



**This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 03-19 (C01020022).**

context of an omnibus account for purposes of SEC Rule 15c3-3.<sup>2</sup> On September 22, 2003, Respondent 2 also filed a motion for leave to introduce expert testimony. Respondent 2 sought leave to call Samuel Luque, Jr., a former Associate Director of Financial Operations/Compliance, NASD.<sup>3</sup>

On September 26, 2003, Enforcement filed an opposition to Respondent 2's motion for expert testimony, arguing that Mr. Luque, Jr.'s testimony regarding general industry practice concerning an omnibus agreement would be irrelevant because of the existence of a pre-existing margin agreement between Respondent 1 and its clearing agent. In addition, on September 26, 2003, Respondent 2 filed an opposition to Enforcement's motion for expert testimony arguing that Enforcement did not provide sufficient information regarding Ms. Demando and Mr. Jach to qualify them as experts.

For the reasons set forth below, the Hearing Officer grants the Parties' Motions for expert testimony.

## **B. Discussion**

NASD Procedural Rule 9263(a) gives the Hearing Officer authority to "exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial." This includes the authority to deny a party's request to offer expert testimony. The NASD Code of Procedure however does not contain a specific rule governing the use of expert testimony. Thus, it is appropriate to look to the Federal Rules of Evidence and relevant federal case law in making

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<sup>2</sup> Enforcement supplemented its motion for expert testimony on October 3, 2003.

<sup>3</sup> Respondent 2 supplemented his motion for expert testimony on September 24, 2003.

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determinations regarding the admissibility of expert testimony in NASD disciplinary proceedings.

Rule 702 of the Federal Rules of Evidence governs the admissibility of expert testimony in the federal courts and provides as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

As a general matter, the Federal Rules of Evidence “embody a strong and undeniable preference for admitting any evidence” that could potentially assist the trier of fact.<sup>4</sup> The critical test for admissibility of expert testimony is its helpfulness. Opinions are excluded if they are “unhelpful and therefore superfluous and a waste of time.”<sup>5</sup> In addition, the proposed expert testimony must be “reasonably reliable.”<sup>6</sup> If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts.<sup>7</sup>

Applying these standards to the present case, the Hearing Officer finds that Enforcement’s and Respondent 2’s proffers of expert testimony are sufficient. The Parties

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<sup>4</sup> Holbrook v. Lykes Bros. Steamship Co., Inc., 80 F.3d 777, 780 (3d Cir. 1996).

<sup>5</sup> Fed. R. Evid. 702 advisory committee’s note.

<sup>6</sup> Id.

<sup>7</sup> See Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147–48 (1999).

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indicate that each proposed witness has experience in reviewing the meaning of "good control location" within the meaning of the NASD rule, and that an integral part of their job was to determine what NASD viewed as "good control location." As such, the witnesses possess the necessary qualifications to render reasonably reliable opinion testimony. Accordingly, the Hearing Officer grants the Parties' motions for expert testimony of Ms. Demando, Mr. Jach, and Mr. Luque, Jr.

**SO ORDERED.**

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Sharon Witherspoon  
Hearing Officer

Dated: Washington, DC  
October 15, 2003