

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File Nos. 3-16311, 3-16312

In the Matters of

RELIANCE FINANCIAL
ADVISORS, LLC, TIMOTHY
S. DEMBSKI and WALTER F.
GRENDA, JR.,

SCOTT M. STEPHAN,

Respondents.

DIVISION OF ENFORCEMENT'S MOTION AND MEMORANDUM
OF LAW IN SUPPORT OF ITS MOTION *IN LIMINE* TO PRECLUDE
RESPONDENT DEMBSKI FROM CALLING TWENTY INVESTOR WITNESSES

DIVISION OF ENFORCEMENT
Michael D. Birnbaum
Tony M. Frouge
Securities and Exchange Commission
New York Regional Office
Brookfield Place
200 Vesey Street, Suite 400
New York, NY 10281
(212) 336-0523 (Birnbaum)
(212) 336-1319 (fax)

ARGUMENT

The Division of Enforcement (“Division”) respectfully moves the Court *in limine*, and submits this memorandum of law in support of that motion, to preclude Respondent Timothy S. Dembski (“Dembski”) from calling investor witnesses to provide “irrelevant, immaterial or unduly repetitious” testimony. Commission Rule of Practice 320. Five days after receiving the Division’s witness list, Dembski offered his own witness list comprising nearly all of his clients who were Prestige Fund investors that were not already identified on the Division’s list (plus four additional individuals, presumably investors who were offered, but declined to purchase, investments in the Fund).¹ Dembski’s witness list, like his reservation of rights to identify exhibits at some later date, appears to be a placeholder through which Dembski seeks to grant himself more time to determine which investor witnesses he wishes to call in his defense. But even if one credits Dembski’s witness list as a good faith effort to identify witnesses he intends to call, these witnesses should not be permitted to testify—and certainly not all twenty of them—about facts irrelevant to the issues in dispute in this case.

In response to the Division’s request that Dembski provide, consistent with Rule 222(a)(4), a brief summary of each witness’s testimony, Dembski informed the Division that he intends to call all twenty of the investor witnesses on his list to testify to the same two things: (i) that they received the Prestige Fund PPM before investing in the Fund, and (ii) that Dembski emphasized to them the risky nature of the Prestige Fund investment. (*See* attached Exhibit A, Apr. 20, 2015 Email from Paul Batista to Tony Frouge, copying the Court, et al.) Then, on April 22, 2015, Dembski provided summaries for the subject of each witness’s anticipated testimony.

¹ As best the Division can determine, the only Dembski client who invested in the Prestige Fund Dembski omitted from his list (other than those already on the Division’s witness list) is one who filed a private suit against Dembski based on Prestige Fund-related events.

Those summaries, attached hereto as Exhibit B, confirmed that the witnesses Dembski intends to call do not have testimony to offer relevant or material to a disputed allegation in this case.

That each Prestige Fund investor received a materially misleading Prestige Fund PPM is not something the Division intends to contest, so there is no reason to call one witness, let alone twenty, to establish that fact. As for the possibility that there may exist some investors who purportedly were told that the Prestige Fund investments were risky, or were otherwise satisfied with Dembski's financial services, that has no relevance in this case.

Courts have held repeatedly that the testimony Dembski apparently seeks to elicit is irrelevant. For example, in *Levine v. SEC*, 436 F.2d 88 (2d Cir. 1971), the Second Circuit embraced the Commission's reasoning in affirming a hearing examiner's decision to preclude the testimony of forty-seven customer witnesses. "[A]s the Commission found[,] 'the testimony of some customers that other misrepresentations had not been made to them would not negate the testimony of the customers who testified the price predictions had been made to them.'" 436 F.2d at 91-92 (affirming decision while noting respondents were permitted to call four other witnesses for the same purpose they sought to call the additional forty-seven individuals). Similarly, in *United States v. Bravata*, a securities fraud case where defendants sought to call witnesses to say they did not feel deceived by defendants' alleged misrepresentations, the trial court stated: "[T]hat some investors may not have felt deceived is simply irrelevant to the Government's case... ." *U.S. v. Bravata*, No. 11-cr-20314 (PDB), 2013 WL 692841, at *3 (E.D. Mich. Feb. 26, 2013). As the Court further explained, "the case law is clear" that "Defendants may not present evidence of 'satisfied investors' to refute the testimony of the Government's investor witnesses." *Id.*, at *1 (citation omitted). Accordingly, anticipated testimony from

Joanne Brown, John Schreiner, Kathryn Senser, Richard and Amy Burns and others that they remain clients of Mr. Dembski (Exhibit B at 1-3) should be precluded.

The Eleventh Circuit reached the same conclusion in *United States v. Elliott*, 62 F.3d 1304 (11th Cir. 1995). There, the *Elliott* Court affirmed the District Court's decision not to permit defendants to call customers who "were to have testified to their belief that [defendants] had committed no wrongdoing." *U.S. v. Elliott*, 62 F.3d at 1308. The Court explained:

To the extent that [defendants] proffered the witnesses to show that these investors did not believe that they had been defrauded, that they had received a portion of their money back upon request, that [defendant] Elliott had told these investors to testify truthfully before the SEC, or that Elliott had backed these investors with the appropriate collateral as he had promised, the district court properly excluded this testimony as irrelevant.

