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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16554

In the Matter of

GRAY FINANCIAL GROUP, INC.,
LAURENCE O. GRAY, and
ROBERT C. HUBBARD, IV,
Respondents,

**DIVISION OF ENFORCEMENT'S
MOTION IN LIMINE TO STRIKE
RESPONDENTS' EXPERT (JELLUM)
REPORT AND TO PRECLUDE HER
FROM FURTHER TESTIMONY**

Pursuant to Rules 320 and 321 of the Commission's Rules of Practice, the Division of Enforcement ("the Division") hereby moves for an Order: (a) striking or excluding the report of Respondents' expert, Linda D. Jellum, which is a thinly disguised legal opinion; and, (b) precluding Jellum from testifying.¹

I.

FACTS

On January 23, 2017, Respondents submitted the expert report of Linda Jellum (the "Report"), a law professor and self-described expert in legal interpretation. Jellum describes herself as "one of the few experts in statutory interpretation and administrative law in the country."² Notably, Jellum is not an expert in the particular Georgia statute at issue in this case, and admits she is not an expert in finance or investments.

¹ The Division will address the report submitted by Respondents' other expert through a separate filing.

² This claim obviously excludes the nation's lawyers and judges.

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1. The first part of the document discusses the importance of maintaining accurate records of all transactions. It emphasizes that this is crucial for ensuring the integrity of the financial data and for facilitating audits.

2. The second part of the document outlines the specific procedures that must be followed when recording transactions. It details the steps from initial identification of the transaction to the final entry in the accounting system.

3. The third part of the document discusses the role of the accounting system in providing timely and accurate information to management. It highlights how this information is used for decision-making and for monitoring the performance of the organization.

4. The fourth part of the document addresses the challenges associated with maintaining accurate records. It identifies common pitfalls and provides strategies to avoid them, such as regular reconciliation and the use of standardized procedures.

5. The fifth part of the document concludes by summarizing the key points and reiterating the importance of accurate record-keeping. It stresses that this is not just a technical requirement but a fundamental aspect of sound financial management.

6. The sixth part of the document discusses the impact of technology on the accounting process. It explores how modern accounting software can streamline the recording process and reduce the risk of errors.

7. The seventh part of the document addresses the need for ongoing training and education for accounting staff. It emphasizes that as the accounting environment evolves, staff must stay current in their skills and knowledge.

8. The eighth part of the document discusses the importance of internal controls in ensuring the accuracy of the accounting records. It outlines the key components of a strong internal control system and how it should be implemented.

9. The ninth part of the document addresses the role of the auditor in verifying the accuracy of the accounting records. It explains the audit process and how it provides an independent assessment of the financial statements.

10. The tenth part of the document concludes by summarizing the overall importance of accurate record-keeping and the role of the accounting system in providing reliable financial information. It reiterates that this is a critical component of any successful organization.

Her report is a piece of legal advocacy. She first provides her interpretation of Georgia Statute 47-20-87 (the "Georgia Investment Act"). Jellum claims that she applied "generally accepted techniques for construing the statute's reasonably discernible intent, purpose and meaning." (Rpt. P. 1). That would be bad enough. In fact, she mixes in opinions on finance (as to which she admits she is not an expert), on what she thinks the legislature intended, and on what she thinks Gray and Hubbard reasonably understood. (Rpt. P. 13).

As a second matter, she adds her expert opinion to the chorus and interprets the U.S. Constitution to conclude that the SEC ALJ's appointment process is unconstitutional.

In addition to legal conclusions, the expert report is full of unsupported conclusions concerning areas as to which Jellum has no expertise, including claims that the SEC's interpretation of the statute would make it difficult if not impossible for public pension systems to invest; and, that under the SEC's interpretation, public pension systems could invest in Bernie Madoff's Ponzi scheme (because it claimed to have \$17 billion and thousands of investors). (Rpt pp. 11, 13).

