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FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. MEGURDITCH PATATIAN (CRD No. 4047060), Respondent.	Disciplinary Proceeding No. 2018057235801 Hearing Officer–DDM

OMNIBUS ORDER ON PRE-HEARING MOTIONS AND OBJECTIONS

I. Introduction

The hearing begins on January 18, 2022. The case focuses on Respondent Megurditch Patatian's allegedly unsuitable recommendations about Real Estate Investment Trusts ("REITs") and variable annuities. In its Complaint, the Department of Enforcement alleges that Respondent made unsuitable recommendations that his customers invest in non-traded REITs at his former firm, Western Securities International, Inc. ("Western") between 2013 and 2017 (Count I); that he made unsuitable recommendations about variable annuity exchanges and surrenders at Western between 2013 and 2018 (Counts II and III); that he impersonated a customer on a phone call with a variable-annuity issuer (Count IV); and that he falsified customer information on disclosure forms used by Western (Count V). Respondent admitted that he violated FINRA Rule 2010 by impersonating a customer (Count IV). But he otherwise denied liability and various affirmative defenses, including laches.

Respondent filed three pre-hearing motions. First, he filed a "Request to Invoke Rule 8210," which I treated as a motion under FINRA Rule 9252. That motion is **DENIED**. Second. Respondent filed a motion in limine to preclude an Enforcement staff witness from testifying. That motion is **DENIED**. Finally, Respondent filed an expedited motion to compel. That motion is **DENIED**.

Enforcement filed a motion in limine to prevent Respondent from calling a former Enforcement attorney as a witness. This motion is **DENIED**, though I limit the areas on which she can be questioned at hearing.

Enforcement's objections to RX-462, RX-463, and RX-464, complete transcripts of Respondent's prior investigative testimony, are **SUSTAINED**. The remainder of the objections by both parties are **DENIED** but may be renewed at the hearing.

II. Background

Some background is necessary for the pre-hearing motions and objections, particularly as they relate to Respondent's laches defense. According to Enforcement, FINRA began an investigation in 2013 into Respondent's termination from CUSO Financial Services, LP ("CUSO") over certain variable annuity transactions there, and whether Respondent had taken confidential information related to CUSO customers when he joined Western in April 2013 (the "2013 investigation"). During that investigation, Enforcement learned about Respondent and his customers at both CUSO and Western. And in January 2018, Enforcement advised Respondent in a letter that Enforcement had determined not to take disciplinary action against him "with regard to your conduct while registered with [CUSO] based on the information currently in our possession."[1] This letter ("the January 2018 Closing Letter") ended the 2013 investigation, according to Enforcement.

Then, Enforcement says, it opened another investigation in 2018 (the "2018 investigation") based on information it learned in the 2013 investigation – namely, that Respondent was recommending that his customers open accounts at Western to invest in non-traded REITs. It is this 2018 investigation that led to the filing of the Complaint, Enforcement asserts. As Enforcement points out, the Complaint does not allege that Respondent engaged in any misconduct while associated with CUSO. Instead, all the misconduct alleged in the Complaint occurred after April 2013, when Respondent joined Western.

While Enforcement describes two separate but related investigations, Respondent sees one, unbroken investigation that started in 2013. By November 2014, as Respondent asserts, Enforcement had obtained, as part of the 2013 investigation, customer account forms and transaction documents for more than three-quarters of the REIT and variable-annuity transactions that are the subject of the Complaint.[2] By January 2017, Enforcement had obtained all customer account documentation and commission information for Patatian on all but one of the 81 REIT transactions in the Complaint.[3] And by February 1, 2017, argues Patatian, Western had provided to Enforcement "all necessary documentation . . . supporting all five causes of action in the Complaint."[4] This was one "extended" investigation that lasted nearly eight years,[5] Respondent argues, rather than just one that began in 2018.

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[1] Respondent's Exhibit ("RX-") 540.

[2] Respondent's Pre-Hearing Brief ("Resp't Pre-Hr'g Br.") 4.

[3] Resp't Pre-Hr'g Br. 7.

[4] Resp't Pre-Hr'g Br. 8.

[5] Resp't Pre-Hr'g Br. 9.

This is the linchpin of Respondent's laches defense. The doctrine of laches "bars, in equity, claims that are not timely pursued."[6] A successful laches defense requires proof of a lack of diligence by the party against whom the defense is asserted, and prejudice to the party asserting the defense.[7] Laches is not just time; "[i]t is time plus prejudicial harm, and the harm is not merely that one loses what he otherwise would have kept, but that delay has subjected him to a disadvantage in asserting and establishing his claimed right or defense."[8]

With this backdrop, I turn to the pre-hearing motions and objections.

