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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16649

In the Matter of:

Ironridge Global Partners, LLC,
Ironridge Global IV, Ltd.

Respondents.

RESPONDENTS' OPPOSITION TO THE DIVISION'S MOTION IN LIMINE TO STRIKE THE OPINIONS OF MESSRS. PICKARD, JURAN, AND DEMARTINO

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Respondents, Ironridge Global IV, Ltd. ("Global IV") and Ironridge Global Partners, LLC ("Partners"), respectfully submit this opposition to the Enforcement Division's motion to exclude the rebuttal reports of Messrs. Lee Pickard, David Juran, and Ralph DeMartino. Contrary to the Division's assertions, each rebuttal expert provides a unique opinion. Moreover, the experts' importance to Respondents' case outweighs the flimsy grounds for the Division's motion – the burden on the Division of having to "research[] [multiple] experts' prior writing and statements, familiariz[e] itself with the expert[s'] background and qualifications, and determin[e] whether the expert is subject to impeachment." Division's Motion in Limine at 5. The Division's motion should be denied and Respondents should be allowed to offer their expert testimony.

BACKGROUND

In this case, the Division alleges that Ironridge Global IV, Ltd. should have registered with the Commission as a "dealer" under § 15(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78n(a), for engaging in court-supervised, debt-for-equity exchanges that § 3(a)(10) of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. § 77c(a)(10), exempts from the Commission's purview. According to the Division, Global IV was a "dealer" for the solitary reason that Global IV was supposedly a statutory underwriter. *See* Division Opposition to Summary Disposition at 16, 18 (arguing that an entity's underwriter status is "[l]egally [s]ufficient" "by itself" to make one a dealer). That position is directly contrary to longstanding guidance, including a No-Action letter indicating that a professed statutory underwriter need not register as a dealer. *Acqua Wellington North Am. Equities Fund, Ltd.*, SEC No-Action Letter, 2001 WL 1230266 (Oct. 11, 2001); *see also Oceana Capitol Grp. Ltd. v. Red Giant Entm't, Inc.*, 150 F. Supp. 3d 1219 (D. Nev. 2015); *Chapel Investments, Inc. v. Cherubim Interests, Inc.*, 177 F. Supp. 3d 981 (N.D. Tex. 2016);1 Publicly Traded Corporations

Handbook § 5:72, n.8 (2016). Nonetheless, the Division asks that the Court sanction Respondents under this new theory on the order of $22 million for the alleged § 15(a) violation.

To support that revolutionary theory and hobbling sanction, the Division submitted the expert report of Robert Lowry. Mr. Lowry is a professional expert witness – or as he puts it "a leading provider of expert witness services" – with the "experience, the dedication and the tools necessary to produce the most favorable result for . . . clients who are engaged in securities litigation." "Home Page," RL Consulting Services, Inc., *available at* http://www.rlcsinc.net/ (last visited October 31, 2016). Before he began his career as a professional advocate for clients, he served as a "Senior Accountant" for the SEC's Division of Market Regulation from 1972 to 1995. *See* Lowry CV at 3.

Mr. Lowry prepared a wide-ranging, 40-page expert report that made a number of assertions, and covered a number of subjects, including (but not limited to):

- **Dealer Status**: Mr. Lowry opines that Global IV was a dealer under Exchange Act § 15(a), based on the SEC's "Guidance Regarding Dealers." Lowry Report at 27; *id.* at 27-36.

- **Underwriter Status**: Mr. Lowry opines that Global IV acted as an underwriter in the expansive statutory sense, as opposed to the narrower real-world sense. Lowry Report at 29-31; *see generally In re Refco, Inc. Sec. Litig.*, 503 F. Supp. 2d 611, 629 (S.D.N.Y. 2007) (explaining that the statutory definition of "underwriter" "has been broadly interpreted"); 15 David A. Lipton, *Broker-Dealer Registration* § 3:2 (2015).

- **Dilution**: Mr. Lowry opines that Global IV's sale of stock it had acquired from issuers in § 3(a)(10) exchanges "heavily diluted existing shareholders" and caused "significant price declines." Lowry Report at 16, 17.

- **FINRA Compensation Limitations:** To support the Division's $22 million disgorgement theory here, Mr. Lowry opines that if Global IV had been registered as a dealer, Global IV also would have been obligated to register with FINRA. Lowry Report at 36. According to Mr. Lowry, FINRA's compensation regulations would then have slashed the profits Global IV allegedly reaped from engaging in the transactions at issue. *Id.* at 36-40.