The fact that Jellum has no expertise in finance doesn't seem to limit her opinions. She also opines that requiring a "fund of funds" to satisfy the same requirements as other pooled investments "makes no sense." (Rpt. P. 13). Jellum reaches this conclusion having no finance expertise and despite the fact that the statute makes no such distinction and, in fact, includes "funds of funds" in the definition of alternative investments. Jellum goes on to offer baseless or unnecessary interpretations of the relevant provisions of the Georgia Investment Act, including her definitions of terms in the statute (for example, "related" means "to be connected in some way").(Rpt. P. 24)

Jellum also goes into wild speculations completely unrelated to her expertise. For example, she speculates that GrayCo likely would have raised \$100 million “had not the SEC interfered with GrayCo’s marketing.” (Rpt p. 32).

II.

ARGUMENT

There is nothing in the report that Respondents could not submit as a brief. It should not be admitted as expert testimony. Nor should Jellum’s testimony be permitted.

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. *See id.* at 459-461 (affirming preclusion of expert testimony of 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 deci-

sions ... 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.”)

The Commission’s established view that expert witnesses should not offer legal opinions is consistent with the holdings of the federal courts. *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”).

In a recent case which involved the definition of a “dealer” in the securities industry, among other things, the court excluded the defendants’ expert report on the ground that it consisted of legal conclusions. *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.”) 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.* This court recently upheld the same principle. *See, In re Ironridge Global Partners, LLC*, Administrative Proceedings Rulings, Release No. 4409 (December 2, 2016).

Jellum's report is nothing but legal arguments in the guise of expertise in statutory construction. Her first conclusion is that the SEC's interpretation of the Georgia Investment Act is incorrect. Her report says nothing else. As noted above, Jellum's submission does not reflect any previous experience with Georgia Investment Act, or with the underlying business of pension fund investing generally. In fact, she admits she has no expertise in finance. Instead, she reads the law, applies what she claims are principles of statutory construction, and provides her interpretation of the law (generally based on what she concludes would work best in the finance context). Her second conclusion is a similar legal argument concerning unconstitutionality of the SEC ALJ appointment process (which somehow misses the court decisions on the subject). It is just another legal brief on the subject.

As one Court of Appeals has noted: "[A]n expert witness may not testify as to his opinion regarding ultimate legal conclusions." *United States v. Long*, 300 F. App'x 804, 814 (11th Cir. 2008) (citing *Montgomery v. Aetna Cas. Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990)).

To make matters worse, Jellum's conclusions are also permeated by her opinions concerning public policy. Consistent with the general prohibition on experts offering legal opinions, the federal courts also have determined that experts should not be permitted to offer their opinions on matters of public policy. *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).

Jellum's report is replete with conclusions about Georgia's public policy, intertwined with conclusions about the finance industry. For example, she interprets the four investor requirement of the statute to not apply to a fund of funds (such as the investment in this case), although "funds of funds" are defined as alternative investments by the statute. She reaches this conclusion by claiming that "money in a fund of funds is not at risk..." She then opines that under the SEC's interpretation, Georgia funds would be disadvantaged because other pension funds would be the seed investors, and may have more say regarding investment decisions. She then concludes that the legislature must have intended something else. (Rpt. p. 17)

These are precisely the kind of conclusory legal opinions that courts consistently refuse to admit. Jellum's opinions on these matters are simply irrelevant to the Court's adjudication. The Court's job is to apply the relevant statutes, precedent, and the authoritative guidance from the Commission to the facts.

Conclusion

For all the reasons stated herein, and any other reasons deemed appropriate by the Court, the Division respectfully requests that the Court issue an Order striking the report of Respondents' expert, Linda D. Jellum, and preclude Jellum from testifying.

Respectfully submitted this 24th day of January, 2017.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served a copy of the DIVISION'S MOTION

IN LIMINE, by electronic mail and by United Parcel Service, addressed as follows:

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This 24th day of January, 2016.

/s/ William P. Hicks
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