This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 23-06 (2017055886402).

FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. CANTONE RESEARCH INC. (CRD No. 26314), ANTHONY J. CANTONE (CRD No. 1066139), and RAYMOND J. DEROBBIO (CRD No. 1092310), Respondents.	Disciplinary Proceeding No. 2017055886402 Hearing Officer–LOM

ORDER REJECTING RESPONDENTS' PRE-HEARING OBJECTIONS TO THE DEPARTMENT OF ENFORCEMENT'S PROPOSED WITNESSES AND DENYING RESPONDENTS' MOTION IN LIMINE

I. Nature of the Case

This proceeding involves two separate and unrelated failed municipal bond offerings, one in 2013 for the purpose of refinancing and rehabilitating a community college dormitory in Illinois, and the other in 2015 for the purpose of acquiring, rehabilitating, and operating an assisted-living facility in Alabama. Respondent Cantone Research Inc. ("CRI" or the "Firm") was the sole underwriter for both offerings. Respondents Anthony J. Cantone, the Firm's owner and CEO, and Raymond J. DeRobbio, a registered representative with the Firm, worked on the offerings and offering documents and were among the Firm's representatives who sold the bonds to retail customers, both in the offerings and in the secondary market.

The Complaint charges Respondents with various violations of the securities laws and rules of the Municipal Securities Rulemaking Board. Among other things, the Complaint alleges that Respondents sold the bonds in the two offerings and on the secondary market without a reasonable basis to believe that the bonds in either offering were a suitable investment. It further alleges that they failed to disclose material facts they knew prior to or at the time of sale, and,

with respect to the assisted-living facility, that Respondents fraudulently made false statements of material fact and omitted to disclose other material facts.

The hearing is scheduled to begin on March 6, 2023. Prior to that, the parties submitted pre-hearing briefs, proposed exhibits, and proposed witness lists.

II. Proposed Customer Testimony

The Department of Enforcement submitted a proposed witness list that included the names of ten customer witnesses. Typically, after identifying the customer, Enforcement described the subject of the customer's testimony by identifying the bond offering in which the customer invested and saying that the customer's testimony would address "suitability and misrepresentations and omissions" related to the offering, the customer's investment in the offering, and "related matters" that include "communications with CRI representatives."[1]

III. Respondents' Objections and Enforcement's Opposition

Respondents jointly object and assert that the proposed testimony is irrelevant, cumulative, and unduly prejudicial. Respondents have filed a motion in limine requesting that the customers' testimony be precluded entirely or, in the alternative, limited. Respondents assert that no more than two customers should be allowed to testify and that they should be precluded from testifying about whether the alleged omissions or misrepresentations were material.

Enforcement opposes the request to preclude or limit the proposed customer testimony. It contends that precluding the testimony before the hearing provides a context would be premature. It also contends that the proposed customer testimony will serve several relevant purposes and would not be cumulative or unduly prejudicial.

IV. Discussion

FINRA Rule 9263 provides that a Hearing Officer "may exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial."[2] Hearing Officers apply this rule while exercising the broad authority granted by FINRA Rule 9235 "to do all things necessary and appropriate to discharge [their] duties," which duties include "regulating the course of the hearing." Under these rules, a Hearing Officer has "broad discretion" to admit or reject any evidence offered by a party.[3]

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[1] After filing its initial witness list, Enforcement filed an unopposed motion for leave to correct it. Some witnesses had initially been listed to testify about both offerings when in fact they invested in only one of the offerings and would have nothing to say about the other. Contemporaneously with this Order, I have issued another Order granting leave to correct the description of the customer witnesses' testimony.

