

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-16184

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In the Matter of :
:
JORDAN PEIXOTO, :
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Respondent. :
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----- X

**DIVISION OF ENFORCEMENT’S MOTION FOR (1) LEAVE TO OFFER
DECLARATION OF FILIP SZYMIK IN LIEU OF LIVE TRIAL TESTIMONY;
AND (2) ADMISSION OF PRIOR SEC TESTIMONY OF FILIP SZYMIK**

Pursuant to SEC Rule of Practice 235, and to avoid unnecessary inconvenience to witness Filip Szymik (“Szymik”), the SEC Division of Enforcement (“the Division”) respectfully requests that the Court (1) grant the Division leave to offer Szymik’s recent declaration – in which he invokes his Fifth Amendment privilege – in lieu of Szymik’s live testimony at trial; and (2) admit at trial Szymik’s November 18, 2013 sworn testimony. The Division has conferred with counsel for respondent Jordan Peixoto (“Peixoto”), but the parties could not reach agreement regarding these issues.

PRELIMINARY STATEMENT

In this insider trading case, Szymik is alleged to have tipped certain confidential information regarding Herbalife to respondent Jordan Peixoto, who used that information illegally to trade Herbalife securities.¹ Szymik resides in Poland, and partly for this

¹ Szymik previously settled related SEC insider trading charges.

reason, the Division respectfully requests two separate pre-trial rulings regarding his trial testimony.

First, the Division seeks to offer Szymik's recent sworn declaration (submitted herewith) -- in which Szymik states that he will assert his Fifth Amendment privilege as to all questions put to him at trial in this case -- in lieu of Szymik's live appearance at trial. The Division offers Szymik's Fifth Amendment declaration solely to avoid the considerable inconvenience and expense (and potential logistical issues) of Szymik's having to travel from Poland to New York merely to invoke the privilege.² To be clear, the Division is not presently seeking a ruling regarding the admission, or probative value, of Szymik's Fifth Amendment assertion. Rather, we merely seek a ruling that his declaration will be deemed equivalent to his appearing in person at trial to assert the privilege. Indeed, even if Szymik resided in New York, the Division likely would seek the same relief -- leave to offer his declaration in lieu of his appearing at trial merely to invoke the privilege.

Second, pursuant to SEC Rule of Practice 235, the Division seeks a ruling permitting the admission at trial of Szymik's November 18, 2013 sworn testimony, which the Division took during its investigation that led to this proceeding. A copy of Szymik's sworn testimony is attached as "Exhibit C" to his declaration.³ In November 2013, Szymik answered all of the Division's questions, save one line of questioning -- i.e.,

² According to Szymik's counsel, Szymik left the United States for his native Poland in early October 2014 -- shortly after settling related SEC charges -- due to his immigration status.

³ The Division also anticipates offering at trial an audio recording of Szymik's November 18, 2013 testimony.

concerning the existence of email correspondence between Szymik and respondent Peixoto (and others) – in response to which Szymik invoked his Fifth Amendment privilege. Pursuant to Rule 235, the Division seeks the admission of Szymik’s prior sworn testimony because it is relevant to certain matters at issue in this case; Szymik resides outside the United States; and, as noted above, even if Szymik were to appear at trial, he would assert his Fifth Amendment privilege.

BACKGROUND

The Division alleges that on December 19, 2012, respondent Peixoto purchased short-term Herbalife stock put-options while in possession of material non-public information concerning an upcoming (December 20) presentation by renowned activist investor William Ackman, at which Ackman was to present publicly for the first time his negative views regarding Herbalife (the “Presentation”). On December 19, prior to any public announcement of the Presentation, Peixoto paid a total of \$19,749 for out-of-the-money Herbalife put options. Three of those options (which cost a total of \$5,950) were set to expire only three days later (December 22, a Saturday). Thus, when Peixoto purchased the options on December 19, he must have known of an imminent negative announcement regarding Herbalife. Indeed, the Division contends, Peixoto knew both the date and essential substance of the December 20 Presentation. Peixoto received this confidential information from his friend Szymik who, in turn, had learned it from his close friend and roommate, Mariusz Adamski -- a Pershing analyst who had been working for months on the Presentation.