III. Pre-Hearing Discovery Motions

A. Respondent's Request to Invoke FINRA Rule 8210

On December 9, 2021, Respondent filed a "Request to Invoke Rule 8210." In this filing, Respondent cites FINRA Rule 9252, which establishes the procedures for a respondent to ask FINRA to invoke FINRA Rule 8210 to compel documents, information, and testimony from member firms or associated persons (the "Rule 9252 Motion"). Respondent asks for an Order requiring Western to produce five categories of documents, all of which relate to non-traded REIT sales at Western and Respondent's former branch office over a five-year period.

According to Respondent, these documents relate to his defense that Western's management "strongly encouraged" the brokers in his office to sell non-traded REITs and that Western "reaped substantial benefits from the sales."[9] Respondent also notes that Western's Chief Compliance Officer will testify at the hearing. Western's Chief Compliance Officer produced documents that are on the exhibit lists for both parties.

The main defect in Respondent's Rule 9252 Motion is that it is more than five months late.[10] At the start of this case, the parties proposed a case management schedule. At the time, Respondent was represented by experienced counsel. In the proposed case management schedule, the parties asked for a deadline of June 25, 2021 for Respondent to file a Rule 9252 motion seeking the production of documents. I incorporated that deadline in the Case Management and Scheduling Order ("CMSO"). Respondent, who was still represented by

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[6] *Talon Real Estate Holding Corp*., Exchange Act Release No. 87614, 2019 SEC LEXIS 4796, at *22 (Nov. 25, 2019).

[7] *Dep't of Enforcement v. Tretiak*, No. C02990042, 2001 NASD Discip. LEXIS 1, at *50 (NAC Jan. 23, 2001), *aff'd*, Exchange Act Release No. 47534, 2003 SEC LEXIS 653 (Mar. 19, 2003).

[8] *Leopard Marine & Trading, Ltd. v. Easy Street Ltd*., 896 F.3d 174, 195 (2d Cir. 2018).

[9] Respondent's Request to Invoke Rule 8210 1.

[10] *See* OHO Order 17-04 (2015044921601) (Mar. 16, 2017), at 2, http://www.finra.org/sites/default/files/OHO_Order-17-04_2015044921601.pdf (rejecting Rule 9252 motion filed one month after CSMO deadline as untimely); OHO Order 05-41 (C07050029) (Dec. 14, 2005), at 2, http://www.finra.org/sites/default/files/OHODecision/p016004_0_0_0.pdf (rejecting Rule 9252 motion that was five months after deadline set by CMSO).

counsel, filed no Rule 9252 motion seeking documents by the June 25, 2021 deadline. Respondent's current attorneys entered their appearances on October 1, 2021. They asked that I re-open all the past deadlines in the CMSO, which I declined to do. Yet Respondent filed this Rule 9252 Request about five weeks before the hearing.

Even if it were not tardy, Respondent's Rule 9252 Motion is objectionable on another ground. He did not establish that the documents he seeks are relevant, material and non-cumulative.[11] Four of the five categories of documents sought by Respondent do not pertain to his non-traded REIT sales, but to sales by other Western registered representatives. As Enforcement notes, a registered representative has an "independent obligation" to make suitable recommendations, and "cannot shift this responsibility to others."[12] And if sales pressure from Western is relevant to sanctions, both Respondent and Western's former Chief Compliance Officer can testify about those topics. In the one requested category of documents that pertains to Respondent's own non-traded REIT sales, Respondent seeks "source documents" pertaining to an Enforcement summary exhibit. But Enforcement represents that it already provided Respondent with the source materials and other documents produced by Western for the non-traded REITs in the summary exhibit.[13] Respondent has therefore failed to establish why his untimely request to obtain these documents pursuant to FINRA Rule 8210 should be granted.

Respondent's Request to Invoke FINRA Rule 8210 is **DENIED.**

B. Respondent's Expedited Motion to Compel Compliance with Discovery Obligations

Nineteen days before the start of the hearing, on December 30, 2021, Respondent filed an "Expedited Motion to Compel Compliance with Discovery Obligations" ("Motion to Compel"). In the Motion to Compel, Respondent seeks an Order that compels Enforcement to do five things:

- "comply with its obligations under the [FINRA Code of Procedure";
- "produce all documents with minimum sufficient metadata fields";
- "produce such documents as held in the ordinary course of business" or as produced to Enforcement;

[11] "A request that FINRA compel the production of Documents or testimony shall be granted only upon a showing that: the information sought is relevant, material, and non-cumulative; . . . ." Rule 9252(b).

[12] *Richard G. Cody*, Exchange Act Release No. 64565, 2011 SEC LEXIS 1862, at *65 (May 27, 2011), *aff'd*, 693 F.3d 251 (1st Cir. 2012).

[13] Enforcement's Omnibus Opposition to Respondent's Objections and Pre-Hearing Motions ("Enf. Omnibus Opp.") 4.

