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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 LEGAL OPINIONS FROM THE EXPERT REPORT OF JAMES BURNS

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The Division has alleged that Ironridge Global IV, Ltd. ("Global IV") 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 Section 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 – a position directly contrary to existing guidance. *See* Opposition to Summary Disposition (Oct. 13, 2015) at 16,18; *contra, 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). Because Global IV did not register, the Division demands that Respondents disgorge at least $22 million.

To support that novel position and hefty sanction, the Division has hired an expert, Robert Lowry, to testify that Global IV was a "statutory" underwriter (Lowry Report at 29-31); that Global IV was therefore automatically a "dealer" and thus should have registered with the SEC – a conclusion supposedly based on SEC "Guidance" and case law (*id.* at 27-36); and that Global IV's profits from the § 3(a)(10) exchanges violated FINRA compensation regulations (*id.* at 36-40).

Despite that raft of legal opinions, the Division has moved to strike the opinion of Respondents' primary expert, James Burns, because his opinion mixes law and fact. The Division's position is without merit and should be rejected.

By way of background, Mr. Burns recently served as the Deputy Director of the SEC's Division of Trading and Markets, after serving in other senior positions with the SEC. *See* Burns Report (filed Nov. 2, 2015) at 4. His responsibilities there included dealer-registration issues. *Id.* He has drawn on that experience to opine that Global IV lacks the attributes of a dealer. He also opines that, if the Court nonetheless deems Global IV a dealer for purposes of § 15(a) of the Exchange Act, such a holding would shock market participants. He explains that market participants have long understood the existing SEC guidance to provide that institutional investors like Global IV are "traders," not "dealers."

That expert opinion is admissible here because it will assist the fact finder, which is the applicable standard for the admission of expert testimony. For example, Mr. Burns' opinion will help the fact finder determine the attributes of real dealers and appreciate how Global IV's business differs from a dealer's. His opinion also will help evaluate Global IV's Due Process defense that the Division is impermissibly trying to punish Global IV under a liability theory Global IV (like other market participants) could not have foreseen. Although Mr. Burns' opinion sometimes mixes law and fact, courts routinely admit such mixed opinions – especially in bench trials.

The Court should deny the motion and receive Mr. Burns' testimony.

BACKGROUND

Global IV is an institutional investor. One of its investment strategies included exchanges under § 3(a)(10) of the Securities Act. In those exchanges, Global IV proposed to extinguish a portion of a public company's debts in return for certain of the company's securities. If the parties agreed to the exchange, they submitted the proposal to a court for a "fairness" review. If the court approved the deal as fair, they completed the exchange. The Securities Act's § 3(a)(10) exempted from registration the securities that Global IV received in

the deal, meaning that the securities were freely tradable. Global IV thereafter arranged for a registered broker dealer to sell some of the securities. According to the Division, that investment strategy made Global IV a "dealer" that should have registered with the SEC under Exchange Act § 15(a).

But under longstanding guidance, whether an entity is a dealer depends on a long list of questions, and all agree that the answer to nearly all those questions here is "No":

- Does the entity make a market in securities? All agree, No.
- Does the entity hold itself out as willing to buy and sell a particular security on a continuous basis? All agree, No.
- Does the entity run a matched book of repurchase agreements? All agree, No.
- Does the entity issue or originate securities that he also buys and sells? All agree, No.
- Does the entity advertise or otherwise let others know that it is in the business of buying and selling securities? All agree, No.
- Does the entity do business with the public directly? All agree, No.
- Does the entity quote prices for both purchase and sale of a security? All agree, No.
- Does the entity participate in a "selling group" or otherwise underwrite securities? The Division incorrectly says "Yes." Global IV says "No."
- Does the entity provide services to investors, such as handling investors' money and securities, extending credit to investors, or giving investment advice to investors? All agree, No.
- Does the entity write derivatives contracts that are securities? All agree, No.

"Who is a Dealer?," *Guide to Broker-Dealer Registration* (April 2008), https://www.sec.gov/divisions/marketreg/bdguide.htm#II.

Given its precarious position under the longstanding guidance, the Division has hired its own expert, Mr. Lowry, to argue that Global IV is nonetheless dealer. Mr. Lowry was a "Senior Accountant" with the SEC twenty years ago. *See* Lowry Curriculum Vitae (filed Nov. 2, 2015).

