act as the advocate. Rules 1.7 and 1.9 pose no obstacle to this arrangement.

Second, even if Mr. Salky were the advocate, Rule 3.7 would still allow him to testify. Rule 3.7(a)(1) permits such a situation when the testimony relates to an uncontested issue. *See id.* As discussed above, although the Division attempts to manufacture a contested issue by using the word "purportedly" to describe the proffer, such an assertion is frivilous.

Third, Rule 3.7(a)(3) provides that a lawyer may also act as both a witness and an advocate when "disqualification of the lawyer would work substantial hardship on the client." Ex. A. As the Division knows, Ms. Wolf is currently unemployed. She has been unemployed since June 2013. Stipulated Fact ¶ 57. Even when she was employed, she earned approximately $60,000 per year. *Id.* ¶ 4. Originally, Wells Fargo paid Ms. Wolf's counsel's fees. However, once Wells Fargo settled with the SEC, it stopped paying Ms. Wolf's legal fees. Nonetheless, Ms. Wolf's current counsel continued to represent her for free. If we are disqualified, Ms. Wolf likely will be unable to afford new counsel. Additionally, no new counsel could be expected to prepare for a hearing in under a week. Therefore, Rule 3.7(a)(3) applies to this situation, as disqualification of counsel would "work a substantial hardship" on Ms. Wolf.

In short, Rule 3.7 allows Mr. Salky's testimony in this proceeding.

IV. Conclusion

For the foregoing reasons, Mr. Salky's will provide relevant testimony, and no rule of evidence or ethics prevents him from doing so. This Court should, therefore, reject the Division's objection to Mr. Salky's testimony.

Date: February 17, 2015

Respectfully submitted,

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Exhibit A

Rule 3.7: Lawyer as Witness

Advocate

Rule 3.7 Lawyer As Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

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Comment on Rule 3.7

Advocate

Rule 3.7 Lawyer As Witness - Comment

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

Advocate-Witness Rule

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

Conflict of Interest

[6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(e) for the definition of "informed consent."

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

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