- "produce all withheld exculpatory evidence"; and
- "produce a withheld document list."

To justify this relief, Respondent makes several claims. First, Respondent asserts that Enforcement "backed the truck up to Patatian's door on the eve of hearing and dumped the entire contents of an equivalent of 60 bankers boxes of paper onto the welcome mat of his front door."[14] According to Respondent, Enforcement "mixed and shuffled" documents before dumping them on Respondent with "no rational organization."[15] As examples, Respondent points to commission runs from consecutive months that were separated in the production by thousands of pages, and an email chain with component emails similarly separated in the production.

Second, Respondent alleges that Enforcement erased metadata from certain documents. Enforcement not only "scrubbed" metadata from files, Respondent contends, it also may have tampered with electronic data and saved the data in a non-native format. As an example, he points to an excel worksheet containing customer information that he claims has been scrubbed of author, name, and custodian information.[16]

Third, Respondent also alleges that numerous documents are missing from Enforcement's production. He points to missing responses from investigative requests, as well as attempts to contact customers without notes or follow-up communications. He also claims that there are missing documents associated with meetings and calls mentioned elsewhere in the production.[17]

Finally, Respondent asserts that Enforcement improperly withheld materially exculpatory information. He points to the Closing Letter, which advised him that Enforcement did not recommend disciplinary action against him for any of his conduct while he was registered with CUSO. Enforcement has not produced "any documents or information related to the determination not to recommend disciplinary action," Respondent complains, "which requires a multi-layered review, including the sufficiency of evidence review . . ."[18] These documents, which reflect Enforcement's analysis and judgment not to recommend a disciplinary action, should have been produced because they are materially exculpatory, Respondent argues.

Enforcement opposed the Motion to Compel, and attached a Declaration signed by its lead counsel. Enforcement's first objection is to the timeliness of the Motion to Compel. Enforcement completed its production of documents under FINRA Rule 9251 to Respondent on

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[14] Respondent's Expedited Motion to Compel Compliance with Discovery Obligations ("Mot. to Compel") 1.

[15] Mot. to Compel 4.

[16] Mot. to Compel 5.

[17] Mot. to Compel 5-6; Exhibits to Mot. to Compel ("Ex.") C-I; Ex. L.

[18] Mot. to Compel 7.

May 27, 2021.[19] Under the CMSO, the Respondent had until nearly a month later – June 25, 2021 – to file motions concerning Enforcement's production. This was a deadline proposed by the parties and incorporated into the CMSO. Respondent, who was represented by counsel, did not file any motions before that deadline about Enforcement's production.

Current counsel has been representing Respondent since October 1, 2021. They received discovery production directly from Enforcement on October 4, 2021.[20] They transferred the discovery production into a "discovery database" by October 9, 2021.[21] In a prior Pre-Hearing Conference and a motion for a continuance of the hearing, Respondent cited problems with the discovery production. Yet Respondent never detailed his specific allegations in writing until he filed the Motion to Compel, slightly more than two weeks before the hearing and after the parties filed prehearing submissions. By any measure, then, at least some of the discovery claims within Respondent's Motion to Compel are untimely.

Even if his Motion to Compel were timely, however, Respondent failed to show that he is entitled to relief. In its written opposition and at the Final Pre-Hearing Conference ("FPHC"), Enforcement refuted each of Respondent's accusations of discovery abuse. This is a separate ground to deny the Motion to Compel.

Respondent did not establish, for example, that Enforcement "dumped massive quantities of documents in disorganized fashion . . . to obscure critical discovery," as he claims in the Motion to Compel. Enforcement denied Respondent's accusations that it scrambled the discovery production,[22] and provided a detailed, logical explanation for how it produced the documents, in a searchable format.[23] In short, "Enforcement produced the discoverable documents from the 2013 and 2018 investigations in the form they were maintained in FINRA's investigative files."[24]

Enforcement also worked with Respondent's attorneys to answer their questions about the document production.[25] Enforcement provided Respondent with its proposed exhibits for all the transactions and misconduct alleged in the Complaint, including draft summary exhibits, and

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[19] Declaration of Brody W. Weichbrodt in Support of Enforcement's Opposition to Respondent's Motion to Compel ("Weichbrodt Decl.") ¶ 19.

[20] Weichbrodt Decl. ¶ 32.

[21] Respondent's Motion for Continuance 1.

[22] Weichbrodt Decl. ¶ 21.

[23] Weichbrodt Decl. ¶¶ 22-23.

[24] Weichbrodt Decl. ¶ 22.

