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FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. WILSON-DAVIS & CO., INC. (CRD No. 3777), JAMES C. SNOW, JR. (CRD No. 2761102), LYLE WESLEY DAVIS (CRD No. 62352), BYRON BERT BARKLEY (CRD No. 12469), and CRAIG STANTON NORTON (CRD No. 349405), Respondents.	Disciplinary Proceeding No. 2016048837401 Hearing Officer–DRS

ORDER GRANTING, IN PART, AND DENYING, IN PART, RESPONDENTS' MOTION IN LIMINE REGARDING EXPERT TESTIMONY

I. Introduction

On May 15, 2020, Respondents filed a motion in limine ("Motion") for an order prohibiting Steve Ganis, the Department of Enforcement's rebuttal expert witness, from offering or in any way using any expert report, testimony, or opinions that are not directly responsive to the issues addressed by Robert Lowry, Respondents' expert witness. Respondents ask that I prohibit Ganis from offering any testimony or opinions regarding (1) any of Respondents' Anti-Money Laundering ("AML") efforts or any "red flags" of suspicious trading; (2) whether Respondent Craig Stanton Norton or Respondent Wilson-Davis & Co., Inc. had any "manipulative intent" or otherwise acted with scienter; and (3) any indicia of manipulative trading that were neither alleged in the Complaint nor discussed in Lowry's expert report,

including purported bid support and manipulative small trades. Respondents also request that I order Ganis to submit a revised expert report that complies with the requested order.

On June 12, Enforcement filed its opposition ("Opposition"). Enforcement characterizes the Motion as "as nothing more than an unfair attempt to prevent the Hearing Panel from learning the full context of the NUGN trading and misconduct at issue and to deprive the Panel of Mr. Ganis' expertise in evaluating Respondents' expert's opinions."[1] It asserts that "Mr. Ganis' opinions and report are proper rebuttal."[2]

As discussed below, I grant the Motion, in part, and deny it, in part.

II. Applicable Legal Standards

A. Motions in Limine

FINRA Rule 9263 provides that the Hearing Officer "may exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial."[3] Under this Rule, "[t]he Hearing Officer is granted broad discretion to accept or reject evidence . . . ,"[4] including expert testimony.[5] The formal rules of evidence do not apply in FINRA disciplinary proceedings.[6] Nor do the Federal Rules of Civil Procedure.[7] But Hearing Officers may seek guidance from both the Federal Rules of Evidence and Civil Procedure in appropriate cases.[8]

Neither FINRA's Code of Procedure nor the federal rules, however, explicitly authorize motions in limine to exclude evidence before a hearing. Nevertheless, federal motion in limine "practice has developed pursuant to the district court's inherent authority to manage the course of

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[1] Enforcement's Omnibus Opposition to Respondents' Objections and Motions in Limine ("Opp.") 1.

[2] Opp. 6.

[3] *Dep't of Enforcement v. Brookstone Sec., Inc.*, No. 2007011413501, 2015 FINRA Discip. LEXIS 3, at *110 (NAC Apr. 16, 2015).

[4] *Id*.

[5] *Dep't of Enforcement v. William H. Murphy & Co.*, No. 2012030731802, 2018 FINRA Discip. LEXIS 24, at *63 (NAC Oct. 11, 2018) ("FINRA Rule 9263 gives Hearing Officers broad discretion to accept or reject expert testimony."), *appeal docketed*, No. 3-18895 (SEC Nov. 9, 2018).

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

[7] OHO Order 11-10 (2008012925001) (July 28, 2011), at 4, https://www.finra.org/sites/default/files/OHODecision/p126063_0.pdf (stating that "[t]he Federal Rules of Civil Procedure do not apply in FINRA proceedings").

