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

ADMINISTRATIVE PROCEEDING
File No. 3-17184

In the Matter of

CHRISTOPHER M. GIBSON,

Respondent

OPPOSITION OF RESPONDENT GIBSON TO DIVISION OF ENFORCEMENT'S MOTION IN LIMINE REQUESTING EXCLUSION OF TESTIMONY OF THOMAS S. HARMAN AND MYRON T. STEELE

Respondent Gibson submits this opposition to the Division of Enforcement's motion *in limine* ("Motion"). The Motion requests that the Hearing Officer issue an order providing that Respondent Christopher M. Gibson may not introduce the testimony of Thomas S. Harman and Myron T. Steele or their written reports as expert testimony during the hearing in this matter. The Division of Enforcement's Motion should be denied because the testimony and expert reports of Mr. Harman and Mr. Steele rebut the testimony and report of Dr. Gary Gibbons, who the Division of Enforcement has identified as its expert, and because the specialized knowledge of Mr. Harman and Mr. Steele will assist the trier of fact in considering the evidence and determining the facts in issue.

PROCEDURAL BACKGROUND

The Order Granting Joint Motion for Prehearing Schedule ("the Order") sets forth the prehearing schedule, including the exchange of expert reports. The Order provided that the Division of Enforcement shall provide the reports of its experts to Respondent Gibson on July

15, 2011, that Respondent Gibson shall provide the reports of his experts to the Division of Enforcement on August 5, 2011 and that the Division of Enforcement shall provide the rebuttal reports of its experts to Respondent Gibson on August 19, 2011. The schedule reflected in the Order clearly contemplates that the Division of Enforcement would submit the reports of its experts and that three weeks later Respondent would submit reports that set forth the opinions of its experts and responses to the expert reports submitted by the Division of Enforcement. The schedule further contemplated that the Division of Enforcement would have two weeks to submit the rebuttal reports of its experts.

On or about, August 5, 2011, the Division of Enforcement provided Respondent Gibson with the Expert Report of Dr. Gary Gibbons. In his report, Dr. Gibbons, who appears to be a professor at a business school, discusses various provisions of the Investment Advisers Act of 1940 as well as decisions by the Supreme Court and lower courts which construe provisions of the Investment Advisers Act that are relevant to this matter. In particular, Dr. Gibbons offers legal conclusions that Respondent Gibson acted as an investment adviser to the Geier International Strategies Fund, LLC ("the Fund"); that Respondent Gibson, under Section 206 of the Investment Advisers Act, owed fiduciary duties to the Fund; that the disclosures in the Fund's offering memorandum and in its operating agreement regarding conflicts of interest did not alter or eliminate the fiduciary duties that Dr. Gibbons asserts were owed by Respondent Gibson to the Fund; and that Respondent Gibson breached his fiduciary duties and violated provisions of the Investment Advisers Act by engaging in front running and favoring a Fund investor over the Fund.

In his report, Mr. Harman, among other things, addresses Dr. Gibbons' opinions regarding the Investment Advisers Act, Respondent Gibson's status under the Investment

Advisers Act and the import and effect of the disclosures contained in the Fund's offering memorandum and operating agreement. In his report, Mr. Steele addresses, among other things, the Fund's operating agreement and the impact of the provisions of the operating agreement upon any duties that Respondent Gibson could owe to the Fund.

Thus, the Division of Enforcement is attempting to submit a report containing legal conclusions, which was prepared by a non-lawyer, and to preclude Respondent from submitting expert reports which respond to Dr. Gibbons' report and which were prepared by persons who possess the requisite education, training and experience and which would assist the trier of fact in considering the evidence and determining the facts in issue. As discussed below, the governing law does not support the Division of Enforcement's request for an order excluding the testimony and reports of Thomas S. Harman and Myron T. Steele.

ARGUMENT

Rule 702 of the Federal Rules of Evidence provides that a witness who is qualified as an expert by knowledge, skill, experience, training or education may testify in the form of opinion or otherwise 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. In *United States v. Offill*, 666 F.3d 168, 175 (4th Cir. 2011), the Court of Appeals noted that courts and commentators have consistently concluded that expert testimony that ordinarily might be excluded on the ground that it gives legal conclusions may nonetheless be admitted in cases that involve highly technical issues.[1] In *Offill,* prosecutors presented the testimony of a professor of securities law and the Commissioner of the Texas State Securities Board in an action against a defendant charged with securities fraud and securities registration violations. The *Offill* court held that the experts could

[1] *See, also, United States v. Bilzerian,* 926 F.2d 1285, 1294 (2d Cir. 1991) (noting that, particularly in complex cases involving the securities industry, expert testimony may help in the understanding of terms and concepts).

not opine that the defendant's conduct was or was not illegal, but could provide opinions on "general securities law concepts and practice." *Id.* at 173-74. The court noted that testimony by a legal expert is admissible where "the legal regime is complex," and found it "difficult to imagine" how the case could have been presented without expert testimony to "explain the intricate regulatory landscape and how securities practitioners function within it." *Id.* at 175.