[25] *See, e.g.*, Ex. A (providing spreadsheet of bates-range numbers for commission runs); Ex. P. (answering questions about investigative requests and responses, providing condensed testimony transcript); Ex. R (answering questions about summary exhibits).

over 200 other documents organized by customer, subject matter, or both.[26] Enforcement did this twice – first in August 2021, and then in October 2021.[27] And after Respondent filed its Motion to Compel, Enforcement provided Respondent with an index of the discovery production.[28] The index can be sorted and searched for specific documents, and the index contains "Source Path" information for each document, which can be used to track the relationship between documents ingested into Enforcement's discovery management system.[29] Enforcement's actions are not consistent with Respondent's accusations of bad faith.

Similarly, Enforcement denies that it removed metadata from documents.[30] Instead, except for some emails, "[a]ll electronic documents were produced to Respondent in the format in which FINRA had obtained or prepared the documents . . ."[31] And Respondent's example of an excel spreadsheet that Enforcement allegedly scrubbed of metadata appears to have metadata embedded within it.[32]

As for the missing documents, Respondent cited four investigative requests for which he could not locate a response.[33] Enforcement states that it produced responses to two of the requests, which can be tracked on the discovery index it provided to Respondent.[34] Enforcement concedes that it inadvertently failed to produce responses to the other two requests, which Enforcement issued as part of its 2013 investigation.[35] But Enforcement asserts that the responses do not relate to the allegations of the Complaint, and produced them to Respondent on January 4, 2021.[36] So while Enforcement erred in omitting these documents from its production, it cured that error without prejudice to Respondent.

Similarly, Enforcement rebutted Respondent's claim that Enforcement did not produce documents related to meetings and calls with customers. In August 2021, Enforcement provided staff notes from customer witness interviews, and has continued to provide documents reflecting communications with customer witnesses.[37] And in his Declaration, Enforcement's lead counsel attests that he is unaware of any other "witness statements" as defined under FINRA Rule 9253

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[26] Weichbrodt Decl. ¶¶28-29.

[27] Weichbrodt Decl. ¶¶ 28, 32.

[28] Weichbrodt Decl. ¶ 41.

[29] Weichbrodt Decl. ¶ 41.

[30] Weichbrodt Decl. ¶¶ 14, 27.

[31] Weichbrodt Decl. ¶ 14.

[32] Attachment B to Weichbrodt Decl.

[33] Ex. C; Ex. D.

[34] Enforcement's Opposition to Mot. to Compel ("Enf. Opp'n") 7 n.27.

[35] Enf. Opp'n 7 n.24.

[36] Enf. Opp'n 7 n.24.

[37] Weichbrodt Decl. ¶ 29.

or any other potentially discoverable documents related to Enforcement's contact with Respondent's customers.[38]

Finally, Enforcement has refuted Respondent's assertion that Enforcement has withheld material exculpatory evidence. Respondent points to internal memoranda, notes, and work product related to FINRA's decision to close the 2013 investigation. Respondent argues that such information would be helpful to his laches defense.

Under FINRA Rule 9251(b), Enforcement may withhold those documents, unless they contain materially exculpatory evidence.[39] FINRA applies Rule 9251(b)(3) consonant with the principles enunciated by the United States Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963). In FINRA disciplinary proceedings, evidence is considered "material" if it relates to liability or sanctions, "might be considered favorable to the respondent's case," and "if suppressed, would deprive the respondent of a fair hearing."[40] Respondent bears the burden of establishing that withheld documents must be produced, and "mere speculation" that FINRA may contain materially exculpatory information does not carry that burden.[41]

Respondent did not carry his burden. Enforcement attested, in the Declaration, that it conducted a *Brady* review when it produced documents under FINRA Rule 9251 and post-complaint. At the FPHC, Enforcement's lead counsel confirmed that the review encompassed a consideration of Respondent's laches defense. Enforcement did not identify material exculpatory evidence in any of the withheld documents.[42] As Enforcement points out, the Closing Letter related to Respondent's conduct "while registered with [CUSO]." But the Complaint stems from Respondent's conduct at Western. Respondent has not explained how Enforcement's decision not to bring a disciplinary action against him while he was registered with CUSO can be exculpatory to Enforcement's allegations that he engaged in misconduct at Western.

In another FINRA case involving laches, the Respondents argued "that since they bear the burden of showing that any delay in bringing the action was inexcusable, all documents relating to the pursuit of the investigation that led up to the filing of the Complaint are *Brady* material." In that case, Respondents sought "a complete accounting of the Department's efforts in bringing this case, including access to all privileged materials in the Department's files."[43] The Hearing Officer rejected the argument that *Brady* required the production of that

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[38] Weichbrodt Decl. ¶¶ 26, 29.

[39] *See* FINRA Rule 9251(b)(3).

[40] *Dep't of Enforcement v. Respondent*, No. 2012034936005, 2015 FINRA Discip. LEXIS 72, at *4 (OHO Jan. 27, 2015).

