FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. LEK SECURITIES CORP. (CRD No. 33135) and SAMUEL FREDERIK LEK (CRD No. 1642936), Respondents.	Disciplinary Proceeding No. 2015045312501 Hearing Officer–DRS

ORDER GRANTING PARTIES' MOTIONS FOR LEAVE TO PERMIT EXPERT TESTIMONY

A. Introduction

The parties moved for leave to each call one expert witness to testify about various anti-money laundering ("AML") compliance and procedure topics. The motions are unopposed and I grant them, as discussed below.

B. The Parties' Motions

On April 22, 2019, the parties moved, in separate motions, for leave to offer expert testimony. The Department of Enforcement ("Enforcement") moved for leave to permit the expert testimony of Arthur D. Middlemiss ("Enforcement's Motion"). According to his curriculum vitae, which was attached to Enforcement's Motion, Middlemiss, currently the managing partner of the New York office of law firm Lewis Baach Kaufmann Middlemiss pllc, "[f]ocus[es] on providing strategic counsel to foreign and domestic entities seeking to mitigate regulatory, criminal and reputational risk in the areas of anti-money laundering and anti-corruption."[1] Enforcement's Motion represents that he "has extensive experience with AML issues as a prosecutor, in-house at major financial institutions, and as a consultant."[2] Further,

[1] Enforcement's Motion, Exhibit A, at 1.

[2] Enforcement's Motion, at 1.

Middlemiss "was previously qualified to testify as an expert on AML-related issues in several proceedings," including "one FINRA matter . . . ," according to Enforcement's Motion.[3] More specifically, Enforcement's Motion represents that Middlemiss's qualifications include the following:

> He is a former assistant district attorney in the New York County District Attorney's Office, where his prosecutions included securities-related cases. He was the head of AML surveillance for Bear, Stearns & Co. and JP Morgan Chase investment bank, including JP Morgan Securities and JP Morgan Clearing Corporation. He also served as the Director of JP Morgan Chase's Global Anti-Corruption Program. Since 2013, he has been the managing partner of a New York law firm, where his practice focuses on consulting on AML and anti-corruption issues. He is a frequent speaker on AML and Bank Secrecy Act issuers [sic] and has testified as an expert on AML issues.[4]

Regarding the topics of Middlemiss's proposed expert testimony, Enforcement represents that the parties have agreed that "expert testimony would be helpful to the Hearing Panel"[5] on the following topics ("agreed upon topics list"):

1. The requirements of the Bank Secrecy Act ("BSA") and the implementing regulations of the Department of Treasury (both parties).

2. Whether Lek Securities Corp. ("LSC") and Samuel Lek developed and implemented an . . . AML . . . compliance program that was reasonably designed to achieve and monitor the firm's compliance with the requirements of the BSA and the implementing regulations (proposed by Enforcement).

3. Whether LSC and Lek developed and implemented an AML compliance program that was reasonably tailored to fit LSC's business model (proposed by Enforcement).

4. Whether LSC and Lek reasonably monitored and investigated red flags in customer accounts that represented potentially suspicious activity (proposed by Enforcement).

5. Whether LSC and Lek took appropriate action regarding this activity to determine whether the filing of Suspicious Activity Reports ("SARs") was required in appropriate instances (proposed by Enforcement).

[3] Enforcement's Motion, at 1–2.

[4] Enforcement's Motion, at 6.

[5] Respondents' Motion, at 1.

6. The adequacy of Respondents' AML programs and written procedures (proposed by Respondents).

7. The sufficiency of the Respondents' due diligence on new customers and on microcap security deposits and sales (proposed by Respondents).

8. The "suspicious" transactions identified by Enforcement and whether the activity contained "red flags" such that Respondents should have considered the trades potentially suspicious (proposed by Respondents).

9. The adequacy of Respondents' responses to the "suspicious" transactions identified by Enforcement by analyzing the information known to Respondents, when and how Respondents reacted to the information, and whether the transactions at issue warranted the filing of a SAR (proposed by Respondents).