[8] *Dep't of Enforcement v. North*, No. 2010025087302, 2017 FINRA Discip. LEXIS 7, at *35 (NAC Mar. 15, 2017) ("FINRA adjudicators may look to the Federal Rules of Evidence for guidance."), *aff'd*, Exchange Act Release No. 84500, 2018 SEC LEXIS 3001 (Oct. 29, 2018), *appeal docketed*, No. 18-1341 (D.C. Cir. Dec. 27, 2018); OHO Order 11-10, at 4 (stating that Hearing Officers may look to the Federal Rules of Civil Procedure in appropriate cases).

trials."[9] Similarly, Hearing Officers are authorized "to do all things necessary and appropriate to discharge [their] duties," which include "regulating the course of the hearing."[10] Therefore, in resolving the Motion, I sought guidance from the federal case law regarding motions in limine.

That case law is well settled. Motions in limine "'aid the trial process' by enabling the Court 'to rule in advance of trial on the relevance of certain forecasted evidence,' without lengthy argument at or interruption of the actual trial."[11] They "serve important gatekeeping functions by allowing the trial judge to eliminate from consideration evidence that should not be presented to the jury."[12]

That said, motions in limine "are disfavored, as courts prefer to resolve questions of admissibility as they arise."[13] SEC Administrative Law Judges[14] and FINRA Hearing Officers have adopted similar views.[15] Accordingly, pre-hearing motions to exclude evidence should be granted only if the evidence at issue is "clearly inadmissible for any purpose,"[16] a position that FINRA Hearing Officers have also espoused.[17] "Unless evidence meets this high standard,

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[9] *Flores v. FCA US LLC*, 2019 U.S. Dist. LEXIS 120115, at *1–2 (E.D. Cal. July 18, 2019) (quoting *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984)).

[10] FINRA Rule 9235(a)(2).

[11] *Ruiz v. Safeco Ins. Co*., 2019 U.S. Dist. LEXIS 109067, at *3 (S.D. Fla. Apr. 23, 2019) (quoting *Highland Capital Mgmt., L.P. v. Schneider*, 551 F. Supp. 2d 173, 176 (S.D.N.Y. 2008) (citing *Palmieri v. Defaria*, 88 F.3d 136, 141 (2d Cir. 1996))); *see also Zanakis v. Scanreco, Inc*., 2019 U.S. Dist. LEXIS 90088, at *2–3 (S.D. Fla. Apr. 11, 2019) ("A motion in limine allows the trial court to rule in advance of trial on the admissibility and relevance of certain forecasted evidence.") (citing *Luce,* 469 U.S. at 40 n.2).

[12] *United States v. Verges*, 2014 U.S. Dist. LEXIS 17969, at *6 (E.D. Va. Feb. 12, 2014).

[13] *Abernathy v. E. Ill. R.R*., 2017 U.S. Dist. LEXIS 160316, at *1 (C.D. Ill. Sept. 26, 2017); *see also Zanakis*, 2019 U.S. Dist. LEXIS 90088, at *3 (same); *Flores,* 2019 U.S. Dist. LEXIS 120115, at *2 (same).

[14] *See Christopher M. Gibson*, Admin. Proc. File No. 3-17184, 2016 SEC LEXIS 3379, at *4 (CALJ Sept. 9, 2016) ("[A] party filing a motion in limine faces an uphill battle because the Commission has not been enthusiastic about orders by administrative law judges granting motions in limine."). As the Chief Administrative Law Judge explained, "The Commission's long standing position is that its 'law judges should be inclusive in making evidentiary determinations,' quoting the proposition 'if in doubt, let it in.'" *Id.* at *4 (quoting *City of Anaheim*, Exchange Act Release No. 42140, 1999 SEC LEXIS 2421, at *4 & n.7 (Nov. 16, 1999)).

[15] OHO Order 16-18 (2014043020901) (May 24, 2016), at 2, http://www.finra.org/sites/default/files/OHO-Order-16-18-2014043020901.pdf ("FINRA Hearing Officers generally disfavor motions in limine seeking to exclude broad categories of evidence and testimony.") (citing OHO Order 16-04 (2012033393401) (Feb. 3, 2016), at 2, http://www.finra.org/sites/default/files/OHO_Order16-04_2012033393401.pdf).

