FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. SANDLAPPER SECURITIES, LLC (CRD No. 137906), TREVOR LEE GORDON (CRD No. 2195122), and JACK CHARLES BIXLER (CRD No. 22331), Respondents.	Disciplinary Proceeding No. 2014041860801 Hearing Officer—DW

OMNIBUS ORDER ON PRE-HEARING MOTIONS

A. Introduction

In this action FINRA member firm Sandlapper Securities, LLC, along with its CEO Trevor Gordon, and the firm's Capital Markets Division President Jack Bixler (collectively "Respondents"), are charged with securities fraud and other violations in connection with certain sales of saltwater disposal wells to investors. Respondents allegedly engaged in a fraudulent scheme to defraud investors by interposing a limited liability company as an intermediary for investor purchases in order to markup and inflate the price of the saltwater well interests. Respondents Gordon and Bixler also allegedly caused the limited liability company to buy and sell well interests without registering with the Securities and Exchange Commission ("SEC") as a dealer, and Gordon and Sandlapper are charged with failing to supervise sales of the saltwater well investments.

The hearing was set for May 7, 2018. The parties made a number of motions in advance of the hearing. This Order disposes of the motions that remain outstanding.

B. Motions for Leave to Offer Expert Testimony

Both Department of Enforcement ("Enforcement") and Respondents moved for leave to offer expert testimony at the hearing. Both motions reflect the parties' agreement that expert testimony is appropriate with regard to: (1) the economics of salt water disposal wells, including how they are used and how they generate revenue; (2) the risks involved in constructing, operating and investing in saltwater disposal wells; (3) whether there was a saltwater disposal well market during the relevant time period and if so, what constitutes that market; (4) whether the prices charged by the limited liability company, TSWR Development, LLC ("TSWR Development") to Tiburon Saltwater Reclamation Fund I, LLC ("Fund I") and investors in direct working interests in saltwater disposal wells were consistent with industry standards or supported by any increase in the value of the underlying well; and (5) whether the valuation methodology and pricing for the saltwater disposal wells sold by TSWR Development and Fund I were within industry standards.

In addition to these topics, Enforcement moves for leave to offer expert testimony as to (1) whether appraisals or other forms of economic evaluation were available for saltwater disposal investments; and (2) the accuracy or inaccuracy of representations, including financial projections, made in connection with sales interests in Fund I and sales of direct working interests by Respondents. Respondents object to these categories of expert testimony.

Respondents move for leave to offer expert testimony as to whether (1) under the facts at issue, do FINRA rules apply to TSWR Development based upon customs, practices and securities industry standards; (2) FINRA rules apply to any payments received by TSWR Development based upon regulatory and securities industry standards; (3) an interest in a saltwater disposal well is real property; and (4) the representations and disclosures made in connection with the sales by Fund I and TSWR Development were adequate. Enforcement objects to each of these categories of expert testimony.

a. The Background of the Proposed Experts

Enforcement proffers the testimony of Daniel T. Reineke on the subjects described above. According to the proffer, Mr. Reineke is a professional engineer with over 42 years of experience in the oil and gas industry. Mr. Reineke's experience includes work as a roughneck, drilling engineer, independent consultant and owner-operator of wells. He holds a Bachelor of Science degree in Petroleum Engineering from the Colorado School of Mines. Through his career, Mr. Reineke has supervised the drilling, completion and operation of wells throughout Oklahoma, Kansas and Texas. He also has experience negotiating sales contracts, lease agreements and operating agreements and has conducted economic evaluations of wells. Through his operating company, Mr. Reineke has owned and operated as many as 88 wells over a 12-year period, with responsibility for all accounting, revenue distribution and operations for

those wells. Mr. Reineke has provided expert testimony related to the oil and gas industry in numerous proceedings, including proceedings in this forum.[1]

Respondents proffered the testimony of two experts, Marc Menchel of Menchel Consulting, and Josh Johnston, CPA. Mr. Menchel's background is that of an attorney, having served as General Counsel of FINRA, and previously as counsel or compliance officer with a number of FINRA-member broker-dealers. Mr. Menchel's curriculum vitae does not demonstrate that he has any specific experience or background in the area of saltwater disposal wells, or even general experience in the oil and gas industry.

