

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

SUZANNE MARIE CAPELLINI
(CRD No. 1357703),

Respondent.

Disciplinary Proceeding
No. 2020066627202

Hearing Officer–DDM

**ORDER GRANTING ENFORCEMENT'S MOTION FOR LEAVE TO OFFER
EXPERT TESTIMONY OF ARTHUR MIDDLEMISS**

I. Introduction

There are two causes of action in the First Amended Complaint. In the first cause of action, Enforcement alleges that Respondent Suzanne Marie Capellini violated FINRA's anti-money laundering ("AML") rules while she was the AML Compliance Officer ("AMLCO") at First Manhattan Co. ("First Manhattan"). Enforcement alleges that, from January 2018 through May 2020, Capellini violated FINRA Rules 3310(a) and 2010 because she failed to establish and implement a reasonable AML program for her firm's handling of microcap securities. Specifically, Enforcement alleges that Capellini "failed to establish and implement AML policies and procedures that could be reasonably expected to detect and cause the reporting of suspicious activity in microcap securities and to achieve compliance with the BSA [Bank Secrecy Act] and the implementing regulations"¹ Enforcement also alleges that Capellini failed to reasonably investigate microcap securities activity in a customer account and consider whether to report the activity by filing a Suspicious Activity Report ("SAR").² In the second cause of action, Enforcement alleges that Capellini violated FINRA Rules 8210 and 2010 by providing false or misleading information in response to three Rule 8210 requests about microcap trading activity at an account held by Capellini's husband at First Manhattan.³ Capellini denies any wrongdoing

¹ Complaint ("Compl.") ¶ 107.

² Compl. ¶¶ 108-09.

³ Compl. ¶¶ 117-19.

and has filed a motion for summary disposition that seeks to dismiss the First Amended Complaint.⁴

Enforcement filed a motion for leave to call an expert to testify about “the AML-related issues in this proceeding.”⁵ Enforcement’s proposed expert witness is Arthur Middlemiss, a lawyer whose practice focuses on AML and anti-corruption issues. According to Enforcement, Capellini does not oppose the motion, but reserves her right to object to testimony by Middlemiss at the hearing, and to offer evidence in rebuttal to his testimony.⁶ Enforcement’s motion is **GRANTED**, subject to certain conditions outlined in this Order.

II. Qualifications and Proposed Testimony from Middlemiss

According to his curriculum vitae, which was attached to Enforcement’s motion, Middlemiss is currently the managing partner of the New York office of law firm Lewis Baach Kaufmann Middlemiss pllc. His practice “[f]ocus[es] on providing strategic counsel to foreign and domestic entities seeking to mitigate regulatory, criminal and reputational risk in the areas of anti-money laundering and anti-corruption.”⁷ He previously worked as an assistant district attorney, where he prosecuted securities fraud and money-laundering cases, and was the head of AML surveillance for two large investment banks.⁸ According to Enforcement, Middlemiss “is a frequent speaker on AML and Bank Secrecy Act issues and has testified as an expert on AML issues.”⁹ In sum, Enforcement asserts, Middlemiss has “decades of experience overseeing, reviewing, and analyzing AML issues, and has provided expert testimony on these issues, including in a prior FINRA disciplinary proceeding”¹⁰

Enforcement proposes that Middlemiss testify as an expert on the following topics:¹¹

1. The requirements of the BSA and the implementing regulations of the Department of Treasury.
2. The AML considerations and risks posed by microcap securities trading generally and specifically with respect to First Manhattan’s microcap business line.

⁴ Enforcement’s opposition to Capellini’s motion for summary disposition is due on December 12, 2022. Nothing in this Order should be construed in any way as an indication as to how the Hearing Panel or I will decide the motion for summary disposition.

⁵ Department of Enforcement’s Unopposed Motion to Permit Expert Testimony (“Expert Mot.”) 5.

⁶ Expert Mot. 1 n.1.

⁷ Expert Mot., Exhibit A, at 1.

⁸ Expert Mot., Exhibit A, at 1-2.

⁹ Expert Mot. 3.

¹⁰ Expert Mot. 5.

¹¹ Expert Mot. 3-4.

3. The features of an AML program that is reasonably designed to achieve and monitor the firm's compliance with the requirements of the BSA and its implementing regulations for the microcap business line.
4. Whether the AML program for which Capellini was responsible during her tenure as AMLCO was consistent with a reasonably designed AML program and, if not, how the program for which Capellini was responsible differed.
5. The various red flags of potentially suspicious activity that are specific to the deposit and liquidation of microcap securities, and how an AMLCO would reasonably monitor and appropriately respond to such red flags, including by considering whether or not the filing of a SAR was required.
6. Whether the deposits and liquidations of microcap securities alleged in the Complaint presented red flags of potentially suspicious activity.
7. Whether Capellini's actions as AMLCO regarding the microcap securities activity engaged in by firm customers, including her husband, were consistent with those of an AMLCO that was reasonably monitoring and appropriately responding to such red flags and, if not, how they differed.

III. Discussion

A party seeking to introduce expert testimony must first obtain permission from the Hearing Officer,¹² who has broad discretion in deciding whether to permit expert testimony.¹³ In applying that discretion, the Hearing Officer considers whether the proposed expert testimony is relevant¹⁴ and reliable.¹⁵ To assist in making that determination, the Federal Rules of Evidence and related case law, though not binding,¹⁶ are instructive.¹⁷ Federal Rules of Evidence Rule 702

¹² Case Management and Scheduling Order ("CMSO"), at 6.