Since then, he has served as a professional expert witness – typically for the SEC. *Id.* Or as Mr. Lowry himself puts it, his job is to "produce the most favorable result for . . . clients who are engaged in securities litigation." "Home Page," RL Consulting Services, Inc., *available at* www.rlcinc.net (last visited November 3, 2016).

Mr. Lowry offers a series of legal opinions to support the Division's novel position. First, he opines that Global IV was indeed a dealer under the SEC's "Guidance," including the "Who is a Dealer" guidance listed above and case law such as *In re Sodorff*, SEC Release No. 31134 (Sept. 2, 1992). Lowry Report (filed Nov. 2, 2015) at 27-35 & n. 64-73. Second, he argues that Global IV was a "statutory" underwriter and therefore also a dealer. *Id.* at 29-30. Third, Mr. Lowery explains the supposed importance of requiring entities like Global IV to register as dealers, invoking case law about the policies behind § 15(a). *Id.* at 37. Third, to support the Division's position that Respondents must disgorge at least $22 million here, Mr. Lowry opines that if Global IV had registered as a dealer, then FINRA regulations would have slashed Global IV's profits. *Id.* at 36-40.

To rebut the Division's novel theory, Respondents have named James Burns as their primary expert. From 2012 to 2014, Mr. Burns was the Deputy Director of the SEC Division and Trading and Markets, which is the Division that has "responsibility for helping the Commission evaluate who is a dealer for purposes of Section 15(a)." Burns Report at 4.[1] In that senior position, he oversaw "broker dealers" and "self-regulatory organizations []such as FINRA." *Id.* at 34. And he "regularly discussed and worked with the Chief Counsel and his staff on broker-dealer status issues and the dealer-trader distinction[.]" *Id.* at 4. Before serving in

[1] *See also* "Trading and Markets, About the Office," Securities and Exchange Commission, https://www.sec.gov/tm ("The Division regulates the major securities market participants, including broker-dealers[.]").

that senior post, Mr. Burns was Deputy Chief of Staff and Counsel to Chairman Mary Schapiro, who he advised "primarily on issues relating to broker-dealer and investment management law." *Id.* And before that, he was Counsel to Commissioner Casey. *Id.*

Mr. Burns has drawn on that experience to opine that deeming Global IV a dealer here would shock market participants – *i.e.*, would be "out of step with the scope of regulatory expectations established by the staff," "create significant regulatory uncertainty," be "unsettling," have a "chilling effect," and fail to "giv[e] fair warning to market participants about the agency's requirements and expectations." Burns Report at 16, 21, 25, 27. He explains that the Division's position is a "departure, and a rather sharp one," from longstanding guidance and how market participants have long understood that guidance. *Id.* at 15-16. Most notably, he continues, the guidance investors have relied on has long stated that one's dealer status depends on the "totality" of many factors, whereas the Division here is relying on just one of the recognized factors – whether the entity is an underwriter. *Id.* at 15. He also explains that the "well-known" guidance has explicitly rejected the idea that one could be a dealer just because one is also (supposedly) a statutory underwriter. *Id.* at 21 (citing *Acqua Wellington*).

In addition, Mr. Burns opines that to label Global IV an underwriter or a dealer is to ignore the real-world differences between Global IV's conduct and what those entities actually do in the marketplace. He explains that actual underwriters perform a number of well-recognized tasks that Global IV did not, such as raising capital for an issuer; undertaking "special selling efforts" to promote an issuer's stock; making a market in an issuer's shares; selling all of an issuer's shares at once in a public offering; avoid realizing profits from the security's appreciation; and so on. Burns Report at 18, 19, 20. Additionally, he notes that Global IV's investment strategy here was similar to the strategy of other institutional investors that are not

dealers, such as "private equity funds, hedge funds, venture capital funds, and even mutual funds." *Id.* at 15, 23, 25.

After Respondents submitted Mr. Burns' report, the Division filed a motion in limine to strike his opinion in part. The Division argues that Mr. Burns' opinion should be excluded because his opinion will amount to nothing more than a legal opinion.

ARGUMENT

"[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 that respondents submit: "It 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. More to the point, the Commission has cautioned against excluding expert opinions. *In re Calabro*, Release No. 15015, 2015 WL 3439152, at *11 n.66 (May 29, 2015) (Commission opinion). In *Calabro*, the Commission explained that the traditional rules for excluding expert opinion are "designed to protect juries," who are more susceptible to experts' persuasion than sophisticated "law judge[s]." *Id.*

By that standard, the Court should admit Mr. Burns' opinion in full. The opinion of a senior regulator with direct responsibility for the very issue at hand will help the trier of fact. And mixed opinions of law and fact like Mr. Burns' are admissible.

