ADMINISTRATIVE PROCEEDING
FILE NO. 3-12359

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
May 2, 2007

In the Matter of	:	
	:	ORDER ON RECONSIDERATION OF
ANTHONY C. SNELL and	:	BENCH RULINGS LIMITING OR
CHARLES E. LECROY	:	EXCLUDING CERTAIN EXHIBITS
	:	

On January 26, 2007, the Division of Enforcement (Division) requested reconsideration of certain bench rulings made during the hearing in this matter. At issue are exhibits I accepted only for a limited purpose (Division Exhibit 62) ("DX ___") or excluded in their entirety (DX 9-DX 13, DX 16, DX 17). On February 22, 2007, Respondents Anthony C. Snell (Snell) and Charles E. LeCroy (LeCroy) urged me to deny the Division's request for reconsideration. I grant the Division's request in part and deny it in part, as described below.

Division Exhibit 62: Accepted for a Limited Purpose

Several sources assured J.P. Morgan Securities, Inc. (JPM), that it would be the lead underwriter on a proposed Philadelphia Gas Works (PGW) revenue bond transaction (Transcript pages 291, 383, 452-53 ("Tr. ___"); DX 60). However, when the transaction closed, JPM was not the lead underwriter.

The head of JPM's energy group was upset when he learned of this outcome (Tr. 294). He accused Snell of "trading off" the lead underwriter's position on the PGW revenue bond transaction for the prospect of a leading position on some future swap transaction (Tr. 453). Snell vehemently denied the accusation (Tr. 303-04). Peter Hill (Hill), LeCroy's supervisor, directed LeCroy to investigate the matter, and LeCroy eventually concluded that there was no merit to the accusation of "trading off" transactions (Tr. 453).

DX 62 is an October 3, 2002, e-mail message from LeCroy to Hill, reporting the results of his investigation. I admitted the exhibit against LeCroy for the limited purpose of showing that LeCroy sent the e-mail to Hill (Tr. 455). The Division seeks reconsideration of this ruling, arguing that the exhibit should have been admitted against LeCroy for all purposes.

In deciding when to admit and whether to rely on hearsay evidence, the Securities and Exchange Commission (Commission) evaluates its probative value, its reliability, and the fairness of its use. See Harry Gliksman, 54 S.E.C. 471, 480-81 & nn.19-20 (1999), aff'd, 24 Fed. Appx. 702 (9th Cir. 2001); Charles D. Tom, 50 S.E.C. 1142, 1145 (1992). "Trading off" is

a collateral issue that has no relevance to the outcome of this proceeding. The Division scarcely mentions the issue in its post-hearing pleadings (Division's Proposed Findings of Fact ## 206-08). As a result, the e-mail message has limited probative value.

The Division offers no support for its assertion that the text of the e-mail accurately summarizes what Crystal Mullins, head of the airport unit for JPM's public finance group, told LeCroy about what Snell "indicated" to her. LeCroy was unable to shed additional light on the matter: "I don't remember her telling me that but I see [it] based on what I'm reading" (Tr. 452). The Division exhausted LeCroy's memory on the issue and came up empty-handed. To this extent, the Division's motion for reconsideration is denied.

The e-mail message also summarizes LeCroy's conclusion: "I am comfortable that there were never any discussions about trading off transactions." This aspect of the e-mail finds independent corroboration in LeCroy's testimony (Tr. 452-53). I reverse my bench ruling and admit DX 62 as an accurate statement of LeCroy's conclusion. The e-mail message next summarizes a conversation between LeCroy and Ronald White (White) and recounts White's statement that "it was simply necessary to spread around the business." This aspect of the e-mail finds independent corroboration in LeCroy's testimony, as well (Tr. 454). I reverse my bench ruling and admit DX 62 as an accurate summary of what White told LeCroy about spreading around the business.