[41] *Respondent*, 2015 FINRA Discip. LEXIS 72, at *6 (citing *In re Jett*, Admin. Proc. File No. 38919, 1996 SEC LEXIS 1683, at *3 (June 17, 1996)).

[42] Weichbrodt Decl. ¶ 13.

[43] OHO Order 01-13 (CAF00045) (May 17, 2001), at 18, http://www.finra.org/sites/default/files/OHODecision/p007868_0_0_0_0.pdf.

information, adding that "the doctrine of laches does not require the degree of proof the Respondents suggest."[44] Instead, the Hearing Officer wrote, "the inquiry focuses on whether the complainant filed the case within a reasonable period of time," and "does not hinge on a day-by-day analysis of the steps the complainant took to investigate and prepare its case."[45] Otherwise, "any time a respondent raised laches among its defenses . . . the respondent would be entitled to go on a fishing expedition through the complainant's confidential files."[46] Neither Brady nor FINRA Rule 9251 requires such a result, the Hearing Officer concluded.[47] This reasoning is persuasive here, where Respondent wants to obtain confidential documents related to Enforcement's earlier decision not to recommend disciplinary action against him.

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Respondent's Motion to Compel is untimely. I nevertheless carefully reviewed each of Respondent's claims that Enforcement engaged in discovery abuse and bad faith. Respondent has not established that he is entitled to relief. His Motion to Compel is **DENIED**.

Motions in Limine

C. Legal Standards

FINRA Rule 9263 provides that the Hearing Officer "may exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial."[48] Under this Rule, the Hearing Officer has "broad discretion" to accept evidence or keep it out.[49] The formal rules of evidence do not apply in FINRA disciplinary proceedings.[50] Nor do the Federal Rules of Civil

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[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*; *See also* Stephen P. Clark, Admin. Proc. File No. 3-7155, 1989 SEC LEXIS 5122, at *6-7 (June 16, 1989) (denying motion to compel production of action memorandum because source information for any factual information summarized in the memorandum were disclosed); OHO Order 13-05 (2011025780101) (June 12, 2013), at 4-5, http://www.finra.org/sites/default/files/OHODecision/p296313_0_0.pdf (rejecting respondent's attempt to obtain investigative closing memorandum under *Brady*).

[48] *Dep't of Enforcement v. Brookstone Sec., Inc.*, No. 2007011413501, 2015 FINRA Discip. LEXIS 3, at *110 (NAC Apr. 16, 2015).

[49] *Dep't of Enforcement v. Weinstock*, No. 2010022601501, 2016 FINRA Discip. LEXIS 34, at *37 (NAC July 21, 2016) ("FINRA Rule 9263 gives Hearing Officers broad discretion to accept or reject expert testimony.").

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

Procedure.[51] But Hearing Officers may seek guidance from both the Federal Rules of Evidence and Civil Procedure in appropriate cases.[52]

Neither FINRA's Code of Procedure nor the federal rules, however, explicitly authorize motions in limine to exclude evidence before a hearing. That said, federal motion in limine "practice has developed pursuant to the district court's inherent authority to manage the course of trials."[53] Similarly, Hearing Officers are authorized "to do all things necessary and appropriate to discharge [their] duties," which include "regulating the course of the hearing."[54] Therefore, in resolving the Motion, I sought guidance from the federal case law about motions in limine.

That case law is well settled. Motions in limine "'aid the trial process' by enabling the Court 'to rule in advance of trial on the relevance of certain forecasted evidence,' without lengthy argument at or interruption of the actual trial."[55] They "serve important gatekeeping functions by allowing the trial judge to eliminate from consideration evidence that should not be presented to the jury."[56] Hearing Officers can exclude evidence that is not relevant, and exclude testimony if the proposed witness "lacks personal knowledge related to the specific allegations of the Complaint or the facts underlying the conduct at issue," and where the testimony "would be cumulative of other evidence in this matter."[57]

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[51] OHO Order 11-10 (2008012925001) (July 28, 2011), at 4, http://www.finra.org/sites/default/files/OHODecision/p126063_0.pdf (stating that "[t]he Federal Rules of Civil Procedure do not apply in FINRA proceedings").

[52] *Dep't of Enforcement v. North*, No. 2010025087302, 2017 FINRA Discip. LEXIS 7, at *35 (NAC Mar. 15, 2017) ("FINRA adjudicators may look to the Federal Rules of Evidence for guidance."), *aff'd*, Exchange Act Release No. 84500, 2018 SEC LEXIS 3001 (Oct. 29, 2018), *petition for review denied*, 828 F. App'x 729 (D.C. Cir. 2020); OHO Order 11-10, at 4 (stating that Hearing Officers may look to the Federal Rules of Civil Procedure in appropriate cases).