*Id.*²

Here, the Division will prove that specific misrepresentations were made to investors in the Prestige Fund, ranging from Dembski's promises to monitor the Prestige Fund closely or daily (when he knew he would do no such thing) to his assurances that the Fund's trading would be conducted by an experienced expert when Dembski knew that his novice partner, Respondent Scott M. Stephan, would be responsible for all trading decisions. That some investors, like Maryann Neary or Gerald May Sr. believed they were aware of the risks involved with the Prestige Fund (Exhibit B at 2), or that Mark and Sue Stapell decided not to invest in the Prestige

² See also *U.S. v. Winograd*, 656 F.2d 279, 284 (7th Cir. 1981) ("[E]vidence that [defendant] engaged in certain legal trades is generally irrelevant to the issue of whether he knew of other illegal trades."); *U.S. v. Biesiadecki*, No. 89 CR 39-2, 1990 WL 36232, at *4 ("Evidence that [defendant] did not make misrepresentations to four customers not named in the indictment has no bearing upon whether he made such misrepresentations to the customers named in the indictment."); *William L. Kicklighter, Jr.*, 51 S.E.C. 1, 1991 WL 288619, at *4 (Dec. 18, 1991) (finding that respondent made misstatements to certain customers "is not impaired because respondents may have made full disclosure to other customers."); *C.f. U.S. v. Perez*, No. 09 CR 1153 (MEA), 2011 WL 1431985, at *1 (S.D.N.Y. Apr. 12, 2011) (granting *in limine* motion to exclude evidence that defendant provided accurate advice to some clients).

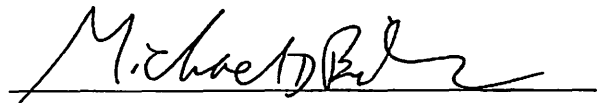
Fund (*id.*), does not negate the misrepresentations the Division will prove at the Hearing. See *U.S. v. Walker* 191 F.3d 326, 336 (2d Cir. 1999) (upholding district court’s decision to exclude evidence of defendant’s purportedly honest work for clients where defendant sought to argue that “the existence of these honest applications disproved his fraudulent intent in this case.”)

CONCLUSION

In short, Dembski should not be permitted to call twenty witnesses to (i) establish the undisputed fact the he gave his clients the misleading Prestige Fund PPM, and (ii) testify that, other than the statements in the PPM, Dembski never lied to them. Should the Court find any of Dembski’s witnesses’ proffered testimony relevant—notwithstanding the case law set forth above—the Division respectfully submits that calling all twenty investors identified on Dembski’s witness list would be unduly repetitious. Moreover, if, as the Division fears, listing all twenty witnesses was just another means by which Dembski chose to award himself more time to decide which witnesses to call—leaving the Division to prepare for each of them—then Dembski should not be permitted to call his investor witnesses for the additional reason that such tactics should not be rewarded.

Dated: April 22, 2015
New York, New York

DIVISION OF ENFORCEMENT



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New York Regional Office
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200 Vesey Street, Suite 400
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EXHIBIT A

Birnbaum, Michael D.

From: Paul Batista [REDACTED]
Sent: Monday, April 20, 2015 4:07 PM
To: Frouge, Tony
Cc: Birnbaum, Michael D.; jmakowski@aol.com; ALJ
Subject: Re: MATTER OF TIMOTHY DEMBSKI, AP FIL NO. 3 16311

WILL DO. BUT ALL OF THEM WILL TESTIFY ESSENTIALLY THAT MR. DEMBSKI PROVIDED THEM WITH THE PPM AND EMPHASIZED TH RISKS OF INVESTMENT IN PRESTIGE.

On Apr 20, 2015, at 3:55 PM, Frouge, Tony wrote:

Paul,

Please provide, pursuant to Rule 222(a)(4), "a brief summary of [your witnesses'] expected testimony." You will find that we included that information in our April 15 filing. Thank you.

Tony M. Frouge
Senior Counsel
Division of Enforcement
Complex Financial Instruments Unit
U.S. Securities & Exchange Commission
200 Vesey Street, Suite 400
New York, NY 10281-1022
direct dial: (212) 336-0117

From: Paul Batista [REDACTED]
Sent: Monday, April 20, 2015 3:41 PM
To: Frouge, Tony
Cc: ALJ; Birnbaum, Michael D.; [REDACTED]; TIMOTHY DEMBSKI
Subject: MATTER OF TIMOTHY DEMBSKI, AP FIL NO. 3 16311

EXHIBIT B

PAUL BATISTA, P.C.
Attorney-at-Law
26 Broadway - Suite 1900
New York, New York 10004
(212) 980-0070

e-mail: [REDACTED]

