

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 07-20 (E102003025201).

**NASD OFFICE OF HEARING OFFICERS**

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DEPARTMENT OF ENFORCEMENT,

Complainant

v.

RESPONDENT 1,

RESPONDENT 2,

RESPONDENT 3,

RESPONDENT 4,

and

RESPONDENT 5,

Respondents.

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Disciplinary Proceeding  
No. E102003025201

Hearing Officer – SW

**ORDER DENYING RESPONDENTS'  
REQUEST FOR LEAVE TO OFFER EXPERT TESTIMONY**

On February 9, 2007, Respondents 1, 2 and 3 filed a motion to permit expert testimony. On February 23, 2007, the Department of Enforcement (“Enforcement”) filed a motion opposing the February 9, 2007 motion for expert testimony. On March 9, 2007, the Respondents filed a reply to Enforcement’s objection to their expert. On April 12, 2007, Enforcement filed a surreply to the Respondents’ reply.

According to the Respondents’ motion and reply, the expert witness, Mr. G, would aid the Hearing Panel’s deliberations regarding the market timing and late trading allegations, by providing an economic damage analysis and disgorgement calculation based on the alleged harm caused by market timing and late trading.

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In its opposition and surreply, Enforcement sought to preclude the expert testimony on the grounds that (i) the expert's opinion would not be helpful to the Hearing Panel because of the Hearing Panel's own relevant expertise, and (ii) the Respondents had failed to comply with the scheduling requirement that a summary of the expert's opinion and the bases of such opinion be provided.

The Parties correctly cited that, although the formal rules of evidence do not apply in a proceeding brought under the Rule 9000 Series, Hearing Officers look to the Federal Rules of Evidence and relevant case law for guidance in determining whether to grant a request for expert testimony.

The Federal Rules of Evidence and relevant case law provide that the party seeking to admit expert testimony bears the burden of demonstrating that such testimony will assist the finder of fact in technical areas outside the fact finder's area of expertise.<sup>1</sup> Moreover, expert testimony is usually only received when the witness has some scientific, technical, or other specialized knowledge that will assist the trier of fact to understand the evidence or determine the facts in issue.<sup>2</sup>

Here, the Complaint sets forth allegations that, among other things, (i) Respondents 1, 4 and 5 violated NASD Conduct Rule 2110 when they assisted customers to trade in mutual funds contrary to the mutual fund's market timing provisions and prohibitions, and (ii) Respondents 1 and 3 violated NASD Conduct Rules 2110 and 3010(b) because during the period July 2002 to

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<sup>1</sup> See In re Diet Drugs Products Liability Litigation, 2000 U.S. Dist. LEXIS 9037 (E.D. Pa. 2000) at \*17, citing Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592 n.10.

<sup>2</sup> See, e.g., F.R.E. 702.

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September 2003, Respondent 1 failed to implement any policies or procedures that addressed either mutual fund market timing or mutual fund order entry.

The primary issues to be determined are (i) did the Respondents engage in trading contrary to the mutual fund procedures while appearing to comply with such procedures, i.e., late trading and market timing, and (ii) was such conduct a violation of NASD Conduct 2110 Rule's requirement to observe high standards of commercial honor and just and equitable principles of trade.

The Respondents' motion failed to persuade the Hearing Panel that the expert's anticipated testimony concerning economic damage analysis and disgorgement calculation for mutual fund investors would assist the Hearing Panel in determining whether the Respondents engaged in late trading and market timing.

Accordingly, the Hearing Panel denies the Respondents' motion for leave to offer the expert testimony of Mr. G.<sup>3</sup>

**HEARING PANEL.**

by: \_\_\_\_\_  
Sharon Witherspoon  
Hearing Officer

Dated: Washington, DC  
May 17, 2007

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<sup>3</sup> Because the Hearing Panel determined that the expert testimony would not be helpful, the Hearing Officer did not rule on whether the Respondents' motion failed to meet the requirements of the scheduling order.