

conclusion testimony because: (a) Presiding Officer Mitchell has sole authority to render factual findings and conclusions of law in this proceeding; (b) Mr. Djokic's opinions will not assist the Presiding Officer in discharging his responsibilities; and therefore, (c) Mr. Djokic's opinions regarding the interpretation and application of RSA Chapter 421-B are irrelevant and immaterial.

RSA 421-B:26-a

3. Since the Staff Petition alleges violations of RSA Chapter 5-B and RSA Chapter 421-B, the applicable procedures for the adjudicatory hearing are set forth in RSA 421-B:26-a. RSA 5-B:4-a, VI ("All hearings shall be conducted in accordance with RSA 421-B:26-a"); RSA 421-B:26-a, I ("All hearings conducted pursuant to this chapter shall be governed by the provisions of this section and the provisions of RSA 541-A shall not apply to this chapter"). The presiding officer has sole authority to make findings of fact and conclusions of law. RSA 421-B:26-a, XIV(m); RSA 421-B:26-a, XXI. Although the presiding officer is not bound by common-law or statutory rules of evidence, he may use his discretion to "exclude any irrelevant, immaterial, unreliable, or unduly cumulative or repetitious evidence." RSA 421-B:26-a, XX.

Legal Conclusions Should be Excluded as Irrelevant and Immaterial

4. Pursuant to RSA 421-B:26-a, it is the presiding officer's responsibility to decide the factual and legal disputes in this case. It is no less important in the adjudicatory hearing here than in a court trial that "[t]he decisions on the ultimate issues in the case cannot . . . be delegated to others for decision." *See Gulf Group General Enterprises Co. v. United States*, 98 Fed.Cl. 639, 641 (2011).

5. Statutory interpretations plainly are issues of law, and therefore, legal conclusions elicited from expert witnesses on those issues “should not be received, much less considered.” *Id. at* 641 (internal citations omitted). When an expert witness “testifies about what the law is or directs the finder of fact how to apply law to facts[, it] does not ‘assist the trier of fact to understand the evidence or to determine a fact in issue’” *Id.* Instead, legal conclusion testimony “offer[s] nothing more than what lawyers for the parties can argue in closing arguments.” *U.S. Securities and Exchange Commission v. Big Apple Consulting USA, Inc.*, 2011 WL 3753581, at *4 (M.D.Fla.).

6. Moreover, while an expert witness may be qualified to testify as to standards and practices within a particular industry or business, legal opinions fall outside the scope of industry or business expertise. *See Marx & Co., Inc. v. The Diners’ Club, Inc.*, 550 F.2d 505, 509 (2d Cir. 1977). Consequently, regardless whether a jury, judge, or presiding officer is the finder of fact, legal conclusion testimony is irrelevant and immaterial and should be excluded for those reasons. *Raytheon Aircraft Company v. United States*, 2008 WL 627488, at *11 (D.KS.2008) (expert testimony regarding the governing legal standard for recovery of response costs under CERCLA and whether plaintiff’s costs satisfy that standard excluded in bench trial); *Magee v. Huppin-Fleck*, 279 Ill.App.3d. 81, 86, 664 N.E.2d 246, 249 (1996) (expert testimony inadmissible in bench trial because “it was not necessary or proper for the court to allow expert opinion testimony concerning the proper interpretation of Oregon law”).

7. The lines for the admissibility of expert testimony in securities cases are well drawn. “In securities cases, expert testimony commonly is admitted to assist the trier of fact in understanding trading patterns, securities industry practice, securities

industry regulations, and complicated terms and concepts.” *Big Apple Consulting USA, Inc.*, 2011 WL 3753581, at *4 (M.D.Fla.). However, legal conclusion testimony opining about whether an instrument is a security must be excluded. *Gilliand v. Hergert*, 2007 WL 4105223 (W.D.Pa.) (“It is the Court’s function, not that of an expert witness, to make legal conclusions, such as whether the Notes at issue were ‘securities.’ Thus, [the expert’s] attempt to opine as to whether the ‘essential elements of the Pennsylvania Securities Act and Pennsylvania common law claims brought against [the defendant] were met is not admissible.”) (internal citations omitted); *Hill v. Equitable Bank*, 1987 WL 8953, at *1 (D.Del.) (“In securities cases, expert testimony has been allowed, but it typically has been permitted in situations where the expert testifies to a technical aspect of the securities industry, not to legal conclusions derived from the facts of a transaction.”).

8. Here, if Mr. Djokic is qualified to offer an opinion as to standard industry practices and procedures, and such testimony is deemed relevant, the opinion should be deemed admissible. However, Mr. Djokic should be precluded from offering legal conclusions, such as whether the LGC’s products are investment contracts and thus securities within the ambit of RSA Chapter 421-B, and whether Mr. Andrews’ conduct violated certain provisions of RSA Chapter 421-B.

The Motion is Timely

9. This motion is not premature. BSR’s deadline to produce its expert report is February 17, 2012. Respondents’ expert disclosures must be produced by March 16, 2012. Defining the parameters of admissible expert testimony would allow all parties to streamline their trial preparation efforts. Particularly given the expedited schedule for the

case, an early ruling on the motion would assist all parties in concentrating their efforts on the issues to be considered by Presiding Officer Mitchell.

Prayer for Relief

Mr. Andrews requests that Presiding Officer Mitchell issue an order precluding BSR's "securities expert," Richard Djokic, from offering testimony at the final hearing consisting of legal conclusions involving securities and New Hampshire securities law. In particular, Mr. Andrews requests an order precluding opinion testimony from Mr. Djokic that: (1) certain of the products offered by LGC are investment contracts and thus securities within the ambit of RSA Chapter 421-B; and (2) Mr. Andrews' conduct violated certain provisions of RSA Chapter 421-B.

Respectfully Submitted,

JOHN ANDREWS

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was forwarded this day via electronic mail to all counsel of record.


Michael D. Ramsdell, Esq.