

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

RICHARD WILLIAM LUNN MARTIN
(CRD No. 723309),

Respondent.

Disciplinary Proceeding
No. 2013035817701

Hearing Officer—DRS

**ORDER (1) GRANTING ENFORCEMENT'S MOTION FOR LEAVE TO PERMIT
EXPERT TESTIMONY AND (2) AMENDING CASE MANAGEMENT AND
SCHEDULING ORDER REGARDING FILING EXHIBITS**

The Department of Enforcement moved for leave to offer the expert testimony of Keith Palzer, a business and litigation consultant. According to the motion, Palzer's testimony will assist the Hearing Panel in understanding the evidence and facts relating to the charge that Martin did not have a reasonable basis for recommending that his customers invest in non-traditional exchange traded funds ("Non-traditional ETFs") for long-term holding. Enforcement represents that Martin does not oppose the motion.

Hearing Officers have broad discretion to accept or reject expert testimony if the expert is qualified to address the proposed topics and the evidence meets the general standard for admissibility set forth in FINRA Rule 9263.¹ While the Federal Rules of Evidence are not applicable to FINRA proceedings, those rules and the case law applying them can provide guidance on the issue of expert testimony.² Rule 702 of the Federal Rules of Evidence specifies that a witness who is "qualified as an expert by knowledge, skill, experience, training, or education" may give opinion testimony if his or her "specialized knowledge will help the trier of

¹ See OHO Order 17-03 (2014042059701) (Feb. 24, 2017), http://www.finra.org/sites/default/files/OHO_Order_17-03_2014042059701.pdf; OHO Order 12-01 (2009018771602) (Mar. 14, 2012), <http://www.finra.org/sites/default/files/OHODecision/p126068.pdf>; *Dep't of Enforcement v. Fiero*, No. CAF980002, 2002 NASD Discip. LEXIS 16, at *89-90 (NAC Oct. 28, 2002).

² See OHO Order 17-03; OHO Order 11-04 (2009017798201) (Mar. 24, 2011), <http://www.finra.org/sites/default/files/OHODecision/p123470.pdf>; FINRA Rule 9145(a) (specifying that the Federal Rules of Evidence do not apply in FINRA disciplinary proceedings).

fact” and the testimony meets certain measures of reliability. “In short, expert testimony is admissible only if it is both relevant and reliable.”³ The overarching and critical factor is whether the proposed testimony would be helpful to the Hearing Panel.⁴ It is the proponent’s burden to show that the expert’s testimony satisfies the conditions for admission.⁵

In this case, Enforcement satisfies that burden. The Complaint alleges that there were “enormous risks associated with holding Non-traditional ETFs for more than one trading session.” Nevertheless, the Complaint continues, Martin recommended, without a reasonable basis, that his customers invest in these instruments and hold them long term.⁶ Because Martin allegedly “did not have a reasonable basis to believe that the Non-traditional ETF products he recommended were suitable for any customer,” the Complaint charges him with violating FINRA and NASD suitability rules (NASD Rule 2310 and FINRA Rules 2111) and just and equitable principles of trade (FINRA Rule 2010).⁷

Enforcement proffers that Palzer “will assist the Hearing Panel in evaluating whether Martin had a reasonable basis to recommend to his customers” that they “concentrate their investments in Non-traditional ETFs for indefinite, extended periods of time.”⁸ More specifically, Enforcement seeks to have Palzer testify about: (1) “the characteristics of Non-traditional ETFs”; (2) “the specific inverse ETFs recommended by Martin to his customers and how they functioned”; (3) “how the leveraged inverse ETF concepts of ‘daily reset’, ‘tracking error’ and ‘compounding’ negatively affect the value and strategy for holding leveraged and inverse ETFs for extended periods of time”; and (4) “the significant risks of a buy and hold strategy for leveraged and inverse ETFs for extended periods of time.”⁹ I find that testimony from a qualified expert on these topics would likely assist the Hearing Panel in deciding relevant issues in this case.

Next, Enforcement argues that Palzer is qualified to provide testimony on these subjects. His curriculum vitae, which is attached to the motion, reflects that since 2014, Palzer has been employed as a director and “business and litigation consultant” at Navigant Consulting, Inc., assigned to the firm’s “Financial Disputes team and its Financial Advisory and Compliance team.” In those positions, Palzer “focuses on investment management, capital markets, banking, and wealth management” and “serves as an expert witness and consultant on capital markets litigation, financial regulatory investigations, and investment fund cases.” His curriculum vitae also states that that he: (1) is an attorney; (2) holds FINRA series 7, 24, and 63 registrations;¹⁰ (3) has worked for two prominent law firms and the United States Treasury Department; (4) “had

³ *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 244 (5th Cir. 2002); *see also* OHO Order 17-03.

⁴ *See* OHO Order 17-03; OHO Order 12-01.

⁵ *See* OHO Order 17-03; OHO Order 12-01.

⁶ Complaint (“Compl.”) ¶ 1.

⁷ Compl. ¶ 38.

⁸ Department of Enforcement’s Motion for Leave to Permit Expert Testimony (“Mot.”) at 5.

⁹ Mot. at 5–6.

¹⁰ Palzer is registered with the broker-dealer subsidiary of Navigant Consulting.

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a 15-year career at Merrill Lynch and Bank of America Corporation, serving in a variety of management positions;” (5) “has significant expertise in mutual funds and ETFs;” and (5) “has designed and launched numerous funds and financial products, including . . . ETFs” Also, Enforcement represents in its motion that during Palzer’s career at Merrill Lynch and Bank of America Corporation, he “gained expertise in Non-Traditional ETFs from an operational and management perspective.”¹¹ After reviewing the motion and curriculum vitae, I find that Enforcement has established that Palzer is qualified to testify regarding the above-referenced subjects.

Based on the foregoing, I **GRANT** the motion subject to the following:

1. Enforcement shall file an expert report for Palzer.
2. The report shall contain:
 - a. a description of Palzer’s qualifications;
 - b. his expert opinions;
 - c. the basis and reasons for such opinions;
 - d. a statement of the compensation paid or to be paid for his work on the case (including but not limited to the compensation paid or to be paid for preparing the expert report); and
 - e. a listing of all documents relied on in forming his opinions. Copies of all such documents shall be served with the report on **March 27, 2017** (to the extent not previously provided by Enforcement to Martin).
3. The report shall be included in Enforcement’s proposed hearing exhibits.
4. To the extent it is admitted at the hearing, the expert report will be considered part of Palzer’s direct testimony.
5. At the hearing, Enforcement’s direct examination of Palzer 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. Enforcement shall make a reasonable effort to complete the summary direct examination within **60 minutes**.

Finally, the Case Management and Scheduling Order (“CMSO”) sets staggered deadlines for the parties to file and serve their witness list, exhibit list, and transcript designations: The CMSO, however, inadvertently omitted a deadline for the parties to file and serve their exhibits. Accordingly, I hereby **AMEND** the CMSO and **ORDER** the parties to file and serve their

¹¹ Mot. at 6.

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exhibits by the deadlines contained in the CMSO for filing their exhibit lists, namely, **March 27, 2017** (Enforcement), and **May 15, 2017** (Martin).

SO ORDERED.

Dated: March 21, 2017