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FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. SIDNEY LEBENTAL (CRD No. 5543658), Respondent.	Disciplinary Proceeding No. 2019063152202 Hearing Officer– CC

ORDER DENYING RESPONDENT'S FINRA RULE 9252 MOTION TO COMPEL PRODUCTION OF DOCUMENTS

I. Background

On May 23, 2023, FINRA's Department of Enforcement filed a four-cause Complaint against Respondent Sidney Lebental. Cause one of the Complaint alleges that during a six-year period, Lebental intentionally or recklessly engaged in 523 instances of "spoofing" by fraudulently displaying a non-bona fide order to induce other market participants to execute against an order on an opposite side of the market in the same or a correlated security product, in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010. Cause two alleges that Lebental intentionally, recklessly, or negligently violated Sections 17(a)(1) and (a)(3) of the Securities Act of 1933 ("Securities Act") and, as a result, violated FINRA Rule 2010, by engaging in the spoofing activities identified in cause one. Cause three alleges that Lebental placed 523 non-bona fide securities orders into one of three trading venues, causing the trading venues to publish or circulate non-bona fide quotations, in violation of FINRA Rules 5210 and 2010. Cause four alleges that by placing and immediately cancelling 523 large, fully-displayed non-bona fide orders, Lebental unethically injected false information into the marketplace, which induced execution of his orders on the opposite side of the market, in violation of FINRA Rule 2010.

On July 11, 2023, Lebental filed an Answer to the Complaint in which he denied all wrongdoing and asserted affirmative and other defenses, including that Enforcement cannot identify inculpatory electronic communications, witness statements, or party admissions to prove intent.

On December 1, 2023, Respondent filed a motion to compel production of documents pursuant to FINRA Rule 9252. Respondent argues that, in this case, Enforcement is relying

exclusively on trading and market data to prove intent, a key element of the alleged violation, and that Enforcement has produced only a cherry-picked sub-category of such data, thereby depriving Respondent of the opportunity to mount a meaningful defense. Specifically, Respondent contends that, in order to afford him a fair hearing, he requires access to trading data and other information, including electronic communications, from three major electronic trading venues ("ECNs"), the high-frequency trading firms ("HFTs") with which he traded, and Bank of America ("BofA"), the successor firm with which he was associated.[1]

Enforcement argues that Respondent's motion, which it characterizes as overbroad and unduly burdensome, fails to establish the relevance and materiality of its request for seven years of data on trades entered by every other market participant. Enforcement notes that even if, as Respondent speculates, other market participants engaged in conduct similar to his, it is not relevant to whether he engaged in misconduct. Similarly, Enforcement argues that production of the parameters that other trading venues use to identify manipulative trading would be equally irrelevant as Respondent cannot exculpate himself by blaming others for failing to catch him.

II. Discussion

A. FINRA Rule 9252

FINRA Rule 9252 allows a respondent to request a hearing officer to order Enforcement to invoke FINRA Rule 8210 to compel the production of documents from third-party entities that are subject to FINRA's jurisdiction.[2] A respondent who requests production under FINRA Rule 9252 must describe with specificity the requested documents, state why the documents are material, and describe his previous efforts to obtain the documents through other means.[3]

A Hearing Officer shall grant a FINRA Rule 9252 request only upon a showing that, among other things, the requested documents are relevant, material, and non-cumulative; and that the respondent has previously attempted in good faith to obtain the documents through other means, but has been unsuccessful and the person or entity from whom documents are sought are subject to FINRA's jurisdiction.[4] "In addition, the Hearing Officer shall consider whether the request is unreasonable, oppressive, excessive in scope, or unduly burdensome, and whether the

[1] The Complaint alleges that Lebental was associated with Merrill Lynch, Pierce, Fenner & Smith through May 2019 when BofA subsumed Merrill Lynch's banking and trading divisions, and Lebental became associated with BofA. Complaint ¶ 5.

[2] OHO Order 19-25 (2017054405401) (July 8, 2019), at 3, http://www.finra.org/sites/default/files/2019-10/OHO_Order_19-25_2017054405401.pdf; OHO Order 17-11 (2014044985401) (Apr. 11, 2017), at 2, http://www.finra.org/sites/default/files/OHO_Order_17-11_2014044985401.pdf.

[3] FINRA Rule 9252(a); OHO Order 19-25, at 3.