For his part, Mr. Johnston is a certified public accountant with years of experience as an auditor, forensic accountant, investigator and expert witness. While Mr. Johnston's curriculum vitae indicates his substantial experience as an expert in calculations of damages, solvency and GAAP accounting, internal controls as well as various other accounting issues, it similarly reveals no background or experience in the oil and gas industry other than his service as a "[n]eutral accountant in a purchase price adjustment dispute over a $150 million oil and gas lease and working interest sale."[2]

In their motion, Respondents did not explain how their experts are qualified to supply their expected opinions. And although Respondents sought leave to offer expert testimony on a number of distinct topics, they never identified in their motion *which* of their two experts were to offer an opinion on each of their proposed topics. Consequently, I deferred ruling on the parties' motions until after the time for filing proposed expert reports so that I could evaluate the particular qualifications and opinions expected to be offered by each expert at the hearing. Enforcement submitted a proposed report for Mr. Reineke. While Respondents offered a report reflecting the opinions of Mr. Johnston, they offered *no report* disclosing the proposed opinions of Mr. Menchel.

b. Admissibility of the Expert Testimony

Hearing Officers have broad discretion to accept or reject expert testimony even where the expert is qualified to address the proposed topics and the evidence meets the general standard for admissibility set forth in FINRA Rule 9263.[3] While the Federal Rules of Evidence are not applicable to FINRA proceedings, those rules and the case law applying them provide guidance on the issue of expert testimony.[4] Rule 702 of the Federal Rules of Evidence specifies that a

[1] Enforcement's Motion for Leave to Present Expert Testimony at 2-3.

[2] Respondents' Motion for Leave to Present Expert Testimony, Ex. A.

[3] *See* OHO Order 12-01 (2009018771602) (Mar. 14, 2012), at 2-3, http://www.finra.org/sites/default/files/OHO Decision/p126068.pdf; *Dep't of Enforcement v. Fiero*, No. CAF980002, 2002 NASD Discip. LEXIS 16, at *89-90 (NAC Oct. 28, 2002).

[4] *See* OHO Order 11-04 (2009017798201) (Mar. 24, 2011), at 3, http://www.finra.org/sites/default/files/OHO Decision/p123470.pdf; FINRA Rule 9145(a) (Federal Rules of Evidence do not apply in FINRA disciplinary proceedings).

witness "qualified as an expert by knowledge, skill, experience, training, or education" may give opinion testimony if his or her "specialized knowledge will help the trier of fact" and the testimony meets certain measures of reliability. "In short, expert testimony is admissible only if it is both relevant and reliable."[5] The proponent of the testimony bears the burden of establishing that the expert's testimony satisfies the conditions for admission.[6] The overarching and critical factor is whether the proposed testimony would be helpful to the Hearing Panel.[7]

Enforcement adequately demonstrated Mr. Reineke's qualifications to offer expert opinions on the identified topics. His extensive background and experience in the area of saltwater disposal wells, the oil and gas industry and related issues described above qualifies him to render his proffered opinions. Respondents disagree, arguing that Mr. Reineke's general background in oil and gas engineering provides him no foundation to opine on the salt water disposal wells in particular. But in his proposed report, Mr. Reineke explains that he has specific experience with salt water disposal wells, including evaluating the wells "for appraisal purposes and for mechanical integrity and operational proficiency."[8] He maintains that "[s]alt water disposal is a part of the overall oil and gas industry and has been for many years."[9] I conclude that Mr. Reineke is adequately qualified to offer his opinions.

I also find that Mr. Reineke's testimony will be helpful to the panel. In determining whether expert testimony would be helpful, the nature of the forum must be taken into account.[10] FINRA Hearing Panels include two industry members who typically possess considerable securities industry experience and expertise. While the Hearing Panel is not in need of expert testimony in the securities-related aspects of this case, it may benefit from expert testimony regarding the underlying factual issues related to salt water disposal wells and the oil and gas industry. This case involves allegations of misrepresentations and omissions related to the realities of the salt water disposal well industry, and I find that Mr. Reineke's proposed expert testimony may assist the Hearing Panel on these fact issues. Consequently, I will permit him to offer his expert testimony.[11]

With regard to Respondents' proposed experts, Respondents did not identify the specific areas of proposed testimony for Mr. Menchel, offered no explanation of how his background and experience qualified him to offer his expert testimony, and failed to submit an expert report for Mr. Menchel identifying the particulars of his opinions or explanation as to how those opinions

[5] *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 244 (5th Cir. 2002).

