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FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. LEK SECURITIES CORP. (CRD No. 33135) and SAMUEL FREDERIK LEK (CRD No. 1642936), Respondents.	Disciplinary Proceeding No. 2015045312501 Hearing Officer–DRS

ORDER FOLLOWING PRE-HEARING CONFERENCE

A. Background

On August 12, 2019, Respondents moved in limine to preclude the admission of certain evidence from the Department of Enforcement's expert witness, Arthur D. Middlemiss ("Motion"). "Large swaths of [his] Report are dedicated to purported conduct that either falls outside the Relevant Period, or is unrelated to the conduct and customers identified in the Complaint, and, in numerous instances, both," according to the Motion. "These discussions," the Motion continues, "are necessarily irrelevant, immaterial, and unduly prejudicial."[1] Thus, Respondents requested that I exclude evidence from Middlemiss on these topics or, alternatively, postpone the hearing to give them "a meaningful opportunity to prepare a defense to this litany of new allegations sprung against them on the virtual eve of the Hearing."[2]

Enforcement opposed the Motion on August 14, 2019, maintaining that the proposed evidence was "appropriate," "within the limits of the Order granting leave to permit expert testimony," and would "otherwise [be] helpful to the Hearing Panel" ("Opposition").[3] Accordingly, Enforcement asked that I not strike any portion of the report, that I not set

[1] Motion at 2.

[2] Motion at 10.

[3] Opposition at 1.

additional limits on Middlemiss's testimony before the hearing, and that I not postpone the hearing.[4] In its Opposition, Enforcement argued that evidence of conduct preceding and post-dating the relevant period, and a discussion of customers not specified in the Complaint, are appropriate and relevant.

I held a pre-hearing conference on August 15, 2019, to address the Motion. For the reasons stated on the record at that conference, I **DENIED** the Motion.[5] Below, I further explain the basis for the denial.

B. Discussion

FINRA's Code of Procedure does not explicitly authorize motions in limine to exclude evidence. While the formal rules of evidence do not apply in FINRA disciplinary proceedings,[6] FINRA Hearing Officers may seek guidance from the Federal Rules of Evidence.[7] But those rules, like the FINRA rules, do not explicitly authorize in limine rulings. Nevertheless, motion in limine "practice has developed pursuant to the district court's inherent authority to manage the course of trials."[8] Similarly, FINRA Hearing Officers are authorized "to do all things necessary and appropriate to discharge his or her duties" which include "regulating the course of the hearing."[9] Therefore, in resolving the Motion, I sought guidance from the federal case law regarding 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."[10] They "serve important gatekeeping

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[4] Opposition at 1–2.

[5] On the same day Enforcement filed its Opposition, it also filed a Partial Consent Motion to Amend Exhibit Lists, Witness List and Exhibits ("Motion to Amend"). Enforcement represented that Respondents consented to certain portions of the Motion to Amend. At the pre-hearing conference, I **GRANTED** the uncontested portion of that motion but did not rule on the contested portion because Respondents had not yet filed their opposition. Respondents later filed their opposition to the Motion to Amend on August 19, 2019.

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

[7] *Dep't of Enforcement v. Thaddeus J. North*, No. 2010025087302, 2017 FINRA Discip. LEXIS 7, at *35 (NAC Mar. 15, 2017) ("It is well settled that the formal rules of evidence do not apply in FINRA proceedings, but 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).

[8] *Flores v. FCA US LLC*, 2019 U.S. Dist. LEXIS 120115, at *1–2 (E.D. Calif. July 18, 2019) (quoting *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984)).

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

[10] *Ruiz v. Safeco Ins. Co.*, 2019 U.S. Dist. LEXIS 109067 at *3 (S.D. Fla. Apr. 23, 2019) (quoting *Highland Capital 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.*, 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 (1984)).

functions by allowing the trial judge to eliminate from consideration evidence that should not be presented to the jury."[11] Even so, motions in limine "are disfavored, as courts prefer to resolve questions of admissibility as they arise."[12] SEC Administrative Law Judges[13] and FINRA Hearing Officers have adopted similar views.[14]

A party seeking "to exclude evidence on relevancy grounds by way of a pretrial motion *in limine* faces an exceptionally high obstacle."[15] Specifically, "[o]nly evidence that is clearly inadmissible for any purpose should be excluded pursuant to a motion in limine,"[16] a position that FINRA Hearing Officers have also espoused.[17] "Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy, and potential prejudice may be resolved in proper context."[18]

FINRA Rule 9263 states that the Hearing Officer shall receive relevant evidence and may exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial. "The Hearing Officer is granted broad discretion to accept or reject evidence under this rule,"[19]

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[11] *United States v. Verges*, 2014 U.S. Dist. LEXIS 17969, at *6 (E.D. Va. Feb. 12, 2014).