[4] FINRA Rule 9252(b); OHO Order 19-25, at 3; OHO Order 16-14 (2015044379701) (Mar. 25, 2016), at 2, http://www.finra.org/ sites/default/files/OHO_Order16-14_2015044379701_0_0_0.pdf.

request should be denied, limited, or modified."[5] If the Hearing Officer determines that a FINRA Rule 9252 request is unreasonable, oppressive, excessive in scope, or unduly burdensome, she may deny the request or grant it only upon such conditions as fairness requires.[6]

Formal rules of evidence do not apply in FINRA disciplinary proceedings,[7] but FINRA adjudicators may look to the Federal Rules of Evidence for guidance.[8] Rule 401 of the Federal Rules of Evidence defines 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.[9] While not referenced specifically, the concept of materiality is embodied in the second part of the relevance test. Although evidence may tend to make a fact more or less probable, that evidence is not relevant unless that fact is also material to the proceeding.[10]

B. ECNs

1. Respondent's Motion and Enforcement's Opposition

Respondent requests that I order Enforcement to issue FINRA Rule 8210 requests to three ECNs on which U.S. Treasuries are traded—BrokerTec, DealerWeb, and eSpeed—for the following categories of documents:

- complete trade and order data for all market participants, including counterparty information (collectively, "market data"), for the 30-year Treasury bond;
- top five levels of bid/offer quotes for the 30-year Treasury bond;
- the data identified above for the products in which Tyler Forbes trades on certain dates;[11] and

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[5] FINRA Rule 9252(b); *see* OHO Order 19-22 (2016050957901) (June 19, 2019), at 2-3, http://www.finra.org/ sites/default/files/2019-10/OHO_Order_19-22_2016050957901.pdf.

[6] OHO Order 15-05 (2012034936005) (Jan. 27, 2015), at 7, http://www.finra.org/ sites/default/files/OHO-Order-15-05-ProceedingNo.2012034936005_0_0_0_0.pdf.

[7] FINRA Rule 9145.

[8] *Dep't of Enforcement v. North*, No. 2010025087302, 2017 FINRA Discip. LEXIS 7, at *35–36 (NAC Mar. 15, 2017), *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).

[9] Fed. R. Evid. 401; *See* OHO Order 22-13 (2019061528001) (July 14, 2022), at 3, http://www.finra.org/sites/ default/files/2022-08/22-13-Order-Denying-the-Parties-Motions-in-Limine.pdf.

[10] *See*, *e.g.*, *United States v. Shomo,* 786 F.2d 981, 985 (10th Cir. 1986); OHO Order 19-10 (2016052503101) (Mar. 13, 2019), at 4, http://www.finra.org/sites/default/files/2019-10/OHO_Order_19-10_2016052503101.pdf.

[11] In July 2019, BofA disclosed to FINRA staff that it had identified potential spoofing in Treasury notes by Tyler Forbes, a junior trader at BofA supervised by Respondent. Declaration of Savvas A. Foukas ("Foukas Decl.") ¶ 2. FINRA thereafter commenced an investigation into Forbes' and BofA's Treasury-related trading and supervision.

- documents sufficient to show the spoofing parameters applied by each of the ECNs, including spoofing reports and any alerts generated for Respondent's orders (or confirmation that no such alerts exist).

Respondent asks that the FINRA Rule 8210 requests cover a period from October 2014 through February 2021, which is the period identified as relevant in the Complaint ("the Relevant Period").

Respondent argues that Enforcement has produced this data for only a limited time surrounding the 523 trading episodes identified in the Complaint. Respondent argues that this limited data set does not enable him to prepare his defense and that he requires the data for the entire Relevant Period to demonstrate that the 523 trading episodes identified by Enforcement are consistent with, and not anomalous from, his typical trading behavior and commonly accepted and lawful trading characteristics frequently used by market participants. Respondent also intends to demonstrate the general trading behavior of Respondent's counterparties, which, he argues, will establish key areas of his defense. Respondent also requests ECN documents identifying their spoofing parameters to demonstrate that the ECNs did not classify Respondent's orders as unlawful or manipulative.

Enforcement argues that none of the documents identified in the first and second bullets are relevant and material to this proceeding and their production would impose a substantial and undue burden on the ECNs. Enforcement contends that, as for Respondent's own trading, he already has data showing every trade and order he placed during the Relevant Period. Thus, Enforcement argues, he already has all the information needed to demonstrate that the trades identified in the Complaint reflect his typical trading patterns. Enforcement also argues that it is not relevant whether other market participants exhibited specific conduct similar to Respondent because isolated incidents of seemingly innocent conduct can, when viewed as a whole, constitute circumstantial evidence of manipulative activity, as alleged in the Complaint. In any event, Enforcement argues, registered persons cannot excuse their misconduct by demonstrating that others acted similarly. Enforcement further argues that Respondent's request for counter-party data because it will likely show that his non-bona fide orders did not cause the counter-parties to act in a particular manner is equally irrelevant because intent, not causation, is relevant in this case. Finally, Enforcement notes that the data Respondent seeks from the ECNs would not suffice to perform the analysis he describes in his motion because about half of the 523 alleged spoofing instances involved orders placed in the futures market, and the ECNs do not have market and quote data for futures trades.