[6] *See* OHO Order 12-01, at 4.

[7] *See* OHO Order 12-01, at 3.

[8] CX-12, at 2.

[9] CX-12, at 2.

[10] *See* OHO Order 16-02 (2014040295201) (Jan. 29, 2016), at 2, http://www.finra.org/sites/default/files/OHO-Order16-02-2014040295201.pdf.

[11] I address Respondents' particular challenges to the opinions offered in Mr. Reineke's report below.

might be helpful. For these reasons, I deny Respondents' leave to present the expert testimony of Mr. Menchel at the hearing.

With regard to Mr. Johnston, I find that his background in accounting and valuations, with at least some experience involving a salt water disposal well transaction, adequately qualifies him to offer his opinions. And given the significance of the reasonableness of the valuations and markups to investors in the transactions at issue, I find that his testimony will also be helpful to the panel. Accordingly, I will also permit Mr. Johnston to offer his expert testimony.[12] Enforcement's Motion for Leave to Present Expert Testimony is GRANTED, and Respondents' Motion for Leave to Present Expert Testimony is GRANTED in part and DENIED in part.

C. Respondents' Motion *In Limine* Concerning Complainant's Proposed Expert Daniel Reineke

Respondents challenge certain opinions offered by Mr. Reineke in his report. Respondents first contend that Mr. Reineke is not qualified to discuss standards for salt water disposal well appraisals or water volume estimates. Respondents also assert that Mr. Reineke improperly offers a legal conclusion in connection with his opinions on the "reasonableness" of the disclosures made in private placement memoranda provided to investors, or the necessity for the creation of TSWR Development.

As set out above, Mr. Reineke has long experience in the oil and gas industry, including experience in the appraisal of salt water disposal wells. He is qualified to offer his opinions on the standards for salt water disposal well appraisals and water volume estimates. Where a witness "is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts."[13] I find that Mr. Reineke has adequately explained the basis for his challenged opinions. Further challenges to the extent of his experience are a matter for cross examination.[14]

Moreover, while an expert may opine on ultimate fact issues,[15] the expert may not give an opinion on the ultimate legal issue by applying the law to the facts of the case[16] or state a

[12] I address Enforcement's particular challenges to the opinions offered in Mr. Johnston's report below.

[13] *U.S. v. Frazier*, 387 F.3d 1244, 1261 (11th Cir. 2004).

[14] *Daubert v. Merrell Dow Pharms. Inc*., 509 U.S. 579, 596 (1993) ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.").

[15] *See, e.g.*, *Hurt v. Commerce Energy, Inc*., 2014 U.S. Dist. LEXIS 125321, at *4 (N.D. Ohio Sept. 8, 2014) ("Although an expert's opinion may 'embrace[] an ultimate issue to be decided by the trier of fact[,]' Fed. R. Evid. 704(a), the issue embraced must be a factual one.") (quoting *Berry v. City of Detroit*, 25 F.3d 1342, 1353 (6th Cir. 1994)). OHO Order 17-05 (201504421601) (Mar. 16, 2017), at 3, http://www.finra.org/sites/default/files/OHO_Order_17-05_201504421601.pdf.

[16] OHO Order 17-05, at 3 n.12 (and cases cited therein).

legal standard.[17] Applying these principles here, I disagree that the sections of Mr. Reineke's report identified by Respondents reflect improper legal opinions. Respondents cite no authority for their bald assertion that the "reasonableness/adequacy of representations made to investors according to [the] Complainant is a legal conclusion and an inappropriate subject of expert testimony."[18] An expert witness may testify to ultimate issues of fact, such as whether representations are "reasonable" or "adequate," so long as the testimony does not embrace legal conclusions or a respondent's state of mind.[19] Respondents identify no improper legal conclusions in Mr. Reineke's report. Accordingly, the motion to exclude portions of his testimony is DENIED.

D. Enforcement's Objections to Proposed Witnesses and Exhibits

a. Objections to Witnesses

Enforcement objects to certain of Respondents' proposed witnesses and exhibits. It first objects to paragraphs 45 and 62 of the Johnston expert report. Enforcement claims that in paragraph 45, Johnston improperly asserts a limited concept of "markup," notwithstanding Respondents' arguments that the issue implicates a legal issue. I disagree that the reasonableness of the markups at issue here calls for an ultimate legal conclusion beyond the reach of expert testimony.[20] The appropriateness of the markups at issue is for cross-examination.

