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FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. SPARTAN CAPITAL SECURITIES, LLC (CRD No. 146251), JOHN D. LOWRY (CRD No. 4336146), and KIM M. MONCHIK (CRD No. 2528972), Respondents.	Disciplinary Proceeding No. 2019061528001 Hearing Officer–MJD

ORDER DENYING THE PARTIES' MOTIONS *IN LIMINE*

I. Introduction

On June 30, 2022, the Department of Enforcement and Respondents Spartan Capital Securities, LLC, John D. Lowry, and Kim M. Monchik each filed a motion *in limine*. Enforcement seeks to exclude a survey of securities industry practices that Respondents commissioned concerning disclosures of customer arbitrations by broker-dealer senior executives on a Uniform Application for Securities Industry Registration or Transfer (Form U4). Respondents want to strike the transcript of an on-the-record investigative interview ("OTR") of a former Spartan Chief Compliance Officer ("CCO") who likely will not appear at the hearing to provide testimony.

For the reasons set forth below, I deny both motions.

II. Background

Enforcement's Complaint contains three causes of action. The first cause alleges that in more than 200 instances Spartan willfully failed to file, or to timely file, amendments to the Forms U4 and Uniform Termination Notices for Securities Industry Registration (Form U5) of

about 70 current or former registered representatives. According to the Complaint, Spartan failed to file, or to timely file, 162 amendments relating to the filing and resolution of certain customer arbitrations in which the registered representatives were named as a respondent or as a subject of the claim. In ten instances, Spartan allegedly failed to disclose other customer complaints that were not the subject of an arbitration. In 51 other instances, Spartan allegedly did not disclose certain financial events, including bankruptcies and unsatisfied judgments or liens, against its registered representatives.[1] The Complaint charges Spartan with violating Article V, Sections 2(c) and 3(b) of FINRA's By-Laws and FINRA Rules 1122 and 2010.

Causes two and three, respectively, allege that Lowry, Spartan's Chief Executive Officer ("CEO") and sole owner, and Monchik, who at different times during the relevant period served as Spartan's CCO, willfully failed to amend, or to timely amend, their own Forms U4 to disclose the filing or resolution of an arbitration claim in which they were a named respondent or the subject of the claim.[2] Enforcement alleges that Lowry failed to make required disclosures in 38 instances and that Monchik failed to do so in 15 instances. The Complaint charges that Lowry and Monchik violated Article V, Section 2(c) of FINRA's By-Laws and FINRA Rules 1122 and 2010.[3]

In their Answer, Respondents deny the allegations. Their main defense to the charges in causes two and three is that Lowry and Monchik were not obligated to amend their own Forms U4 for the arbitration claims that Enforcement cites based on guidance they received from FINRA staff and advice given by securities professionals and counsel.[4] Respondents also state that they did not act willfully, as the Complaint alleges, but instead acted in good faith because they reasonably relied on the advice of the Firm's CCOs and outside counsel and on their discussions with FINRA staff.[5] Finally, Respondents claim that their actions were consistent with industry practice.[6]

III. Legal Standard for Motions *In Limine*

FINRA Rule 9263 states that the Hearing Officer shall receive relevant evidence, and may exclude all 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."[7] FINRA Rule 9235(a)(2) authorizes Hearing Officers "to do all things necessary and appropriate

[1] Complaint ("Compl.") ¶¶ 100-103.

[2] Compl. ¶¶ 108-118, 123-133.

[3] Compl. ¶¶ 116, 120, 131, 135.

[4] Answer ¶¶ 45-46, 54-55, 58, 111, 126. *See also* Answer 22-24 (counterstatement of facts).

[5] Answer 19-21 (Fourth, Fifth, Sixth, Eleventh, and Eighteenth Separate Defenses) and 22-24 (counterstatement of facts).

[6] Answer 19-20 (Seventh and Tenth Separate Defenses).

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

to discharge [their] duties," which includes "regulating the course of the hearing." Rule 401 of the Federal Rules of Evidence, which does not apply in FINRA proceedings but is consulted for guidance, 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."[8]

Motions *in limine* may serve an important function in litigation because they prevent the presentation of irrelevant and immaterial information at a hearing.[9] However, FINRA Hearing Officers generally disfavor motions *in limine* seeking to exclude broad categories of evidence and testimony.[10] A Hearing Officer "should grant such motions only if the evidence at issue 'is clearly inadmissible for any purpose.'"[11] "Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context."[12]

