FINANCIAL INDUSTRY REGULATORY AUTHORITY OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. CHARLES EDWIN TAYLOR (CRD No. 443066), JODI OYLER PADGETT (CRD No. 1828918), and JOHN LODGE FARMER (CRD No. 5354041), Respondents.	Disciplinary Proceeding No. 2017053382401 Hearing Officer–DW

ORDER ON ENFORCEMENT'S OBJECTIONS TO RESPONDENTS' PROPOSED WITNESS LIST AND EXHIBITS AND MOTION *IN LIMINE*

I. Background

In this matter the Department of Enforcement charges Respondents with engaging in an undisclosed and unapproved outside business activity involving sales of precious metal bullion coins, in violation of NASD Rules 3030 and 2110, and FINRA Rules 3270 and 2010. Enforcement also charges Respondent Taylor with failing to reasonably supervise Respondents Padgett and Farmer regarding the alleged outside business activity, in violation of NASD Rules 3010(b) and 2110, and FINRA Rules 3110(b) and 2010. Respondents deny the charges.

In advance of the hearing, Enforcement moved *in limine* to exclude from evidence at the hearing two affidavits that Respondents submitted as proposed exhibits. According to Enforcement, the affidavits are inadmissible because they are unauthenticated, irrelevant to any disputed material issue, and unreliable hearsay. Enforcement also objects to Respondents' designation of unidentified witnesses on its witness list. The witness list discloses that Respondents may call "[a]ny witness" necessary for rebuttal or impeachment. Respondents oppose the motion.

II. Discussion

FINRA Rule 9263 provides that "[t]he Hearing Officer shall receive relevant evidence, and may exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial."[1] A Hearing Officer maintains broad discretion to decide whether proffered documents or testimony are relevant and should be admitted into evidence.[2] 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 disfavored and should be granted "only if the evidence at issue 'is clearly inadmissible for any purpose.'"[3]

A. Enforcement's Motion to Exclude Affidavits

Proposed Exhibits RX-1 and RX-2 are notarized affidavits from two individuals employed by the firm through which Respondents engaged in the undisclosed outside business. Both generally describe the business relationship between Respondents and the firm. Enforcement maintains that I should exclude both affidavits from evidence for several reasons.

Enforcement's first objection is that "Respondents do not provide a foundation for authenticating them, including when and who drafted them."[4] It asserts that it attempted to contact the affiants and both declined to provide details regarding the drafting or preparation of the affidavits. Respondents argue in response that a notarized affidavit "speaks for itself" and no further authentication of the two affidavits here is required.[5] Respondents are correct. Affidavits are generally admissible evidence in this forum.[6] Even under the Federal Rules of Evidence,[7] a notarized affidavit is a self-authenticating document that requires "no extrinsic evidence of authenticity in order to be admitted."[8] Enforcement's authenticity objection is without merit.

---

[1] FINRA Rule 9263(a); *accord* OHO Order 16-04 (2012033393401) (Feb. 3, 2016), at 2, finra.org/sites/default/filesOHO_Order16-04_2012033393401.pdf.

[2] *Dep't of Enforcement v. Brookstone Securities, Inc.*, No. 2007011413501, 2015 FINRA Discip. LEXIS 3, at *110 (NAC Apr. 16, 2015) ("The Hearing Officer is granted broad discretion to accept or reject evidence under this rule.").

[3] 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).

[4] Enforcement's Motion at 2.

[5] Respondents' Opposition at 2.

[6] *Dep't of Enforcement v. Sears*, No. C07050042, 2007 FINRA Discip. LEXIS 1, at *8, 13-14 (NAC Sept. 24, 2007), *aff'd in part*, Exchange Act Release No. 58075, 2008 SEC LEXIS 1521 (July 1, 2008).

[7] While the Federal Rules of Evidence are not applicable to FINRA proceedings, those rules and the case law applying them provide helpful guidance. *Dep't of Enforcement v. North*, No. 2010025087302, 2017 FINRA Discip. LEXIS 7, at *35-36 (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] Fed. R. Evidence Rule 902(8). Respondents also contend that "[a] signed sworn statement is valid pursuant to 28 USC § 1746." Respondents' Opposition at 2. But that provision requires a declarant to declare "under penalty of perjury that the foregoing is true and correct." The affidavits here contain no such declaration.

Enforcement also maintains that the affidavits are irrelevant because they discuss conduct that pre-dates the time period relevant to this case.[9] But Respondents assert that this history is relevant, and provides a "reasonable and harmless" explanation for their subsequent conduct during the time periods at issue.[10] At this stage, I agree with Respondents that at least some evidence "that provides context for the conduct at issue is reasonable."[11] Accordingly, I cannot say that the affidavit evidence will be irrelevant for all purposes and decline to exclude the evidence on that basis.

Enforcement finally contends that the affidavits are unreliable. Enforcement says that the affidavits contain a number of objectively false statements and admission of the evidence would unfairly prejudice it because of its inability to cross-examine the affiants on the misstatements. Again, it is well established in this forum that hearsay statements like the two affidavits at issue "may be admitted in evidence and, in an appropriate case, may form the basis for findings of fact."[12] Of course, hearsay affidavits are not always admissible without qualification. "In determining whether to rely on hearsay evidence, it is necessary to evaluate its probative value and reliability, and the fairness of its use."[13] Hearsay affidavits, even if given under oath, "should not be admitted if they are unreliable."[14] In making this assessment, "[t]he factors to consider include the possible bias of the declarant, the type of hearsay at issue, whether the statements are signed and sworn to rather than anonymous, oral or unsworn, whether the statements are contradicted by direct testimony, whether the declarant was available to testify, and whether the hearsay is corroborated."[15]