[16] *Abernathy*, 2017 U.S. Dist. LEXIS 160316, at *1 (quoting *Tzoumis v. Tempel Steel Co*., 168 F. Supp. 2d 871, 873 (N.D. Ill. 2001)); *see also Zanakis*, 2019 U.S. Dist. LEXIS 90088, at *3 ("A motion in limine should only exclude evidence when it is clearly inadmissible on all potential grounds.").

[17] OHO Order 18-09 (2014039775501) (May 2, 2018), at 4, https://www.finra.org/sites/default/files/OHO_Order_18-09_2014039775501.pdf; OHO Order 16-18, at 2 ("A Hearing Officer should grant such motions only if the evidence at issue is clearly inadmissible for any purpose.") (quoting OHO Order 16-04, at 2 (citing *Miller UK Ltd. v. Caterpillar, Inc.*, 2015 U.S. Dist. LEXIS 156874, at *5 (N.D. Ill. Nov. 20, 2015))).

evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context."[18]

B. Rebuttal Expert Testimony

In deciding the Motion, I also found instructive the federal law governing the permissible scope of rebuttal expert testimony. Under Federal Rule of Civil Procedure 26(a)(2)(D)(ii), rebuttal experts may be permitted to present evidence contradicting or rebutting evidence on the same subject matter identified by an initial expert witness.[19] "Rebuttal opinions," however, "are limited in scope: they must be 'intended solely to contradict or rebut evidence on the same subject matter identified by another party['s] expert."[20] Put slightly differently, "[t]he proper function of rebuttal evidence is to contradict, impeach or defuse the impact of the evidence offered by an adverse party."[21] Conversely, "[a]n expert is not a rebuttal expert if their testimony 'does not address or rebut previously disclosed expert testimony.'"[22]

Courts have imposed a number of restrictions on the use of rebuttal expert testimony. For example, rebuttal experts cannot "offer testimony under the guise of 'rebuttal' only to provide additional support for [a party's] case in chief."[23] Nor can they "be used to advance new arguments or new evidence to support" a plaintiff's claims,[24] or "put forth their own theories; they must restrict their testimony to attacking the theories offered by the adversary's experts."[25]

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[18] *WEL Cos. v. Haldex Brake Prods. Corp*., 2020 U.S. Dist. LEXIS 106613, at *15 (S.D. Ohio June 17, 2020); *Haller v. AstraZeneca LP* (*In re Seroquel Prods. Liab. Litig*.), 2009 U.S. Dist. LEXIS 134900, at *1762 (M.D. Fla. Feb. 4, 2009); *Clipco, Ltd. v. Ignite Design, LLC*, 2005 U.S. Dist. LEXIS 26044, at *2 (N.D. Ill. Oct. 28, 2005).

[19] *Northrup v. Werner Enter., Inc*., 2015 U.S. Dist. LEXIS 105281, at *5 (M.D. Fla. Aug. 11, 2015).

[20] *Estate of Moreno v. Corr. Healthcare Cos*., 2020 U.S. Dist. LEXIS 40681, at *14 (E.D. Wash. Mar. 3, 2020) (quoting Fed. R. Civ. P. 26(a)(2)(D)(ii)); *see also Marmo v. Tyson Fresh Meats, Inc*., 457 F.3d 748, 759 (8th Cir. 2006) ("The function of rebuttal testimony is to explain, repel, counteract or disprove evidence of the adverse party."). *See also Lexington Ins. Co. v. Horace Mann Ins. Co*., 2015 U.S. Dist. LEXIS 120061, at *51 (N.D. Ill. 2015) ("A rebuttal expert report should be limited to contradicting or rebutting evidence on the same subject matter identified by another party in its expert disclosures.") (citation omitted).

[21] *Peals v. Terre Haute Police Dep't*, 535 F.3d 621, 630 (7th Cir. 2008) (quoting *United States v. Grintjes*, 237 F.3d 876, 879 (7th Cir. 2001)).