Enforcement's complaint as to paragraph 62 of the Johnston report fares no better. It argues that Mr. Johnston's claim that for taxation purposes, interests in salt water disposals are treated similarly to real property interests. Again, whether Mr. Johnston has an adequate basis for his claim, and whether it is even relevant to the issues disputed here, is for cross-examination. Enforcement's application is denied as to Mr. Johnston's report.

Enforcement also objects to Respondents' listing of Susan Byford and Heidi Tickle, FINRA staff members, as witnesses. While FINRA investigative staff cannot be compelled to

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[17] *U.S. v. McIver*, 470 F.3d 550, 562 (4th Cir. 2006) ("[O]pinion testimony that states a legal standard or draws a legal conclusion by applying law to the facts is generally inadmissible.").

[18] Respondents' Motion *in Limine* Concerning Enforcement's Expert at 6.

[19] *U.S. v. Moran*, 493 F.3d 1002, 1008 (9th Cir. 2007) (expert properly described certain tax transactions as "sham" transactions).

[20] *See, e.g., Dep't of Enforcement v. Grey*, No. 2009016034101, 2013 FINRA Discip. LEXIS 24 (OHO June 20, 2013) (permitting expert testimony on pricing of municipal bonds), *aff'd findings and modified sanctions*, 2014 FINRA Discip. LEXIS 31 (NAC Oct. 3, 2014), *aff'd sub nom., Anthony A. Grey*, Exchange Act Release No. 75839, 2015 SEC LEXIS 3630 (Sept. 3, 2015); OHO Order 05-35 (CAF040058) (Oct. 19, 2005) http://www.finra.org/sites/default/files/OHODecision/p015999.pdf (allowing expert testimony on the pricing of convertible bonds). While expert testimony as to markups involving equity securities has at times been excluded in this forum, this was because in the ordinary case the testimony is not helpful. OHO Order 01-15 (CAF000013) (May 23, 2001), at 5, http://www.finra.org/sites/default/files/OHODecision/p007831_0_0_0.pdf ("[M]atters pertaining to the fairness and reasonableness of the mark-downs charged on such securities, including the determination of prevailing market price, are well within the expertise of the industry members of the Hearing Panel"). As explained above, I believe the specialized nature of the interests at issue here justify expert testimony.

provide relevant testimony at a hearing pursuant to Rule 8210, a Hearing Officer maintains the authority to direct investigative staff to provide evidence at the hearing where there is good cause to believe that a staff member's relevant and material testimony is necessary to ensure the fairness of the proceeding.[21]

Respondents make no showing as to why the testimony of either witness is necessary to ensure the fairness of the proceeding. Their witness list offers only boilerplate that the witnesses will testify as to "facts concerning the investigation." In their opposition to Enforcement's motion, Respondents claim that they need to question the witnesses regarding the factual findings and conclusions of a related investigation. But the "factual findings" of Enforcement's investigation are not at issue here—at issue are the allegations of the Complaint. Respondents never explain what specific relevant evidence bearing on those allegations that these witnesses might possess. While some inquiry into the investigation may be relevant, Respondents identify no issue that cannot be addressed through Enforcement witness John Hanlon. On the showing here, I find no basis to order either witness to appear.

As to witness Hanlon, as Enforcement notes it intends to call Mr. Hanlon to testify in its own case, Respondents will have the opportunity to elicit whatever evidence they seek from the witness at that time.

As to proposed expert witness Marc Menchel, as explained above, his expert testimony is excluded, and so Enforcement's objection to his presence of Respondents' witness list is sustained.

b. Objections to Evidence

Enforcement also objects to certain of Respondents' evidence. Enforcement objects to proposed exhibits RX-94 through RX-97; RX-121; RX-139; RX-140; and RX-177, all on the grounds that they are irrelevant to the issues in this proceeding.