The Division's Motion to Exclude the Expert Report of Thomas S. Harman Should Be Denied

Mr. Harman possesses the education, training, experience and knowledge to assist the trier of fact with the evidence. Mr. Harman has represented investment advisers and investment funds for more than two decades. Prior to that, he spent twelve years in the SEC's Division of Investment Management, including more than five years as its Chief Counsel and Associate Director. He also taught Investment Management at Georgetown University Law Center. His career makes him eminently qualified to offer expert opinions with regard to the matters at issue in this case. For example, he testifies regarding industry practice with regard to disclosures regarding conflicts of interest in offering memoranda of private funds. Resp. Exh. 148 at 15-16. These opinions – comparing the events at issue here to industry practices – are clearly not excludable as improper legal conclusions.

Moreover, Mr. Harman's proposed testimony, unlike Dr. Gibbons' proposed testimony, hews the line between permissible and impermissible legal expert testimony and rebuts the opinions set forth in Dr. Gibbons' expert report.

The distinction between a permissible expert opinion and an impermissible legal conclusion "is not always easy to perceive." *Hanson v. Waller*, 888 F.2d 806, 811 (11th Cir. 1989). An expert may offer an opinion on an "ultimate issue" of fact, based on "adequately

explored legal criteria" (*Id.* at 812), but may not "merely tell the jury what result to reach." *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990). An expert may not testify "about how the law should apply to the facts of a particular case." *Pinal Creek Group v. Newport Mining Corp.*, 352 F. Supp. 2d 1037, 1042 (D. Ariz. 2005). Dr. Gibbons clearly transgresses this rule, opining, even though he is not an attorney, that Respondent violated fiduciary duties on three specific occasions. Div. Exh. 185 at 5-6, 20-26.

Mr. Harman does not stray into this impermissible territory. Mr. Harman describes, based on his long experience as a practicing attorney in the industry, the nature of the investment adviser relationship, and his opinion as to whether such a relationship existed between Respondent and the Fund. He also offers observations comparing the disclosures in the Fund's offering memorandum to similar provisions in other private placement documents. To this extent, Mr. Harman's opinions are the "flip side" of opinions offered by the Division's expert, Dr. Gary Gibbons. *E.g.*, Resp. Exh. 148 at 15-16. Dr. Gibbons claims that, as an investment adviser to the Fund, Respondent owed it certain fiduciary duties, and that the conflicts of interest provision in the Fund's offering memorandum and operating agreement did not "eliminate or lessen[]" those duties. Div. Exh. 185 at 5, 9-14, 17-20. Mr. Harman refutes these opinions, opining that Respondent did not owe GISF the fiduciary duties Dr. Gibbons identifies, because Respondent was not an investment adviser to GISF. Resp. Exh. 148 at 4-11. Mr. Harman then counters Dr. Gibbons' view of the offering memorandum, explaining that an adviser may limit the scope of any duties to clients through disclosure of conflicts, and that the Fund's offering memorandum and operating agreement effectively did so. *Id.* at 11-17.

In other words, on these two issues, both Mr. Harman and Dr. Gibbons, attempt to navigate the difficult to locate line between permissible expert opinion and impermissible legal

conclusions, offering mirroring opinions on these questions. Either both are successful, or neither is. It cannot be that an opinion on one side of a legal question is impermissible for an expert, while the opposite side of that question is admissible.

By contrast, as the *Offill* court held, a legal expert may not opine that a party's conduct violated applicable law, or that a party is liable. *Offill*, 666 F.3d at 174. Dr. Gibbons' conclusions that Respondent in fact violated fiduciary duties owed to GISF go far beyond the permissible line, and must be excluded.

The Division's Motion to Exclude the Expert Report of Myron T. Steele Should Be Denied

As the former Chief Justice of the Delaware Supreme Court, Mr. Steele possesses the requisite training and experience to assist the trier of fact regarding the evidence to be presented in this matter. The Division of Enforcement's contention that Mr. Steele's consideration of Delaware, rather than federal law, renders his opinions irrelevant overlooks the fact that the Fund is a Delaware limited liability company and that the Fund's operating agreement defines the relationships among the Fund, its managing member (another Delaware limited liability company) and its members. Mr. Steele is eminently qualified to assist the trier of fact in considering the evidence that will be presented at the hearing in this matter.

The Division of Enforcement attempts to argue that the Expert Report of Myron T. Steele is irrelevant and argument rather than expert testimony. Specifically, the Division of Enforcement contends that this matter deals only with federal statutory law, i.e., Section 206 of the Advisers Act and Section 10(b) and Rule 10b-5 of the Exchange Act. The Division of Enforcement continues by stating "[b]ecause 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."

The Division of Enforcement does not cite a statute or decision supporting its argument that Respondent Gibson's obligations are solely a matter of federal law and that his obligations cannot be altered or nullified by private agreement or state law. However, the Supreme Court has addressed the role of state law in the context of the federal securities laws.