[22] *Moreno*, 2020 U.S. Dist. LEXIS40681, at *14 (quoting *Amos v. Makita U.S.A., Inc.*, 2011 U.S. Dist. LEXIS 158103, at *3 (D. Nev. Jan. 6, 2011)).

[23] *Frerck v. Pearson Educ., Inc*., 2014 U.S. Dist. LEXIS 14622, at *4 (N.D. Ill. Feb. 6, 2014) (citation omitted).

[24] *Larson v. Wis. Cent. Ltd*., 2012 U.S. Dist. LEXIS 13057, at *10 (E.D. Wis. Feb. 3, 2012).

[25] *Boles v. United States*, 2015 U.S. Dist. LEXIS 42332, at *5 (M.D.N.C. Apr. 1, 2015).

Notwithstanding these limitations, courts have taken a broad view of the term "same subject matter."[26] Moreover, they have permitted rebuttal expert witnesses to use an alternative, allegedly better, methodology and contrary facts;[27] point out that the opposing expert has failed to consider factors relevant to the analysis;[28] and raise a new theory if the expert is not doing so "independently, but rather relies on it in challenging" the competing expert's opinions.[29] "Ultimately, [r]ebuttal testimony is proper as long as it addresses the same subject matter that the initial experts address."[30]

III. Discussion

Enforcement submitted Ganis's report to rebut Lowry's report. Lowry's report does not explicitly state the subjects of his testimony. But they can be gleaned from the reason he was hired and the report's subheadings that succinctly summarize his opinions. Lowry wrote that he was engaged to opine on "whether [Norton's] trading activity was indicative of an intent to interfere with the free economic forces of supply and demand and/or a fair and orderly market, and/or was an effort to artificially increase the price of NUGN stock."[31]

Consistent with the scope of his engagement, the report contains the following relevant subheadings:

- No pattern of manipulative behavior is found in Norton's bids.[32]

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[26] *Northrup*, 2015 U.S. Dist. LEXIS 105281, at *5–6; *see also Armstrong v. I-Behavior Inc*., 2013 U.S. Dist. LEXIS 77482, at *9 (D. Colo. June 3, 2013) (declining to confine the term in an overly restrictive manner); *1550 Brickell Assocs. v. QBE Ins. Corp*., 2010 U.S. Dist. LEXIS 58083, at *5 (S.D. Fla. May 13, 2010) (agreeing with the concept that the term should not be so narrowly construed as to impose additional restrictions on the parties); *TC Sys. Inc. v. Town of Colonie*, 213 F. Supp. 2d 171, 180 (N.D.N.Y. 2002) (declining to construe the term narrowly because doing so would "impose an additional restriction on the parties that is not included in the Rules").

[27] *Hoist Fitness Sys. v. Tuffstuff Fitness Int'l, Inc.*, 2019 U.S. Dist. LEXIS 118446, at *7–8 (C.D. Cal. Jun. 10, 2019) ("[O]ffering a different, purportedly better methodology is a proper way to rebut the methodology of someone else."); *see also TCL Commc'ns Tech. Holdings Ltd. v. Telefonaktenbologet LM Ericsson*, 2016 U.S. Dist. LEXIS 194814, at *11 (C.D. Cal. Aug. 17, 2016) (same).

[28] *Buccellati Holding Italia v. Laura Buccellati LLC,* 2014 U.S. Dist. LEXIS 192337, at *25–26 (S.D. Fla. Apr. 14, 2014) (finding that rebuttal expert's report did not exceed the scope of the opposing experts report when it pointed out factors the opposing expert failed to consider).

[29] *Pogue v. Northwestern Mut. Life Ins. Co.*, 2017 U.S. Dist. LEXIS 155177, at *9 (W.D. Ky. Sept. 22, 2017). *But cf. Amos*, 2011 U.S. Dist. LEXIS 158103, at *5–6 (finding that the defendant's expert "cannot be a rebuttal expert or anything analogous to a rebuttal expert" because he was "not being called to rebut Plaintiff's experts alone, but will be called to testify to a new, alternative theory" that was "outside the scope of the opinions of Plaintiff's experts" and also because the subject of his testimony "is an expected and anticipated portion of Defendant's case-in-chief").

