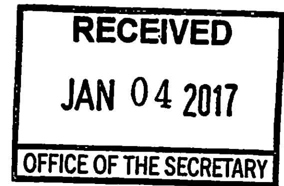

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17551

In the Matter of

MED-X, Inc.,

Respondent.

Enforcement Division's Motion *In Limine* to Exclude Med-X's Expert Report and Preclude Its Expert from Testifying about Legal Opinions

Pursuant to Rules 320 and 321 of the Commission's Rules of Practice, the Division of Enforcement ("the Division") moves for an Order: (a) excluding the report of Respondent's expert, which is nothing more than a series of legal opinions relating to Regulation A+, including his opinions relating to statutes, precedent, Commission guidance, practice, and policies; and (b) precluding Med-X from offering any of these opinions as evidence during the hearing.

I. Introduction

On December 30, 2016, Respondent submitted the expert report of Gerald Laporte (the "Report"), a longtime attorney and currently a Securities Regulation Consultant. Laporte's report is a piece of legal advocacy which, like a trial brief, includes legal conclusions, legal arguments, and opinions regarding Commission

guidance, rulemaking, practice, and policies. Because the Report presumes to tell this Court how to rule, and comprises no more than Med-X's legal opinions regarding the appropriate remedy in this case, it is irrelevant to the Court's consideration of the allegations.

II. Argument

Laporte's Report is Comprised of Inadmissible Legal Conclusions.

Commission Rule of Practice 320 provides that the hearing officer "may receive relevant evidence and shall exclude all evidence that is irrelevant." *In re IMS/CPSs & Assocs.*, AP File No. 3-9042, 55 S.E.C. 436, 460 (Nov. 5, 2001) (quoting Rule 320). The Commission repeatedly has held that expert testimony consisting of legal opinions is inadmissible.[1] The Commission's established view that expert witnesses should not offer legal opinions is consistent with the holdings of the federal courts that have

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[1] *See id.* at 459-461 (affirming preclusion of expert testimony about whether respondent's Form ADV disclosures complied with securities laws); *In re Robert D. Potts,* AP File No. 3-7998, S.E.C. 187, 208 (Sept. 24, 1997) (affirming preclusion of expert testimony regarding Commission's interpretation of roles and responsibility of concurring audit partner, because such "[m]ere opinion on the law" is inadmissible); *In re Pagel, Inc.,* AP File No. 3-6142, 1985 S.E.C. 223, 229-230 (Aug. 1, 1985) (affirming exclusion of expert testimony on issue of whether respondents engaged in market manipulation, because such a determination was the province of the law judge), *aff'd, Pagel v. SEC,* 803 F.2d 942, 947 (8th Cir. 1986); *In re Christiana Secs. Co.,* AP File No. 3-3928, 45 S.E.C. 649, 660 n.38 (Dec. 13, 1974) ("The questions presented are in our view essentially legal. Hence they cannot be resolved by reference to the opinions of financial experts, however conscientious and however eminent... [T]he experts seem to have spent a great deal of time studying our decisions ... and pondering the implications of the opinions in those cases. That sort of thing is normally the function of a lawyer, not of an expert witness.")

addressed the issue.[2] Moreover, federal courts also have declined to permit expert testimony about legal opinions in the form of policy arguments.[3]

In *SEC v. Big Apple Consulting USA*, a case that involved the definition of a "dealer" in the securities industry, the court excluded the defendant's expert report on

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[2] *See Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1212-13 (D.C. Cir. 1997) ("Expert testimony that consists of legal conclusions cannot properly assist the trier of fact ... and thus it is not 'otherwise admissible'"; witness precluded from opining on the legal requirements of the Americans with Disabilities Act); *Kinder v. Acceptance Ins. Co.*, 423 F.3d 899, 905 (8th Cir. 2005) ("The opinions themselves were more or less legal conclusions about the facts of the case as presented to the experts by the shareholders. As a result, the expert opinions were merely opinions meant to substitute the judgment of the district court. When the expert opinions are little more than legal conclusions, a district court should not be held to have abused its discretion by excluding such statements.") (citations omitted). *See also, Pinal Creek Group v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1042-1046 (D. Ariz. 2005) (expert "precluded from offering his opinion regarding the law that governs this case and federal anti-trust law"); *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983) (upholding exclusion of expert testimony on ultimate legal conclusion: "allowing an expert to give his opinion on the legal conclusions to be drawn from the evidence both invades the court's province and is irrelevant."); *Specht v. Jensen*, 853 F.2d 805, 807 (10th Cir. 1988) (noting that the law "requires only one spokesman...who of course is the judge."); *Rolls-Royce Corp. v. Heros, Inc.*, Civil Action No. 3:07-CV-0739-D, 2010 WL 184313, at *7 (N.D. Tex. Jan. 14, 2010) (citing *Snap-Drape, Inc. v. Comm'r*, 98 F.3d 194, 198 (5th Cir. 1996) for the proposition that "An expert cannot offer conclusions of law"); *In re Air Crash Disaster at New Orleans, La.*, 795 F.2d 1230, 1233 (5th Cir. 1986) ("expert may not offer opinions that simply reiterate what the lawyer can offer in argument").