¹³ See, e.g., OHO Order 17-07 (2013035817701), at 1 (Mar. 21, 2017), http://www.finra.org/sites/default/files/OHO_Order_17-07_2013035817701.pdf; OHO Order 16-20 (20120342425-01), at 4 (July 28, 2016), http://www.finra.org/sites/default/files/OHO_Order16-20_20120342425-01_0.pdf; OHO Order 15-04 (2011025706401), at 2 (Feb. 3, 2015), <http://www.finra.org/sites/default/files/OHO-Order-15-04-ProceedingNo.2011025706401.pdf>; OHO Order 12-07 (2010020846601), at 1 (Nov. 9, 2012), <http://www.finra.org/sites/default/files/OHODecision/p229431.pdf>.

¹⁴ OHO Order 16-20, at 4; OHO Order 12-01 (2009018771602), at 2 (Mar. 14, 2012), <http://www.finra.org/sites/default/files/OHODecision/p126068.pdf>. See also FINRA Rule 9263 (The Hearing Officer may admit evidence that is relevant, but may exclude evidence that is "irrelevant, immaterial, unduly repetitious, or unduly prejudicial.").

¹⁵ OHO Order 16-20, at 4; OHO Order 15-04, at 2 (citing *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 244 (5th Cir. 2002) ("In short, expert testimony is admissible only if it is both relevant and reliable.")).

¹⁶ See FINRA Rule 9145(a) ("The formal rules of evidence shall not apply in a proceeding brought under the Rule 9000 Series.").

¹⁷ OHO Order 17-07, at 1; OHO Order 16-20, at 4; OHO Order 12-07, at 2 n.3.

provides, in pertinent part, that “[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if . . . the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.” And, indeed, the key factor in this forum is whether the anticipated expert testimony would be helpful to the Hearing Panel.¹⁸ As the movant, Enforcement has the burden of establishing the conditions for offering expert testimony.¹⁹

I find that good cause exists for granting Enforcement’s motion. Issues involving AML have frequently been the subject of expert testimony in FINRA disciplinary proceedings.²⁰ Here, Middlemiss appears qualified to opine about the topics identified in Enforcement’s motion.²¹ Further, expert testimony on those topics would be helpful to the Hearing Panel in resolving the issues in this case. Finally, Capellini may object at the hearing to any particular testimony by Middlemiss beyond these topics or that encompasses issues that are within the exclusive province of the Hearing Panel.

IV. Order

Enforcement’s motion for leave to call Middlemiss as an expert witness is **GRANTED**,²² subject to the following:

1. Enforcement shall file an expert report for Middlemiss by **January 13, 2023**, as provided in the CMSO.²³

¹⁸ OHO Order 17-07, at 2; OHO Order 16-20, at 4; OHO Order 15-04, at 2; OHO Order 12-01, at 3.

¹⁹ OHO Order 17-07, at 2 (“It is the proponent’s burden to show that the expert’s testimony satisfies the conditions for admission.”); OHO Order 12-01, at 4 (same).

²⁰ *See, e.g.*, OHO Order 15-04, at 2 (“AML procedures are a sufficiently specialized area that expert testimony . . . may well assist the Panel in evaluating the AML-related allegations in the Complaint, notwithstanding the Panelists’ generalized expertise in securities industry issues.”); OHO Order 12-07, at 3 (finding that AML expert testimony “will assist the Hearing Panel in understanding pertinent legal and regulatory requirements and the reasonable steps firms should take to comply with those requirements.”).

²¹ I make this finding solely for the purpose of deciding whether Middlemiss meets the threshold for being permitted to testify. How much weight, if any, should be accorded to his testimony—including how his qualifications may impact credibility findings—will be determined by the Hearing Panel based on the evidence presented at the hearing.

²² Under the CSMO, Capellini has until December 9, 2022 to file a motion to call a counter-expert witness. Papers filed in support of a motion to permit counter-expert testimony shall conform to the requirements for a motion to permit expert testimony. Any opposition shall be filed within 10 days of the filing of the motion.

²³ CMSO, at 3.

2. The report shall contain:
 - a. a description of the Middlemiss's qualifications;
 - b. his expert opinions;
 - c. the basis and reasons for such opinions;
 - d. a summary, at the beginning of the report, of: Middlemiss's opinions, the basis, and reasons for such opinions;
 - e. a statement of the compensation paid or to be paid for Middlemiss's work on the case (including but not limited to the compensation paid or to be paid for preparing the expert report); and
 - f. a listing of all documents relied on in forming Middlemiss's opinions. Copies of all such documents, along with any related demonstrative exhibits, shall be served with the report on **January 13, 2023**.
3. The report and supporting documents shall be included in Enforcement's proposed hearing exhibits.
4. To the extent they are admitted at the hearing, the expert report will be considered part of Middlemiss's direct testimony.
5. At the hearing, Enforcement's direct examination of Middlemiss 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 its summary direct examination within **60 minutes**.

SO ORDERED.



Daniel D. McClain
Hearing Officer

Dated: December 2, 2022

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