IV. The Lucosky Survey

A. Enforcement's Motion *In Limine* to Exclude Lucosky Survey of Industry Disclosure Practices

Enforcement's motion *in limine* seeks to preclude Respondents from introducing into evidence an industry survey prepared by the law firm Lucosky Brookman (the "Lucosky Survey"), dated June 30, 2020, concerning Form U4 reporting activity of nearly 1,000 registered broker-dealers, including any testimony regarding the survey.[13] Respondents hired attorney Joseph Lucosky to review Forms U4 associated with New York-based firms over a ten-year period, from 2010 to 2019. Respondents asked Lucosky to identify instances in which (i) a firm executive disclosed on a Form U4 an arbitration in which he or she was named as a respondent, and (ii) the executive allegedly failed to supervise a registered representative engaged in sales practice violations. Respondents attached a copy of the Lucosky survey to their Wells submissions. According to Enforcement, of the multiple arbitrations that were the subject of the

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[8] Fed. R. Evid. 401. *See also* OHO Order 12-03 (2010024889501) (July 6, 2012), at 2, https://www.finra.org/sites/default/files/OHODecision/p150733_0_0_0.pdf.

[9] OHO Order 16-04 (2012033393401) (Feb. 3, 2016), at 2, https://www.finra.org/sites/default/files/OHOOrder16-04_2012033393401.pdf.

[10] *See* OHO Order 16-04, at 2.

[11] *Id.* (citing *Miller UK Ltd. v. Caterpillar, Inc.*, No. 10-cv-03770, 2015 U.S. Dist. LEXIS 156874, at *5 (N.D. Ill. Nov. 20, 2015)); *see also* OHO Order 16-18 (2014043020901) (May 24, 2016), at 2, https://www.finra.org/sites/default/files/OHO-Order-16-18-2014043020901.pdf.

[12] *WEL Cos. v. Haldex Brake Prods. Corp.*, 467 F.Supp. 3d 545, 555 (S.D. Ohio 2020) (citing *Ind. Ins. Co. v. GE*, 326 F. Supp 2d. 844, 846 (N.D. Ohio 2004)).

[13] Enforcement's Motion *In Limine* to Exclude the Lucosky Survey and Preclude Any Evidence Related Thereto ("Enforcement Mot.") 1. Respondents identified the Lucosky Survey as RX-22. It is also attached to Respondents' Wells submissions (RX-34 and RX-38) as Exhibit 5.

potential charges contained in FINRA's Wells notices to Respondents, only one was filed after June 30, 2020.[14]

Enforcement claims that Respondents never consulted Lucosky or his firm for advice about their Form U4 disclosure obligations. When asked during the investigation to identify law firms they relied on for legal advice about Form U4 reporting obligations, Respondents named six lawyers and five law firms, but not Lucosky or his firm.[15] As a consequence, Enforcement argues that the Lucosky Survey is not relevant to Respondents' advice of counsel defense, which they asserted as one of their affirmative defenses in their Answer. Even though *scienter* is not an element of a violation of FINRA Rule 1122, Enforcement acknowledges that reliance on the advice of counsel may be relevant to sanctions and to whether Respondents acted willfully.[16] But because during the investigation Respondents did not identify Lucosky and his firm as attorneys they relied on for advice, Enforcement claims that the Lucosky Survey is not relevant to a finding of willfulness or to determining appropriate sanctions should the hearing panel find Respondents liable.[17]

Enforcement also disputes that the Lucosky Survey is relevant to other affirmative defenses asserted by Respondents, one of which is that other broker-dealers do not disclose arbitrations naming executive officers on the officers' Forms U4. Enforcement argues that a respondent cannot excuse misconduct by showing that others engaged in similar misconduct.[18] For similar reasons, Enforcement argues that the Lucosky Survey is also not relevant to another of Respondents' arguments, also set forth as an affirmative defense in their Answer—that FINRA has engaged in selective prosecution because they were singled out for an enforcement action while others similarly situated have not been charged.[19] Enforcement notes that FINRA has ample discretion in deciding against whom to proceed with an enforcement action.[20]

B. Respondents' Opposition to Enforcement's Motion *In Limine*

Respondents state they will present testimony at the hearing that will support their position that the Lucosky Survey was "one of the continuing legal opinions" that Respondents relied on for their defense that certain arbitrations were not reportable.[21] They also argue that

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[14] Enforcement Mot. 2.

[15] Enforcement Mot. 3, 5.

[16] Enforcement Mot. 5-6.

[17] Enforcement Mot. 6.

[18] Enforcement Mot. 7 (citing OHO Order 07-29 (2005001919501) (July 13, 2007), at 8, https://www.finra.org/sites/default/files/OHODecision/p037091_0_0_0_0.pdf).

[19] Enforcement Mot. 8.