FINRA Rule 9263 provides that the Hearing Officer should admit relevant evidence but may exclude 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."[22] Because the relevance of challenged evidence can be difficult to discern without the context of other evidence presented at the hearing, pre-hearing motions to exclude evidence are generally

[21] OHO Order 05-28 (C3A040045) (June 23, 2005), at 6-7, http://www.finra.org/sites/default/files/OHODecision/p015992.pdf ("Rule 9235, which provides that the Hearing Officer 'shall have authority to do all things necessary and appropriate to discharge his or her duties,' would allow the Hearing Officer to order the appearance and testimony of [a FINRA] employee if it appeared that such testimony was necessary, in a particular case, to 'provide a fair procedure for the disciplining of members and persons associated with members,' as required by Section 15A(b)(7) of the Securities Exchange Act of 1934.").

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

disfavored and should be granted "only if the evidence at issue 'is clearly inadmissible for any purpose.'"[23]

I cannot say on the present record that the above-listed exhibits and testimony are clearly irrelevant to any issue in this proceeding. Therefore, consideration of Enforcement's objections will be deferred until the hearing, when the relevance of the exhibits and testimony may be better evaluated. Enforcement may raise its objections when and if Respondents offer the exhibits or testimony.

E. Enforcement's Motion to Strike Amended Witness List and List of Expert Testimony

Enforcement challenges Respondents' belated filing of a list of expert testimony of expert Marc Menchel, as well as an "Amended Witness List" identifying opposing Enforcement counsel Greg Firehock as a witness.

First, because Mr. Menchel is excluded as a witness as set forth above, his statement of prior testimony is irrelevant, impertinent to the proceedings and is therefore stricken.

As to Respondents' amended witness list to add opposing counsel as a witness, because "[a]n attorney who is likely to be a witness at a trial is generally prohibited from acting as an advocate at the trial, … [a] party may call opposing counsel to the stand 'only when doing so is justified by a compelling need.'"[24] As Enforcement notes, Respondents make no showing of any compelling need for counsel's proposed testimony. And there is no showing that Respondents made any effort to meet and confer to attempt to obtain whatever evidence they believe they need from opposing counsel in some alternative form short of testimony. Accordingly, the untimely application to amend Respondents' Witness List is denied.

F. Respondents' Objections to Complainant's Exhibits and Witness Lists

a. Objections to Evidence

Respondents object to certain of Enforcement's proposed witnesses and exhibits. They object to proposed exhibit CX-169, and related materials on hearsay grounds. The proposed exhibit, a witness memorandum of interview, can be admissible in FINRA disciplinary proceedings.[25] In determining whether to rely on hearsay evidence, it is necessary to evaluate its

[23] OHO Order 16-18 (2014043020901) (May 24, 2016), at 2, http://www.finra.org/sites/default/files/OHO-Order-16-18-2014043020901.pdf (quotation omitted).

[24] *See* OHO Order 13-04 (2009019042402) (June 3, 2013), at 3, http://www.finra.org/sites/default/files /OHODecision/p296314_0_0_0.pdf (citing ABA Model Rules of Professional Conduct 3.6 and Restatement (Third) of the Law Governing Lawyers, §108(4)).

[25] *See Dep't of Enforcement v. Niekras*, No. 2013037401001, 2017 FINRA Discip. LEXIS 40, at *31 n.121 (OHO Oct. 2, 2017), *appeal docketed* (Oct. 24, 2017) ("Declarations, affidavits, and video depositions, although hearsay, can be admissible in FINRA disciplinary proceedings."). Respondents argue that the exhibit should not be used if the witness is available to testify. I agree that the proposed exhibit will not be permitted if the witness testifies. OHO

probative value, reliability, and fairness of use.[26] The following factors must be considered when evaluating hearsay evidence: possible bias of the declarant; the type of hearsay involved; whether the statements are signed and sworn rather than anonymous, oral or unsworn; whether the statements are contradicted by direct testimony; whether the declarant is available to testify; and whether the hearsay is corroborated.[27] Respondents make no showing of possible bias, or that the statements contained in the document are unreliable. Respondents have sought, and obtained, the notes of each FINRA representative who participated in the interview, facilitating cross-examination of the presentation of the evidence. There is no showing adequate to exclude the evidence at this time, so the objection is overruled.

Respondents also object to evidence from third parties obtained by Enforcement after the filing of this proceeding because Respondents were not provided access to other materials the third parties produced to Enforcement. But after this objection was filed, I ordered all such materials produced to Respondents. Accordingly, this objection is moot.

Respondents further object to Enforcement's proposed exhibits CX-172 through CX-174, as improper settlement evidence. Enforcement maintains that the evidence is relevant for other purposes. At this stage, exclusion of the evidence is not warranted,[28] so the objection is overruled.