During the Division’s investigation, Szymik testified regarding all relevant matters, except questions concerning the existence of certain 2012 email communications

between himself and Peixoto -- as to which Szymik asserted his Fifth Amendment privilege. To understand the relative significance of Szymik's SEC testimony, it is necessary to understand its relation to the additional evidence that the Division intends to introduce at trial. The anticipated trial evidence includes the following:

- Peixoto's extremely risky Herbalife put-options purchases -- the timing and risky nature of which strongly suggest that Peixoto knew the Presentation date and its substance;
- recorded telephone calls by Peixoto to his securities brokers two days later, in which Peixoto asked his brokers not to exercise his then-highly profitable options (strongly suggesting Peixoto's guilty state of mind);
- Peixoto's December 8 text message to Szymik: "What will be key is to find out when the presentation will be made public"; and Szymik's reply: "In 10 days";⁴
- Szymik's intentional destruction of pre-Presentation email exchanges between himself and Peixoto;⁵
- December 19 Gmail chats between Szymik and third parties, in which Szymik indicates his prior knowledge of the Presentation date and its subject matter;⁶

⁴ Pershing Square initially scheduled the Presentation for December 18, but subsequently rescheduled it to December 20.

⁵ Adamski -- Szymik's roommate who worked at Pershing Square -- is expected to testify that Szymik confessed his email destruction to Adamski. Also, Szymik asserted his Fifth Amendment privilege in response to questions concerning such emails during his investigative testimony. Finally, the Division may call one of its staff attorneys to recount a conversation she had with Szymik's counsel on the day of Szymik's testimony, in which Szymik's counsel admitted that Szymik had intentionally deleted such emails.

⁶ Szymik testified that he did not possess such precise prior knowledge of the Presentation and claimed that his Gmail messages were based (in part) on a CNBC report about the Presentation that had aired an hour earlier. (Szymik Decl. Ex. C, at 29-39.) However, Szymik's testimony is contradicted by strong circumstantial evidence, including the unambiguous phrasing of the Gmail messages themselves. Id.

- Szymik’s testimony that, in December 2012, (1) Szymik “considered [Peixoto] one of my best friends”; and (2) Peixoto knew Adamski socially, through Szymik (Szymik Decl. Ex. C, at 39-40);⁷
- Szymik’s testimony that, prior to December 19, Szymik informed Peixoto that (1) Adamski was working on an Herbalife presentation for Pershing Square; (2) Adamski “thinks Herbalife is a bad company,” and “from what I heard from [Adamski] this company is terrible”; and (3) the approximate date of the presentation (“sometime in December”) (*id.*, at 34-35, 41-44);
- Szymik’s testimony that, prior to the Presentation, they discussed (1) the fact that the presentation could cause Herbalife’s stock price to decline; and (2) their interest in trading Herbalife securities prior to the presentation (*id.*, at 34-36, 43-45);
- Szymik’s testimony that (1) Peixoto told Szymik that it was “important to know when the presentation was going to happen” and repeatedly asked Szymik to find out the presentation date; (2) Szymik understood that Peixoto sought that information in order to trade Herbalife securities prior to the presentation; and (3) Szymik attempted to reach Adamski to learn the presentation date (*id.*, at 44-48);
- Szymik’s testimony that, as of December 2012, (1) Adamski was “one of my closest friends” and long-time roommate; (2) although Szymik did not “remember any specific conversations about the confidential nature of [Adamski’s] work,” Szymik’s “understanding was that [Adamski] is working on things that he doesn’t want people to know about because the competition might learn about it”; that the two of them had an “understanding” that Adamski “worked on companies that I understood his firm didn’t want other people to know”; and that Szymik understood that Pershing Square “wouldn’t want other hedge funds to know what Pershing Square is working on” (*id.*, at 15, 17-18);
- Adamski is expected to testify that (1) he and Szymik were close childhood friends and roommates who trusted and confided in each other regarding personal matters; (2) Adamski repeatedly told Szymik that any information he learned from Adamski regarding his Pershing Square work was highly confidential and could not to be disclosed to anyone or used for trading; and (3) Szymik agreed to maintain the confidentiality of such information;
- Adamski’s then-girlfriend, Kathryn Nave, is expected to testify that, prior to the Presentation (1) Adamski informed her of the Presentation date and