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

[3] OHO Order 22-13 (2019061528001) (OHO July 14, 2022), at 2–3, *available at* https://www.finra.org/sites/default/files/2022-08/22-13-Order-Denying-the-Parties-Motions-in-Limine.pdf. *See also Dep't of Enforcement v. Ghosh*,

Pre-hearing motions to exclude evidence are generally disfavored. Federal courts prefer to resolve questions of admissibility as they arise.[4] SEC Administrative Law Judges[5] and FINRA Hearing Officers have adopted similar views.[6] In the federal courts, the standard for granting a pre-hearing motion to exclude evidence is a high one. Such a motion should be granted only if the evidence at issue is "clearly inadmissible for any purpose,"[7] a position that FINRA Hearing Officers have also espoused.[8] Hearing Officers generally disfavor objections seeking to exclude evidence and will sustain such objections only if the challenged evidence is inadmissible for any purpose.[9] The Hearing Officer is almost always better situated during the actual hearing to assess the value and utility of evidence.[10]

Respondents here have failed to meet that high standard for precluding evidence prior to hearing. They have not demonstrated that the customers' testimony is clearly inadmissible for any purpose.

Respondents contend that the customers' testimony would be irrelevant or unnecessary on two grounds. First, they say that the Complaint alleges only misrepresentations and omissions that were made in writing. In their view, only the written material is relevant and whatever the customers discussed with Respondents about the bonds at issue is not. Second, they say that any

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No. 2016051615301, 2021 FINRA Discip. LEXIS 32, at *41 (NAC Dec. 16, 2021); *Dep't of Enforcement v. Reyes*, No. 2016051493704, 2021 FINRA Discip. LEXIS 29, at *58 (NAC Oct. 7, 2021).

[4] *Abernathy v. E. Ill. R.R.*, No. 3:15-cv-3223, 2017 U.S. Dist. LEXIS 160316, at *1 (C.D. Ill. Sept. 26, 2017), *aff'd*, 940 F.3d 982 (7th Cir. 2019); *see also Zanakis v. Scanreco*, No. 1:18-cv-21813-UU, 2019 U.S. Dist. LEXIS 90088, at *3 (S.D. Fla. 2019) (same).

[5] *See Christopher M. Gibson*, Admin. Proc. Rulings Release No. 4141, 2016 SEC LEXIS 3379, at *4 (Sept. 9, 2016) ("[A] party filing a motion in limine faces an uphill battle because the Commission has not been enthusiastic about orders by administrative law judges granting motions in limine."). As the Chief Administrative Law Judge explained, "The Commission's long standing position is that its 'law judges should be inclusive in making evidentiary determinations,' quoting the proposition 'if in doubt, let it in.'" *Id.* (quoting *City of Anaheim*, Exchange Act Release No. 42140, 1999 SEC LEXIS 2421, at *4 n.7 (Nov. 16, 1999)).

[6] OHO Order 16-18 (2014043020901) (May 24, 2016), at 2, *available at* http://www.finra.org/sites/default/files/OHO-Order-16-18-2014043020901.pdf ("FINRA Hearing Officers generally disfavor motions in limine seeking to exclude broad categories of evidence and testimony.") (citing OHO Order 16-04 (2012033393401) (Feb. 3, 2016), at 2, *available at* http://www.finra.org/sites/default/files/OHO_Order16-04_2012033393401.pdf).

[7] *Abernathy*, 2017 U.S. Dist. LEXIS 160316, at *1 (quoting *Tzoumis v. Tempel Steel Co.*, 168 F. Supp. 2d 871, 873 (N.D. Ill. 2001)); *see also Zanakis*, 2019 U.S. Dist. LEXIS 90088, at *3 ("A motion in limine should only exclude evidence when it is clearly inadmissible on all potential grounds.").

[8] OHO Order 18-09 (2014039775501) (May 2, 2018), at 4, *available at* http://www.finra.org/sites/default/files/OHO_Order_18-09_2014039775501.pdf; OHO Order 16-18, at 2 ("A Hearing Officer should grant such motions only if the evidence at issue is clearly inadmissible for any purpose.") (quoting OHO Order 16-04, at 2 (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))).

[9] OHO Order 20-09 (2016048837401) (July 2, 2020), at 3, *available at* http://www.finra.org/sites/default/files/2020-10/OHO_Order_20-09_2016048837401.pdf.

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

testimony about the importance of the alleged misrepresentations and omissions to the customers is not relevant to the issue of materiality because materiality is analyzed on an objective basis.