[53] *Flores v. FCA US LLC*, No. 1:17-cv-00427 JLT, 2019 U.S. Dist. LEXIS 120115, at *1–2 (E.D. Cal. July 18, 2019) (quoting *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984)).

[54] FINRA Rule 9235(a)(2).

[55] *Ruiz v. Safeco Ins. Co*., No. 18-21036-CV-WILLIAMS/TORRES, 2019 U.S. Dist. LEXIS 109067, at *3 (S.D. Fla. Apr. 23, 2019) (quoting *Highland Cap. Mgmt., L.P. v. Schneider*, 551 F. Supp. 2d 173, 176 (S.D.N.Y. 2008) (citing *Palmieri v. Defaria*, 88 F.3d 136, 141 (2d Cir. 1996))); *see also Zanakis v. Scanreco, Inc*., No. 1:18-cv-21813-UU, 2019 U.S. Dist. LEXIS 90088, at *2–3 (S.D. Fla. Apr. 11, 2019) ("A motion in limine allows the trial court to rule in advance of trial on the admissibility and relevance of certain forecasted evidence.") (citing *Luce,* 469 U.S. at 40 n.2).

[56] *United States v. Verges*, No. 1:13cr222 (JCC), 2014 U.S. Dist. LEXIS 17969, at *6 (E.D. Va. Feb. 12, 2014).

[57] OHO Order 18-09 (2014039775501) (May 3, 2018), at 2-3, http://www.finra.org/sites/default/files/OHO_Order_18-09_2014039775501.pdf.

Yet motions in limine "are disfavored, as courts prefer to resolve questions of admissibility as they arise."[58] SEC Administrative Law Judges[59] and FINRA Hearing Officers have adopted similar views.[60] Accordingly, pre-hearing motions to exclude evidence should be granted only if the evidence at issue is "clearly inadmissible for any purpose,"[61] a position that FINRA Hearing Officers have also espoused.[62]

D. Respondent's Motion in Limine to Exclude Enforcement Staff Witness

Enforcement alleges that 59 customers made unsuitable REIT purchases at Respondent's recommendation. Six of those 59 customers appear on Enforcement's witness list. As for the other 53 customers, Respondent seeks to "exclude any testimony" from an Enforcement Senior Case Manager, Kelsey Goodman, and "limit any evidence or argument" about them.[63] Respondent argues that allowing Goodman to provide "hearsay testimony" about the "suitability profiles" of these other 53 customers would violate due process.[64]

Enforcement alleges that Respondent engaged in customer-specific suitability violations. For those charges, Enforcement will call customers to testify at the hearing.[65] But Enforcement also alleges that Respondent engaged in reasonable-basis suitability obligations.[66] According to Enforcement, Respondent failed to understand the REITs he was selling to his customers, and

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[58] *Abernathy v. E. Ill. R.R.*, No. 3:15-cv-3223, 2017 U.S. Dist. LEXIS 160316, at *1 (C.D. Ill. Sept. 26, 2017); *see also Zanakis*, 2019 U.S. Dist. LEXIS 90088, at *3 (same); *Flores,* 2019 U.S. Dist. LEXIS 120115, at *2 (same).

[59] *See Christopher M. Gibson*, Admin. Proc. File No. 3-17184, 2016 SEC LEXIS 3379, at *4 (Sept. 9, 2016) ("[A] party filing a motion in limine faces an uphill battle because the Commission has not been enthusiastic about orders by administrative law judges granting motions in limine."). As the Chief Administrative Law Judge explained, "The Commission's long standing position is that its 'law judges should be inclusive in making evidentiary determinations,' quoting the proposition 'if in doubt, let it in.'" *Id.* at *4 (quoting *City of Anaheim*, Exchange Act Release No. 42140, 1999 SEC LEXIS 2421, at *4 n.7 (Nov. 16, 1999)).

[60] OHO Order 16-18 (2014043020901) (May 24, 2016), at 2, http://www.finra.org/sites/default/files/OHO-Order-16-18-2014043020901.pdf ("FINRA Hearing Officers generally disfavor motions in limine seeking to exclude broad categories of evidence and testimony.") (citing OHO Order 16-04 (2012033393401) (Feb. 3, 2016), at 2, http://www.finra.org/sites/default/files/OHO_Order16-04_2012033393401.pdf).

[61] *Abernathy*, 2017 U.S. Dist. LEXIS 160316, at *1 (quoting *Tzoumis v. Tempel Steel Co*., 168 F. Supp. 2d 871, 873 (N.D. Ill. 2001)); *see also Zanakis*, 2019 U.S. Dist. LEXIS 90088, at *3 ("A motion in limine should only exclude evidence when it is clearly inadmissible on all potential grounds.").