[30] *Hoist Fitness Sys.*, 2019 U.S. Dist. LEXIS 118446, at *8.

[31] RX-69A, at 4.

[32] RX-69A, at 12.

- Norton did not engage in marking the close.[33]
- Norton did not engage in price leadership.[34]
- Wilson-Davis Did Not Dominate and Control NUGN Market.[35]
- No pattern of manipulation through controlling the market or price leadership.[36]
- The specific trades identified do not have typical characteristics of match trades.[37]

In pertinent part, the Report contains these findings and opinions:

- My opinion is that there was nothing remarkable about Wilson-Davis' bids or quotes, in general.[38]
- I did not observe any patterns of unusual behavior and/or apparent irregularities that would indicate Norton used his quotes -- and in particular his bid -- to interfere with the free economic forces of supply and demand.[39]
- I did not find any indicia that Norton controlled or set artificial prices.[40]
- [In] my opinion . . . the prices for NUGN shares were the result of the free economic forces of supply and demand.[41]
- My opinion is that the trades identified by Enforcement on these specific dates do not have common characteristics of manipulation.[42]
- It is my opinion that Mammoth Mountain's purchases of NUGN stock at this time does not have the characteristics of a pattern of trading intended to affect the market.[43]
- I do not see a pattern of conduct or irregularities by Norton . . . from which I would infer or conclude that Norton was artificially increasing the NUGN price through his trading or otherwise interfering with a fair and orderly market.[44]

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[33] RX-69A, at 13.

[34] RX-69A, at 13.

[35] RX-69A, at 14.

[36] RX-69A, at 18.

[37] RX-69A, at 19.

[38] RX-69A, at 12.

[39] RX-69A, at 12–13.

[40] RX-69A, at 16.

[41] RX-69A, at 19.

[42] RX-69A, at 19.

[43] RX-69A, at 21.

[44] RX-69A, at 36–37.

The thrust of Ganis's report is that Lowry's analysis is flawed. Ganis tries to show this by identifying purported indicia of manipulation (what he termed "red flags") that he claims Lowry ignored or inadequately considered. Ganis asserts, among other things, that Lowry

- was underinclusive in identifying the types of manipulative devices;[45]
- failed to consider classic red flags of a manipulative scheme;[46]
- ignored most of the evidence indicating a coordinated trading scheme;[47]
- failed to satisfactorily address Norton's $5.00 NUGN trade on February 24, 2015;[48]
- failed to consider suspicious circumstances surrounding March 2–3, 2015 trading;[49] and
- failed to consider suspicious circumstances with Wilson-Davis cross trades.[50]

Respondents claim that Ganis's report is problematic. The gravamen of the Motion is that Enforcement is trying "to fill evidentiary gaps in its case"[51] by offering Ganis's "opinions on issues Mr. Lowry did not discuss—namely, the existence of supposed 'red flags' and deficient customer vetting procedures; and . . . an 'alternative theory' of alleged manipulation—a theory that Mr. Lowry did not address because it is not alleged in the Complaint."[52] According to Respondents, Ganis's report "violates the requirements of the Case Management Order and the rules governing the admission of expert testimony while causing Respondents[] substantial prejudice."[53] Regarding the prejudice point, Respondents contend that they were not on proper notice of, and did not have a chance to respond to, Ganis's alternate theory—based on "bid support" and the impact of "small trades"—because it was not alleged in the Complaint.[54]

Respondents specifically object to the portions of Ganis's report discussing the following topics:

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[45] CX-50, at 16.

[46] CX-50, at 26.

[47] CX-50, at 31, 38.

[48] CX-50, at 43.

[49] CX-50, at 45.

[50] CX-50, at 47.

[51] Respondents' Motion in Limine Regarding Steve Ganis Expert Report and Testimony ("Mot.") 2.