10. Whether LSC conducted reasonable testing of its AML program (both parties).[6]

Accordingly, "Enforcement proposes, with Respondents' consent, that any of the parties' AML experts, if qualified, may address any of these issues, regardless of which party proposed them."[7]

For their part, Respondents moved for leave to offer expert testimony from Henry R. Ferguson ("Respondents' Motion"). According to Ferguson's curriculum vitae supporting the motion, he is a Director of Capital Forensics, Inc., a firm that "provides expert analysis and expert testimony in securities and ERISA related matters."[8] Respondents' Motion sets out Ferguson's qualifications and experience, which purportedly includes "over 40 years of experience in the securities industry where," according to Respondents' Motion, "he cultivated specialized knowledge of [AML]-related matters."[9] That experience includes, according to Respondents' Motion, "senior management positions at several respected firms" and "over 30 years of experience as a consulting expert on various issues relating to securities trading, including microcap securities, broker-dealers, and [AML]."[10] As to AML in particular, Respondents' Motion represents that Ferguson attends the Financial Markets Association's annual AML panel; has completed "most of FINRA's courses on retail AML issues"; and is "a member of the Association of Certified Anti-Money Laundering Specialists ("ACAMS")," the organization from which he "received his CAMS certification as an AML specialist." Finally, he

[6] Enforcement's Motion, at 3–4.

[7] Enforcement's Motion, at 4.

[8] Respondents' Motion, Exhibit A, at 1.

[9] Respondents' Motion, at 1.

[10] Respondents' Motion, at 3.

"has been qualified as an expert in previous cases involving issues related to customer due diligence and monitoring red flags."[11]

Respondents' Motion confirmed that the parties have agreed "that expert testimony would be helpful to the Hearing Panel in this matter" and also agreed "to the proposed topics for testimony for each respective expert."[12] Finally, Respondents requested permission for Ferguson to testify on a particular subset of the agreed upon topics list—Nos. 1, 6–10—and "on any additional topics about which Enforcement's expert opines."[13]

Neither party's motion addressed whether either party objected to the other party's proposed expert witness. Therefore, on April 23, 2019, I ordered the parties to meet and confer and file a report regarding this issue.[14] On April 25, 2019, Enforcement responded to that order on behalf of itself and Respondents ("Response")[15] and represented the following:

> The parties have reviewed the qualifications of the experts as presented in the motions. The parties reserve the right to cross-examine each other's experts about their qualifications and make arguments about how their qualifications should impact the weight afforded to their opinions. However, the parties do not object to each party calling its respective expert as a witness, and the parties do not intend to file oppositions to each other's motions to permit expert testimony.[16]

C. Discussion

A party seeking to introduce expert testimony must first obtain permission from the Hearing Officer,[17] who has broad discretion in deciding whether to permit expert testimony.[18] In applying that discretion, the Hearing Officer considers whether the proposed expert testimony is

[11] Respondents' Motion, at 4.

[12] Respondents' Motion, at 1.

[13] Respondents' Motion, at 3.

[14] Order Directing Parties to Meet and Confer (Apr. 23, 2019).

[15] Department of Enforcement's Response to Order to Meet and Confer, at 1, n.1.

[16] Response, at 1.

[17] Case Management and Scheduling Order ("CMSO"), at 6.

[18] *See, e.g.*, OHO Order 17-07 (2013035817701), at 1 (Mar. 21, 2017), https://www.finra.org/sites/default/files/OHO_Order_17-07_2013035817701.pdf; OHO Order 16-20 (20120342425-01), at 4 (July 28, 2016), https://www.finra.org/sites/default/files/OHO_Order16-20_20120342425-01_0.pdf; OHO Order 15-04 (2011025706401), at 2 (Feb. 3, 2015), http://www.finra.org/sites/default/files/OHO-Order-15-04-ProceedingNo.2011025706401.pdf; OHO Order 12-07 (2010020846601), at 1 (Nov. 9, 2012), http://www.finra.org/sites/default/files/OHODecision/p229431.pdf.

relevant[19] and reliable.[20] To assist in making that determination, the Federal Rules of Evidence and related case law, though not binding,[21] are instructive.[22] Federal Rules of Evidence Rule 702 provides, in pertinent part, that "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if . . . the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." And, indeed, the key factor for me in ruling on this motion is whether the anticipated expert testimony would be helpful to the Hearing Panel.[23]

Each movant has the burden of establishing the conditions for offering expert testimony.[24] I find that good cause exists for granting the parties' motions. Issues involving AML have frequently been the subject of expert testimony in FINRA disciplinary proceedings.[25] Here, the proposed experts appear qualified to opine about the agreed upon topics list.[26] Further, expert testimony on those topics would be helpful to the Hearing Panel in resolving the issues in this case.

