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FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. RICHARD A. MCCOLLAM (CRD No. 1419048), Respondent.	Disciplinary Proceeding No. 2012035284301 Hearing Officer–MJD

ORDER GRANTING ENFORCEMENT'S MOTION TO STRIKE RESPONDENT'S POST-HEARING AFFIDAVIT AND EXHIBITS AND ORDERING RESPONDENT TO RESUBMIT POST-HEARING BRIEF

I. Introduction

The hearing in this matter was held on November 30 and December 1, 2016. On February 27, 2017, the parties filed their post-hearing briefs. The same day, Respondent Richard A. McCollam submitted an Affidavit containing 16 enumerated paragraphs, together with three emails. Respondent also attached to his post-hearing brief a letter dated December 15, 2016, from the State of New York attorney grievance committee labeled Exhibit 1. The letter acknowledges receipt of Respondent's written complaint about the attorney who, he claims, was responsible for the alleged failure to make required disclosures on his Uniform Application for Securities Industry Registration or Transfer (Form U4). Respondent did not file a motion to reopen the record to offer his Affidavit, emails, or the New York attorney grievance committee letter.

On March 16, 2017, the Department of Enforcement filed a motion to strike Respondent's Affidavit and the email exhibits. (Enforcement did not move to strike the attorney grievance committee letter.) On March 24, 2017, Respondent filed an opposition to the motion.

For the reasons discussed below, I grant Enforcement's motion to strike Respondent's Affidavit and attached emails. I also *sua sponte* strike the New York grievance committee letter. I further strike references in Respondent's post-hearing brief to the Affidavit, the emails, and the grievance committee letter, and order him to resubmit the post-hearing brief without the references.

II. Background

The sole cause of the Complaint alleges that Respondent willfully failed to disclose two customer arbitration claims and seven customer complaints on his Form U4, in violation of Article V, Section 2(c) of FINRA's By-Laws and FINRA Rules 1122 and 2010. The alleged failure to disclose occurred when Respondent filed a Form U4 on January 22, 2014, in support of his application for registration of his broker-dealer, Ramcon Financial LLC.

Respondent filed an Answer generally denying the allegations of the Complaint, including that he had acted willfully when he failed to disclose the customer arbitrations and complaints on his Form U4. In Respondent's pre-hearing brief, he says any failure to make the disclosures was "inadvertent." Furthermore, because Respondent had given the attorneys handling his broker-dealer's registration application the responsibility for filing an amended Form U4 to make any necessary disclosures, he contends he did not act willfully. At the hearing, Respondent testified in support of these defenses.

III. Discussion

Enforcement moved to strike Respondent's Affidavit on the grounds that it seeks to introduce evidence that was not admitted at the hearing and purports to contain facts that are irrelevant, duplicative or contradict Respondent's own hearing testimony and admitted documentary evidence.

In his Opposition, Respondent insists that his Affidavit does not contradict his hearing testimony and "does not contain new testimony." He says it "provides clarification" on the dates he traveled to New York to meet the company handling Ramcon's broker-dealer application and his Form U4. He further states that his testimony at the hearing "covered the issues in [the] Affidavit."[1]

Under FINRA Rule 9235(a), a hearing officer has the "authority to do all things necessary and appropriate to discharge his or her duties," including reopening any hearing, upon notice to all parties, before the issuance of the hearing panel's decision. I therefore have the authority to reopen the record and admit new evidence.

Respondent, however, did not file a motion seeking leave to admit the Affidavit (including emails) and the New York grievance committee letter into the record. For this reason alone, the documents are objectionable.

I decline to admit each of the documents into the record for the following additional reasons.

[1] Respondent's Opposition, at 1-2.

A. Respondent's Affidavit

The Affidavit is at a minimum duplicative of evidence elicited at the hearing. Despite Respondent's assertion that the Affidavit does not introduce new testimony, he effectively restates in a self-serving manner the ample hearing testimony he gave on subjects he covers in the Affidavit. The Affidavit also deprives Enforcement of the ability to confront Respondent about the statements he makes in it to the extent they vary from his hearing testimony and statements contained in documents admitted into evidence.