[20] Enforcement Mot. 8 (citing *Schellenbach v SEC*, 989 F.2d 907, 912 (7th Cir. 1993) ("[FINRA] disciplinary proceedings are treated as an exercise in prosecutorial discretion.")).

[21] Respondents' Opposition to DOE's Motion to Suppress the Lucosky Report ("Resp't Opp'n") 1.

while the Lucosky Survey "was not utilized as a basis for not reporting most of the arbitrations" it was the basis for Respondents' "continued decision" to not report certain arbitrations after the initial arbitration filing.[22]

Respondents also argue that the Lucosky Survey, because it provides an overview of how other broker-dealers handle Form U4 reporting for their executives, is relevant to whether they acted willfully. Respondents claim they had a good faith belief they were not required to report the arbitrations citing as grounds that they were named solely because they were the CEO or CCO of Spartan, not because they were the broker or supervisor directly involved in the transactions that resulted in the arbitrations.[23]

C. Discussion

Enforcement's argument relies in part on a finding in my May 26, 2022 Order denying Respondents' motion for leave to present expert testimony. In that Order, I determined that the Lucosky Survey would not be helpful to the hearing panel *as an expert report*. I did so chiefly because I found that the hearing panel possesses sufficient expertise in this subject area and because Respondents stated they intended to use it to show how FINRA applies its rules and regulations in other cases.[24] In my Order, I did not exclude the possibility that the Lucosky Survey may be admissible for purposes other than as an expert report.

I find that Respondents have established that the Lucosky Survey may be relevant to their defense that they acted in good faith, and not willfully, in connection with their determination that Lowry and Monchik were not obligated to disclose certain arbitrations. Thus I cannot, at this stage of the proceedings, state that the Lucosky Survey will not be relevant for any purpose and I decline to exclude it on that basis. Under the circumstances, a ruling on the admissibility of the Lucosky Survey should be made at the hearing in the context of a fuller record.

Enforcement's motion *in limine* is **DENIED**.

V. Transcript of Andrew Heath's On-the-Record Interview

A. Respondents' Motion *In Limine*

Enforcement took the OTR of former Spartan CCO Andrew Heath on February 17, 2021. The 299-page transcript of Heath's testimony is Enforcement's proposed exhibit CX-23A. Both parties identified Heath as a potential witness in their witness lists. Both parties have

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[22] Resp't Opp'n 2. Respondents also incorrectly claim that the Lucosky Survey is already part of the record because it was attached to the Wells submission. *Id.* Documents are not automatically made part of the evidentiary record to be considered by a hearing panel simply because they make up a part of a respondent's Wells submission.

[23] Resp't Opp'n 2-3.

[24] Enforcement Mot. 5. *See also* Order Denying Respondents' Motion for Leave to Offer Expert Testimony (May 26, 2022) 6-7.

acknowledged that Heath is in ill health and likely will not appear at the hearing.[25] Enforcement and Respondents have said that they have been unsuccessful in contacting Heath recently.[26]

Respondents' chief objection to admitting the Heath transcript is that Heath left Spartan after a confrontation with Monchik that resulted from charges that he had engaged in inappropriate conduct in the office. According to Respondents' motion, Heath was reprimanded and then left Spartan as a result. Respondents thus claim that Heath's testimony is unreliable. They dispute an assertion Heath made during the OTR that Monchik solely controlled the compliance department even during the time Heath served as Spartan's CCO. Respondents argue that Heath made this false assertion in order to protect himself because he believed he was being investigated by FINRA.[27]

Respondents insist that admitting Heath's transcript would prevent Respondents from challenging his "false and otherwise prejudicial statements."[28] Respondents ask that they be given a fair opportunity to confront and cross examine Heath's testimony if the transcript is admitted. To that end, Respondents claim that they would need to present multiple rebuttal witnesses "just for sole purpose of attacking the credibility of [Heath's] testimony."[29]

Shortly after filing their motion *in limine*, Respondents filed a supplement to the motion. In the supplement, they state that the Heath transcript provides no testimony about Form U4 disclosure issues. Instead, the transcript focuses on potential sales practice violations that Respondents state are not relevant to this proceeding and on Heath's purported lack of authority to decide compliance issues when he was CCO. Respondents then identify six Spartan employees they assert they would have to call to testify at the hearing to controvert Heath's testimony, including a recorded video allegedly of Heath's improper behavior in the office.[30]

B. Enforcement's Opposition to Respondents' Motion *In Limine* to Exclude Heath Transcript

Enforcement first notes that Heath is no longer under FINRA's jurisdiction. He has not been registered with FINRA since serving as Spartan's CCO from February 2017 to February 2019. It notes that Heath's testimony was taken in connection with another matter that does not

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[25] Respondents state that Heath "has been suffering from a severe physical condition" resulting from his time in military service. The condition was apparent while Heath was employed with Spartan. Respondents believe Heath's condition has gotten significantly worse since leaving Spartan. Respondents' *In Limine* Motion to Preclude the On The Record ("OTR") Transcript of Andrew Heath ("Resp't Mot.") 3.