To rebut Mr. Lowry's wide-ranging and multi-part opinion, Respondents have obtained rebuttal reports from four experts. First, Respondents have obtained a report from James Burns, who was the Deputy Directory of the Division of Trading and Markets until 2014, where he had direct responsibility for dealer-registration question. Mr. Burns will opine that the definition of a "dealer" that Lowry advances is inconsistent with how industry participants have long understood the term "dealer." Second, Respondents have obtained a report from Lee Pickard, who was Director of the Division of Trading and Markets at the time Mr. Lowry was an accountant there. Mr. Pickard will draw on his experience regulating underwriters to opine that Global IV has not an underwriter, especially in the real-world sense (as opposed to the broad, statutory sense). Third, Respondents have obtained a report from Ralph DeMartino. Mr. DeMartino is a securities lawyer with extensive experience interacting with FINRA and applying FINRA's Corporate Financing Rules. He will rebut Mr. Lowry's assertions that, if Global IV had registered as a dealer, FINRA's compensation limitations would have applied to Global IV and limited Global IV's compensation from the transaction at issue. Finally, Respondents have obtained a report from David Juran, a statistician. Mr. Juran will rebut Mr. Lowry's assertions that Global IV diluted issuers' stock and caused stock prices to decline.

Although the Division has not yet seen any of the rebuttal reports, the Division has moved to exclude all but Mr. Burns's rebuttal report. According to the Division, the reports will be cumulative and would overburden the Division's trial-preparation work.

ARGUMENT

The Court should admit Respondents' rebuttal expert reports. Each of those reports has a different focus and is thus readily admissible under SEC practice, which favors admission over exclusion. Moreover, the Division overstates its objection about the burden of confronting four

rebuttal experts. The Division will have plenty of time to prepare for cross-examining Respondents' rebuttal experts.

A. The Reports are Admissible under the SEC's Liberal Standard for Admissibility.

"[T]he Commission has consistently made clear that administrative law judges should be inclusive in making evidentiary determinations." *In re Matter of J.S. Oliver Capital Management, LP.*, Admin File No. 3-15446, 2013 WL 11234075, at *5 (Dec. 31, 2013); *In re City of Anaheim*, Admin. File No. 3-9739, 1999 WL 1034489, at *2 & n.7 (Nov. 16, 1999) (Commission opinion). That is particularly so of evidence from respondents. For, "[i]t is vital that Respondents have a full and fair opportunity to show that the allegations in the OIP are not true." *Oliver Capital*, 2013 WL 11234075, at *5.[1]

Such is the case with expert testimony, too. SEC practice, like federal-court practice, allows respondents to call multiple experts, at least as long as those experts "shed a different light" on the case. *In re F.N. Wolf & Co, Inc., et al.*, Admin File No. 3-8533, 1995 WL 424932, at *1 (July 12, 1995) ("Even though there may be some repetitive testimony, the respondents represent that the testimony will not exceed an hour. Each expert may shed a different light of the material . . . ."); *see also Combs v. Peabody Energy Corp.*, No. 07-089, 2008 WL 11248796, at *1-2 (D. Wyo. Jan. 14, 2008) (allowing testimony by experts whose opinion shared some "overlap" but whose focus was nonetheless different); *Treaster v. Healthsouth Corp.*, No. 05-

[1] The cases the Division cites held merely that judge have *discretion* whether to exclude expert testimony, not that judges must do so. *In re Scott G. Monson*, Admin. File No. 3-12429, 2008 WL 2574441, at *6 n.27 (June 30, 2008) (Commission opinion) (stating in a footnote that judges have "broad discretion" to exclude "duplicative" experts);
In re Pagel, Inc., Admin. File No. 3-6142, 1985 WL 548387, at *5-6 (Aug. 1, 2015) (Commission opinion) (holding merely that an ALJ had "broad discretion" to exclude an unhelpful expert opinion).

2061, 2006 WL 1580980, at *2 (D. Kan. June 5, 2006) (allowing two experts to testify because their reports were "not identical" and they had "different area[s] of expertise").

By that standard, each of Respondents' rebuttal reports is admissible, because each sheds different light on the case. Mr. Burns will testify about industry expectations regarding who is a dealer under the SEC's longstanding guidance; Mr. Pickard will testify about the attributes of a real-world underwriter; Mr. DeMartino will testify about FINRA's compensation limitations; and Mr. Juran will address statistical weaknesses in Mr. Lowry's assertion that Global IV's transactions diluted issuers' stock or caused issuers' stock prices to decline.

The Court should therefore deny the Division's motion.

