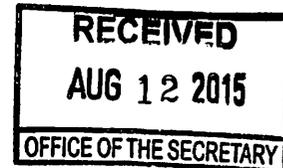


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**UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION**

**ADMINISTRATIVE PROCEEDING
File No. 3-16399**



In the Matter of

**HALPERN & ASSOCIATES LLC,
and BARBARA HALPERN, CPA,**

Respondents.

**MOTION *IN LIMINE* TO EXCLUDE EXPERT WITNESS TESTIMONY FOR FAILURE
TO COMPLY WITH SCHEDULING ORDER**

The Division of Enforcement (“Division”) respectfully submits the following memorandum of law in support of its motion *in limine* to exclude Respondents Halpern & Associates LLC (“H&A”) and Barbara Halpern (“Halpern”) (collectively, the “Respondents”) from introducing the expert testimony of Robert V. Castro in the above-captioned matter.

FACTUAL BACKGROUND

On February 23, 2015, an order instituting proceedings (“OIP”) was filed against Respondents charging them with: (1) engaging in improper professional conduct in violation of Rule 102(e)(1)(iv)(B) of the Rules of Practice; and (2) causing Lighthouse Financial Group, LLC (“Lighthouse” or the “Company”), a formerly registered broker-dealer, to violate Section 17 of the Exchange Act and Rule 17a-5(a) thereunder by filing a materially inaccurate annual audited report. A hearing is set in this matter for September 8, 2015.

FACTS SUPPORTING THE INSTANT MOTION

On August 3, 2015, Respondents provided the Division with a Witness List, which is attached hereto as Exhibit A. The Witness List identified Robert V. Castro as “an expert witness who will testify regarding applicable generally accepted accounting principles and generally accepted auditing standards of broker-dealers, including, but not limited to, auditors [sic] use of alternative confirmation procedures.” *Exhibit A* at p. 2. Respondents indicated that, with respect to this expert witness, “[t]he information required pursuant to SEC Rule of Practice 222(b) shall be supplied under separate cover.” However, Respondents have never provided this information to the Division. (Respondents have also failed to turn over their exhibits to the Division as well.)

In addition to failing to provide the Division with the information required pursuant to Rule 222(b), Respondents have failed to turn over an expert report as required. The Scheduling and General Prehearing Order, dated March 13, 2015 (hereinafter the “Scheduling Order”) in this case required the parties to exchange and file expert reports no later than August 3, 2015. Respondents have not done so. As a result, the Division has not received an expert report setting forth the opinions, much less the basis for the opinions, that Mr. Castro would provide with respect to the generally accepted accounting principles (“GAAP”) and generally accepted auditing standards (“GAAS”) relevant to Respondents’ audit of Lighthouse.¹

LEGAL SECTION

A. Mr. Castro’s Expert Testimony Should Be Excluded Because Respondents Have Not Complied with Rule 222(b).

Respondents have violated Rule 222(b) which, in and of itself, provides a sufficient basis to exclude Respondents from offering Mr. Castro’s expert testimony. “Rule 111 of the

¹ The Division turned over its expert report prepared by accountant Harris Devor to Respondents on August 3, 2015.

Commission's Rules of Practice, which is based upon Section 556(c) of the Administrative Procedure Act, 5 U.S.C. § 556(c), (APA), provides a list of powers of an Administrative Law Judge (ALJ) that includes 'receiving relevant evidence and ruling upon the admission of evidence and offers of proof' and 'regulating the course of a proceeding. . . .'" *In the Matter of Russo Securities, Inc.*, Exchange Act Rel. 562, 1998 WL 211391, at *1 (Apr. 21, 1998). This power includes determining whether evidence should be admitted in a proceeding.