A. Mr. Burns' Opinion Will Help the Fact Finder.

Like other courts, SEC ALJs may admit an expert's opinion if it is helpful to the fact finder – including when the opinion mixes fact and law. *E.g., In re Reliance Financial Advisors, LLC*, Admin. File No. 3-16311, 2016 WL 123127, at *13-14 (Jan. 11, 2016); *In re Morgan*

Stanley & Co., Admin. File No. 3-7473, 1991 WL 417850 (June 13, 1991); *SEC v. Sky Way Global LLC*, No. 09-455, 2010 WL 5058509, at *4 (M.D. Fla. Dec. 6, 2010); *see also In re Borgardt, et al.*, Admin. File No. 3-9730, 2000 WL 708438, at *18, 25 & n.11, 30 (June 1, 2000). Such an opinion is especially likely to be helpful where, as here, the fact finder is a judge rather than a jury. *In re Morgan Stanley*, 1991 WL 417850, at *1. In that situation, the opinion does not risk confusing the fact finder on "the judge's role in instructing the jury on the applicable principles of law" or otherwise influence the fact finder unduly. *Id.*[2]

Two cases illustrate the point. In *In re Morgan Stanley,* respondent Morgan Stanley called an expert to opine whether it was a "statutory underwriter." 1991 WL 417850, at *1. In that opinion, the expert addressed the "development of the Commission's views" on the law at issue and "the implications of the Division's position." *Id.* The Division moved to exclude the expert because he was providing a legal opinion. *Id.* ALJ Brenda Murray rejected that request, assuming for the sake of argument that the expert's views were "purely legal" rather than "mixed questions of law and fact." *Id.* The court explained that the expert's legal opinion would "assist in deciding the matters at issue." *Id.* at *2. In particular, "[e]xpert evidence as to what was considered legally appropriate behavior, at the time and in these circumstances" would help determine the respondent's "culpability" and thus "what, if any, sanction [was] appropriate." *Id.* The court also distinguishes cases the Division had relied upon, noting that in those cases courts excluded legal experts because testimony on legal issues might confuse the jury. *Id.* at *1.

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[2] *See also Martin v. Indiana Michigan Power Co.*, 292 F. Supp. 2d 947, 959 (W.D. Mich. 2002) ("In addition, here, where the court is acting as a trier of fact, the dangers which can be presented by such 'ultimate issue' testimony are minimal if not non-existent."); *Katzin v. United States*, 120 Fed. Cl. 199, 213 (Ct. Fed. Claims 2015); *Window Specialists, Inc. v. Forney Enters., Inc.*, 47 F. Supp. 3d 53, 60 (D.D.C. 2014); *WFC Holdings Corp. v. U.S.*, No. 07-3320, 2010 WL 1027812, at *4 (D. Minn. March 17, 2010); *Wyeth v. Apotex*, No. 08-22308, 2009 WL 8626786, at *5 (S.D. Fla. Oct. 6, 2009); *Suter v. Gen. Acccident Ins. Co. of Am.*, 424 F. Supp. 2d 781, 792-93 (D. N.J. 2006).

Likewise, in *Sky Way*, the defendant's proposed expert was a former "attorney for the Commission" with "extensive experience in matters related to . . . broker/dealer regulations." 2010 WL 5058509, at *4. He opined that the defendant was not a "broker" for purposes of § 15(a) based on the Exchange Act's text, the "applicable case law," a "review of the Commission's 'No Action' letters," and the pleadings and evidence in the case. *Id.* The court rejected the Division's request to exclude the expert, who the Division said was offering an impermissible legal opinion. *Id.* The Court explained that the expert's opinion offered "insight into the custom and practice of broker registration in the securities industry" that would "assist[] the trier of fact." *Id.*

These cases and the principle they illustrate support admitting Mr. Burns' opinion here. His opinion would help the factfinder for the same reasons that the opinions were helpful in *In re Morgan Stanley* and *Sky Way*.

