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FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. Respondent.	Disciplinary Proceeding No. 2007007255603 Hearing Officer—Andrew H. Perkins

ORDER FOLLOWING FINAL PRE-HEARING CONFERENCE AND GRANTING, IN PART, ENFORCEMENT'S MOTION TO PRECLUDE TESTIMONY AND EXHIBITS

The Hearing Officer held a Final Pre-Hearing Conference ("Conference") in this disciplinary proceeding by conference call on November 11, 2009.

During the Conference, the parties argued Enforcement's Motion to Preclude Testimony and Exhibits, which Enforcement filed with the Office of Hearing Officers on October 30, 2009. Respondent did not file a written opposition to the motion. The deadline for filing any such opposition was November 6, 2009.[1]

Enforcement moved to preclude Respondent from introducing documents and the testimony of witnesses at the hearing because it failed to serve and file a pre-hearing brief, a list of proposed witnesses, a list of proposed exhibits, and copies of proposed exhibits by October 20, 2009, the deadline set in the scheduling order for filing pre-hearing submissions. Although Respondent did not provide an excuse for its failure to comply with the scheduling order and the Initial Case Management Order, which required the parties to file pre-hearing submissions,

[1] *See* Order Granting Complainant's Mot. to Modify Pre-Hr'g Schedule (Oct. 2, 2009).

nonetheless, Respondent's counsel stated at the Conference that she wanted to present evidence on two issues regarding sanctions. First, that FINRA engaged in selective prosecution in bringing this case. Second, that the Respondent firm is under new management and therefore sanctions, or significant sanctions, are not appropriate.

For the reasons discussed below, the Hearing Officer grants Enforcement's motion, in part.

Discussion

A motion in limine, such as Enforcement's motion in this case, is a request for guidance concerning an evidentiary question.[2] "[Courts] may give such guidance by issuing a preliminary ruling regarding admissibility. Trial judges are authorized to rule on motions in limine pursuant to their authority to manage trials, even though such rulings are not explicitly authorized by the Federal Rules of Evidence." [3] Similarly, Hearing Officers are authorized to rule on motions in limine pursuant to their authority to manage disciplinary proceedings pursuant to FINRA Rule 9235(a).[4]

In ruling on motions in limine, Hearing Officers generally apply the standards used in the federal courts. Courts have ruled that while judges have broad discretion when ruling on motions in limine, judges should exclude evidence only when it is inadmissible on all potential grounds.[5] "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

[2] *See CDX Liquidating Trust v. Venrock Assoc.*, 2009 U.S. Dist. LEXIS 63546, at *6 (July 23, 2009).

[3] *CDX Liquidating Trust*, 2009 U.S. Dist. LEXIS 63546, at *6-7 (citing *Luce v. United States*, 469 U.S. 38, 41 n.4 (1984)).

[4] Rule 9235(a) provides in relevant part that Hearing Officers "shall have authority to do all things necessary and appropriate to discharge his or her duties," including the authority to resolve all evidentiary matters.

[5] *E.g., Jenkins v. Chrysler Motors Corp.*, 316 F.3d 663, 664 (7th Cir. 2002).

context."[6] "Thus, the party moving to exclude evidence in limine has the burden of establishing the evidence is not admissible for any purpose."[7]

"Denial of a motion in limine does not mean all evidence contemplated by the motion will be admitted at trial. Rather, denial means the court cannot determine whether the evidence in question should be excluded outside of the trial context."[8] Further, pre-trial rulings on such motions are not final. In the exercise of sound discretion, a judge may alter a previous ruling "even if nothing unexpected happens at trial."[9]

Applying these general standards to the present case, the Hearing Officer concludes that Enforcement has demonstrated sufficient reason to preclude Respondent from submitting evidence in support of its claim of selective enforcement. In summary, Respondent wants to compare this proceeding with the treatment that other and larger firms received for alleged net capital violations. But Respondent has not shown the relevance of this proffered evidence to the question of sanctions, the only remaining issue to be determined at the hearing after the Hearing Panel granted Enforcement's motion for summary disposition on the issue of liability. Moreover, FINRA's decision not to take enforcement action against other wrongdoers, if true, would constitute an exercise of FINRA's prosecutorial and regulatory discretion, as is its decision to initiate an investigation of the Respondent firm and to commence disciplinary proceedings

[6] *CDX Liquidating Trust*, 2009 U.S. Dist. LEXIS 63546, at *7 (quoting *Hawthorne Partners v. AT&T Techs., Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993)).

[7] *CDX Liquidating Trust*, 2009 U.S. Dist. LEXIS 63546, at *7 (citing *Robenhorst v. Dematic Corp.*, 2008 U.S. Dist. LEXIS 32842, at *3 (N.D. Ill. Apr. 22, 2008)).

[8] *Id.* at *7-8 (citations omitted).

[9] *Id.* (quoting *Luce v. United States*, 469 U.S. 41-42).

concerning its alleged misconduct.[10] Accordingly, the Hearing Officer grants Enforcement's motion to preclude Respondent from introducing evidence of selective enforcement.

As to Respondent's second argument that its change in management after the wrongdoing in question is a mitigating factor that the Hearing Panel can consider when it determines sanctions in this case. Respondent argued that it should be permitted to prove that it replaced the managers responsible for the misconduct charged in this case by referring to unspecified "public records." Respondent argued that the Hearing Panel could take official notice of the documents despite the fact that it had not identified them as proposed exhibits or provided them to Enforcement.

Upon consideration of the parties' arguments, the Hearing Officer deferred ruling on Enforcement's motion to preclude Respondent from using the unidentified "public records" at the hearing and directed Respondent to provide Enforcement with copies of the documents and then to confer with Enforcement regarding a possible stipulation of facts. The Hearing Officer will rule of the balance of Enforcement's motion at the hearing if the parties cannot stipulate to the facts Respondent seeks to present to the Hearing Panel regarding its change in management since the violations occurred.

IT IS SO ORDERED.

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Andrew H. Perkins
Hearing Officer

Dated: November 11, 2009

[10] *Dep't of Enforcement v. Epstein*, No. C9B040098, 2007 FINRA Discip. LEXIS 18, at *77-78 & n.37 (Dec. 20, 2007 ("To succeed on a claim of improper selective prosecution, [Respondent] must establish that he was singled out for discipline while others who were similarly situated were not, and that this action was motivated by arbitrary or unjust considerations such as race, religion, or the desire to prevent the exercise of a constitutionally-protected right.).