The record does not offer independent corroboration as to whether White's statement to LeCroy was an accurate reflection of the City of Philadelphia's (City) policy about spreading around the business, or whether the City even had a policy on that subject. Nor is there independent corroboration as to whether White's other representation to LeCroy, as reflected in the e-mail ("the general feeling at the City . . . is that we have become the primary go-to firm"), was an accurate statement of the City's "general feeling," or whether the City even had feelings. To the extent that the Division seeks admission of DX 62 as evidence of the truth of these two matters, its motion is denied.

Rejected Division Exhibit 17

Folasade Olanipekun (Olanipekun) testified for the Division at the administrative hearing (Tr. 9-66). The Division's direct examination was brief, lasting one hour, ten minutes (Tr. 9-48).

At the close of its direct examination, the Division sought to introduce excerpts of testimony that Olanipekun gave during the criminal trial of United States v. Kemp (Tr. 43; DX 17).[1] Respondents objected, but made it clear that they would have no problem if the Division

[1] In its witness list, the Division stated: "To the extent that the agreement of Respondents can be secured, the Division reserves the right to present the testimony of any witness by offering designated portions of the transcript of such witness's previously taken sworn testimony." The Division never secured Respondents' agreement to present any part of Olanipekun's prior testimony. See infra n.3.

wanted to elicit more live testimony from Olanipekun (Tr. 43-47).[2] The Division declined to ask Olanipekun any more questions, opting instead to "stand on what the law permits" (Tr. 47). I deferred a ruling and encouraged the parties to negotiate their differences. They were unable to do so (Tr. 47-48, 477).[3] However, the Division never specifically renewed its motion to admit DX 17. I will therefore treat its motion for reconsideration as a renewed request for the admission of DX 17.

The Division's argument fails for several reasons. Both the hearing transcript and the motion for reconsideration fail to show how the exclusion of DX 17 prejudices the Division's case against Snell and LeCroy. As a result, anyone reading the record is left to speculate whether the Division merely wants the criminal trial testimony to bolster Olanipekun's administrative hearing testimony, or whether the Division believes her prior testimony has some independent evidentiary significance.[4]

I have read the Division's proffered excerpts of Olanipekun's prior testimony and I conclude that they duplicate her testimony at the administrative hearing. The Division's excerpts are not just cumulative; they are unduly repetitious. See Rule 320 of the Commission's Rules of Practice ("[T]he hearing officer . . . shall exclude all evidence that is . . . unduly repetitious."); 5 U.S.C. § 556(d) (same); Del Mar Fin. Servs., Inc., 56 S.E.C. 1332, 1351 & n.22 (2003) ("The law judge would have been within her discretion in requiring the Division to specify the specific statements that it was relying on and in excluding . . . unduly repetitious evidence under our Rule of Practice 320."). Olanipekun was a credible witness at the administrative hearing. Accepting

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[2] Snell and LeCroy were not defendants during the Kemp trial. The district court had previously granted their motion for severance and a separate trial. Snell and LeCroy then pleaded guilty before the Kemp trial began. As a result, Respondents had no opportunity to object to the form of the questions asked or to cross-examine Olanipekun during the Kemp trial. The Division has not sustained its burden of showing that the other defendants in the Kemp trial effectively stood in the shoes of Snell and LeCroy and had a similar motive to develop the Kemp trial record on issues relating to Municipal Securities Rulemaking Board Rule G-38.

[3] Before we took testimony on the morning of December 7 or 8, 2006, counsel advised me that their good faith efforts to narrow the designations in DX 17 had failed (Division's Reply Brief, dated Mar. 5, 2007, at 1 n.1).