Enforcement argues that similar market and quote data related to Forbes' spoofing (the third bullet) is also irrelevant and immaterial. First, Enforcement notes that Respondent already

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Foukas Decl. ¶ 3. In September 2021, FINRA issued a Letter of Acceptance, Waiver and Consent finding that Forbes engaged in 194 instances of spoofing in Treasury notes between February and June 2019. Foukas Decl. ¶ 4.

has data showing every trade and order placed by Forbes.[12] Second, Enforcement contends that Forbes' spoofing, whether similar to or different from Respondent's, is not relevant and, even if different from Respondent's conduct, does not exculpate him.

As to the fourth bullet—Respondent's request for the ECNs' spoofing parameters and alerts—Enforcement argues they too are not relevant to this case. Enforcement argues that Respondent cannot escape liability by arguing that the ECNs did not identify his conduct as spoofing and stop him. This is particularly true here, Enforcement contends, because each venue did not have the full picture of Respondent's trading and saw only the activity routed to that venue. Enforcement also asserts that the venues themselves have expressed concern with producing this information to a current market participant who could use it to circumvent supervision in the future.[13]

2. Ruling

I first deny Respondent's motion because the information he seeks is irrelevant to this proceeding. A fact is of consequence, i.e., it is material, "when its existence would provide the fact-finder with a basis for making some inference, or chain of inferences, about an issue that is necessary to a" decision.[14] This case involves allegations that Respondent engaged in 523 instance of spoofing by (1) placing a bona fide order for the 30-year U.S. Treasury Bond ("30-year Bond") or the correlated Ultra Treasury Bond future ("Ultra-T Bond") with only the minimum size displayed, (2) placing a large, fully-displayed non-bona fide order in the 30-year Bond on the opposite side of the market, and (3) cancelling the non-bona fide bond order within three seconds of entry and while receiving execution on his bona fide order. Evidence that other market participants did, or did not, engage in similar conduct or a similar pattern of trading is simply not relevant to whether Respondent engaged in spoofing as alleged. "It is well established that registered persons cannot excuse their misconduct by showing that others engaged in similar misconduct."[15] Numerous Hearing Officers have rejected FINRA Rule 9252 motions on similar grounds.[16]

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[12] Foukas Decl. ¶ 21.

[13] Foukas Decl. ¶¶ 30, 35.

[14] OHO Order 16-14, at 3 (citing *U.S. v. McVeigh*, 153 F.3d 1166, 1190 (10th Cir. 1998)).

[15] OHO Order 17-12 (2012032019101) (Apr. 21, 2017), at 2, http://www.finra.org/sites/default/files/OHO_Order_17-12_2012032019101.pdf.

[16] *See* OHO Order 17-12, at 2; OHO Order 16-34 (2014042690502) (Dec. 28, 2016), at 4, http://www.finra.org/sites/default/files/OHO_Order%2016-34_2014042690502.pdf; OHO Order 16-30 (2014040476901) (Nov. 14, 2016), at 5-6, http://www.finra.org/sites/default/files/OHO_Order16-30_2014040476901.pdf; OHO Order 16-17 (2013038333001) (May 20, 2016), at 5, http://www.finra.org/sites/default/files/OHO-Order-16-17-2013038333001_0_0.pdf.

Even if, as Respondent contends, other market participants entered the same or similar individual trades, it is not relevant to whether he engaged in manipulation.[17] Indeed, even evidence that other market participants also engaged in manipulation would not serve as a defense for Respondent. Both FINRA and the SEC have long held that "it is no defense that others in the industry may have been operating in a similarly illegal and improper manner."[18] Similarly, evidence that Respondent, on other occasions, may have acted analogously without being named in a Complaint is not relevant to whether his actions here violate FINRA Rules and the securities laws. The relevant evidence in this case relates to Respondent's misconduct and the current trades at issue, not what he or others may or may not have done in the past or the review of isolated trades as opposed to trading patterns.[19]

Respondent's request for counter-party trading data to demonstrate that his non-bona fide orders did not cause counter-parties to execute against his bona-fide orders also must fail. This evidence, if it exists, is also irrelevant to the allegations against Respondent. Reliance, economic loss, and loss causation must be proved by *a plaintiff seeking damages in a civil action* under Exchange Act Rule 10b-5, but they are not required elements of proof in a regulatory action.[20] Respondent's request for similar information related to Forbes also fails. Enforcement contends that Respondent already possesses data showing every trade and order placed by Forbes.[21] Additionally, evidence that Forbes' spoofing occurred in a manner different from Respondent's does not negate the potentially violative nature of Respondent's actions.

