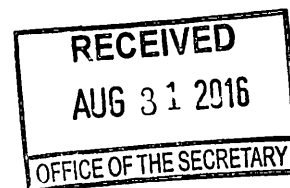


UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-17184



In the Matter of

CHRISTOPHER M. GIBSON

MOTION IN LIMINE REQUESTING EXCLUSION OF TESTIMONY
OF LAWYERS THOMAS HARMAN AND MYRON STEELE

The Division of Enforcement ("Division") requests an order providing that Respondent Christopher M. Gibson ("Gibson") may not introduce the testimony of attorneys Thomas S. Harman and Myron Steele, or their written reports, as expert testimony during the hearing in this matter.

Gibson has listed these two attorneys as "experts" and both have submitted reports. But neither Steele nor Harman offers any specialized knowledge or expertise other than his knowledge of the law, which is properly within the province and competence of the Hearing Officer. The proposed testimony would consist solely of inadmissible legal argument of paid advocates, dressed up as the opinions of expert witnesses, and should be excluded.

BACKGROUND

The Division alleges that Gibson, in his capacity as an investment adviser to the Geier International Strategies Fund, LLC ("GISF"), engaged in "front-running" his own client and favoring another party at the expense of GISF. Gibson violated his fiduciary duties to GISF under Sections 206(1) and 206(2) of the Investment Advisers Act of 1940 ("Advisers Act"), as

well as his obligations to GISF and GISF's investors pursuant to Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder. The Division also alleges that Gibson's conduct constituted deceptive schemes and courses of conduct in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rules 10b-5(a) and (c) thereunder.

The hearing in this matter is scheduled to begin on September 12, 2016. On August 5, 2016, Respondent submitted to the Division the reports of four "experts," including lawyers Thomas S. Harman ("Harman"), an attorney with the law firm of Morgan, Lewis & Bockius in Washington, and Myron T. Steele ("Steele"), a partner at the Delaware law firm of Potter Anderson & Corroon LLP.

ARGUMENT

"The purpose of an *in limine* motion is to aid the trial process by enabling the Court to rule in advance of trial on the relevance of certain forecasted evidence, as to issues that are definitely set for trial, without lengthy argument at, or interruption of, the trial." *Palmieri v. Defaria*, 88 F.3d 136, 141 (2d Cir. 1996) (internal quotation marks omitted). *See also Luce v. United States*, 469 U.S. 38, 41 n.4 (1984).

In securities cases, courts frequently admit expert testimony to assist the trier of fact in understanding practices in the securities industry. *See, e.g., United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir.1991); *Highland Capital Mgmt, L.P. v Schneider*, 551 F. Supp.2d 173, 178 (S.D.N.Y. 2008). However, "[c]are must be taken lest, in the field of securities law, [the expert] be allowed to usurp the function of the judge." *Marx & Co., Inc. v. Diners' Club Inc.*, 550 F.2d 505, 512 (2d Cir. 1977). Expert testimony may be admitted only if (i) the expert is qualified to testify competently, (ii) the methodology used is sufficiently reliable, and (iii) the testimony assists the trier of fact to understand the evidence or to determine a fact. *See Daubert v. Merrell*

Dow Pharm., Inc., 509 U.S. 579, 589-92 (1993). See also *Elliott v. Commodity Futures Trading Comm.*, 202 F.3d 926, 934 (7th Cir. 2000) ("[T]he principle . . . that all expert testimony must be reliable should apply with equal force to the weight a[n agency] factfinder accords expert testimony."); *In re WSF Corporation*, 2002 WL 917293 (May 8, 2002) (applying *Daubert* in SEC administrative proceeding).

I. Harman's Report Is Merely Attorney Argument And Should Not Be Admitted As Expert Testimony

Harman's report is essentially a legal brief attempting to instruct the Hearing Officer on the Advisers Act and arguing for an outcome favorable to Gibson.¹ Harman offers his legal interpretation of, *inter alia*, Section 202(a)(11) of the Advisers Act, Sections 3.01 and 3.02 of the GISF operating agreement, the legislative history of Advisers Act Sections 202(a)(17) and 203(b) and several "no action" letters by Commission staff. He also argues that, based on his legal analysis, the Commission wrongly decided a prior investment adviser case, *In the Matter of Dennis J. Malouf*, Sec. Act Rel. No. 10115 (July 27, 2016). Harman also offers sweeping generalizations said to be based on his experience with an unspecified number of unidentified offering documents, but points to nothing showing he has ever dealt with matters involving disclosure or non-disclosure of front running or the type of favoritism at issue here. Harman also makes claims regarding the fiduciary relationships among Gibson, James Hull, Hull's daughters, John Gibson, and Giovanni Marzullo based on his analysis of Commission policy (and on "facts" inconsistent with the record).

In short, Harman's report is simply argument by another of Gibson's attorneys. Likewise, his testimony would be additional oral argument. Such lawyer argument is not expert testimony, and would be wholly unnecessary and cumulative in this case. "Each courtroom comes equipped

¹ Expert Report of Thomas S. Harman, August 5, 2016 ("Harman Report"), Respondent's Ex. 148.

with a 'legal expert,' called a judge." *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1213 (D.C. Cir.1997). Because the court (or in this case, the Hearing Officer) "is well-equipped to instruct itself on the law," *Stobie Creek Invest., LLC v. U.S.*, 81 Fed. Cl. 358, 361 (Fed. Cl. 2008), such "expert" testimony on the law is inadmissible.