[62] OHO Order 18-09 (2014039775501) (May 2, 2018), at 4, http://www.finra.org/sites/default/files/OHO_ Order_18-09_2014039775501.pdf; OHO Order 16-18, at 2 ("A Hearing Officer should grant such motions only if the evidence at issue is clearly inadmissible for any purpose.") (quoting OHO Order 16-04, at 2 (citing *Miller UK Ltd. v. Caterpillar, Inc.*, No. 10-cv-03770, 2015 U.S. Dist. LEXIS 156874, at *5 (N.D. Ill. Nov. 20, 2015))).

[63] Respondent's Motion in Limine ("Resp't Mot. in Lim.") 4.

[64] Resp't Mot. in Lim. 3.

[65] Except for one customer, who is deceased, and whose son is expected to testify.

[66] Enf. Omnibus Opp. 5; Enforcement's Pre-Hearing Brief 24; Complaint ¶¶ 82-86.

this lack of understanding "is a per se violation of the reasonable basis suitability obligations."[67] Put another way, because Respondent did not know the risks and features of non-traded REITs, he could not make a suitable recommendation of a non-traded REIT to *any* customer, regardless of that customer's investment profile. This separate theory of liability renders unnecessary any testimony from the 53 other customers, according to Enforcement.

It does not follow, however, that Enforcement should be precluded from introducing *any* evidence from Goodman about these non-testifying customers. While Respondent argues that such evidence would violate his constitutional due process rights, "FINRA's disciplinary proceedings are not subject to the Constitution's due process requirements."[68] Instead, under the Exchange Act, FINRA must "provide fair procedures for disciplining its members and their associated persons."[69] And those fair procedures can sometimes allow for the admission of hearsay into evidence. As the SEC has repeatedly stated, "it is well-established that hearsay evidence is admissible in administrative proceedings and can provide the basis for findings of violation, regardless of whether the declarants testify."[70] In deciding whether to admit hearsay evidence, adjudicators must consider the probative value, reliability, and fairness.[71] The NAC and SEC have found, for example, that "[t]hird parties, including FINRA staff, may testify about statements made to them by others if their testimony is probative of the issues and reliable."[72]

It is unnecessary to decide now whether Goodman's testimony or other hearsay evidence about the non-testifying customers will be probative and reliable. Such a determination must be made at hearing, with a fuller context. I will therefore not preclude Goodman from testifying at hearing about the non-testifying customers. Respondent's motion in limine is **DENIED**.

E. Enforcement's Motion in Limine to Preclude the Proposed Testimony of Former Enforcement Attorney

Enforcement's motion in limine seeks to preclude Respondent from calling a former Enforcement attorney, Emma Jones, as a witness. Jones participated as counsel in both the 2013 and 2018 investigations. Although she left Enforcement, Jones still works at FINRA. According to his witness list, Respondent intends to call Jones to testify about "[i[nterviews with customers . . . and the Patatian investigation timeline."

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[67] *Dep't of Enforcement v. Hicks*, No. 2017052867301, 2021 FINRA Discip. LEXIS 10, at *52 (OHO May 19, 2021) (citing *Cody*, 2011 SEC LEXIS 1862, at *31-34), *appeal docketed* (NAC July 7, 2021).

[68] *Dep't of Enforcement v. Jorge A. Reyes*, No. 2016051493704, 2021 FINRA Discip. LEXIS 29, at *42 n.45 (NAC Oct. 7, 2021).

[69] *Id.* (citing 15 U.S.C. § 78o-3(b)(8)).

[70] *Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *46 (Jan. 30, 2009).

[71] *Id.* at *47.

[72] *Reyes*, 2021 FINRA Discip. LEXIS 29, at *56.

Enforcement argues that Jones's testimony about customer interviews would be immaterial and cumulative. Both parties listed five customers on their witness lists, besides one deceased customer's son. As Enforcement notes, Goodman participated in the interviews of those customers and the son, so he can be asked about them. Enforcement also produced notes from all customer interviews that led to the filing of the Complaint, including notes from Jones during interviews in which Goodman was also present.[73]

And the timeline of the investigative steps is undisputed, Enforcement argues. The investigative timeline is documented by the regulatory requests, regulatory responses, and testimony excerpts on the exhibit lists of both parties.[74] Respondent can also testify about the investigation and its effect on him, Enforcement argues, including any prejudice he suffered.

According to Enforcement, Respondent is engaged in a fishing expedition to try to elicit privileged information from Jones. Respondent's Motion to Compel suggests that Respondent wants to question Jones about the Closing Letter, and the analysis, internal memoranda, and other attorney work product that led to that Closing Letter.[75] In fact, at the FPHC, Respondent's counsel stated that he intended to ask Jones about privileged communications because he speculated that they contained *Brady* material.