[52] Mot. 5.

[53] Mot. 3.

[54] Mot. 6–7.

- purported "red flags" of manipulative trading unrelated to the trading data that Lowry addressed;[55]
- purported "errors or omissions in Mr. Norton's intake of certain stock deposits, or 'red flags' associated with those deposits";[56]
- AML and supervision;[57]
- manipulation theories relating to alleged "bid support" and the impact of "small trades";[58] and
- "the ultimate question of whether there was actual manipulation or whether Norton (and therefore Wilson-Davis in Enforcement's view) intended to manipulate the market."[59]

Enforcement defends Ganis's report mainly on the following grounds:

- Ganis properly used the term "red flags," not in relation to the AML or supervision charges, but to describe indications of potentially manipulative activity in the record;
- Lowry's analysis was incomplete because it failed to consider all relevant facts, unlike Ganis's analysis which properly considered those additional facts;
- "Respondents have had fair notice of Enforcement's 'bid support' and 'small purchase' allegations and will have a full opportunity to defend against those allegations at the disciplinary hearing";[60]
- Lowry "opened the door to issues related to Norton's bid activity, as well as the nature, timing, and frequency of his NUGN transactions" by "claim[ing] to have reviewed all of [Wilson-Davis]'s bid and quote activity and [finding] 'nothing remarkable' and no patterns of unusual behavior";[61] and
- "[Basic fairness . . . counsels" against precluding Ganis from testifying "about evidence in the record that could support a finding of manipulative intent in Mr.

[55] Mot. 5 (citing CX-50, at 23–25, 27, 55–56). Indeed, Respondents argue that Lowry "did not discuss red flags at all." Mot. 5.

[56] Mot. 5 (citing CX-50, at 31–37).

[57] Mot. 6.

[58] Mot. 6–8. Respondents argue these topics are not referenced in the Complaint and therefore "[a]llowing such testimony would plainly be unduly prejudicial to [them] and is therefore properly excluded under Rule 9263(a)." Mot. 7.

[59] Mot. 8 (citing CX-50, at 56). Respondents argue that not only did Lowry not address this question, but it is not a proper subject for expert testimony because "an expert may not usurp the role of the Panel in deciding whether or not there was a manipulation, let alone the requisite mental intent to manipulate." Mot. 8.

[60] Opp. 10.

[61] Opp. 9.

Ganis' view."[62] According to Enforcement, Ganis's testimony regarding manipulative intent is appropriate; it supports Ganis's conclusion that although "Lowry looked for certain patterns of trading activity, he failed to holistically consider the record, including evidence of potential manipulative intent."[63]

* * *

Respondents' arguments that Ganis offered improper opinions miss the mark in some respects. Ganis's testimony is not impermissible on the basis that he addressed indications of manipulation that Lowry did not discuss or that were not alleged in the Complaint. As recounted above, the subject of Lowry's testimony is whether the record reflected indicia of manipulation. His central conclusion is that, after reviewing the trading data and other evidence, he found no indicia or patterns of conduct typically associated with a manipulation. As the federal case law instructs, in rebutting this opinion, Ganis is entitled to demonstrate that Lowry's analysis and conclusions are flawed. He does not venture outside the subject of Lowry's report by pointing out that Lowry failed to consider (or failed to adequately consider) certain indicia of a manipulation that he claims are relevant to a thorough analysis. Likewise, it is appropriate for Ganis to rely on a purportedly new, alternative theory of manipulation when challenging Lowry's conclusions; I find that he did not offer this theory independently of Lowry's opinions but, rather, to challenge them.[64]

Respondents' argument that Ganis improperly opined on AML and supervision issues, however, has merit. In several instances, Ganis opined that Wilson-Davis's response to purported red flags did not comply with supervisory best practices or the Firm's supervisory procedures:

- "I conclude that Wilson-Davis' response to those red flags did not comport with widely recognized best practices for supervising market making and trading activity at the firm to prevent and monitor for potential manipulation, including following up on red flags of potentially suspicious activity."[65]
- "Facts alleged in the Complaint indicate that Wilson-Davis appears to have taken no meaningful supervisory or compliance actions to address the red flags presented by the Touting that NuGene's Form 8-K filing alerted the public to or Norton's related trading. . . . In my experience with industry practices, an announcement of the nature of NuGene's Form 8-K on the Touting would cause a firm with reasonably designed processes to review its proprietary and customer trading in NuGene."[66]

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[62] Opp. 12.