⁷ “Szymik Decl.” refers to the Declaration of Filip Szymik, submitted concurrently herewith.

its substance; and (2) Adamski repeatedly implored Nave to maintain the confidentiality of that information;⁸

- Pershing Square's general counsel is expected to testify that, under the company's written confidentiality policy, the Presentation was highly confidential and -- with limited exceptions not applicable here -- could not be disclosed to persons outside Pershing Square;
- Szymik is expected to assert his Fifth Amendment privilege at trial regarding all matters; and
- Peixoto asserted his Fifth Amendment privilege during the Division's investigation.⁹

ARGUMENT

For the following reasons, the Division respectfully requests that the Court (1) permit the Division to offer at trial Szymik's Fifth Amendment declaration in lieu of Szymik's live assertion of his Fifth Amendment privilege at trial; and (2) permit the Division to introduce Szymik's November 18, 2013 sworn SEC testimony.

I. Szymik Fifth Amendment Declaration

By his declaration (submitted herewith), and through his counsel, Szymik has assured the parties and the Court that, if required to testify at the March 2015 trial in this proceeding, he will assert his Fifth Amendment privilege broadly -- in response to all

⁸ Adamski testified during the investigation that he did not recall discussing his Pershing Square Herbalife work with anyone, but that it is possible Szymik became aware of it because they lived together (and Adamski was working on the Presentation constantly). The strong preponderance of the evidence -- including Szymik's and Nave's testimony -- is expected to establish that Adamski told Szymik about the Presentation. In any event, even if Adamski inadvertently disclosed the Presentation to Szymik, the evidence will establish that Szymik illegally breached his duty of confidentiality to Adamski by disclosing it to Peixoto, with the intent that both he and Peixoto trade Herbalife securities.

⁹ Peixoto's counsel has informed the Division that Peixoto has not yet decided whether he will testify at trial in this proceeding.

questions put to him regarding the subject matter of this proceeding, his settled administrative proceeding, and his November 2013 SEC testimony. Thus, no substantive difference exists between Szymik's declaration and his live invocation of his Fifth Amendment privilege at trial. Therefore, requiring Szymik to travel from Poland to New York merely to assert the privilege would be an unnecessary inconvenience and expense for both Szymik and the Division.

We also note that the Division is not presently asking the Court to rule on either the admissibility or probative value of Szymik's Fifth Amendment declaration. Thus, if the Court grants the Division's request, Peixoto would be free to object to Szymik's declaration on any appropriate evidentiary ground -- save Szymik's physical absence from the trial. Hence, Peixoto would be in precisely the same position that he would be in if Szymik were to appear at trial and assert the privilege, and Peixoto cannot claim any prejudice from the Division's present request to offer Szymik's declaration in lieu of live testimony.

II. Admission of Szymik's Prior Sworn Testimony

SEC Rules 235(a)(2) & (5) provide that "any person wishing to introduce a prior sworn statement of a witness, not a party, otherwise admissible in the proceeding, may make a motion setting forth the reasons therefore." The rules further provide that such a motion:

may be granted if . . . the witness is out of the United States, unless it appears that that the absence of the witness was procured by the party offering the prior sworn statement . . . or in the discretion of the . . . hearing officer, it would be desirable, in the interests of justice, to allow the prior sworn statement to be used. In making this determination, due regard shall be given to the presumption that witnesses will testify orally in an open hearing.

SEC Rule 235(a)(2) & (5).

Pursuant to Rule 235(a)(2) & (5), the Division respectfully requests that the Court permit it to introduce at trial Szymik's November 18, 2013 investigative testimony because (1) Szymik resides outside the United States; (2) even if he were in the United States, he would assert his Fifth Amendment privilege; (3) Szymik was a principal participant in the insider trading scheme alleged in this proceeding; (4) significant portions of Szymik's testimony either will be corroborated by other trial evidence or were against his own penal interest (and, thus, appear trustworthy); and (5) to the extent Szymik's testimony appears or purports to be exculpatory (as to either Szymik or Peixoto), it lacks credibility and, thus, further supports the Division's insider trading claim against Peixoto.