Respondents also raise an objection of the use of OTR transcripts in lieu of live testimony. But as Enforcement notes, there is no prohibition on the use of OTR transcripts *of the Respondents*, as these are party admissions. These materials are admissible. Respondents objection is overruled.

In addition, Respondents object to numerous proposed exhibits, including CX-23 through CX-28, JX-48 through JX-52, JX-61, JX-62, JX-67, JX-68, JX-73 and JX-74 as irrelevant. At this stage, I cannot say that this evidence will be irrelevant for any purpose, so the objections are overruled without prejudice to Respondents reasserting their objections at the hearing.

Respondents finally object to summary exhibits offered by Enforcement as proposed exhibits CX-1 through CX-11 and CX-156. According to Respondents, the summaries do not comport with the case management and scheduling order in that they do not identify the source documents used to prepare them, nor do they identify the person who prepared them.

Order 16-13 (2014040968501) (Mar. 3, 2016), at 8, http://www.finra.org/sites/default/files/OHO_Order%2016-13_2014040968501_0_0_0.pdf (noting that live testimony is preferred and should be used when available).

[26] *Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *46-47 (Jan. 30, 2009) ("In determining whether to rely on hearsay evidence, 'it is necessary to evaluate its probative value and reliability, the and fairness of its use"').

[27] *Dep't of Enforcement v. North*, No. 2012030527503, 2017 FINRA Discip. LEXIS 28, at *13 (NAC Aug. 3, 2017), *appeal docketed* (Sep. 7, 2017).

[28] Order 06-14 (C05050015) (Jan. 20, 2006), at 6, http://www.finra.org/sites/default/files/OHODecision/p017576_0_0_0_0.pdf (denying prehearing motion to exclude evidence related to settlement).

True, the summaries do not, on their face, reference each specific document from which the proposed exhibits are derived. But the proposed exhibits do identify the general categories of source materials summarized. And there is no assertion that the summaries are inaccurate, nor any suggestion that they do not fairly represent the contents of documents summarized. And significantly, there is no representation that Respondents met and conferred, discussed or otherwise asked Enforcement the identity of particular source documents pertinent to any proposed exhibit before filing objections. Because Respondents failed to adequately meet and confer to resolve any potential objection, the objection is overruled.

b. Objections to Witnesses

Respondents generally object to the testimony of any witness who provided documents to Enforcement but not produced to Respondents. In light of my prior order requiring Enforcement to produce third-party documents, this objection is moot. Respondents object to Mr. Hanlon testifying to the substance of witness interviews, such as the interview reflected in CX-169. For the reasons that I overrule Respondents' objections to the proposed exhibit, I overrule the objection to Mr. Hanlon's testimony. Respondents also object to Enforcement's witness JI, because he is not an investor in Fund I, but instead the husband of an investor. But there is no showing at this stage that JI does not possess relevant evidence. This objection is overruled.

G. Enforcement's Motion for Sequestration Order

Enforcement filed a motion to sequester the witnesses during the hearing, with the exception of Respondents Trevor Lee Gordon and Jack Bixler, Enforcement's case-witness agent, John Hanlon, and any expert witnesses. Enforcement further requests that no one, including all witnesses and counsel, may disclose the substance of a witnesses' testimony to any other witness during the hearing, except to those witnesses who are permitted to attend the entire hearing.

Sequestration is commonly used in courtrooms and in FINRA hearings to ensure that a witness's testimony is not influenced by the testimony of other witnesses heard in the hearing room or by conversations with others during hearing breaks and adjournments.[29] Sequestration discourages fabrication, collusion, and tailoring of testimony.[30]

[29] A request for the sequestration of witnesses is so well known in federal, state, and administrative adjudication that counsel routinely call upon a court or administrative body to "invoke the Rule." OHO Order 06-53 (EAF0300770001) (Nov. 9, 2006), at 1, http://www.finra.org/sites/default/files/OHODecision/p018443_0.pdf.

[30] OHO Order 06-22 (CAF040079) (Mar. 9, 2006), at 2, http://www.finra.org/sites/default/files/OHODecision/p017561_0_0.pdf.