[63] Opp. 12.

[64] In deciding the Motion, I need not address—and therefore make no finding regarding—whether Respondents in fact had prior notice of the purported new alternative theory relied on to rebut Lowry's conclusions.

[65] CX-50, at 4.

[66] CX-50, at 54.

- "Wilson-Davis earned significant compensation from these liquidations and apparently, according to facts alleged in the Complaint, did little or nothing to impede them regardless of the regulatory inquiries Wilson-Davis received about NuGene trading, their attorney's advice to impose conservative and substantial limitations, the firm's own written supervisory procedures, the firm's compliance obligations under FINRA rules and federal securities and anti-money laundering laws, and the manifest red flags associated with fraud and manipulation."[67]
- "Wilson-Davis and the individual principal Respondents did not take compliance or supervisory actions to respond to the many red flags described and analyzed above that comport with established industry best practices for detecting, preventing, and reporting securities fraud and manipulation and other potential securities law violations by its personnel and customers receiving certificates of and trading in microcap shares."[68]

The above references to supervision and supervisory procedures do not directly relate to the subject of manipulation, but, rather, to AML and supervision. Lowry did not opine on AML or supervision; therefore, they are not proper subjects for rebuttal. Additionally, I find that whatever relevance, if any, these references and opinions might have to the manipulation charge, they are unduly prejudicial to Respondents regarding the AML and supervision charges.[69]

Respondents also object that "Ganis appears to be offering opinions on the ultimate question of whether there was actual manipulation or whether Norton (and therefore Wilson-Davis in Enforcement's view) intended to manipulate the market."[70] Respondents' objection is well founded, in part. "An opinion is not objectionable just because it embraces an ultimate issue."[71] So, for example, an expert may testify on an ultimate issue of fact. But an expert may not testify on an ultimate legal issue.[72] As for expert testimony regarding manipulation, an expert may point to factors indicating that a manipulation occurred or factors showing that a respondent

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[67] CX-50, at 55–56.

[68] CX-50, at 57.

[69] Nevertheless, Respondents have not established that any testimony by Ganis that might touch on their AML efforts would be inadmissible for any proper purpose. Therefore, I do not grant their broad request that I preclude him, in limine, from testifying on those efforts.

[70] Mot. 8.

[71] Fed. R. Evid. 704(a).

[72] *See, e.g.*, *Plexxikon Inc. v. Novartis Pharms. Corp.*, 2020 U.S. Dist. LEXIS 81665, at *6 (N.D. Cal. May 8, 2020) ("Thus, although an expert witness may give opinion testimony that embraces an ultimate issue to be decided by the jury, that expert may not express a legal opinion as to the ultimate legal issue.") (citing *Mukhtar v. Cal. State Univ., Hayward*, 299 F.3d 1053, 1066 n.10 (9th Cir. 2002)); *United States v. Akers*, 2020 U.S. Dist. LEXIS 69928, at *4 (E.D. Ky. Apr. 21, 2020) ("[A]n expert's testimony may embrace an ultimate factual issue, but not an ultimate legal issue.") (citing *Berry v. City of Detroit*, 25 F.3d 1342, 1353 (6th Cir. 1994)) ("Although an expert's testimony may embrace an ultimate issue to be decided by the trier of fact, the issue embraced must be a factual one.").

engaged in a manipulation. The expert, however, may not opine on the ultimate legal questions of whether a manipulation occurred or whether a respondent engaged in a manipulation.[73]