Enforcement's claim that the affidavits are unreliable focuses in large part on certain statements in the documents that it regards as inconsistent with other evidence. Enforcement says that certain dates referred to in the affidavits, related to when Respondents either associated with their firm or did their work with the outside business, are inconsistent with the actual dates. According to Enforcement, the affidavits also report the existence of certain written seller agreements that Respondent Taylor attested did not exist. The affidavits reflect the affiants' clear recollection of events in a manner inconsistent with the more foggy recollection apparent in their conversations with Enforcement.[16]

Although the inconsistencies identified by Enforcement are not insignificant, they do not appear to be overwhelming. And determining the reliability of the affidavits as a whole is particularly difficult without the context of the complete record. Enforcement makes no showing that the declarants have any particular bias or motive to fabricate. Indeed, Respondents suggest that the cited

---

[9] Enforcement's Motion at 3.

[10] Respondents' Opposition at 3.

[11] OHO 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.

[12] *Dep't of Enforcement v. Puma*, No. C 10000122, 2002 NASD Discip. LEXIS 46, at *13 (OHO Dec. 20, 2002), quoting *Charles D. Tom*, 50 S.E.C. 1142, 1145 (1992).

[13] *Tom*, 50 S.E.C. at 1145.

[14] OHO Order 00-24 (C3A990071) (Aug. 28, 2000), at 7, http://www.finra.org/sites/default/files/OHODecision/p007930_0_0.pdf.

[15] *Tom*, 50 S.E.C. at 1145.

[16] Enforcement's Motion at 5-8.

inconsistencies among the various dates described in the affidavits may simply be a product of the fact that the events memorialized took place decades ago, and memories fade. The statements are signed and sworn. And although Enforcement faults Respondents for making no effort to secure the in-person testimony of the affiants, Respondents state that both are of relatively advanced age and in less than perfect health, and that it would be unduly burdensome to require them to present in-person testimony as to evidence that comprises "just a small part" of their case.[17]

At this stage, I cannot say that the affidavits are so unreliable that Respondents should not have an opportunity to present the evidence.[18] Although Enforcement claims that it will be prejudiced by its inability to cross-examine the affiants, it never explains why it believes it will be unable to present at the hearing just the sort of contrary evidence it relies upon now to inform the hearing panel's consideration of the evidence.[19] Accordingly, Enforcement's motion to strike the affidavits will be denied at this time, without prejudice to Enforcement's opportunity to renew its application at the hearing in the context of a more complete record.

B. Objection to Witness List

Enforcement also objects to Respondents' designation of witnesses. On their witness list, Respondents disclose that they may call "[a]ny witness" necessary for rebuttal or impeachment. Enforcement objects to Respondents calling any rebuttal or impeachment witness at the hearing without a showing of good cause, presumably including a showing of why Respondents could not reasonably identify such witnesses before the hearing.[20]

According to Respondents, they "have no way of knowing or predicting if any inaccurate or misleading information will be presented through the testimony of Enforcement's witnesses," so impeachment or rebuttal witnesses are "practically speaking, unable to be identified in advance."[21]

Because Enforcement's objection at this point is to unidentified witnesses that Respondents may never call, there appears no present relief to be granted. Therefore, this aspect of the motion will also be denied. That said, the rules of this forum anticipate and expect both sides to have notice and a fair opportunity to respond to evidence presented at the hearing. Early disclosure of all evidence and witnesses each party "intends to present at the hearing" is required.[22] To that end, the Scheduling Order entered in this matter requires all evidence —even exhibits relevant only to impeachment—

---

[17] In any event, it is undisputed that neither affiant will testify. So this circumstance is different than that presented in OHO Order 16-13, where I denied the use of affidavit testimony as to affiant who would also provide live testimony. Because the affiants here will not testify, their affidavits presumably represent the only evidence of their testimony.

[18] *Dennis J. Malouf*, 2014 SEC LEXIS 3533, at *3 (Sept. 23, 2014) ("Whether [hearsay] testimony is reliable or not must be evaluated in light of the entire record, and the correct procedure is to admit the testimony first and then weigh its reliability").

[19] *Edgar B. Alacan*, 57 S.E.C. 715, 731 (July 6, 2004) (no unfairness in receiving hearsay evidence where opposing party was provided "ample notice" prior to hearing of offering party's intent to rely upon the evidence).

[20] Enforcement's Motion at 8.

[21] Respondents' Opposition at 5.

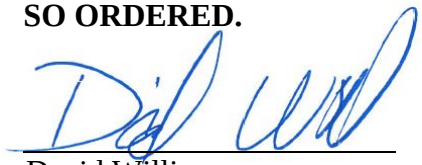
[22] FINRA Rule 9261(a).

disclosed in advance.[23] Evidence or witnesses not so disclosed will be received only upon a showing of good cause.[24] In this context, my determination of good cause will be informed by the extent to which the need for an undisclosed witness or evidence offered by either side was genuinely unforeseen at the time of prehearing submissions.

III. Conclusion

For the reasons explained above, Enforcement's Motion is **DENIED**.

SO ORDERED.



David Williams
Hearing Officer

Dated: May 14, 2019

Copies to:

Dochtor Kennedy, Esq. (via email and first-class mail)
Frances Menzer, Esq. (via email)
Adeline Liu, Esq. (via email and first-class mail)
Eric Hansen, Esq. (via email)
Richard Chin, Esq. (via email)
Brody W. Weichbrodt, Esq. (via email)
Andrew Cattell, Esq. (via email)
Lara C. Thyagarajan, Esq. (via email)

[23] January 16, 2019 Scheduling Order at 9.

[24] FINRA Rule 9261(c).