[26] *See* Transcript of Pre-Hearing Conference (June 10, 2022) 28-29.

[27] Resp't Mot. 3.

[28] Resp't Mot. 4.

[29] *Id.*

[30] Respondents' Supplemental Submission in Further Support of *In Limine* Motion to Preclude the On-The-Record ("OTR") Transcript of Andrew Heath, 1-2.

concern Form U4 or Form U5 disclosures.[31] However, a portion of Heath's testimony, according to Enforcement, is relevant to this proceeding because it concerns Monchik's role in Spartan's compliance matters. Enforcement represents that the parts of the transcript that do not relate to Monchik's role will not be offered into evidence.[32]

C. Discussion

The Case Management and Scheduling Order in this proceeding provides that the admissibility of a prior sworn statement depends on the unavailability of the declarant:

> The Hearing Officer will entertain—but not automatically grant—a motion to admit a non-party's prior sworn investigative . . . statement . . . if the evidence is admissible under Rule 9263(a) and . . . (a) the witness is unavailable to testify in person, by telephone, or by videoconference at the hearing . . . ; (b) the Hearing Officer determines in the interests of justice that it would be appropriate to allow the use of the prior sworn testimony . . . [33]

Respondents claim that Enforcement has not sufficiently demonstrated that Heath is unavailable. However, Respondents' own observations describing Heath's serious medical condition persuade me that Heath is not available to participate in the hearing. Respondents' also claim that they have had no chance to cross-examine Heath. But just because a party disputes a witness's testimony is not grounds for excluding the testimony. Furthermore, in FINRA disciplinary proceedings, hearsay statements "may be admitted in evidence and, in an appropriate case, may form the basis for findings of fact."[34]

I find that at this stage of the proceeding Enforcement has shown that at least some portions of the Heath transcript may be relevant to compliance practices at Spartan and Monchik's purported authority.[35] I have considered that Heath testified under oath[36] and that Monchik and Lowry will have an opportunity at the hearing to challenge Heath's testimony. Although Respondents assert they will be prejudiced by their inability to cross-examine Heath, they do not adequately explain why they believe they will be unable to present contrary evidence to inform the hearing panel's consideration of the evidence.

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[31] Enforcement's Opposition to Respondents' *In Limine* Motion to Preclude the OTR Transcript of Andrew Heath ("Enforcement Opp'n") 1-2.

[32] Enforcement Opp'n 2-4 n.7.

[33] Case Management and Scheduling Order (Dec. 14, 2021), ¶ VIII(B)(1)(a) and (b).

[34] *Dep't of Enforcement v. Puma*, No. C 10000122, 2002 NASD Discip. LEXIS 46, at *13 (OHO Dec. 20, 2002) (quoting *Charles D. Tom*, Exchange Act Release No. 31081, 1992 SEC LEXIS 2000, at *6-7 (Aug. 24, 1992).

[35] Enforcement represents that it intends to use only a portion of the Heath transcript. Enforcement Opp'n 2-4 n.7.

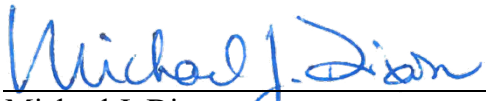
[36] Respondents also assert that because Heath took "extensive pain killers" he may have testified under a "mental impairment." Resp't Mot. 3. Enforcement states that at the OTR Heath testified that he was not taking any medicine that would interfere with his ability to testify truthfully. Enforcement Opp'n 5-6 (citing CX-23A at 4).

Accordingly, Respondents' motion *in limine* to strike the Heath transcript is **DENIED**, without prejudice to their opportunity to renew their opposition at the hearing in the context of a more complete record.

VI. Order

For the foregoing reasons, Enforcement's Motion *In Limine* is **DENIED** and Respondents' Motion *In Limine* is **DENIED**.

SO ORDERED.



Michael J. Dixon
Hearing Officer

Dated: July 14, 2022

Copies to:

David A. Schrader, Esq. (via email)
John R. Baraniak, Jr., Esq. (via email)
Jeffrey E. Baldwin, Esq. (via email)
Sathish Dhandayutham, Esq. (via email)
David Monachino, Esq. (via email)
Jennifer L. Crawford, Esq. (via email)