[3] *See e.g., Austin Firefighters Relief and Ret. Fund v. Brown*, 760 F. Supp. 2d 662, 671 n.3 (S.D. Miss. 2010) (striking expert testimony that tax shelters were in furtherance of public policy as impermissible legal conclusion testimony); *Coral Way, L.L.C. v. Jones*, 2006 U.S. Dist. LEXIS 97233, *2-5 (S.D. Fla. Oct. 17, 2006) (precluding expert testimony concerning interpretation of Florida's public policy concerning settlements); *Gruber, P.C. v. Deuschle*, 2002 U.S. Dist. LEXIS 14698, *11-12 (N.D. Tex. Aug. 9, 2002) (barring expert testimony that contract violated public policy).

the ground that it consisted of legal conclusions.[4] Defendants' expert in *Big Apple Consulting* was a securities lawyer who opined that the defendants were not broker dealers and that they were exempt from the registration requirements of Section 5. The court held that such opinions constituted legal opinions that the defendants were not liable under Section 15 or Section 5. The court determined that such legal opinions usurped the court's role, did not assist the trier of fact, and were therefore inadmissible. *Id.*

Here, Laporte's Report is replete with legal arguments in support of Med-X's preferred outcome in this case. That it is nothing more than a legal brief masquerading as an expert report is evident from the outset, where Laporte—an attorney—sets forth the statement of the issue for which he was hired to provide his expertise:

> Whether a permanent suspension of an exemption to registration under Regulation A pursuant to Rule 258 is, in the case of a company that has corrected a single delinquent periodic filing and otherwise has no record of delinquent filings or other extenuating circumstances, consistent with (a) regulatory custom and practice in addressing late periodic report filings, and (b) the statutory scheme and the purpose and intent of Section 401 of the JOBS Act?
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> (Report, at 2).

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[4] *SEC v. Big Apple Consulting USA*, Case No. 6:09-cv-1963-Orl28GJK (M.D. Fla. Order of Aug. 25, 2011) (granting partial summary judgment in favor of the Division; holding that defendant was an underwriter and a dealer and therefore did not qualify for the exemption from Section 5 in Section 4(1), providing that Section 5 registration requirements do not apply to "transactions by any person other than an issuer, underwriter, or dealer.").

Laporte's Report completely ignores the critical fact that Med-X sold more than 400,000 shares of its stock to numerous investors while it was out of compliance with filing requirements. Med-X's unlawful sale of stock, like the failure to file its annual report, is a significant violation of Regulation A+. The Report advances Med-X's *preferred* statement of the legal issue rather than the real issue: What does Regulation A+ require in the face of significant violations such as those committed by Med-X.

Laporte's summary of his own opinions underscores that his Report is at bottom no more than his (Med-X's) legal conclusions. (Report, at 3.) He opines that to permanently suspend Med-X's Regulation A+ exemption would be "inconsistent with regulatory practices" and "inconsistent with the statutory scheme and the purpose and intent of Section 401 of the JOBS Act." (*Id.*) In the Report's summary, Laporte also advances the policy-based opinion that if the Court entered an order permanently suspending Med-X's exemption, it would, in his opinion, "have a chilling effect on the use of Regulation A by small companies to raise capital, and could potentially harm investors who have provided capital to the company." (*Id.*).

The body of the Report reads like a legal brief formatted in a numbered paragraph template, and includes a few first-person references, which are not supported by data or evidence (*e.g.*, "I am aware of no case where the SEC has permanently revoked a Section 12(g) registration . . . ." (Report, at 6)).

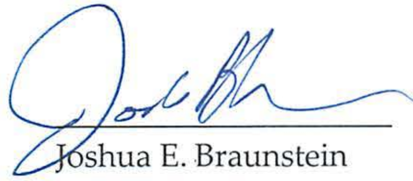
The opinions at the heart of Laporte's Report—that permanently suspending Med-X's exemption from registration requirements of Section would be contrary to applicable legal standards (including statute, case law, and SEC guidance and practice) and could have policy implications—are purely legal conclusions that are the exclusive province of the law judge in an administrative proceeding. *IMS/CPAs*, 55 S.E.C. at 459-461; *Pagel*, 1985 at 229-230; *Burkhart*, 112 F.3d at 1212-13. And Laporte's analysis (of applicable statutes, Commission staff's interpretations, regulations, public statements by Commissioners, and his own judgments or personal experiences relating to SEC policies or potential policy implications) are inadmissible legal opinions, which should be reserved for trial briefs and any arguments by counsel thereon.

In sum, Laporte's putatively expert opinions are precisely the sorts of legal opinions that courts consistently refuse to admit as evidence at trial. And, as potential evidence, they are simply irrelevant to this Court's adjudication. The Court's job is to apply the relevant statutes, precedent, and the authoritative guidance from the Commission to the facts. And policy considerations are the province of the Commission.

Accordingly, the Court should exclude from the record Laporte's report (or portions thereof which the Court concludes contain his opinions and conclusions on legal and public policy matters), and preclude Laporte from testifying on those same issues at the hearing.

Dated: January 4, 2017

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that true copies of the Enforcement Division's Motion *In Limine* to Exclude Med-X's Expert Report and Preclude Its Expert from Testifying about Legal Opinions was served on the following, this 4th day of January 2017, in the manner indicated below:

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