In considering whether disinterested directors of a mutual fund could terminate a derivative action, the Supreme Court, in *Burks v. Lasker*, 441 U.S. 471, 478-79 (1979) stated, "The fact that 'the scope of [respondents'] right is, of course, a federal question' does not, however, make state law irrelevant. It is true that in certain areas we have held that federal statutes authorize federal courts to fashion a complete body of federal law. Corporation law, however, is not such an area." (citations omitted). The Court continued by stating that the Investment Company Act and the Investment Advisers Act, therefore, "do not require that federal law displace state laws governing the powers of directors unless the state laws permit action prohibited by the Acts, or unless 'their application would be inconsistent with federal policy underlying the cause of action . . .'" (citations omitted). Id. at 479. The Court then stated "[t]he foregoing indicates that the threshold inquiry for a federal court in this case should have been to determine whether state law permitted Fundamental's disinterested directors to terminate respondent's suit. If so, the next inquiry should have been whether such a rule was consistent with the policy of the ICA and IAA." Id. at 480.

In the instant matter, one of the principal issues is whether the Fund's operating agreement, as amplified by its offering memorandum, modified or eliminated fiduciary obligations. As the Fund is a Delaware limited liability company, the report and testimony of

Mr. Steele, the former Chief Justice of the Delaware Supreme Court, could assist the trier of fact in determining that the Fund's operating agreement and offering memorandum modified or eliminated fiduciary duties. Thus, Mr. Steele could provide relevant testimony with respect to the inquiry that the Supreme Court established as the threshold inquiry, i.e., "whether state law permitted Fundamental's directors to terminate respondents' suit." Id. at 480.

With respect to whether state law is consistent with the policy of the Investment Advisers Act, the relevant issue is whether the Delaware Limited Liability Company Act, which permits an operating agreement to modify or eliminate fiduciary duties, is consistent with the Investment Advisers Act which permits investment advisers to disclose potential conflicts of interest and to engage in the conduct that is the subject of the disclosure. The Supreme Court, in *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191-92 (1963) stated, "The Investment Advisers Act of 1940 thus reflects a congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship,' as well as a congressional intent to eliminate, or at least expose, all conflicts of interest which might incline an investment adviser-consciously or unconsciously-to render advice which is not disinterested." Thus, the Investment Advisers Act has been construed as permitting an adviser to limit fiduciary duties to clients by disclosure of potential conflicts to clients. The Commission has also acknowledged that investment advisers may modify or restrict fiduciary duties that might otherwise apply to their advisory relationships by disclosing potential conflicts: "Unlike the laws of many other countries, the U. S. federal securities laws do not prescribe minimum experience or qualification requirements for persons providing investment advice. They do not establish maximum fees that advisers may charge. Nor do they preclude advisers from having substantial conflicts of interest that might adversely affect the objectivity of the advice they provide. Rather, investors have the responsibility, based

on disclosures they receive, for selecting their own advisers, negotiating their own fee arrangements, and evaluating their advisers' conflicts." Investment Advisers Act Release No. 2711 (Mar. 3, 2008) (proposing amendments to Form ADV).

Nor are Mr. Steele's opinions improper "legal argument." As discussed above, an expert may not "merely tell the jury what result to reach," *Montgomery*, 898 F.2d at1541, but may give opinions regarding "general securities law concepts" and "how securities practitioners function within it," even when that testimony touches on issues "directly relevant to" the conduct at issue in the case. *Offill*, 666 F.3d at 173-74, 176. Mr. Steele's proposed testimony does the latter, without falling into the former, and is therefore admissible.

CONCLUSION

For the reasons discussed above, the Division's request to exclude the testimony of Messrs. Harman and Steele misses the mark as a matter of law. But in addition, as the court in *Offill* found, the line between permissible and impermissible legal expert opinion is especially difficult to draw absent the context of the testimony itself, and is best addressed during the proceeding. *Id.* at 174. At a minimum, the Division's request to exclude this testimony *ab initio* should be denied, and the Division's objections addressed during the hearing.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of September, 2016:

(i) an original and three copies of the foregoing Opposition of Respondent Gibson to Division of Enforcement's Motion In Limine Requesting Exclusion of Testimony of Thomas S. Harman and Myron T. Steele were filed with the Office of the Secretary, Securities and Exchange Commission, 100 F Street, N.E. Washington, D.C. 20549;

(ii) a copy of the foregoing Opposition of Respondent Gibson to Division of Enforcement's Motion In Limine Requesting Exclusion of Testimony of Thomas S. Harman and Myron T. Steele was delivered by courier to the following:

H. Michael Semler
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Counsel for Division of Enforcement

(iii) a copy of the foregoing Opposition of Respondent Gibson to Division of Enforcement's Motion In Limine Requesting Exclusion of Testimony of Thomas S. Harman and Myron T. Steele was provided Chief Administrative Law Judge Brenda P. Murray via email to ALJ@sec.gov.

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