This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 16-15 (2013036681701).

FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. RESPONDENT 1, and RESPONDENT 2, Respondents.	Disciplinary Proceeding No. 2013036681701 Hearing Officer—DW

ORDER GRANTING ENFORCEMENT'S MOTION FOR LEAVE TO WITHHOLD DOCUMENTS FROM DISCOVERY PRODUCTION

A. Background

The Department of Enforcement brought this action against Respondents. The Complaint alleges that Respondent 1 violated FINRA By-Laws Article V, Section 2 and FINRA Rule 2010 by failing to ensure that his application for FINRA registration (as reflected on his Form U4) was updated to reflect a customer complaint during a period when Respondent 1 was a registered representative with FINRA member firm RRTC. The Complaint further alleges that Respondent 2, a principal at RRTC at the time of the alleged complaint against Respondent 1, violated FINRA Rules 3010 and 2010 by preventing compliance personnel at the firm from reviewing the communication so that appropriate action could be taken. Respondent 1 and Respondent 2 dispute the allegations, and in particular dispute that the customer communication at issue was a "complaint" required to be disclosed under FINRA rules.

B. Motion to Withhold Documents

On February 29, 2016, Enforcement filed a motion seeking leave to withhold certain documents from its discovery production pursuant to FINRA Rule 9251(b)(1)(D). The Rule permits Enforcement to withhold materials or categories of materials that are "not relevant to the subject matter of the proceeding, or for other good cause shown." Respondents have opposed the motion.

Enforcement describes the materials as "brokerage statements for accounts belonging to associated persons of Respondent 1 and Respondent 2's former firm. . . ." Enforcement notes that the materials contain personally sensitive financial account information, and argues that the statements have "absolutely no even arguable relevance to the narrow issue in this disciplinary proceeding." Respondents oppose the motion arguing that they "deserve to see documents and the relevant and irrelevant files associated with this case." But FINRA Rule 9251(b)(1)(D) expressly permits Enforcement to obtain leave to withhold materials that are "not relevant," and Respondents offer no reason to believe that account statements of other associated persons might have any bearing on the sole issue in this case—whether disclosure of an alleged customer complaint was required by FINRA rules. In light of the sensitive nature of the information, and the absence of any plausible suggestion of the possible relevance of the materials from Respondents, I **GRANT** the motion to withhold the materials identified in the motion.

C. Motion to File Reply

On March 17, 2016, Enforcement filed a motion seeking leave to file a reply to Respondents' opposition. Enforcement argues that its reply is necessary, among other reasons, in order to seek to strike statements in Respondents' opposition pursuant to FINRA Rule 9136(e) because certain statements are false and/or slanderous.

In light of the serious issues raised by the proposed reply, I **GRANT** the motion to file a reply and consider the issues raised therein. Enforcement challenges Respondents' assertions that Enforcement failed to produce what Respondents regard as an exculpatory customer letter, and that Enforcement "failed to deliver the full discovery file" to Respondents in a timely fashion. But Enforcement acknowledges in its reply that through an oversight "it did not initially produce all of the discoverable materials in this matter." It is unclear from Respondents' opposition whether their complaints relate to past production issues or to present, ongoing problems. With regard to past production issues, so long as the materials have now been produced, Respondents identify no harm given that they now have the materials and substantial time remains to prepare for the August 2016 hearing in this matter. To the extent that Respondents believe that there are active, outstanding issues, they are directed to bring these issues to my attention in the form of a motion, supported by evidence, demonstrating in detail the factual basis for any assertion that Enforcement is presently withholding materials required to be produced by FINRA Rule 9251 in this matter. Any such motion shall be filed by April 15, 2016.

Enforcement also objects to a number of statements in Respondents' opposition alleging that counsel for Enforcement has targeted Respondents and purposefully withheld relevant materials from Respondents based upon an improper racial motive. Enforcement seeks to have these statements stricken from Respondents' opposition.