In the Affidavit, Respondent describes purported problems he had with a supervisor at a prior member firm with which he was registered two years before the events giving rise to the Complaint. Respondent states that the supervisor and former firm were engaged in a "defamation campaign" against him and caused customers to file baseless complaints against him.[2]

He repeats his hearing testimony concerning the circumstances surrounding his retaining a company to file Ramcon's broker-dealer application with FINRA and how its staff failed to make appropriate disclosures on the Form U4 the company prepared and filed on his behalf.[3] He describes his unsuccessful efforts in 2014 and 2015 to meet with the company to discuss the Form U4 filing (after the allegedly deficient Form U4 was filed in January 2014).[4]

He also states that his former employer never sent him copies of the amended Uniform Termination Notice for Securities Industry Registration Forms (Form U5) it filed with FINRA to report customer complaints it received (that include those he allegedly failed to disclose on his Form U4).[5] Finally, Respondent asserts in the Affidavit—as he did at the hearing—that he did not act willfully and he had no motive to conceal the customer arbitrations and complaints by not disclosing them on his Form U4.[6]

Respondent testified at length at the hearing on each of these subjects. His post-hearing brief contains multiple references to his hearing testimony. The Hearing Panel therefore will rely on hearing testimony in deciding this matter.[7]

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[2] Respondent's Affidavit ("Aff.") ¶¶ 1-3.

[3] Aff. ¶¶ 4-10.

[4] Aff. ¶¶ 11-13.

[5] Aff. ¶ 15.

[6] Aff. ¶¶ 14, 16.

[7] The Affidavit is improper for another reason. It is not properly limited to statements of fact. For example, Respondent alleges that a former supervisor defamed him which led to customers filing "phony" complaints against him. He further asserts that he did not act willfully, and he had no motive to hide the customer complaints. Aff. ¶¶ 2, 14, 16. Such argumentative and conclusory statements are improper in an Affidavit. *Burch v. Regents of the Univ. of Cal.*, 433 F.Supp.2d 1110, 1119 (E.D. Cal. 2006) (in ruling on a motion for summary judgment, "statements in declarations based on speculation or improper legal conclusions, or argumentative statements, are not facts and likewise will not be considered"). *See also Talley v. Triton Health Sys., LLC*, 2016 U.S. Dist. LEXIS 119834, at *20

B. The Three Emails

Respondent attached three emails to his Affidavit. The first is from Respondent to his attorney, dated January 12, 2017, in which he provides the specific dates he traveled to New York City in 2014 and 2015 to meet with the company that filed Ramcon's broker-dealer application, and lists expenses he incurred during each trip. The second email, dated February 1, 2017, is from a Holiday Inn in New York City to Respondent confirming a reservation for February 5-7, 2017. The third email, dated February 5, 2017, is an airline's check-in reminder to Respondent for a flight later that day to New York from Los Angeles.[8]

The emails do not contain relevant evidence. They post-date the hearing of this matter and the alleged misconduct. The email Respondent sent his counsel refers to his attempts to meet with the company he alleges mishandled his Form U4 filing. These efforts occurred after January 2014 when Respondent allegedly failed to make required disclosures. The other two emails concern his efforts to meet with the company a few months ago—three years after the alleged misconduct. For these reasons, I strike the three emails.

C. The State of New York Grievance Committee Letter

Respondent attached as Exhibit 1 to his post-hearing brief a letter from the New York State grievance committee. During the hearing, I sustained Enforcement's objection to the admission of a complaint Respondent filed with the grievance committee, dated November 15, 2016 (two weeks before the hearing), and excluded it on the grounds that it was not material or relevant. For the same reason, the grievance committee's acknowledgment of receipt of the grievance also is irrelevant. Accordingly, I strike Exhibit 1 attached to Respondent's post-hearing brief.

IV. Order

For the foregoing reasons, Enforcement's motion to strike Respondent's Affidavit and emails is **GRANTED**. I also strike the State of New York grievance committee letter Respondent attached as Exhibit 1 to his post-hearing brief.

I further order that Respondent strike references in his post-hearing brief to his Affidavit, the emails, and the New York grievance committee letter as follows:

- Page 12, line 27 (specifically, the sentence beginning "Mr. McCollam's New York travel . . .") (citing the Affidavit and emails);
- Page 17, line 28, to page 18, line 2 (citing the Affidavit); and

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(N.D. Ala. 2016) ("affidavits or depositions containing conclusory arguments, as opposed to statements of fact based on personal knowledge are improper").

[8] Aff. ¶ 15.

- Page 19, line 23 through line 26 (citing the New York grievance committee letter).

Respondent shall file a revised post-hearing brief that does not contain the above-referenced text and Exhibit 1 no later than **April 14, 2017**.

SO ORDERED.

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Michael J. Dixon
Hearing Officer

Dated: April 7, 2017