First, Mr. Burns' opinion explains that Global IV engaged in "legally appropriate behavior, at the time and in these circumstances" by investing in § 3(a)(10) deals without first registering as a dealer. *Morgan Stanley*, 1991 WL 417850, at *2. That will help determine Respondents' "culpability" and thus the appropriate sanction, if any. *Id.*

Second, Mr. Burns will explain the "custom and practice of [dealer] registration in the securities industry," *i.e.*, the industry's view that under longstanding guidance an institutional investor like Global IV is a trader, not a dealer. *Sky Way*, 2010 WL 5058509, at *4. That opinion will help evaluate the novelty of the Division's position and thus also Respondents' Due Process defense – which is that an agency may not *punish* a respondent under a theory about which the public lacked fair warning even if an agency may sometimes *announce* new liability

theories in administrative proceedings. *E.g., Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000); *Upton v. SEC*, 75 F.3d 92, 98 (2d Cir. 1996).

Third, Mr. Burns explains what role dealers actually perform in the real world. That will help the fact finder better understand whether Global IV is a dealer under the applicable guidance, which focuses on "economic realities" of entities' role in the market. *Definition of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks under Section 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934*, 67 Fed. Reg. 67,496, 67,499, 2002 WL 31452294 (Nov. 5, 2002).

Finally, Mr. Burns' opinion will not confuse the fact finder about who decides what the law is or persuade the fact finder unduly. The fact finder here is a judge, not a lay jury.

Because Mr. Burns' opinion would be helpful to the fact finder, the Court should deny the Division's motion and allow Mr. Burns to testify.

B. Mixed Questions of Law and Fact Are Admissible.

Despite the opinion's helpfulness, the Division argues that the opinion is a legal one and that legal opinions are always inadmissible. The Division is incorrect – as SEC ALJ Jason Patil explained just months ago: In *In re Reliance Financial Advisors LLC,* the Division itself proffered as an expert a securities lawyer who (like Mr. Burns) had worked for the "Commission staff." Admin. File No. 3-16311, 2016 WL 123127, at *13-14 (Jan. 11, 2016) (review pending). A respondent objected that the expert's opinion was an "inadmissible legal conclusion." *Id.* Judge Patil rejected that argument. He explained that "[e]ven assuming [the witness's] testimony amounted to legal conclusions, such testimony is not inadmissible, but rather *may* be excluded at the hearing officer's discretion." *Id.* at *14. The court admitted the testimony because it (like Mr. Burns') helped show "prevailing customs and practices in" the industry. *Id.*

Judge Patil's position, and the Division's own position in *Reliance*, is the right one. Courts often admit expert opinions related to legal issues. Such is particularly the case when opinions apply the law to the evidence at hand, rather than provide a mere statement to the factfinder "on how its verdict should read" or a "bald assertion of the law." *Cary Oil Co., Inc. v. MG Refining & Mktg., Inc.*, No. 99-1725, 2003 WL 1878246, at *6 (S.D.N.Y. 2003) (admitting testimony as long as the testimony did not "become a statement to the jury 'on how its verdict should read'"); *Gulf Ins. Co v. Skyline Displays, Inc.*, No. 02-3503, 2004 WL 5716699, at *5 (D. Minn. April 9, 2004) (testimony on mixed question of law and fact, as opposed to "bald assertion[s] of law," are admissible); *see also Aspex Eyewear, Inc. v. E'Lite Optik, Inc.*, No. 02-3503, 2002 WL 1751381, at *34-35 (N.D. Tex. April 4, 2002); *In re Morgan Stanley*, 1991 WL 417850, at *1 ("[E]xpert testimony is allowed generally on mixed questions of law and fact.").

Mr. Burns' opinion does just that. For example:

- He explains how Global IV's investment strategy differed from traditional, "real-world" underwriting. Burns Report at 16-21. Based on that factual analysis, he concludes that one of the legal factors for identifying a dealer – whether the entity is an underwriter – favors Global IV. *See In re Morgan Stanley*, 1991 WL 417850, at *1 (holding that analysis whether an entity "acted as a statutory underwriter" is a mixed question of law and fact).

- He explains that Global IV does not provide the kind of "investment advice" indicative of a dealer, because Global IV's supposed "advice" is in fact "common practice among institutional investors" who are not dealers. Burns Report at 23.

- He explains that the record contains no evidence that Global IV had any of the other recognized dealer attributes. *Id.* at 15.

- He explains that, as a factual matter, many market participants have declined to register because they relied on the guidance the Division now seeks to jettison. Burns Report at 15.