[4] Bolstering is the impermissible practice of offering evidence solely for the purpose of enhancing a witness's credibility before that credibility is attacked. See United States v. Lindemann, 85 F.3d 1232, 1242-43 (7th Cir. 1996). Bolstering is not so much a concern in bench trials as it is in jury trials, because the judicial fact finder can disregard any cumulative evidence erroneously admitted. If I were positive that the Division offered Olanipekun's prior testimony only to bolster her credibility in the administrative proceeding, I could admit DX 17 and then ignore it. However, if I guess wrong, and the Division later argues that Olanipekun's prior testimony has independent evidentiary significance, Respondents would be irreparably prejudiced.

into evidence the Division's excerpts of her criminal trial testimony would not make her twice as credible.

Rule 235(a) of the Commission's Rules of Practice describes the circumstances under which a prior, sworn statement of a witness who is not a party may be introduced into the record. A motion to introduce a prior sworn statement "may" be granted if the witness is unavailable, see Rule 235(a)(1)-(4), or if, 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, see Rule 235(a)(5). In making this latter determination, due regard "shall" be given to the presumption that witnesses will testify orally in an open hearing. See Rule 235(a)(5).

Rule 235(a) may be applied only if the witness's prior sworn statement is "otherwise admissible." For that reason, the parties devote considerable energy to arguing whether Olanipekun's testimony at the criminal trial is hearsay.[5] Assuming arguendo that Olanipekun's

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[5] The Division insists that Olanipekun's prior testimony is not hearsay, because she adopted it at the administrative hearing (Tr. 12). In support, the Division cites case law interpreting an Advisory Committee Note to proposed Federal Rule of Evidence 801(d)(1) (Prehearing Conference of Oct. 31, 2006, at 15-16; Prehearing Conference of Dec. 1, 2006, at 17-18; Tr. 44-45; Motion for Reconsideration at 6). The relevant part of the Advisory Committee Note states: "If the witness admits on the stand that he made the statement and that it was true, he adopts the statement and there is no hearsay problem."

I agree with the Division that Olanipekun adopted her prior criminal trial testimony. However, it is unclear why the Division begins its analysis by ignoring the text of Federal Rule of Evidence 801(d)(1) and proceeding straight to the Advisory Committee Note. Language appearing in an Advisory Committee Note, but absent from the text of a Rule, can be problematic. See Tome v. United States, 513 U.S. 150, 167 (1995) (Scalia, J., concurring); United States v. Carey, 120 F.3d 509, 512 (4th Cir. 1997); United States v. Downin, 884 F. Supp. 1474, 1479 (E.D. Cal. 1995). The Division has not argued that the text of Federal Rule of Evidence 801(d)(1) is ambiguous.

The text of Federal Rule of Evidence 801(d)(1) does not define all types of prior statements as non-hearsay. Rather, it does so with respect to a prior statement that is: (A) inconsistent with the declarant's testimony and given under oath subject to the penalty of perjury at a prior trial or hearing; (B) consistent with the declarant's testimony and is offered to rebut a charge against the declarant of recent fabrication; or (C) one of identification of a person made after perceiving the person. Even if Olanipekun's prior testimony—which occurred over three days and involved hundreds of questions and hundreds of answers—can legitimately be characterized as a single "statement" for purposes of Federal Rule of Evidence 801(a), the Division's argument ignores the additional conditions (A, B, or C) of Federal Rule of Evidence 801(d)(1).

The better approach would be to treat Olanipekun's prior testimony as the equivalent of a deposition and to consider its admissibility by analogy to Federal Rule of Civil Procedure 32(a)(3)(E) (recognizing the importance of presenting testimony orally and in open court and

prior testimony should be deemed "non-hearsay," the Division still has not overcome the Rule 235(a)(5) presumption that Olanipekun should testify orally in an open hearing. Nor has the Division addressed the two most recent Commission opinions discussing this subject. See Martin B. Sloate, 52 S.E.C. 1233, 1235 (1997) ("[W]hatever prior testimony individuals may have given, they should be called to testify at the hearing, if available, in order to give the law judge the opportunity to assess their credibility. Under all the circumstances, we think that the law judge's decision to exclude most of the trial transcript [from an earlier injunctive proceeding] was proper."); id. at 1235 n.3 ("The law judge concluded that, since Sanford Weill had testified at the hearing and the Division had failed to offer sufficient justification to admit his prior testimony, admission of that testimony was unwarranted. We agree with that determination."); cf. Samuel O. Forson, 53 S.E.C. 31, 33 (1997) ("[L]ive testimony is preferable in our proceedings if the witnesses are available . . . the law judge did not rely on [the transcripts of certain witnesses who testified at Forson's criminal trial], and neither have we.").[6]