Although Respondents object to Enforcement's investigative agent being exempted from the Order, I find it reasonable for Enforcement to designate a single party representative to be exempted, as is each Respondent. For good cause shown, the motion is granted in part.[31]

All witnesses subject to sequestration are precluded from conferring with any other witness about the subject matter of any other witness's testimony until all the witnesses have finished testifying and are not subject to recall. The party calling a witness subject to sequestration 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. Respondents, Enforcement's case-agent witness and any expert witness shall be excepted from this Order and shall be permitted to be present in the hearing.

H. Motion to Permit Telephone Testimony

Enforcement filed a motion to permit 13 witnesses to testify by telephone or video at the hearing. Enforcement represents that the proposed witnesses are not subject to FINRA's jurisdiction and reside far away from the hearing location. Enforcement states that although it has offered to pay for travel and lodging expenses, each witness asserts that he or she will not travel to Washington, DC to testify in person.

Based on these representations, I find that it is reasonable to permit the proposed witnesses to testify by telephone. Although Respondents oppose the motion, the relevant witnesses cannot be compelled to give evidence here. So the practical alternative to telephone testimony is that the panel is deprived of relevant evidence. And Respondents make no adequate showing that the evidence presented in this manner would be unreliable. It is well established that telephone testimony is permissible, in appropriate circumstances, in FINRA disciplinary proceedings, and that permitting telephone testimony is not inherently unfair.[32] Although it is always preferable for witnesses to testify in person, it is permissible to allow testimony by telephone so long as a respondent is afforded a "full and fair opportunity to cross examine."[33] While "[c]ross-examination may be more difficult over the telephone … it can be done effectively, and hearing panels are able to evaluate the credibility of witnesses who testify by telephone, even though they cannot observe the witnesses' demeanor."[34]Accordingly, for good cause shown, Enforcement's motion is granted, subject to the following conditions:

1. On or before May 4, 2018, it shall file a notarized declaration from each witness listed above that the testimony he will give at the hearing will be truthful.

[31] Enforcement also requests that sequestration be extended to communications with counsel in addition to other witnesses. I do not believe this aspect of the requested relief is warranted, and do not grant it.

[32] *Dep't of Enforcement v. Brigandi*, No. C10040025, 2007 NASD Discip. LEXIS 3, at *22, n.20 (NAC Jan. 17, 2007) (citing *Daniel Joseph Alderman*, 52 S.E.C. 366, 368 (1995), *pet. denied, Alderman v. SEC*, 104 F.3d 285, 288 n.4 (9th Cir. 1997)); *Ronald W. Gibbs*, Exchange Act Release No. 35998, 1995 SEC LEXIS 1824, at *16 (July 20, 1995); *Keith L. DeSanto*, 52 S.E.C. 316, 319 n.5 (1995), *aff'd*, 1996 U.S. App. LEXIS 5304 (2d Cir. 1996).

[33] *Dist. Bus. Conduct Comm. v. Gibbs*, 1991 NASD Discip. LEXIS 93, at *29 (NBCC Aug. 26, 1991), *aff'd*, 51 S.E.C. 482 (1993), *aff'd*, 25 F.3d 1056 (10th Cir. 1994) (table).

[34] OHO Order 06-21 (CAF040079) (Mar. 8, 2006), at 2, http://www.finra.org/sites/default/files/OHODecision/p017562.pdf.

2. Enforcement shall ensure that each witness has, at the time of testifying, copies of all exhibits that relate to his direct testimony, as well as any exhibits designated for possible use on cross-examination. Enforcement must provide any such exhibits on or before May 4, 2018.

3. Enforcement shall ensure that the witnesses will be available for a block of time when it is reasonable to expect that they may be called to testify, so that the hearing is not unduly disrupted if the testimony of prior witnesses is longer or shorter than expected.

4. Enforcement shall investigate the possibility of using Skype or other video services for the testimony of the witnesses.

I. Motion for Clawback

Enforcement seeks the return of an inadvertently produced document. Respondents have offered the document as proposed exhibit RX-177. Respondents do not dispute that the document is a confidential, internal document inadvertently produced among the hundreds of thousands of documents produced by Enforcement in this case. But Respondents argue that the document is exculpatory, so it was due to be produced anyway and bears on significant disputed issues in the case. While I have not yet ruled on Enforcement's prehearing objection to the document, I find that Respondents have adequately demonstrated that the document may bear on disputed issues regarding their scienter. Accordingly, the motion for clawback is denied.