Additionally, Rule 222(b) of the Rules of Practice expressly requires parties to turn over certain, specific categories of information with respect to proposed experts. Rules of Practice, Rule 222(b). The language of the rule is mandatory: "[e]ach party who intends to call an expert witness *shall* submit . . . a statement of the expert's qualifications, a listing of other proceedings in which the expert has given expert testimony, and a list of publications authored or co-authored by the expert." *Id.* (emphasis added). This information is required to provide the opposing party with an opportunity to investigate or challenge the offered expert's possible biases, qualifications, and/or conclusions. Significantly, Rule 222(b) also enables ALJs to fulfill their gatekeeper function of ensuring that the expert is qualified on the subject matter and applying reliable principles and methodologies to their work.

Although courts have acknowledged that excluding certain aspects of desired evidence or even wholesale testimony on a topic may be a harsh sanction, they have held that this sanction is required if the discovery rules of a forum are to be "perceived as a credible deterrent rather than a 'paper tiger.'" *Cine Forty-Second Street Theater Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1064 (2d Cir. 1979) (citation omitted); *see also Olson v. Montana Rail Link, Inc.*, 227 F.R.D. 550, 552 (D. Mont. 2005) (observing that discovery rules "give teeth to the expert disclosure requirements 'by forbidding the use at trial of any information required to be disclosed

by Rule 26(a) that is not properly disclosed.’’) (citing *Yeti By Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001)). Prompt disclosure is especially important where the testimony to be elicited involves specialized knowledge for which expertise outside of a layman’s or lawyer’s common understanding is required.

In this case, despite the significant purposes served by Rule 222(b), Respondents have violated the rule. Respondents have also failed to comply with the Court’s Scheduling Order, which required the parties to exchange and file expert reports by August 3, 2015. These failures have not only deprived the Division from timely assessing Mr. Castro’s credentials, but they have the potential to also deprive the Court from being able to meaningfully carry out its gatekeeper function. For these reasons alone, the Court should exclude Mr. Castro’s expert testimony pursuant to Rule 111 of the Rules of Practice.

B. Mr. Castro’s Expert Testimony Should Also Be Excluded Because of Prejudice to the Division.

Courts have routinely excluded expert testimony because of the prejudice to the opposing party caused by either the failure to turn over an expert report or the delayed production of such reports. *See, e.g., Reese v. Herbert*, 527 F.3d 1253, 1265 (11th Cir. 2008). As the Eleventh Circuit noted in *Herbert*, excluding or striking expert testimony is appropriate where a failure to comply with a scheduling order would deprive the opposing party a “reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses.” *Id.* (quoting *Sherrod v. Lingle*, 223 F.3d 605, 613 (7th Cir. 2000)). *See also Jorgenson Forge Corp. v. Consarc Corp.*, 2002 WL 34363668, at *1 (W.D. Wash. Jan. 9, 2002) (excluding witness testimony: “Defendant did not disclose a copy of Mr. Gleason’s report to Plaintiff until November 26, 2001. Defendant has not presented substantial justification for the delay and the delay is not harmless.”).

Significantly, this is not a case where Respondents have produced an expert report after a scheduling deadline. Instead, even though they have had several months to prepare and produce an expert report, Respondents have failed to produce anything.² The Division would be prejudiced if the Court were to permit Mr. Castro's opinion testimony at this late stage. The parties are less than a month away from the trial, and the Division does not have any understanding as to the scope, basis, or nature of Mr. Castro's expert testimony. As a result, the Division cannot meaningfully begin to prepare for its cross-examination of Mr. Castro, unlike Respondents who have the Division's expert report to review. Nor can the Division work with its own expert witness to begin to rebut any statements of Mr. Castro because it still does not have any understanding as to what the bases are for his opinion testimony.³ *See, e.g., NutraSweet Co. v. X-L Eng'g Co.*, 227 F.3d 776, 786 (7th Cir. 2000) ("Without even a preliminary or draft supplemental expert witness report from [the expert], NutraSweet was greatly hampered in its ability to examine him about his analysis of the site work. In these circumstances, the use of the 'automatic' sanction of exclusion was not an abuse of discretion.") (citations omitted); *Whiting v. United States*, 2005 WL 5994163, at *4 (S.D. Cal. Jul. 15, 2005) (excluding an expert from testifying for failure to provide an expert report because "Defendant would be subjected to the very type of ambush that Rule 26(a)(2)(B) is designed to prevent.").