This is a matter that Rule 235(a)(5) commits to my discretion. It would not be desirable, in the interest of justice, to allow the Division to use Olanipekun's prior testimony as substantive evidence in this proceeding. Giving due regard for the presumption that witnesses will testify orally in open court, as well as the Commission's guidance in Sloate, I deny the Division's request to admit DX 17.

Finally, certain relevant matters were omitted from the Division's excerpts in DX 17. See Rule 235(a) of the Commission's Rules of Practice ("If only part of a statement is offered in evidence, the hearing officer may require that all relevant portions of the statement be introduced."). The omitted matters include Olanipekun's prior testimony that: (a) Corey Kemp (Kemp) was not involved in recommending finance teams while Olanipekun was Treasurer and Kemp was a Deputy Treasurer; (b) appointing White's law firm as underwriter's co-counsel or co-bond counsel on many City transactions meant that other qualified minority law firms were bypassed; (c) Olanipekun was involved in the preliminary selection of a finance team for the Philadelphia Redevelopment Authority's Neighborhood Transformation Initiative and Kemp was not involved; and (d) Olanipekun never allowed White to make telephone calls to finance team participants before the City publicly announced the team's composition, but she did not know if Janice Davis (Davis), George Burrell, or Mayor Street provided such advance information to

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requiring proof of "exceptional circumstances"). The showing required to demonstrate "exceptional circumstances" is formidable. See Griman v. Makousky, 76 F.3d 151, 153-54 (7th Cir. 1996). In the alternative, the Division might have approached the issue by analogy to Federal Rule of Evidence 803(5).

[6] The Commission's opinion in Alessandrini & Co., 45 S.E.C. 399, 408-09 (1973) (affirming an ALJ's ruling that a respondent's investigative testimony was not "mere hearsay" and admitting it into the record), is not to the contrary. The Initial Decision in that proceeding makes it clear that the ALJ found that (a) the respondent was fully examined and cross-examined on the prior testimony he had given; and (b) if the respondent's prior testimony were to be treated as hearsay, there was sufficient non-hearsay testimony in the record to corroborate his prior testimony. See Alessandrini & Co., 1971 SEC LEXIS 3975, at *39-40 (ALJ) (Dec. 10, 1971) (emphasis added).

White. If DX 17 were to be admitted into evidence, these pages of the criminal trial testimony should also be introduced.[7]

Rejected Division Exhibit 16

DX 16 is a far more controversial document than DX 17. Davis testified as a fact witness for both the Division and Respondents during the administrative hearing (Tr. 113-77, 185-229). The Division's direct examination lasted only fifty minutes (Tr. 113-36). At the close of its direct examination, the Division sought to introduce excerpts of testimony that Davis gave during the Kemp criminal trial (Tr. 135-36; DX 16). I sustained Respondents' objections, but gave the Division an opportunity to continue with its direct examination, if it needed to elicit more live testimony (Tr. 136). I also gave the Division the opportunity to continue to negotiate stipulations with Respondents about specific pages of excerpts (Tr. 136). The parties were unable to resolve their differences. See supra n.3. I now deny the Division's motion for reconsideration, with one exception.