- He explains "the implications of the Division's position" that Global IV is a dealer – *i.e.*, that many unregistered market participants would be surprised and fear that they might need to register. *In re Morgan Stanley*, 1991 WL 417850, at *1. Like the court held in *Morgan Stanley*, that is a mixed question of law and fact. *Id.*

- His rebuttal will further respond to Mr. Lowry's assertions about what actual, real-world dealers do in the marketplace.

Thus, Mr. Burns' opinion is admissible.

The cases the Division cites are not to the contrary. The administrative decisions show at most that ALJs have *discretion* to exclude expert legal opinions when those opinions are unhelpful, not that ALJs always must do so.[3] And the federal-court authority (including one where the court struck part of Robert Lowry's report) merely shows that federal judges likewise have discretion to exclude expert legal opinions and that federal courts are likely to do so when such opinions could confuse a *jury* about the judge's role in saying what the law is.[4] Thus, the Court should deny the Division's motion and allow Mr. Burns to testify.

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[3] *In re IMS/CPSs & Assocs.*, Admin. File No. 3-9042 (Nov. 5, 2011), available at https://www.sec.gov/litigation/opinions/33-8031.htm#P218_49892 (holding merely that the ALJ "did not commit error" in excluding an opinion that was irrelevant); *In re Robert D. Potts*, Admin. File No. 3-7998 (Sept. 24, 1997), available at https://www.sec.gov/litigation/opinions/3439126.txt (holding merely that the ALJ properly exercised "discretion" to exclude an expert); *In re Matter of Pagel, Inc.*, Admin. File No. 3-6142, 1985 WL 548387, at *5 (Aug. 1, 1985) (holding that the law judge did not "abuse[] his discretion in excluding the testimony"); *In re Christiana Secs. Co.*, File No. 3-3928, 1974 WL 161445, at *7 n.38 (Dec. 13, 1974) (remarking in a footnote that a "financial expert" could not resolve a "legal" question but noting that the expert's analysis had been "interesting and even instructive")

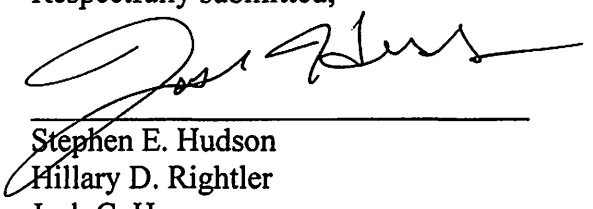
[4] *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1210 (D.C. Cir. 1997) (noting that case was "tried to a jury" and holding that the trial court should have excluded a legal expert because "it is [the judge's] province alone to instruct the jury on the relevant legal standards"); *In re Acceptance Ins. Co. Sec. Litig.*, 423 F.3d 899, 905 (8th Cir. 2005) (holding that district court did not "abuse[] its discretion" by excluding legal expert testimony); *U.S. v. Long*, 300 F. App'x 804, 814 (11th Cir. 2008) (applying the rule in the context of a jury trial); *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1540 (11th Cir. 1990) (same); *SEC v. Big Apple Consulting,* No. 6:09-1963 (M.D. Fla. Aug. 25, 2011) [ECF No. 91] at 91 (striking Robert Lowry's opinion because it "usurp[ed] the Court's role in instructing the jury"); *Coral Way, LLC v. Jones*, No. 05-21934, 2006 WL 5556004, at *1 (N.D. Fla. Oct. 17, 2006) (excluding an expert on "public policy" because it was the Court's job to "instruct the jury" on such issues); *Grodwin Gruber PC v. Deuschle*, No. 300-17, 2002 WL 1840929, at *3 (N.D. Tex. Aug. 9, 2002) (excluding an expert's opinion on public policy because the Court itself would "instruct the jury on" such legal issues).

CONCLUSION

Mr. Burns was a senior regulator with direct responsibility for the issue here. His opinion on mixed questions of law and fact is admissible and will help the Court evaluate the issue at hand. 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 the Division's counsel), as follows:

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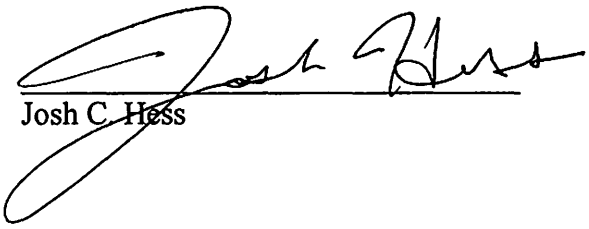

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