

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

MARK SAM KOLTA
(CRD No. 5324620),

Respondent.

Disciplinary Proceeding
No. 2018057297102

Hearing Officer–MJD

**ORDER GRANTING, IN PART, AND DENYING, IN PART,
ENFORCEMENT’S CONSENT MOTION FOR LEAVE TO OFFER
TELEPHONE OR VIDEOCONFERENCE TESTIMONY**

The hearing in this disciplinary proceeding is scheduled to begin February 5, 2024, in Boca Raton, Florida. The Complaint alleges that Respondent Mark Sam Kolta, while registered with National Securities Corporation (“National”), made unsuitable recommendations to 16 customers to purchase \$4.8 million in a non-traded real estate investment trust (“REIT”), resulting in losses exceeding \$4.1 million. Cause one alleges that Kolta’s actions violated FINRA Rules 2111 and 2010. Causes two and three allege that Kolta violated FINRA Rules 4511 and 2010 by causing his customers’ account records, updates to their account records, and their subscription documents to contain false and inaccurate information so they could qualify to buy the REIT. Cause four alleges that Kolta sent customers communications about the REIT that were not fair and balanced and contained misleading, unwarranted, and promissory statements and claims that violated FINRA Rules 2210 and 2010.

The Department of Enforcement filed a consent motion to permit five of Kolta’s former customers and two associated persons to testify at the hearing by videoconference or telephone. Enforcement states that the customers will testify about their investment profiles and the accounts they maintained with Kolta, including his investment recommendations and their communications with him and his staff.

The customers are not subject to FINRA’s jurisdiction and therefore cannot be compelled to appear in person. Two customers live in New York; one resides in Connecticut. Another customer lives in California. The fifth customer currently lives in Florida but approximately 230 miles from the hearing location, according to the motion. According to the Complaint and Enforcement’s witness list, three of the customers were over 70 years old at the time of filing in December 2022 and are now retired. All the customers have told Enforcement that they were not willing to appear in person but would agree to testify via videoconference or telephone.

The other two persons—Jennifer LaFrancois and Jonathan Tortorici—are currently subject to FINRA’s jurisdiction. LaFrancois lives in New York state. She is expected to testify about topics relating to the first, second, and third causes of action—more specifically, her responsibilities as Kolta’s assistant, her interactions with him and other persons at the firm, and her role in preparing and revising customer new account forms and updates to forms. She will also testify about Kolta’s responses to National’s decisions in accepting or rejecting REIT purchases by his customers and hearing exhibits.

Enforcement expects LaFrancois’s direct testimony will take up to three hours. According to Enforcement, when asked about her willingness to travel to Florida to testify in person, LaFrancois responded that she “would prefer” to testify by videoconference or telephone.

Tortorici lives in New York state. According to Enforcement’s witness list, Tortorici is no longer associated with National, where he worked as an operations specialist. Like LaFrancois, he is expected to testify about matters relevant to the first, second, and third causes of action. Tortorici will testify about his responsibilities at National, the firm’s alternative investment group and policies relating to non-traded REITs, including Kolta’s recommended purchases of non-traded REITs and the firm’s rejections of his recommendations. Tortorici will also testify about proposed hearing exhibits.

Enforcement estimates that Tortorici’s direct testimony will take up to two hours. Tortorici informed Enforcement that, rather than travel to Florida to attend the hearing in person, he “would prefer” to testify via videoconference or telephone.

Telephone testimony is regularly used in FINRA proceedings, particularly when the witness is a customer.¹ The SEC has repeatedly upheld FINRA’s reliance on telephone testimony in reaching its decisions.² Telephone or videoconference testimony is often necessary because FINRA lacks subpoena power to compel a witness not subject to FINRA jurisdiction, such as a customer, to appear in person.³ I therefore find that it is appropriate to permit the five customer

¹ See, e.g., *Dep’t of Enforcement v. Tucker*, No. 2009016764901, 2013 FINRA Discip. LEXIS 45, at *18 (NAC Dec. 31, 2013) (“[T]elephone testimony is not uncommon in FINRA proceedings, and the Commission has repeatedly upheld FINRA’s reliance on telephone testimony in reaching its decisions.”), *appeal dismissed*, Exchange Act Release No. 71972, 2014 SEC LEXIS 1370 (Apr. 18, 2014). See also OHO Order 23-16 (2012070337501) (May 26, 2023), at 3, https://www.finra.org/sites/default/files/2023-09/oho_order_23-16_2021070337501_venturino.pdf (granting Enforcement’s motion for leave to permit customer testimony by telephone or videoconference).

² See *Ronald W. Gibbs*, Exchange Act Release No. 35998, 1995 SEC LEXIS 1824, at *16 (July 20, 1995) (“[T]elephonic testimony frequently is used in NASD disciplinary proceedings, and neither the Commission nor the courts have found the use of such testimony to be unfair.”).

³ See, e.g., OHO Order 18-07 (2014041860801) (May 2, 2018), https://www.finra.org/sites/default/files/OHO_Order_18-07_2014041860801.pdf (granting Enforcement’s motion to present customer testimony by telephone); OHO Order 15-14 (2012030564701) (Oct. 22, 2015), https://www.finra.org/sites/default/files/OHO_Order15-14_201203564701_0.pdf (same).

witnesses to testify via videoconference or telephone.⁴

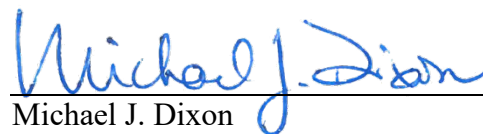
LaFrancois and Tortirici fall into a different category from the customers, however. They are subject to FINRA's jurisdiction and thus can be compelled to appear in person. I find that their stated "preference" to testify via videoconference or telephone, without more, is an insufficient basis to grant Enforcement's motion. Enforcement has not identified any hardship LaFrancois or Tortirici would suffer if they were required to appear in person. Based on Enforcement's representations about the substance of their expected testimony, the Hearing Panel would likely benefit from hearing LaFrancois and Tortirici testify in person.

Accordingly, Enforcement's motion for leave to offer videoconference or telephone testimony is **GRANTED** as to the five customer witnesses only. As to LaFrancois and Tortirici, the motion is **DENIED**.

Enforcement's right to present testimony by videoconference or telephone of the customers will be subject to the following conditions:

1. By January 29, 2024, Enforcement shall file an affidavit or declaration signed by the testifying witness stating that his or her testimony at the hearing will be truthful, under penalty of perjury.
2. Enforcement shall ensure that each witness has, at the time he or she is called to testify, copies of all exhibits that relate to his or her direct testimony and any exhibits that Kolta requests be made available for possible use on cross-examination. Enforcement must notify Kolta of the exhibits it will provide to each witness no later than seven business days before the witness is expected to testify, and Kolta may designate exhibits that he wants available for cross-examination no later than three business days before the witness is expected to testify.
3. Enforcement must ensure that each witness who will testify by videoconference or telephone is available during a block of time when it is reasonable to expect that he or she will be called to testify, so the hearing is not disrupted if the testimony of a prior witness is longer or shorter than anticipated.

SO ORDERED.



Michael J. Dixon
Hearing Officer

Dated: January 17, 2024

⁴ The Hearing Panel would prefer that the customers testify by videoconference. However, Enforcement states that the customers will be testifying from home or work locations, and that poor internet connections or other technical problems may make videoconference testimony impossible for some witnesses. This would require that we accept telephone testimony instead.

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