[12] *Abernathy v. E. Ill. R.R.*, 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).

[13] *See Christopher M. Gibson*, Exchange Act Release. No. 3-17184, 2016 SEC LEXIS 3379, at *4 (CALJ 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, "[t]he 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)).

[14] OHO Order 16-18 (2014043020901), at 2 (May 24, 2016) ("FINRA Hearing Officers generally disfavor motions in limine seeking to exclude broad categories of evidence and testimony."), http://www.finra.org/sites/default/files/OHO-Order-16-18-20140430209O1.pdf (citing OHO Order 16-04 (2012033393401), at 2 (Feb. 3, 2016), http://www.finra.org/sites/default/files/OHO_Order16-04_2012033393401.pdf.).

[15] *Abernathy*, 2017 U.S. Dist. LEXIS 160316, at *2 (quoting *Brom v. Bozell, Jacobs, Kenyon & Eckhardt, Inc.*, 867 F. Supp. 686, 695–96 (N.D. Ill. 1994)).

[16] *Id.*, 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.").

[17] OHO Order 16-18, at 2 (quoting OHO Order 16-04, at 2) ("A Hearing Officer should grant such motions only if the evidence at issue is clearly inadmissible for any purpose.") (citing *Miller UK Ltd. v. Caterpillar, Inc.*, 2015 U.S. Dist. LEXIS 156874, at *5 (N.D. Ill. Nov. 20, 2015)) (internal quotation marks omitted).

[18] *Zanakis*, 2019 U.S. Dist. LEXIS 90088, at *3 (quoting *Haller v. AstraZeneca LP* (*In re Seroquel Prods. Liab. Litig.*), 2009 U.S. Dist. LEXIS 134900, at *1762 (M.D. Fla. Feb. 4, 2009)); *Clipco, Ltd. v. Ignite Design, LLC*, 2005 U.S. Dist. LEXIS 26044, at *2 (N.D. Ill. Oct. 28, 2005) ("[I]f evidence is not clearly inadmissible, evidentiary rulings must be deferred until trial to allow questions of foundation, relevancy, and prejudice to be resolved in context.") (citing *Hawthorne Partners v. AT&T Technologies*, 831 F.Supp. 1398, 1400 (N.D. Ill. 1993)).

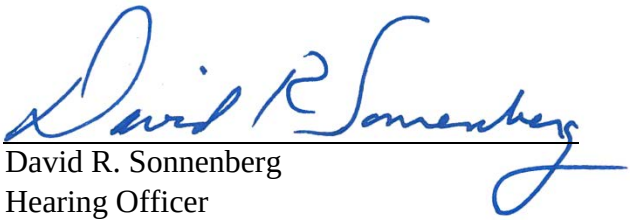
[19] *Dep't of Enforcement v. Brookstone Sec., Inc.*, No. 2007011413501, 2015 FINRA Discip. LEXIS 3, at *110 (NAC Apr. 16, 2015).

including expert testimony.[20] The Federal Rules of Evidence define evidence as relevant if "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."[21] In assessing the relevance of the expert evidence at issue here, I considered whether it could be relevant for either liability or sanctions purposes, or both. As the Case Management and Scheduling Order informed the parties, "[t]he Hearing Panel will not hold a separate hearing to determine the appropriate remedial sanction if a violation is found. Thus, all evidence bearing on both liability and sanctions must be presented at the hearing . . . ."[22]

C. Conclusion

After reviewing the Motion and Opposition, and hearing the parties' arguments at the pre-hearing conference, I concluded that Respondents failed to meet the high standard that the evidence at issue was clearly inadmissible for any purpose.[23] Therefore, I **DENIED** the Motion.[24]

SO ORDERED.



David R. Sonnenberg
Hearing Officer

Dated: August 23, 2019

[20] *Dep't of Enforcement v. Murphy*, No. 2012030731802, 2018 FINRA Discip. LEXIS 24, at *63 (NAC Oct. 11, 2018) ("FINRA Rule 9263 gives Hearing Officers broad discretion to accept or reject expert testimony."), *appeal docketed*, No. 3-18895, 2018 SEC LEXIS 3480 (Dec. 11, 2018).

[21] OHO Order 16-18, at 2 (quoting Fed. R. Evid. 401).

[22] Case Management and Scheduling Order at 11, § VIII.

[23] For the reasons stated at the pre-hearing conference, I also rejected Respondents arguments that they would be unfairly prejudiced unless I excluded the evidence, in limine.

[24] Denial of the Motion does not mean that the expert evidence at issue will be admitted at the hearing, only that I could not determine in advance of the hearing that it should be excluded. *See Clipco*, 2005 U.S. Dist. LEXIS 26044, at *2 (citing *United States v. Connelly*, 874 F.2d 412, 416 (7th Cir. 1989)). Respondents may re-assert their objection to this evidence if Enforcement offers it at the hearing.

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