J. Respondents' Motion for Continuance

Respondents move for a one-week adjournment of the hearing. Requests to postpone a disciplinary hearing are governed by FINRA Rule 9222, which addresses extensions of time, postponements, and adjournments. "A hearing shall begin at the time and place ordered," the Rule states in relevant part, "unless the Hearing Officer, for good cause shown, . . . postpones the commencement of the hearing . . ."[35] Any postponement "shall not exceed 28 days unless the Hearing Officer states on the record or provides by written order the reasons a longer period is necessary."[36] The primary purpose of the Rule is "to ensure prompt resolution of [FINRA's] disciplinary proceedings, which is necessary to enable [FINRA] to carry out its regulatory mandate and fulfill its responsibilities in protecting the public interest."[37]

The Rule specifies five factors I must consider when deciding whether to grant a postponement: (1) the length of the proceeding to date; (2) the number of postponements, adjournments, or extensions already granted; (3) the stage of the proceedings at the time of the request; (4) potential harm to the investing public if an extension of time, adjournment, or

[35] FINRA Rule 9222(b).

[36] FINRA Rule 9222(b)(2).

[37] *Dep't of Enforcement v. Respondent 1 and Respondent 2*, No. 2009019108901, 2013 FINRA Discip. LEXIS 48, at *12–13 (Jan. 2, 2013) (quoting OHO Order 06-28 (CLI050007) (internal quotation marks omitted)).

postponement is granted; and (5) such other matters as justice may require. "A Hearing Officer has broad discretion to grant or deny an extension of time, taking into account the particular facts and circumstances."[38]

After considering the facts and circumstances, including the five relevant factors in Rule 9222, I conclude that Respondents have not shown good cause for a one-week postponement of the hearing. This proceeding has now been pending since September 2017. I have previously granted an adjournment requested by Respondents. And significantly, the proceeding is on the eve of hearing with logistical and other arrangements already made. Moreover, the matter involves serious charges involving fraud and deception which, if proven, represent a substantial threat to the investing public.

Respondents claim that they need more time to review recently produced materials. But Enforcement asserts, without substantial contradiction, that the materials constitute only approximately 500 documents, many of which are irrelevant scheduling emails. Respondents claim to have discovered newly produced materials "that will require follow-up and may require further intervention of the Hearing Officer." But I have already ordered Enforcement to produce all third party documents; it is not clear what "further investigation" there is to be had when all materials have already been produced.

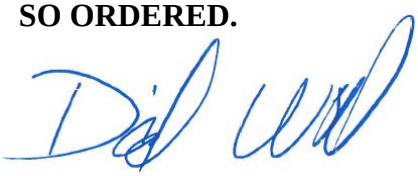
That said, because Respondents represented during the final pre-hearing conference that a shorter continuance of three days will permit them to accomplish any needed follow-up, and a shorter continuance will be less disruptive to the fair and orderly disposition of this case, I will grant Respondents a brief continuance. The hearing will begin on May 10, 2018. To the extent Respondents intend to offer additional evidence, this evidence should be disclosed to Enforcement by May 7, 2018.

[38] *Respondent 1 and Respondent 2*, 2013 FINRA Discip. LEXIS 48, at *13 (citing OHO Order 00-22, at 6 and n.5 (C01000003) ("It is well established that in [FINRA] proceedings, as in judicial proceedings, the adjudicator has broad discretion in determining whether a request for a continuance should be granted, based upon the particular facts and circumstances presented.")).

K. Order

Enforcement's Motion to Permit Expert Testimony is **GRANTED**, and Respondents' Motion for Leave to Offer Expert Testimony is **GRANTED in part and DENIED in part**, as set forth above. Respondents' Motion *in Limine* Concerning Enforcement's Expert is **DENIED**. Enforcement's Objections to Proposed Witnesses and Exhibits is **GRANTED in part and DENIED in part**, as set forth above. Enforcement's Motion to Strike Amended Witness List And List of Expert Testimony is **GRANTED**. Respondents' Objections to Complainant's Exhibit and Witness Lists is **DENIED**. Enforcement's Motion for Sequestration Order and Motion for Telephone Testimony are **GRANTED** as set forth above. Enforcement's Motion for Clawback is **DENIED**. Respondents' Motion for Continuance is **GRANTED in part**.

SO ORDERED.



David Williams
Hearing Officer

Dated: May 2, 2018

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