Respondent's request for the ECNs' spoofing parameters is equally unavailing. Whether Respondent's misconduct would or would not fall within their parameters and whether they issued alerts with respect to Respondent's activities is not relevant to whether Respondent in fact engaged in the misconduct alleged. Indeed, a respondent may not shift his responsibility for complying with FINRA rules and securities laws to others.[22] Accordingly, the ECNs' spoofing parameters are not relevant here.

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[17] *See Dep't of Enforcement v. Yoshikawa*, No. CMS020247, 2005 NASD Discip LEXIS 33, at *16 n.13 (NAC Aug. 31, 2005) (finding that even the non-violative placing and canceling of orders can be found to be manipulative when accompanied by fraudulent intent), *aff'd*, Exchange Act Release No. 53731, 2006 SEC LEXIS 948 (Apr. 26, 2006).

[18] *Patricia H. Smith*, No. 3-8553, 1995 SEC LEXIS 3625, at *5 n.8 (June 27, 1995) (citing Donald T. Sheldon, 1992 SEC LEXIS 3052, at *59-66 n.32 (1992), *aff'd*, 45 F.3d 1515 (11th Cir. 1995)).

[19] *Cf. Robert Conway*, Exchange Act Release No. 70833, 2013 SEC LEXIS 3527, at *24 (Nov. 7, 2013) (rejecting argument that allegations against respondents should be dismissed because they complied with industry norms as evidenced by the conduct of other industry participants).

[20] *Dep't of Enforcement v. Casas*, No. 201303679951, 2017 FINRA Discip. LEXIS 1, at *38 (NAC Jan. 13, 2017); *see also Dep't of Enforcement v. Fillet*, No. 2008011762801, 2013 FINRA Discip. LEXIS 26, at *19 n.7 (NAC Oct. 2, 2013).

[21] Foukas Decl. ¶ 21.

[22] *See Dep't of Enforcement v. Capellini*, No. 2020066627202, 2023 FINRA Discip. LEXIS 11 (OHO July 14, 2023), at *67 n.472, *appeal docketed* (NAC Aug. 4, 2023).

I also find that Respondent's requests for information from the ECNs are tentative and unduly broad and burdensome. While Respondent identifies what he believes the requested information will likely show, his arguments are predominantly conjecture. His request for such a large production cannot be justified by "speculative hope."[23] The degree of Respondent's speculation, coupled with the ECNs' expressed concern for the excessive nature of Respondent's request,[24] cause me to conclude that this portion of Respondent's motion is unreasonable, oppressive, excessive in scope, and unduly burdensome.

Accordingly, for these reasons, I deny Respondent's FINRA Rule 9252 motion with respect to the ECNs.

C. HFTs

1. Respondent's Motion and Enforcement's Opposition

Respondent asks that I order Enforcement to issue FINRA Rule 8210 requests to the three HFTs with which Respondent most frequently traded.[25] Respondent specifically requests:

- documents sufficient to show information concerning their trading activity in the 30-year Treasury bond, including the frequency with which the HFTs placed overlapping orders on both sides of the market, speed and cancelation rates of the firms' orders, and the percentage of orders that the firms placed at the best bid or offer; and

- documents sufficient to show the anti-spoofing filters employed by the HFTs in their trading algorithms.

Respondent argues that this information is relevant and probative to this case because HFTs account for the majority of trading in the Treasury market.

Enforcement opposes this request because, it argues, Respondent's motion is deficient in several aspects. First, Respondent fails to identify the entities to whom information requests should be issued and does not demonstrate that these entities are subject to FINRA jurisdiction. Second, Enforcement argues that Respondent's request is vague and lacks sufficient specificity to identify the documents that Respondent seeks. Additionally, Enforcement argues that Respondent's request for information related to the HFT's anti-spoofing filters, if provided, would result in providing a current market participant with a roadmap for manipulating the

[23] OHO Order 98-24 (CAF970002) (May 18, 1998), at 6-7, http://www.finra.org/sites/default/files/OHODecision/p007757.pdf.

[24] Foukas Decl. ¶¶ 26-36.

