

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

EUGENE H. KIM
(CRD No. 2264940),

Respondent.

Disciplinary Proceeding
No. 2019064508802

Hearing Officer—DRS

ORDER GRANTING MOTION FOR SEQUESTRATION

I. Introduction

On May 8, 2024, the Department of Enforcement moved for an order directing: (1) the sequestration of witnesses other than Eugene Kim and FINRA Senior Principal Examiner Kevin Macfadden; and (2) that all hearing participants, including counsel, be precluded from disclosing the substance of any witness's testimony to any sequestered witness before the conclusion of the hearing. Enforcement requests an exemption for Macfadden so he can participate in the entire hearing to assist Enforcement's counsel.

According to Enforcement's witness list, "Macfadden is expected to testify about certain aspects of Enforcement's investigation in the matter that led to the filing of this disciplinary proceeding, facts related to the allegations in the Complaint, and various hearing exhibits in this matter."¹ In its motion, Enforcement said that it expects him to testify about "information and documents gathered in connection with the filing of this matter. Enforcement also expects he will authenticate and otherwise provide foundation for the admission of documents obtained or created by Enforcement."² Given the scope of his involvement in this matter, Enforcement represents that he is "important to Enforcement counsel's efforts to present the case in the most effective and efficient manner."³ Enforcement characterizes Macfadden as the equivalent of a case agent and argues he should be exempted for that reason.

¹ Department of Enforcement's Witness List 3.

² Mot. 3.

³ *Id.*

Also on May 8, Kim filed a partial opposition to Macfadden upon learning from Enforcement that it wants Macfadden to be present throughout the hearing. Kim describes Macfadden's expected testimony as going "to the essence of the facts at issue in this case." Accordingly, given that Enforcement has the burden of proof in this case, Kim maintains that Macfadden "should offer his direct testimony on the issues set forth on Enforcement's Witness list prior to being able to evaluate and synthesize the evidence and testimony of other witnesses which could impact his testimony."⁴ But once Macfadden testifies, Kim said, he has no objection to Macfadden remaining in the hearing.

On May 15, Kim responded to the motion. He said he does not object to a sequestration order and has no objection to being allowed to remain in the hearing room. Kim incorporated by reference his partial opposition to Macfadden. Also on May 15, Enforcement responded to the partial opposition by asserting that, to the extent the partial opposition can be viewed as an objection to Macfadden, it is unfounded and should be denied for the reasons set forth in its sequestration motion.

II. Discussion

FINRA Hearing Officers routinely order witness sequestration in FINRA disciplinary proceedings.⁵ The purpose of sequestration is "to ensure a witness's testimony is not influenced by the testimony of other witnesses whom the witness has heard while sitting in the hearing room . . . and that a witness is not influenced by conversations with others in hearing breaks, adjournments, or recesses."⁶ "Testimony that is a witness's own, not influenced by others, promotes fairness to the parties and accuracy in the truth-seeking process."⁷ Additionally, "[s]equestration discourages fabrication, collusion, tailoring, and giving inaccurate testimony."⁸ I find sequestration appropriate in this case. I also find that the exclusions from sequestration

⁴ Opp'n. 2.

⁵ See, e.g., OHO Order 21-10 (2016048837401) (July 1, 2021), at 2, https://www.finra.org/sites/default/files/2021-11/OHO_Order_21-10_2016048837401.pdf; OHO Order 19-28 (2016049321302) (Sept. 19, 2019), at 1, https://www.finra.org/sites/default/files/2019-10/OHO_Order_19-28_2016049321302.pdf; OHO Order 18-08 (2014039775501) (May 3, 2018), at 2, https://www.finra.org/sites/default/files/OHO_Order_18-08_2014039775501.pdf.

⁶ OHO Order 21-10, at 2; OHO Order 19-01 (2016050938301) (Jan. 9, 2019), at 1, https://www.finra.org/sites/default/files/2019-10/OHO_Order_19-01_2016050938301.pdf.

⁷ OHO Order 21-10, at 2; OHO Order 19-01, at 1.

⁸ OHO Order 21-10, at 2; OHO Order 19-28, at 1; see also OHO Order 19-01, at 1 ("Sequestration discourages fabrication, collusion, and tailoring of testimony").

sought by Enforcement for Kim⁹ and Macfadden¹⁰ are appropriate, as exemptions from sequestration for these types of witnesses are well established in this forum. Finally, based on Enforcement's description of Macfadden's expected testimony, it does not appear that he is a percipient witness to the underlying facts at issue in this case. And Kim has not asserted otherwise. Accordingly, it is unnecessary for him to testify before being permitted to remain in the hearing.

III. Order

For good cause shown, the motion is **GRANTED**. All witnesses, with the exceptions noted above, are excluded from the hearing except when they testify. All witnesses and counsel are also ordered not to discuss the testimony of any witness with any sequestered witness for the duration of the hearing. The party calling a witness shall advise the witness of this prohibition and shall notify the witness when all witnesses have completed their testimony and are not subject to recall.

SO ORDERED.


David R. Sonnenberg
Hearing Officer

Dated: May 21, 2024

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⁹ See, e.g., OHO Order 21-10, at 2; OHO Order 19-28, at 1 (exempting respondents from sequestration); OHO Order 08-03 (20070077587) (Feb. 29, 2008), at 3, https://www.finra.org/sites/default/files/OHODecision/p038254_0_0.pdf (exempting respondent from sequestration).

¹⁰ See, e.g., OHO Order 21-10, at 2; OHO Order 19-28, at 1 (exempting investigative agent from sequestration); OHO Order 16-24 (2014043020901) (Aug. 30, 2016), at 2, https://www.finra.org/sites/default/files/OHO_Order16-24_2014043020901.pdf (“[H]earing officers have frequently exempted examiners from sequestration.”).