In part, my reasons for rejecting DX 16 mirror my reasons for rejecting DX 17. Some of the excerpts of Davis's testimony at the criminal trial merely duplicate her testimony at the administrative hearing. These passages in DX 16 involve Davis's educational background, her professional work history, her positive experiences with Snell in Texas, her duties as the Finance Director in Philadelphia, her description of the City Treasurer's duties, and her recollection of how Snell renewed contact with her in Philadelphia. Davis's live testimony on these matters was credible and non-controversial. Accepting these parts of DX 16 into the record would not enhance Davis's credibility. As to these parts of DX 16, I deny the Division's request for reconsideration on the grounds that they are unduly repetitious.

As with Olanipekun, I note that the Division's motion for reconsideration fails to state how the rejection of DX 16 prejudices its case against Snell and LeCroy. However, once the duplicative materials in DX 16 are eliminated from consideration (as discussed immediately above), the Division's design for the balance of DX 16 is plain. The remaining excerpts from Davis's prior testimony are the heart and soul of what should have been live testimony during the Division's case-in-chief.

I do not agree with the Division that Davis adopted her criminal trial testimony. The Division did not ask Davis if she had recently reviewed her criminal trial testimony, as it did with Olanipekun (compare Tr. 12 with Tr. 135). "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602. Rule 602 applies to incorporated prior statements just as it applies to other parts of live testimony. BCCI Holdings (Luxembourg) v. Khalil, 184 F.R.D. 3, 7-8 (D.D.C. 1999), modified on other grounds, 56 F. Supp. 2d 14, 24 (D.D.C. 1999), aff'd in part

[7] The relevant pages from Olanipekun's testimony at the criminal trial are Day 2, page 133, lines 4-6; page 153, line 2 through page 154, line 4; page 227, lines 1-14; Day 3, page 43, lines 19-22; page 46, lines 22-25; Day 4, page 19, lines 11-14; page 27, line 22 through page 28, line 2; page 33, line 10 through page 34, line 2; and page 38, line 14 through page 41, line 15.

and rev'd in part on other grounds, 214 F.2d 168 (D.C. Cir. 2000). Where a witness currently lacks personal knowledge of matters addressed by a prior statement, but knows the statement to be true, the statement cannot be incorporated as part of the witness's present testimony because the witness lacks personal knowledge and is unavailable for cross-examination as to the prior statement.[8] Id. I therefore treat Davis's prior testimony as hearsay. To the extent that there is nothing in the record to corroborate such hearsay, I exclude it in the interest of fairness.

Davis was a very important fact witness for the Division, or at least she should have been. Yet her direct examination embraced only twenty-four pages of live testimony. In contrast, DX 16 contains 140 pages of excerpts. If the Division's tactics were to be permitted, there would be two results: the Division could insulate itself from any surprises by a potentially problematic witness on direct examination (memory failures, changed testimony, and inconsistencies); and it could deprive the presiding ALJ of the opportunity to observe the witness's demeanor on direct examination as she grappled with the tough questions. This does not comport with my understanding of what is desirable or in the interest of justice. To the extent that Davis's prior testimony may be "otherwise admissible" under Rule 235(a), the Division did not overcome the holding of Sloate or the Rule 235(a)(5) presumption that Davis should testify orally in open court. In these circumstances, I conclude that Davis's testimony at the criminal trial should not be used as substantive evidence in the administrative proceeding. Any other result would emasculate Rule 235(a)(5) of the Commission's Rules of Practice.[9]

I further find that the excerpts the Division offered in DX 16 did not include "all the relevant portions" of Davis's prior testimony, within the meaning of Rule 235(a) of the Commission's Rules of Practice. I note that DX 16 omits Davis's testimony on Day 6, Tr. 15-16, of the Kemp criminal trial that PGW, a City agency, "very often" came up with the participants for its own finance teams. DX 16 also omits Davis's testimony on Day 6, Tr. 18, 23-27. Those omitted pages give an entirely different perspective on White's recommendations to Kemp for the finance team on the PGW transaction during September 2002. If DX 16 were to be admitted into evidence, these pages of the criminal trial testimony should also be introduced.