Facsimile: (212) 344-7677

April 22, 2015

Tony M. Frouge, Esq.
U.S. Securities and Exchange Commission
200 Vesey Street, Suite 400
New York, New York 10081-1022

Re: **In the Matter of Reliance Financial, Inc., et al.,**
(AP File No. 3-16311) and
Scott M. Stephan (AP File No. 3-16312)

Dear Mr. Frouge:

ADDEMDUM TO LETTER DATED APRIL 20, 2015
TO TONY FROUGE OF THE SEC

1. **Joanne Brown**

Ms. Brown is expected to testify that she has been, and still is, an investment client of Mr. Dembski. She had a complete understanding of the risks involved with the Prestige Fund. She consulted with an attorney familiar with hedge funds. She received a copy of the Private Placement Memorandum ("PPM"). She is married to a very wealthy individual.

2. **Guenther and Iona Commichau**

The Commichaues are long-term investment clients of Mr. Dembski. They will testify that they trusted and still trust Mr. Dembski. Moreover, they will testify that they had the PPM and understood the Prestige Fund and hedge funds.

3. **Randy Settleberg**

Mr. Settleberg will testify that he was and still is a long-term client of Mr. Dembski and that he understood the risks of hedge funds and how the Prestige Fund was designed to operate.

4. **Donald and Juliane Goeltz**

The Goeltzes will testify that they are sophisticated investors with complete knowledge of hedge funds and the Prestige Fund. They will testify that they understood the algorithm of the Prestige Fund and that they had the Prestige PPM.

5. **John Schreiner**

Mr. Schreiner will testify that he understood the trading strategy of the PPM and had frequent contact with Schott Stephan ("Stephan") and was fully cognizant of the risks involved with the Prestige Fund. He will testify that he had his own trading account and is still a client of Mr. Dembski.

6. **Gerald May, Sr.**

Mr. May will testify that he is a long-term investment client of Mr. Dembski and that he was fully aware of the risks involved with the Prestige Fund and the function of the algorithm. He will also testify that he had experience in oil and gas trading. He is a very experienced investor and still a client of Mr. Dembski.

7. **Richard and Amy Burns**

These individuals will testify that they fully understood the risks involved with the Prestige Fund. They are still investment clients of Mr. Dembski.

8. **Stanley and Rosemary Kleidys**

They will testify that they are long-term clients of Mr. Dembski. They requested multiple times to invest in the Prestige Fund. Mr. Dembski denied these requests even though the couple were fully familiar with the fund.

9. **Mark and Sue Stapell**

They will testify that they too have been long-term clients of Mr. Dembski. They are experienced and seasoned investors who made their own decision not to invest in the Prestige Fund.

10. **Maryann Neary**

Ms. Neary will testify that she has been a long-term investor and client of Mr. Dembski. She was cognizant of the risks involved in the Prestige Fund. She remains an investment client of Mr. Dembski.

11. **Eric and Susan Oerich**

The Oeriches are long-term clients of Mr. Dembski and experienced real estate investors. They expressed an interest in the Prestige Fund. But, in Mr. Dembski's and their own views, they did not adequately grasp the Stephan algorithm and decided not to invest in the Prestige Fund.

Tony M. Frouge, Esq.
April 22, 2015
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12. **Kathryn Senser**

She will testify that she remains a long-term client of Mr. Dembski, and that she understood the risks involved in the fund.

13. **Julia Boduch**

She will testify that she very much wanted to invest in Prestige but that her request was denied because of the lack of sufficient sophistication. She remains a client of Mr. Dembski.

14. **Adam Dembski**

He will testify that he is a highly experienced engineer and that he understood the risks relating to Prestige and understood the algorithm. He remains a client of Mr. Dembski.

Sincerely yours,



Paul Batista

cc: Hon. Jason S. Patil
Secretary, Office of Administrative Law Judges
Michael Birnbaum, Esq.
Joseph Mak nowski, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Division of Enforcement's Motion and Memorandum of Law in Support of Its Motion *in Limine* to Preclude Respondent Dembski from Calling Twenty Investor Witnesses, and accompanying cover letter, addressed to The Honorable Jason S. Patil, dated April 22, 2015, by mailing a copy of same via UPS Overnight Mail on this 22nd day of April 2015 to:

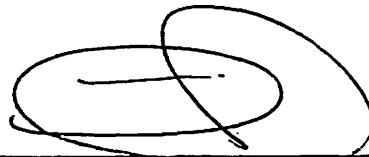
Brent J. Fields
Secretary of the Commission, Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street N.E.
Washington DC 20549

And by email to Respondents:

Timothy S. Dembski through counsel, Paul Batista, Esq., at [REDACTED]

Scott M. Stephan through counsel, Andrew J. Pace, Esq., at andrew@paceandpace.com

Reliance Financial Advisors, LLC and Walter F. Grenda, J. through counsel, Joseph Makowski, at [REDACTED]



Tony M. Frouge