Ganis impermissibly opined at least twice that certain conduct was manipulative: (1) "[I]t is likely some or all of these trades were, contrary to Lowry's conclusion, manipulative notwithstanding whether the price at which they were executed was within the bid-ask spread";[74] and (2) "In my view, manipulative bid support, as Norton describes it, is the most compelling explanation for Norton's large, unfilled buy orders and bid activity beginning in early February 2015 with Mesa Strategies."[75]

It is also improper for an expert to opine on the ultimate question of whether a person acted with manipulative intent. Scienter is another word for fraudulent, deceptive, or manipulative intent.[76] And whether scienter exists is an ultimate legal question.[77] Ganis testified at least twice that Norton acted with manipulative intent:

- "The bid support device Norton described in his [investigative] testimony is textbook manipulation because its purpose is 'so the stock doesn't go down.' ***This intent is manipulative*** because the natural supply and demand forces would cause the price to go down but for the bid support device."[78]
- "Based on my review of the totality of the circumstances, the more likely explanation is that ***he caused Wilson-Davis to buy NuGene at $5.00 with the manipulative intent*** of moving the market to trigger the contractual release of the deposited NuGene shares."[79]

Finally, I reject Respondents' argument that Ganis rendered an improper opinion on an ultimate issue for the Hearing Panel when he testified, "There are many pump-and-dump red flags in this matter, as I have explained above. In my view Norton and Wilson-Davis must have known of or, at a minimum, disregarded these red flags."[80] Whether a person knew something is

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[73] *See United States v. Scop*, 846 F.2d 135, 139–40 (2d Cir. 1988) (holding expert's repeated statements that defendants' conduct established a manipulative and fraudulent scheme within the meaning of the securities laws exceeded the permissible scope of opinion testimony); *Ayers Oil Co. v. Am. Bus. Brokers, Inc*., 2010 U.S. Dist. LEXIS 130958, at *15 (E.D. Mo. July 27, 2010) ("[A]n expert can point to factors indicating that a defendant manipulated the market, but the expert cannot simply state that the defendant manipulated the market.").

[74] CX-50, at 5.

[75] CX-50, at 31.

[76] *Shull v. Dain, Kalman & Quail, Inc*., 561 F.2d 152, 156 (8th Cir. 1977) (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976)).

[77] *Burroughs v. Northrop Grumman Corp*., 2000 U.S. Dist. LEXIS 23668, at *43 (C.D. Cal. Oct. 16, 2000).

[78] CX-50, at 30–31 (bold italics added).

[79] CX-50, at 42 (bold italics added).

[80] CX-50, at 56.

an ultimate factual question[81]—not an ultimate legal one—and, therefore, testimony on this question is permissible.

IV. Order

Based on the foregoing, the Motion is **GRANTED, IN PART, AND DENIED, IN PART**, as follows:

A. Respondents' request that I prohibit Ganis from offering any testimony or opinions regarding (1) any of the Respondents' AML efforts or any "red flags" of suspicious trading is **DENIED**; (2) whether Norton or Wilson-Davis had any "manipulative intent" or otherwise acted with scienter is **GRANTED**; and (3) any indicia of manipulative trading that were not either alleged in the Complaint or discussed in Lowry's expert report, including purported bid support and manipulative small trades, is **DENIED**.

B. Because Ganis's report, CX-50, contains certain improper statements and opinions as detailed above, it is **EXCLUDED**. Enforcement shall have until **July 16, 2020**, to file a revised expert report deleting the improper language. The revised report shall be labeled CX-50A.

C. Ganis is **PRECLUDED** from testifying or opining on the ultimate issues of whether a manipulation occurred or whether any Respondent engaged in a manipulation.

SO ORDERED.

David R. Sonnenberg
Hearing Officer

Dated: July 2, 2020

[81] *See United States v. De Anda*, 2019 U.S. Dist. LEXIS 110880, at *19 (N.D. Cal. July 2, 2019) (finding that whether the defendant knew that certain tax returns were false was an ultimate factual question).

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