There is one final wrinkle that requires consideration. Paragraph II.C.7 of the Order Instituting Proceedings (OIP) alleges that Davis testified throughout the Kemp criminal trial that White had "advocated" on behalf of JPM. It further alleges that Davis's criminal trial testimony

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[8] As an illustration, the Division asked Davis whether she could recall any situations in which White advocated to include JPM in any debt transactions (Tr. 118). Davis recalled only one such matter, a workers' compensation transaction (Tr. 118). The Division then used a passage from Davis's prior testimony to refresh her recollection about another transaction involving the Philadelphia Municipal Authority (PMA) (Tr. 121-22). With her memory thus refreshed, however, Davis said she could recall the PMA transaction "just vaguely" (Tr. 122). In these circumstances, Respondents could not effectively cross-examine Davis about White's purported advocacy on behalf of JPM in connection with the PMA transaction.

[9] The Division has not claimed that Davis's situation is comparable to that of Ernesto Lanza (Lanza), who submitted written direct testimony and was cross-examined by Respondents. Lanza was not a fact witness, and observation of his demeanor was not as important.

identified "at least" four separate transactions in which White endorsed JPM for City business.[10] This is an unusual way of crafting an OIP, and the first question to consider is: for purposes of this administrative proceeding, why should it matter how Davis testified at the Kemp criminal trial? Even if Davis testified as characterized in Kemp, that fact would not establish that her prior testimony was credible or complete. I do not read OIP ¶ II.C.7 as implicitly repealing the Rule 235(a)(5) presumption that Davis, like all witnesses, would testify orally in open court during the administrative proceeding. There is a procedure for waiving compliance with an otherwise applicable Rule of Practice. See Rule 100(c) of the Commission's Rules of Practice. The Commission did not invoke that procedure here to waive the Rule 235(a)(5) presumption.

Nonetheless, I do not know how the Division could prove the allegations in OIP ¶ II.C.7 without introducing the relevant passages of Davis's testimony at the criminal trial. I therefore grant the Division's motion for reconsideration in part and admit the following excerpts from DX 16 into the record for a limited purpose: Day 4 criminal trial testimony, page 113, lines 4-25; page 127, line 24 to page 128, line 10; page 176, line 2 to page 181, line 11; page 214, line 15 to page 215, line 19; page 219, lines 18-22; page 221, lines 8-16; page 224, line 17 to page 225, line 7; Day 5 criminal trial testimony, page 27, line 5 to page 28, line 2; Day 6 criminal trial testimony, page 59, line 11 to page 60, line 15. I admit these excerpts for the limited purpose of allowing the Division to prove that Davis testified at the Kemp criminal trial in the manner alleged in Paragraph II.C.7 of the OIP. I note that nothing in DX 16 supports the allegation in OIP ¶ II.C.7 that White endorsed JPM for a transaction involving the "Philadelphia" Convention Center. I specifically find that Davis's prior testimony on these matters did not relieve the Division of its Rule 235(a)(5) obligation to present live testimony on direct examination at the administrative hearing, if the Division believed these matters to be relevant.

Rejected Division Exhibits 9 through 13

JPM's compliance department and its outside legal counsel conducted a series of interviews to learn what had happened in Mobile, Alabama, and Philadelphia, Pennsylvania (Tr. 93, 98-99). Lawyers from Morgan, Lewis & Bockius LLP (Morgan Lewis), outside counsel to JPM, and an in-house JPM lawyer interviewed Snell and LeCroy twice each, in January and March 2004. When a federal grand jury subpoenaed Morgan Lewis's interview notes, Morgan Lewis initially balked, claiming various privileges. As a compromise, Morgan Lewis created four memoranda to summarize its lawyers' notes of the interviews with Snell and LeCroy (DX 10-DX 13). Morgan Lewis then provided the four memoranda, but not the interview notes, to the grand jury (Tr. 474-75). The history of this controversy is recounted in more detail in United States v. LeCroy, 348 F. Supp. 2d 375 (E.D. Pa. 2004).