Significantly, as explained in the background section above, Szymik admitted in his investigative testimony that he had discussions with his roommate, Adamski, concerning Adamski's work on the Presentation and conveyed that information to Peixoto. Szymik further admitted that he learned from Adamski the approximate date of the Presentation and Adamski's view that Herbalife was a "bad company" (information he conveyed to Peixoto). Szymik's admissions – although not entirely forthcoming, in the Division's view – nonetheless were against Szymik's penal interest and, thus, should be given consideration by the Court. See FRE 804(b)(3)(A) (permitting admission in Federal Court of prior statement that "a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it . . . had

so great a tendency . . . to expose the [witness] to civil or criminal liability.”).¹⁰

Furthermore, the fact that Szymik conveyed to Peixoto confidential information concerning the Presentation – both its substance and timing – is corroborated (and independently established) by the strong additional circumstantial evidence outlined in the background section above (including Peixoto’s attempts to have his highly-profitable Herbalife options expire unexercised, and Szymik’s destruction of pre-Presentation emails between himself and Peixoto).

Finally, to the extent that Szymik’s investigative testimony might contradict the Division’s theory regarding Peixoto’s liability, the Division offers such testimony not for its truth but, rather, to establish Szymik’s lack of credibility. Indeed, Szymik’s attempts to cover up or rationalize the events that led to Peixoto’s insider trading serve only to further support the Division’s case against Peixoto. Thus, for example, Szymik’s extremely strained reading of his own December 19 Gmail messages strongly implicate both himself and Peixoto by attempting to avoid what the text messages plainly indicate -- that Szymik both knew, and had conveyed to Peixoto, the Presentation’s precise date and substance. Thus, evidence of Szymik’s evasiveness -- including destruction of evidence -- further supports the Division’s case against Peixoto and should be admitted.

CONCLUSION

For the foregoing reasons, the Division respectfully requests that the Court (1) grant the Division leave to offer Szymik’s Fifth Amendment declaration at trial in lieu of his live appearance at trial; and (2) issue a ruling that the Division also may introduce

¹⁰ Although the “Federal Rules of Evidence do not govern Commission proceedings . . . they are often used as a reference point.” In the Matter of Miguel A. Ferrer, et al., Admin. Proc. File No. 3-14862, 2012 WL 8751437, *5 n.1 (November 2, 2012). (Murray, C.J.).

at trial Szymik's November 18, 2013 investigative testimony.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jack Kaufman", written over a horizontal line.

Jack Kaufman

Sheldon Mui

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November 24, 2014

CERTIFICATE OF SERVICE

I, Jack Kaufman, certify that on the 24th day of November, 2014, I caused true and correct copies of

- (1) the foregoing Division of Enforcement's Motion for (1) Leave to Offer Declaration of Filip Szymik in Lieu of Live Trial Testimony; and (2) Admission of Prior SEC Testimony of Filip Szymik; and
- (2) the Declaration of Filip Szymik

to be filed and served by United Parcel Service and electronic mail on:

Derrelle M. Janey, Esq.
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Suite 701
New York, NY 10006
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(Counsel for Respondent Jordan Peixoto)



Jack Kaufman



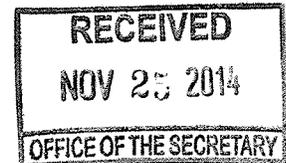
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JACK KAUFMAN
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November 24, 2014

VIA UPS OVERNIGHT

Brent J. Fields, Secretary
Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Mail Stop 1090
Washington, D.C. 20549



Re: In the Matter of Jordan Peixoto, Admin Proc. File No. 3-16184

Dear Mr. Fields:

Enclosed please find an original and three copies of the Division of Enforcement's

- (1) Motion for (1) Leave to Offer Declaration of Filip Szymik in Lieu of Live Trial Testimony; and (2) Admission of Prior SEC Testimony of Filip Szymik in the above-captioned proceeding; and
- (2) Declaration of Filip Szymik in support of the Division's motion.

Respectfully submitted,

Jack Kaufman
Senior Trial Counsel
Division of Enforcement

cc: Derrelle M. Janey, Esq.