II. Steele's Report Should Be Excluded As Irrelevant And Because It Is Nothing More Than Lawyer Argument

A. Steele Addresses Only Delaware Law

Myron Steele is identified in his report as a former Chief Justice of the Delaware Supreme Court and currently a partner at the Delaware law firm of Potter Anderson & Corroon LLP. Steele's report and proposed testimony relate solely to Delaware law, and expressly do not address any aspect of federal securities law.²

Steele states that he was retained "to opine on certain limited Delaware law issues."³ He further cautions that:

In evaluating the foregoing questions, I have only considered the laws of the State of Delaware in effect on the date hereof, and I have not considered and express no opinion on the effect of, matters involving, or otherwise with respect to, any laws of any other jurisdiction (including, without limitation, any other state's laws and any federal laws of the United States of America (including any federal securities laws)), or rules, regulations, orders, or decisions relating thereto.⁴

While offering his views on Gibson's fiduciary duties under the Delaware Limited Liability Company Act and Delaware case law, Steele repeatedly makes clear that he is only opining regarding duties "under Delaware law." *See, e.g.*, Steele Report at paragraphs 3, 4, 23, and 29. Steele then repeats his disclaimer:

² Expert Report of Myron T. Steele, August 5, 20016 ("Steele Report"), Respondent's Ex.150

³ *Id.* at para 3.

⁴ *Id.* at para. 3.

In making the foregoing determination, I have only considered the laws of the State of Delaware in effect on the date hereof, and I have not considered and express no opinion on the effect of, matters involving, or otherwise with respect to, any laws of any other jurisdiction (including, without limitation, any other state's laws and any federal laws of the United States of America (including any federal securities laws)), or rules, regulations, orders, or decisions relating thereto.⁵

Steele ends his report with yet an additional reminder that "[n]othing stated in this Opinion purports to opine beyond the applicability of Delaware State Law."⁶

This matter deals only with Gibson's liability under federal statutory law, *i.e.*, Section 206 of the Advisers Act and Section 10b/Rule 10b-5 of the Exchange Act. Because Gibson's obligations under those federal provisions (and the Commission's ability to enforce those provisions) cannot be altered or nullified by private agreement or state law, Steele's report and testimony are irrelevant to the issues in this case.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Ozark Automotive Distributors, Inc. v. National Labor Relations Board*, 779 F.3d 576, 584 (D.C. Cir. 2015). Here, a fact of consequence is whether Gibson eliminated or modified his fiduciary duty to the extent that he could properly engage in "front-running" and favoritism. But the duty at issue is under federal, not state, law. Thus, Steele's opinions regarding Delaware law make it no more or less probable that Gibson owed fiduciary duties under the Advisers Act.

⁵ *Id.* at para 23.

⁶ *Id.* at para 29(iv).

B. Steele Offers Only Attorney Argument, Not Expert Testimony

Additionally, Steele's report consists entirely of attorney argument regarding the law, not technical or other specialized testimony that would be helpful to the Hearing Officer. Steele opines, inter alia, that GISF's operating agreement modified Geier Group's state law fiduciary duty of loyalty to GISF and that, from the perspective of Delaware law, Geier Group and Gibson therefore were allowed to "act contrary to the best interests of [GISF]." Steele also opines on the meaning of GISF's operating agreement in light of Section 18-402 of the Delaware LLC Act. This is not expert testimony, but argument regarding the state contract law. *See, e.g. Marx & Co.* 550 F.2d at 510) (expert testimony inadmissible because it analyzed the legal obligations of the parties under a contract) (citing 3 Corbin on Contracts s 554, p. 227 (1960): "Construction [of a contract] is always a matter of law for the Court"). *See also Loeb v. Hammond*, 407 F.2d 779, 781 (7th Cir. 1969) (upholding trial court's refusal to permit attorney testimony interpreting a contract.)

Opinion evidence must be helpful to the trier of fact in order to be admissible, and evidence which is needlessly cumulative may be excluded. *U.S. v. Scop*, 846 F.2d 135, 140 (2d Cir. 1988). Because Steele's report addresses only irrelevant issues of Delaware law, and because his report consists solely of lawyer argument, Steele's report and his proposed testimony should be excluded as irrelevant, cumulative and unhelpful to the trier of fact.

CONCLUSION

Wherefore, the reports and proposed testimony of Thomas Harman and Myron Steele should be excluded from evidence in this matter.

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Counsel for Division of Enforcement

Dated: 8/31/, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 2016:

(i) an original and three copies of the foregoing Motion In Limine Requesting Exclusion Of Testimony Of Lawyers Thomas Harman And Myron Steele were filed with the Office Of The Secretary, Securities And Exchange Commission, 100 F Street, N.E., Washington, D.C. 20549-9303;

(ii) a copy of the foregoing Motion In Limine Requesting Exclusion Of Testimony Of Lawyers Thomas Harman And Myron Steele was sent by UPS next day delivery to the following:

Thomas A. Ferrigno, Esq.
Brown Rudnick LLC
601 Thirteenth Street, N.W.
Suite 600
Washington, DC 20005; and

(iii) a copy of the foregoing Motion In Limine Requesting Exclusion Of Testimony Of Lawyers Thomas Harman And Myron Steele was provided to Brenda P. Murray, Chief Administrative Law Judge, via email to *ALJ@sec.gov*.



H. Michael Semler