Under FINRA Rule 9136(e), the Hearing Officer may strike from any filing "[a]ny scandalous or impertinent matter." "'Scandalous' matter casts a derogatory light on someone, usually a party to the action,' and 'impertinent' matter is 'not responsive or relevant to the issues

involved.'"[1] The term "'[s]candalous' includes allegations that cast a cruelly derogatory light on a party or other person."[2] Unsupported allegations of racial bias and motives on the part of opposing counsel fall within this scope.[3]

Respondents have not supported allegations of racial bias by competent evidence. Their claim to have been singled out for prosecution on the basis of an improper racial motive suggests the affirmative defense of selective prosecution—to prevail on such a defense Respondents must show that they were "singled out for enforcement action, while others similarly situated were not, and that [their] selection as a target for enforcement was based on an unjustifiable consideration such as [their] race, religion, national origin, or the exercise of constitutionally protected rights."[4] Respondents have not asserted such a defense in their Answer, much less pointed to evidence on the question beyond their own unsworn statements.[5]

Instead, Respondents make unsupported allegations of racial bias in response to an unrelated motion pertaining only to whether certain brokerage records are relevant or irrelevant to the claim asserted in this case. Striking offensive material is particularly appropriate where the offensive material is not responsive to an argument but, rather, constitutes an inappropriate attempt to attack an individual personally.[6] Because the unsupported allegations made by Respondents here do not implicate the subject of the motion, or more generally any claim or defense actually asserted in this matter, and plainly impugn the character of opposing counsel, I will strike the allegations from Respondent's submissions.

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[1] OHO Order 12-06 (2011026664301) at 2, http://www.finra.org/sites/default/files/OHODecision/p229429.pdf (quoting *Egan-Jones Rating Company*, 2012 SEC LEXIS 2204, at *4 (July 13, 2012)). *See also* OHO Order 98-20 (CAF970002) at 14, http://www.finra.org/sites/default/files/OHODecision/p007753.pdf (quoting *Skadegaard v. Farrell*, 578 F.Supp. 1209, 1221 (D. N.J. 1984) (defining a scandalous pleading as one that reflects cruelly upon a party's moral character, uses repulsive language, or detracts from the dignity of the court)).

[2] *In re 2TheMart.com, Inc. Sec. Litig.*, 114 F. Supp. 2d 955, 965 (C.D. Cal. 2000).

[3] *Pigford v. Veneman*, 215 F.R.D. 2, 4 (D.D.C. 2003) (striking allegation in a motion accusing opposing counsel of having a "racist attitude"); *see Donald T. Sheldon*, 1988 SEC LEXIS 5258, at *2 (July 22, 1988) (striking "[a]ttacks of a clearly personal nature on present and past staff members, including derogatory comments about their personal lives and employment history. These are scandalous as well as impertinent").

[4] *Dep't of Enforcement v. Ricupero*, No. 20060049953-01, 2009 FINRA Discip. LEXIS 36, Slip. Op. at 11, n.15 (NAC Oct. 1, 2009), *aff'd*, 2010 SEC LEXIS 2988 (Sept. 10, 2010), *pet. rev. denied*, 436 F. App'x 31 (2d Cir. 2011).

[5] *See* FINRA Rule 9215(b) (requiring that "[a]ny affirmative defense shall be asserted in the answer."); *and see Dep't of Enforcement v. Evansen*, No. 2010023724601, 2014 FINRA Discip. LEXIS 10, at *41 (NAC June 3, 2014) (respondent was "required to present evidence that he was unfairly singled out and that FINRA's disciplinary action was motivated by a discriminatory purpose or desire to prevent his exercising a constitutionally protected right.").

[6] *See, e.g., Magill v. Appalachia Intermediate Unit 08*, 646 F. Supp. 339, 343 (W.D. Pa. 1986) (striking allegations that "reflect adversely on the moral character of an individual who is not a party to this suit" which were "unnecessary to a decision on the matters in question"); *Murray v. Sevier*, 156 F.R.D. 235, 258 (D. Kan. 1994) (striking allegation that defendant and his counsel "bought off" and paid "hush money" to prospective witnesses); *Cairns v. Franklin Mint Co.*, 24 F. Supp. 2d 1013, 1037 (C.D. Cal. 1998) (striking allegation that "defendants are 'like vultures feeding on the dead'").

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Accordingly, paragraphs 2 and 7 of Respondent's March 10, 2016 "Response to Department of Enforcement's Motion for Leave to Withhold Documents from Discovery Production" and page 2, lines 1, 8-10, 15-16, page 3, lines 5-7 and page 4, lines 1, 5-7, 11-14 of their March 25, 2016 "Response to Enforcement's Motion to File Reply" are **STRICKEN**.[7]

SO ORDERED

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David Williams
Hearing Officer

Dated: March 30, 2016

[7] Enforcement requests that I order Respondents not to make similar statements in future filings or at the hearing in this matter. I do not enter such an order at this time. Respondents will be afforded an opportunity to be heard on any relevant and properly asserted defense, but are admonished that unsubstantiated insults and personal attacks against opposing counsel will not be tolerated and are counterproductive to the fair and expeditious resolution of this matter.