The Division first offered these four memoranda to support its motion for summary disposition. It was improper for the Division to do so under Rule 250(a) of the Commission's

[10] Respondents joined the issue in their Answer, as follows: "Davis . . . testified for four days at the criminal trial. Without conceding the admissibility of this transcript, the prior testimony of Ms. Davis speaks for itself. . . . Respondents deny the [Division's] characterization of her testimony to the extent it suggests that White 'advocated' for [JPM] as a G-38 consultant."

Rules of Practice. The four memoranda did not involve stipulations. They were not the subject of an uncontested affidavit or a proper matter for official notice. While the Division argued that the memoranda contained admissions, Respondents strongly disputed the point. The Division now claims that the four memoranda are already part of the record (Div. Brief at 38 n.34). That is true only in the most technical sense; it does not moot the issue now before me.

The Division next offered the memoranda as hearing exhibits (DX 10-DX 13), along with a sworn declaration from a Morgan Lewis attorney describing the circumstances of their preparation (DX 9). Respondents opposed admission of the declaration and the four memoranda into evidence, and I sustained their objection (Tr. 472-76). Immediately thereafter, the Division rested its case-in-chief (Tr. 476-78). The Division now asks me to reconsider that ruling and admit DX 9-DX 13 against both Respondents. As a fallback position, the Division urges me to admit DX 10 and DX 11 against LeCroy, and DX 12 and DX 13 against Snell.

DX 9. The Division never called the author(s) of the memoranda to testify during the administrative hearing. Nor did it show that the author(s) was (were) unavailable to testify. See Rule 235(a)(1)-(4) of the Commission's Rules of Practice. A sworn declaration, such as DX 9, is no substitute for meaningful cross-examination.[11] See William L. Kicklighter, Jr., 51 S.E.C. 1, 7 (1991) (holding that it was appropriate to exclude an affidavit from evidence when there was no showing of the affiant's unavailability and the Division would otherwise be deprived of an opportunity to cross-examine the affiant), aff'd sub nom., Brown v. SEC, 992 F.2d 328 (11th Cir. 1993); Ferdinand Russo, 1995 SEC LEXIS 3003 (ALJ) (Nov. 2, 1995) (denying the Division's motion to admit testimony by affidavit in lieu of live testimony).

As discussed above, I am required to give due regard to the presumption that witnesses will testify orally in an open hearing. See Rule 235(a)(5) of the Commission's Rules of Practice. The Division cannot satisfy the presumption by shifting the burden of proof to Respondents, as it seeks to do (Motion for Reconsideration at 5) ("If portions of the memoranda did not accurately reflect their prior statements, respondents had the opportunity to identify and explain such inaccuracies."). I deny the Division's motion for reconsideration, and exclude DX 9 on the grounds that the Division did not provide a live witness to testify at the administrative hearing.

DX 10-DX 13. The fact that Morgan Lewis provided its memoranda to a federal grand jury is not dispositive of the issues presented here. The district court noted that a grand jury's operation "generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials." LeCroy, 348 F. Supp. 2d at 387. It also observed that the use of the memoranda during the then-anticipated criminal trial "is, at this point, entirely hypothetical

[11] The Division did not ask for extra time to present live testimony from a Morgan Lewis representative before concluding its case-in-chief (Tr. 476-78). I had previously offered the Division additional time and an opportunity to amend its witness list when it appeared that Respondents would use a last-minute expert (Order of Nov. 29, 2006). After Respondents rested their case, the Division presented a brief rebuttal case (Tr. 790-802). The Division did not offer to produce a live witness from Morgan Lewis at that time, either.

and theoretical." Id. at 377. Ultimately, there was no trial because Snell and LeCroy entered guilty pleas.