B. The Division is Incorrect that the Reports are Cumulative.

Without seeing any of the rebuttal reports, the Division hypothesizes that they will be cumulative. *See* Motion in Limine at 4-5. The Division predicts that all will address whether Global IV was an underwriter or a dealer. As explained above, the Division is incorrect.

The Division is right that Mr. Burns's original report (filed November 2, 2015) about whether Global IV is a dealer did discuss (among other things) whether Global IV is an underwriter, because industry participants understand whether one is an underwriter to be one of many non-dispositive factors in deciding whether an entity is a dealer. Mr. Pickard will likewise analyze whether Global IV is an underwriter. That overlap does not warrant excluding either expert's opinion. Even assuming the two have some "repetitive testimony," their reports and testimony will shed a "different light" on the case. *F.N. Wolf & Co*, 1995 WL 424932, at *1 ("Even though there may be some repetitive testimony, the respondents represent that the testimony will not exceed an hour. Each expert may shed a different light of the material . . . ."). For example:

- Mr. Burns's reports focus on a dealer's many possible attributes, of which underwriter status is but one. Mr. Pickard's report will not.

- Mr. Burns explains industry participants' expectation – based on the *Acqua Wellington* No-Action Letter, among other things – that being a statutory underwriter is insufficient, by itself, to make one dealer. Mr. Pickard will not.

- Pickard will address, one by one, Mr. Lowry's many assertions (sometimes incorrect) about Global IV's business and explain why those attributes are not underwriter attributes. Those include, for example, Lowry's assertion that Global IV's holdings never exceeded 10% of issuers' shares outstanding (Lowry Report at 6 n.8); that Global IV's transaction supposedly diluted issuers' stock (*id.* at 16); that Global IV supposedly charged issuers fees; that some of Partners' principals were also principals of a registered investment advisor (*id.* at 22); and so on. Mr. Burns will also address Mr. Lowry's assertions about Global IV's business, but he will focus on explaining why Global IV's attributes are not *dealer* attributes.

In short, this case is unlike the ones the Division cites – where a party seeks to introduce a number of reports on the same topic. *See F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1258 (2d Cir. 1987) (holding that a district court may exclude an expert's testimony that duplicates the testimony of "at least four other witnesses"); *Highland Capital Management, LP v. Schneder*, 551 F. Supp. 2d 173, 184 (S.D.N.Y. 2008) (deeming "needlessly cumulative" multiple experts' testimony "on the same subject"). Each witness will focus on a different question. Under the "inclusive" standard for admitting evidence, the Court should admit all four rebuttal reports. *J.S. Oliver Capital Management, LP.*, 2013 WL 11234075, at *5.

At the very least, Respondents request that the Court reserve judgment about whether the reports are cumulative until Respondents file those reports and the witnesses appear at the hearing. If the testimony at the hearing become cumulative, the Court may then limit or terminate the witnesses' examination, as may be appropriate, and exclude the duplicative testimony. *In re Russo Secs., Inc.*, Admin File No 3-9484, 1998 WL 211391, at *1 (April 21, 1998).

C. The Court Should Reject the Division's Assertion that the Reports Will Overburden the Division.

The Division also argues that admitting four rebuttal reports will overburden the Division, because its attorneys will have to "research[] [multiple] experts' prior writing and statements, familiariz[e] itself with the expert[s'] background and qualifications, and determin[e] whether the expert is subject to impeachment." Motion in Limine at 5. The Court should reject that argument. To begin, the Division is in no position to make such an argument; it has named over 30 witnesses for the final hearing, which will likewise burden Respondents' hearing preparation. More to the point, the hearing is still months away. The Division has plenty of time to prepare for the witnesses' testimony.

CONCLUSION

For these reasons, the Court should deny the Division's motion in limine.

Dated: November 10, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2016, I filed an original and three copies of the foregoing with the Office of the Secretary, Securities and Exchange Commission, Attn: Secretary of Commission Brent J. Fields, 100 F Street NE, Mail Stop 1090, Washington, DC 20549, by Federal Express overnight delivery and filed a copy by facsimile transmission to (202) 772-9324, and served a true and correct copy upon counsel of record by electronic mail (as well as Fedex delivery to Division counsel), as follows:

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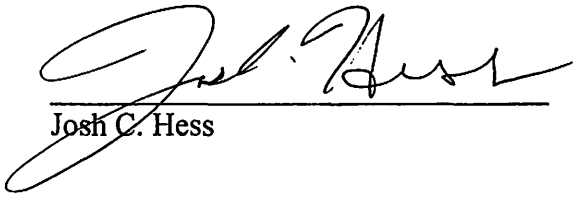

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