Federal Rule of Evidence 401 provides the definition of relevant evidence used by the federal courts and generally applied in FINRA proceedings.[11] FRE 401 provides that evidence is relevant if (i) the evidence has any tendency to make a fact more or less probable than it would be without the evidence and (ii) the fact is of consequence in determining the action. As Enforcement points out, a fact can be of consequence even if it does not directly establish or disprove a claim at issue. Some evidence is necessary to provide background and context.[12]

In this case customer testimony would not simply be background and context. Customer testimony could be central to understanding what Respondents said and did in selling the bonds in the initial offerings and later in the secondary market. For example, it would be relevant if Respondents reiterated the alleged written misrepresentations in their oral recommendations of the bonds or counseled customers that the misrepresentations were not important. It might also be relevant if customers inquired about matters omitted from the written materials and Respondents failed to disclose material information known to them in response. In connection with the secondary market transactions, Respondents may have learned additional material information after the initial offerings that should have been disclosed in the secondary market transactions. Such information also would bear on the suitability of the secondary market transactions. With respect to the fraud charge, customer testimony could bear on Respondents' knowledge and intent. And, contrary to Respondents' assertion that customer testimony is irrelevant to the analysis of materiality, it is important for the Hearing Panel to understand the total mix of information available to the Firm's investors to evaluate whether, in those circumstances, a reasonable investor would find certain alleged misrepresentations or omissions material.[13] Customer testimony also could be relevant to sanctions if violations are found, since customer harm is a consideration in the sanctions analysis. The customers' testimony certainly should not be precluded as inadmissible for any purpose.

Additionally, Respondents argue that the testimony of ten witnesses would be duplicative or repetitious. That is an assertion that is difficult if not impossible to assess before the hearing has even begun. Furthermore, Enforcement provided in its opposition some specific details distinguishing the customers and their expected testimony from one another. Two customers engaged in secondary market purchases while others bought bonds in the initial offerings. Some customers dealt with Respondent DeRobbio; another customer dealt with the Firm's municipal principal, who is not a Respondent in this matter but who is expected to testify. At least one

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[11] Although the Federal Rules of Evidence do not govern in a FINRA proceeding like this, they may be considered as instructive guidance. *See*, *e.g.*, OHO Order 22-13 (2019061528001) (July 14, 2022), at 3 & n.8, *available at* https://www.finra.org/sites/default/files/2022-08/22-13-Order-Denying-the-Parties-Motions-in-Limine.pdf.

[12] *United States v. Gonzalez*, 110 F.3d 936, 942 (2d Cir. 1997).

[13] *SEC v. Morgan Keegan & Co.*, 678 F.3d 1233, 1247–50 (11th Cir. 2012) (specifically ruling that a misstatement or omission by an individual broker to an individual investor may be included in the analysis of the "total mix" of information available to a hypothetical reasonable investor for purposes of determining materiality).

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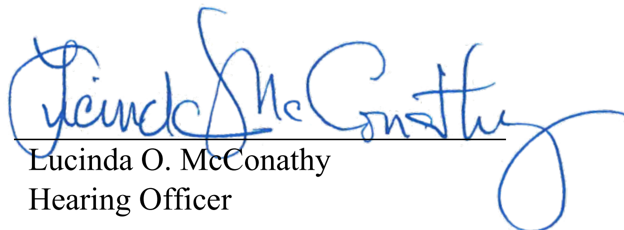
customer bought bonds in both offerings at issue, but others bought bonds in only one offering. The customers also have varying levels of sophistication and experience with the Firm, which may be relevant to the suitability analysis and to sanctions. In sum, it cannot be presumed in advance of the hearing that the customers' testimony will be duplicative or repetitious.

Finally, Respondents argue that allowing customers to testify about their "disappointment" in the performance of the investments at issue would be unduly prejudicial to them. They cite a case they describe as disallowing fraud by hindsight.[14] This argument is premature and speculative. We do not know what the customers may testify.

V. Order

Accordingly, I overrule Respondents' objections and **DENY** their motion to preclude or limit customer testimony in advance of the hearing. This ruling is without prejudice to any appropriate objections made at the hearing.

SO ORDERED.



Lucinda O. McConathy
Hearing Officer

Dated: February 21, 2023

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[14] *Ponsa-Robell v. Santander Sec. LLC*, 35 F.4th 26, 33 (1st Cir. 2002).