Assuming arguendo that the sworn declaration from the Morgan Lewis attorney is truthful and complete, the declaration makes it clear that the authors of the memoranda "did not attempt to create a verbatim record," but only to capture "the substance" of the four interviews (DX 9 ¶¶ 3, 5). Respondents' attorneys were not present during the March 2004 interviews. Respondents never adopted the memoranda as their own statements. They testified during the administrative hearing that the memoranda are inaccurate (Tr. 429, 438-39, 464).[12]

The four memoranda were not contemporaneously prepared. Rather, they were written six weeks to three months after the interviews in question. Morgan Lewis attorneys composed the memoranda in April 2004. JPM had already fired Snell and LeCroy in March 2004 (Tr. 249, 351-52; DX 8 at 131). The memoranda were prepared in anticipation of criminal litigation, and not in the ordinary course of business. It is unclear from reading DX 9 whether the in-house JPM attorney took interview notes of his/her own and, if so, why the Morgan Lewis attorneys did not use those notes in drafting the four memoranda. These are not self-authenticating documents. Nor are they matters as to which official notice is appropriate.

Nonetheless, the Division correctly observes that the Commission favors a liberal approach to the admission of evidence in administrative proceedings. In doubtful cases, the Commission has expressed a preference for inclusiveness, with the ALJ then determining the weight to be given to the evidence. See Del Mar, 56 S.E.C. at 1349-50.

I therefore grant the Division's motion for reconsideration, in part, and admit DX 10 and DX 11 as to LeCroy and DX 12 and DX 13 as to Snell. I deny the Division's motion, insofar as it seeks to admit all four memoranda against both Respondents.[13] Although I have granted the

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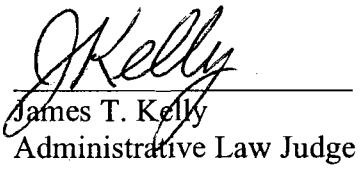
[12] There is considerable irony in the Division's argument that the four memoranda should be treated as Snell's and LeCroy's own statements, and thus, as non-hearsay, under Federal Rule of Evidence 801(d)(2)(A). When Respondents sought production of the Division's notes of an interview with Snell pursuant to Rule 231(a) of the Commission's Rules of Practice, the Division urged me to find that its interview notes were not "substantially verbatim statements" (Tr. 190-91, 245, 325-28, 467-68).

[13] With respect to DX 10-DX 13, there is no merit to the Division's invocation of the co-conspirator exception to the hearsay rule. Cf. United States v. Eubanks, 591 F.2d 513, 519-20 (9th Cir. 1979); United States v. Wilson, 490 F. Supp. 713, 717 (E.D. Mich. 1980), aff'd, 639 F.2d 314 (6th Cir. 1981). The Division has a colorable argument that conspiracy principles should be applied co-extensive with the wire fraud scheme (March-October 2003), even though Snell and LeCroy were not indicted for conspiracy. "Statements" that Snell and LeCroy made in January and March 2004 were not made during the course and in furtherance of any conspiracy.

Division's motion for reconsideration in part, I conclude that DX 10-DX 13 have not been shown to be trustworthy, and I will give them no weight in preparing my Initial Decision.[14]

IT IS ORDERED THAT the Division's motion for reconsideration is granted in part as to Division Exhibits 10 through 13, 16, and 62, to the extent explained in this Order; and

IT IS FURTHER ORDERED THAT the Division's motion for reconsideration is otherwise denied.



James T. Kelly
Administrative Law Judge

[14] There is no functional difference between excluding a given exhibit, on the one hand, and admitting the exhibit, but giving it no weight, on the other hand. Compare Sloate, 52 S.E.C. at 1235 & n.3, with Forson, 53 S.E.C. at 33; see also Peabody Coal Co. v. McCandless, 255 F.3d 465, 469 (7th Cir. 2001) ("Agencies relax the rules of evidence because they believe that they have the skill needed to handle evidence that might mislead a jury. . . . An agency must act like an expert if it expects the judiciary to treat it as one.").