D. Order

Therefore, based on the foregoing, I **GRANT** the parties' motions, subject to the following:

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[19] OHO Order 16-20, at 4; OHO Order 12-01 (2009018771602), at 2 (Mar. 14, 2012), http://www.finra.org/sites /default/files/OHODecision/p126068.pdf. See also FINRA Rule 9263 (The Hearing Officer may admit evidence that is relevant, but may exclude evidence that is "irrelevant, immaterial, unduly repetitious, or unduly prejudicial.").

[20] OHO Order 16-20, at 4; OHO Order 15-04, at 2 (citing *Pipitone v. Biomatrix, Inc*., 288 F.3d 239, 244 (5th Cir. 2002) ("In short, expert testimony is admissible only if it is both relevant and reliable.")).

[21] *See* FINRA Rule 9145(a) ("The formal rules of evidence shall not apply in a proceeding brought under the Rule 9000 Series.").

[22] OHO Order 17-07, at 1; OHO Order 16-20, at 4; OHO Order 12-07, at 2 n.3.

[23] OHO Order 17-07, at 2; OHO Order 16-20, at 4; OHO Order 15-04, at 2; OHO Order 12-01, at 3.

[24] OHO Order 17-07, at 2 ("It is the proponent's burden to show that the expert's testimony satisfies the conditions for admission."); OHO Order 12-01, at 4 (same).

[25] *See, e.g.*, OHO Order 15-04, at 2 ("AML procedures are a sufficiently specialized area that expert testimony . . . may well assist the Panel in evaluating the AML-related allegations in the Complaint, notwithstanding the Panelists' generalized expertise in securities industry issues."); OHO Order 12-07, at 3 (finding that AML expert testimony "will assist the Hearing Panel in understanding pertinent legal and regulatory requirements and the reasonable steps firms should take to comply with those requirements.").

[26] I make this finding solely for the purpose of deciding whether each expert meets the threshold for being permitted to testify. How much weight, if any, should be accorded to each expert's testimony—including how each expert's qualifications may impact credibility findings—will be determined by the Hearing Panel based on the evidence presented at the hearing.

1. The parties shall file expert reports for their respective experts by **July 1, 2019**, as provided in the Case Management and Scheduling Order.[27]

2. Each report shall contain:

    a. a description of the expert's qualifications;

    b. his expert opinions;

    c. the basis and reasons for such opinions;

    d. a summary, at the beginning of the report, of: the expert's opinions, the basis, and reasons for such opinions;

    e. a statement of the compensation paid or to be paid for the expert's work on the case (including but not limited to the compensation paid or to be paid for preparing the expert report); and

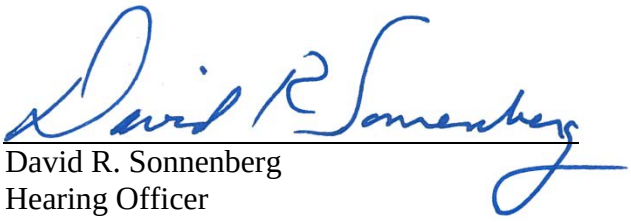
    f. a listing of all documents relied on in forming the expert's opinions. Copies of all such documents, along with any related demonstrative exhibits, shall be served with the report on **July 1, 2019**.[28]

3. The reports and supporting documents shall be included in the parties proposed hearing exhibits.

4. To the extent they are admitted at the hearing, the expert reports will be considered part of the experts' direct testimony.

5. At the hearing, each party's direct examination of their respective expert shall consist of a summary direct examination, presenting his qualifications and opinions subject to the scope of the expert report, and the bases and explanation for his opinions. The parties shall each make a reasonable effort to complete their respective summary direct examinations within **60 minutes**.

SO ORDERED.



David R. Sonnenberg
Hearing Officer

Dated: May 2, 2019

[27] CMSO, at 3.

[28] To the extent that either party's expert has relied on documents previously provided by the opposing party, copies of those documents do not need to be provided back to the opposing party.

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