Given the prejudice suffered by the Division as a result of Respondent's failures to produce an expert report and the required Rule 222(b) information, the Court should exclude Mr. Castro's testimony.

² This matter was initiated in February 2015 and the Scheduling Order issued in March 2015.

³ Moreover, forcing the Division and its expert Harris Devor to analyze a belatedly produced expert report (should one be provided) in a shorter time frame than the one in which Respondents have had to analyze the Division's expert report, would harm the Division by placing a party that violated the Scheduling Order in an arguably better position than the Division at trial.

CONCLUSION

For all the foregoing reasons, the Division respectfully requests that the Court grant its motion *in limine* to exclude Mr. Castro's expert testimony.

Dated August 10, 2015
New York, New York

DIVISION OF ENFORCEMENT

/s/ Nicholas A. Pilgrim 

Nicholas A. Pilgrim

Barry O'Connell

Securities and Exchange Commission

New York Regional Office

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New York, NY 10281

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CERTIFICATE OF SERVICE

I hereby certify that I served true copies by electronic mail of the foregoing Motion *in Limine* to Exclude Witness Testimony for Failure to Comply With Scheduling Order on the following on the 10th day of August, 2015.

The Honorable Cameron Elliot
Administrative Law Judge
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549
alj@sec.gov

Robert Heim
Meyers & Heim LLP
444 Madison Ave., #30
New York, NY 10022
RHeim@meyersandheim.com
Counsel for Respondents

Dated: August 10, 2015

/s/ Nicholas A. Pilgrim
Nicholas A. Pilgrim

EXHIBIT A

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16399

-----X
In the Matter of :
Halpern & Associates, LLC and :
Barbara Halpern, CPA :
Respondents. :
-----X

**WITNESS LIST OF RESPONDENTS HALPERN & ASSOCIATES, LLC AND
BARBARA HALPERN, CPA**

Respondents Halpern & Associates, LLC and Barbara Halpern, CPA respectfully submit this Witness List pursuant to the Order Setting Prehearing Schedule dated March 13, 2015.

1. Barbara Halpern
[REDACTED]
Wilton, CT [REDACTED]

Ms. Halpern is expected to testify about the allegations in the Order Instituting Proceedings and all aspects of the December 31, 2009 audit of Lighthouse Financial Group ("Lighthouse").

2. Richard Krill
[REDACTED]
Whitehouse Station, NJ [REDACTED]

Mr. Krill is expected to testify regarding his knowledge of Lighthouse's financial condition, financial statements and audits thereof.

3. David Prunier

[REDACTED]
New Windsor [REDACTED]

Mr. Prunier is expected to testify about his work at Halpern & Associates and his knowledge of the December 31, 2009 audit of Lighthouse.

4. Nancy Cooper

[REDACTED]
Staten Island, NY [REDACTED]

Ms. Cooper is expected to testify regarding her knowledge of Lighthouse's financial condition, statements and audits thereof.

5. Robert Bradley

[REDACTED]
New York, NY [REDACTED]

Mr. Bradley is expected to testify regarding his knowledge of Lighthouse's financial condition, statements and audits thereof.

6. Robert V. Castro (Expert Witness).

Savvy Fare LLC
Seaford, NY 11783

Mr. Castro is an expert witness who will testify regarding applicable generally accepted accounting principles and generally accepted auditing standards of broker-dealers, including, but not limited to, auditors use of alternative confirmation procedures. The information required pursuant to SEC Rule of Practice 222(b) shall be supplied under separate cover.

Respondents reserve the right to call any witnesses listed on the Division of Enforcement's Witness List, rebuttal witnesses and witnesses that may be needed to authenticate documents.

Dated: New York, New York
August 3, 2015

Respectfully submitted,

MEYERS & HEIM LLP

By: 

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New York, New York 10022
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