But Enforcement confirmed during the FPHC that its *Brady* review consisted of interviewing Jones and collecting documents from her. Because it contains no materially exculpatory evidence, Jones's attorney work product and privileged communications are shielded from production in discovery under FINRA Rule 9251(b). Respondent will therefore not be permitted to elicit privileged information from Jones at the hearing.

At the FPHC, however, Respondent asserted that Goodman was not present for communications with customers before 2018 and had no personal knowledge of the investigative requests or responses from the 2013 investigation. As Respondent points out, Jones is the only available FINRA witness who can testify with personal knowledge about events in the 2013 investigation, which led to the 2018 investigation. Respondent may call Jones as a witness to testify about those limited areas. With those limitations, Enforcement's motion is **DENIED**.

IV. Objections

A. Enforcement's Objections

Enforcement objects to three witnesses on Respondent's witness list. One of the witnesses is Emma Jones, who was the subject of Enforcement's motion in limine. That objection is overruled, with the limits on her testimony set forth above. As for the other two

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[73] Enforcement's Motion in Limine ("Enf. Mot.") 5.

[74] *See, e.g.*, Complainant Exhibit ("CX-") 235-37; RX-524-40.

[75] Resp't Mot. to Compel 6-7.

witnesses, Respondent stated that he does not intend to call them at the hearing. Enforcement's objection is therefore moot.

Enforcement also objects to two sets of exhibits on Respondent's exhibit list. The first set consists of full transcripts from Respondent's prior investigative testimony (RX-462, RX-463, and RX-464). Section VIII(B)(2) of the CMSO provides that

> A party may use a Respondent's prior sworn investigative testimony or statement for any purpose if it is otherwise admissible under Rule 9263(a). The Hearing Officer may nonetheless require the Respondent to testify at the hearing.

This provision is modified by the next provision of the CMSO, however. Section VIII(B)(3) states that if a party intends to use prior testimony at hearing, that party should include as a proposed exhibit "only the portions of the transcript that the party intends to offer as evidence . . . ." As the provision further states: "The Hearing Officer may require that all relevant portions of the testimony or statement be introduce" or that "irrelevant portions be excluded."

RX-462, RX-463, and RX-464 do not comply with the CMSO. These exhibits are sworn investigative testimony under Section VIII(B)(2), but Respondent will testify at the hearing. Enforcement's objection is therefore sustained. This ruling does not preclude an otherwise appropriate use of the transcripts at the hearing, such as for refreshing recollection.

Finally, Enforcement objects to exhibits relating to the disciplinary history of Western and a former compliance officer at Western (RX-490-98). Enforcement argues that these exhibits are irrelevant. Because these exhibits are not "clearly inadmissible for any purpose,"[76] this objection is overruled. Enforcement may renew its the objection at the hearing.

B. Respondent's Objections

Respondent objects to exhibits proposed by Enforcement that relate to customers who will not testify at the hearing. Specifically, Respondent objects to account and transaction documents for customers who will not testify (CX-49-68, CX-88-98, CX-100-14, CX-146-58, CX-159-201). For the reasons I denied Respondent's Motion in Limine, this objection is overruled. Respondent may renew objections to the admission of these documents as necessary at hearing.

Respondent also objects to two written statements from a customer witness about the value of his home (CX-78, CX-79). This customer is expected to testify at the hearing. Respondent objects to these written statements as "[i]rrelevant, cumulative, and lacks foundation" without further explanation. According to Enforcement, these documents are relevant to its books-and-records charge and Respondent will be able to question the customer about the documents, if Enforcement uses them at the hearing. Respondent's objection is

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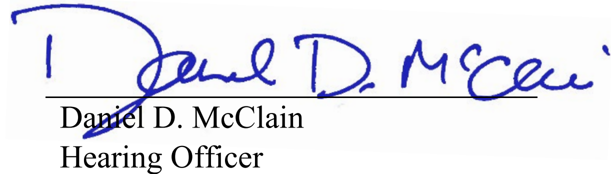
[76] *Abernathy*, 2017 U.S. Dist. LEXIS 160316, at *1 (quoting *Tzoumis v. Tempel Steel Co.*, 168 F. Supp. 2d 871, 873 (N.D. Ill. 2001)).

overruled. Respondent may renew objections to the admission of these documents as necessary at the hearing.

Finally, Respondent objects to a recording of a telephone call between Respondent and a representative of a variable annuity issuer **(CX-99)**. As Respondent admits, he impersonated a customer during that call. Respondent objects to the recording as "[u]nauthorized hearsay" and "lack of two-party consent under California law[.]" But Respondent does not identify any provision of California law that prevents the use of the recording at the hearing. Nor has he established that the recording was made without his consent. This objection is therefore overruled**.**

SO ORDERED.



Daniel D. McClain
Hearing Officer

Dated: January 12, 2022

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