

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

DEPARTMENT OF ENFORCEMENT,	
Complainant	Disciplinary Proceeding No. 2007011413501
v.	
RESPONDENT FIRM,	Hearing Officer – RSH
RESPONDENT 2,	
RESPONDENT 3,	
and	
RESPONDENT 4,	
Respondents.	

**ORDER DENYING RESPONDENTS' MOTION TO EXCLUDE CERTAIN
PORTIONS OF THE EXPERT REPORT OF HGF AND TO PRECLUDE HIS
EXPERT TESTIMONY ON THE ISSUE OF SUITABILITY**

On April 26, 2011, Respondents filed a Motion to Exclude Certain Portions of the Expert Report of HGF and to Preclude his Expert Testimony on the Issue of Suitability. In their Motion, the Respondents seek an order precluding HGF from testifying on the issue of suitability, and excluding Section 3.6 (entitled "Suitability") of HGF's expert report. The Hearing Officer previously issued an order allowing HGF to testify as an expert, and the Respondents do not dispute that he is qualified to testify as an expert. Instead, the Respondents seek to exclude Section 3.6 of his report, and to preclude his testimony on suitability, because his opinions about the suitability of certain collateralized mortgage obligations ("CMOs") for certain customers is based on statements made in those customers' written affidavits. The Respondents argue that

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Enforcement is using HGF “as a pass-through for inadmissible evidentiary hearsay statements,” and that HGF’s report and testimony should be excluded because it is unreliable under Federal Rule of Evidence (“FRE”) 702 and the *Daubert* line of cases which interpret FRE 702.¹

On May 9, 2011, Enforcement filed its opposition to the Respondents’ Motion, arguing that, although HGF’s opinion is based on the statements made in customer declarations, Enforcement does not seek to use HGF’s report or his testimony for the truth of the customers’ statements.

HGF states in his report that he based his opinions about suitability on customer declarations about their investment objectives. Thus, for example, assuming a customer’s objective was to “not lose retirement money,” HGF’s opinion is that the CMOs at issue in this case are unsuitable for her. The Respondents’ argument that because HGF based his opinions on hearsay (which the customer declarations surely are), his opinions are unreliable under FRE 702 and *Daubert*, is a misunderstanding of the FRE and *Daubert*.

First of all, hearsay is admissible in FINRA disciplinary proceedings.² Even if it were not, the FRE do not require that facts and data relied on by experts be admissible in evidence, “if of a type reasonably relied upon by experts in the particular field in forming opinion or inferences upon the subject.”³

In forming an opinion on suitability, an expert such as HGF would reasonably rely upon a customer’s own statements about what his investment objectives are. But that does not mean that the bases for his opinions are true. Instead, HGF states that his

¹ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co., Ltd. v. Carmichael, etc.*, 526 U.S. 137 (1999).

² *Department of Enforcement v. Chase*, No. C8A990081, 2001 NASD Discip. LEXIS 30 (NAC 2001).

³ FRE 703.

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opinions about suitability *assume* that the customers' investment objectives are those as described in the customers' declarations. HGF will presumably be cross-examined about his opinions and the data and assumptions upon which he based his opinions. The Hearing Panel will not assume the truth of HGF's assumptions; the customers' investment objectives must be proved by other evidence. If other evidence shows that the customers' investment objectives were different from those *assumed* by HGF, then HGF's opinions will presumably be invalid. In any event, the Hearing Panel will ultimately decide whether the CMOs at issue in this case were suitable for the customers to whom they were sold. HGF's opinion may be helpful to the Hearing Panel in reaching its decision. For these reasons, the Respondents' Motion is hereby denied.

SO ORDERED.

Rochelle S. Hall
Hearing Officer

Dated: May 16, 2011