[25] In the alternative, if the information that Respondent requests is not readily available, Respondent requests the same information from two of the most active HFTs in the U.S. Treasury market.

markets. Enforcement also states that Respondent has not demonstrated the relevance and materiality of the information sought.

2. Ruling

I deny Respondent's motion for information from the three HFTs with which Respondent most often traded or the two most active HFTs in the Treasury market. FINRA Rule 9252 requires Respondent to describe with specificity the requested documents, state why the documents are material, and demonstrate that the person or entity from whom documents are sought is subject to FINRA jurisdiction. On this aspect of his motion, Respondent has not met these requirements. He fails to identify the particular documentation or records he seeks or the timeframe in which he is interested. He has not identified specific HFTs (except in the alternative if his initial request is unattainable). Nor has he demonstrated that the unidentified HFTs are subject to FINRA jurisdiction.

Furthermore, Respondent fails to demonstrate that this request would produce information material and relevant to this case. He does not show how the speed and cancellation rates for the HFT's trading in the Treasury market could make a consequential fact in this case more or less probable. What is of consequence here is evidence related to Respondent's own actions, not the HFTs. With respect to Respondent's request for information about the HFT's anti-spoofing filters, his argument that the filters would show that the HFT's would not classify his trading as spoofing is unpersuasive. It does not matter whether the HFTs, who are not responsible for regulating Respondent, would find his actions violative. What is relevant in this case is the evidence that reflects Respondent's actions. Accordingly, I deny Respondent's FINRA Rule 9252 motion with respect to the HFTs.

D. BofA

1. Respondent's Motion and Enforcement's Opposition

Respondent requests that I order Enforcement to issue FINRA Rule 8210 requests to BofA to produce emails related to Tyler Forbes and Frantz Bien-Aime, the head of BofA's Business Controls Office, which was responsible for developing and implementing policies on spoofing and spoofing surveillance. Respondent argues that Enforcement collected extensive amounts of electronic communications related to other individuals who provided on-the-record testimony in Enforcement's investigation and that the two individuals identified by Respondent also provided on-the-record testimony during Enforcement's investigation, have personal knowledge about key issues in this case, and may be called as material witnesses. Respondent also argues that Bien-Aime's communications particularly could include information relevant to BofA's spoofing surveillance and internal review of Forbes' trading.

Enforcement opposes the request because, it contends, documents responsive to the request are irrelevant and immaterial in this case. Enforcement notes that Respondent has already received more than 55,000 Forbes communications, including all communications from the five-month period during which Forbes actively traded and other Forbes communications produced

by other BofA custodians. Enforcement argues that communications that fall outside these categories are not relevant. Similarly, Enforcement contends that Respondent has already received more than 6,500 communications between Bien-Aime and other BofA custodians, including Respondent. Enforcement argues that, even if these documents provide insight into BofA's spoofing surveillance related to Forbes or any other BofA associated person, they are not relevant to this case.

2. Ruling

I deny Respondent's motion because the documents he requests are not relevant to the facts that are of consequence to this proceeding—whether Respondent acted as alleged in the Complaint. Even if the communications that Respondent seeks demonstrate that BofA failed to properly surveil for spoofing or inadequately trained and educated traders about spoofing, those facts would be irrelevant to this case. The Complaint alleges that Respondent engaged in a specific pattern of conduct, and he cannot shift his responsibility for his own actions to his firm, a supervisor, or others in the market.[26] Furthermore, much of what Respondent requests relating to Forbes appears to have already been produced to him.[27] In any event, even if it has not been produced, it is not relevant to the allegations against Respondent. Accordingly, I deny Respondent's FINRA Rule 9252 motion with respect to BofA.

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For these reasons, I **DENY** Respondent's motion.

SO ORDERED.

Carla Carloni
Hearing Officer

Dated: January 3, 2024

[26] *See Merrimac Corporate Securities, Inc*., Exchange Act Release No. 86404, 2019 SEC LEXIS 1771, at *12 n.28 (July 17, 2019) (stating that respondent's attempt to shift his responsibility to others does not relieve him of the duty to comply); *Louis Ottimo*, Exchange Act Release No. 83555, 2018 SEC LEXIS 1588, at *42 (June 28, 2018) (holding that, even if others are aware of the respondent's misconduct, he cannot shift his responsibility for regulatory compliance to them); *Jason A. Craig*, Exchange Act Release No. 59137, 2008 SEC LEXIS 2844, at *15 (Dec. 22, 2008) (finding that a respondent cannot shift the responsibility for regulatory compliance to his firm).

[27] Foukas Decl. ¶¶ 7-12, 15.

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