

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

MARK SAM KOLTA
(CRD No. 5324620),

Respondent.

Disciplinary Proceeding
No. 2018057297102

Hearing Officer–MJD

**ORDER DENYING RESPONDENT’S MOTION FOR EXCEPTION TO
FINRA RULE 9242 AND ORDERING HIM TO COMPLY
WITH THE CASE MANAGEMENT AND SCHEDULING ORDER**

The hearing in this disciplinary proceeding is scheduled to begin on February 5, 2024. On December 11, 2023, I held a status conference with the parties, whose pre-hearing submissions were scheduled to be filed on December 15, 2023. Minutes before the status conference began, Respondent filed a Motion for Exception to Rule 9242, or in the Alternative, an Extension to the Deadline [to file pre-hearing submissions] (“Motion”).

After hearing argument from the parties, I orally denied the Motion. On December 15, the parties filed their pre-hearing submissions with the Office of Hearing Officers. Respondent’s pre-hearing submissions do not comply with the requirements of the Case Management and Scheduling Order (“CMSO”) I issued on March 23, 2023. I therefore reject Respondent’s pre-hearing submissions and again deny the Motion. I grant Respondent leave to re-file (and serve on the Department of Enforcement) his pre-hearing submissions, including his exhibit list and proposed hearing exhibits, in a manner compliant with the CMSO no later than **January 3, 2024**.

I. Respondent’s Motion

The Motion notes that the parties had exchanged preliminary exhibit and witness lists, as required by the CMSO. In the exchange, Respondent did not identify to Enforcement any exhibits that he intends to introduce at the hearing, other than stating “Complainant’s exhibits.” Also, without specifying any particular exhibit, he listed the following two broad categories: “[a]ny documents provided [by Enforcement] via discovery” and “[a]ny other exhibits that may

become relevant during the course of the hearing.”¹ Respondent also did not identify any witnesses in his exchange with Enforcement or in the Motion, other than stating “Complainant’s witnesses.” He also listed as potential witnesses, without identifying anyone by name, “[a]ny person who is named or referenced in the documents provided [by Enforcement] via discovery” and “[a]ny other witness who may become relevant during the course of the hearing.”

In the Motion, Respondent states that he has “not processed through the massive amount of documents” Enforcement produced in discovery. He argues that Enforcement would not be prejudiced by his failure to identify documents and “by a presentation of its own information back to it” because “[t]he documents are Enforcement’s documents.”² Respondent says he seeks an exemption from the requirements of FINRA Rule 9242 because of the volume of discovery.

II. Applicable Law

FINRA Rule 9242(a) empowers a hearing officer,

in the exercise of his or her discretion, [to] order a Party to furnish to all other Parties and the ... Extended Hearing Panel, such information as deemed appropriate, including any or all of the following:

- (1) an outline or narrative summary of a Party’s case or defense;
- (2) the legal theories upon which a Party shall rely;
- (3) a list and copies of documents that a Party intends to introduce at the hearing;
- (4) a list of witnesses who shall testify on a Party’s behalf, including the witnesses’ names, occupations, addresses, and a brief summary of their expected testimony.

In accordance with Rule 9242, the CMSO establishes standards for pre-hearing submissions in this case. It provides Respondent with ample notice of the requirements for exhibit lists and hearing exhibits. Concerning exhibit lists, the CMSO states:

Exhibit lists shall include all documents that a party expects to use at the hearing for any purpose, including documents that are relevant only for impeachment purposes. Exhibit lists shall include a description of each exhibit (e.g., email, letter, chart, hand-written note, etc.), the date (if the document is dated), the

¹ Respondent’s Motion for Exception to Rule 9242, or in the Alternative, an Extension to the Deadline (Dec. 11, 2023) (“Mot.”) 1.

² Mot. 1-2.

author (if identifiable from the face of the document), and a statement of the purpose for which the exhibit will be offered in evidence.

When a party files its pre-hearing submissions with the Office of Hearing Officers, it should send a duplicate copy of its exhibit list in Microsoft Word format to OHOCASEFILINGS@FINRA.ORG.³

Regarding proposed hearing exhibits themselves, the CMSO directs the parties to submit properly paginated and numbered copies of the exhibits (electronic and hard copy) they intend to introduce:

The parties shall submit to the Office of Hearing Officers, both electronically and in hard copy (paper), all exhibits they intend to introduce at the hearing. Exhibits in both formats shall be pre-marked for identification in the manner outlined in Part (D)(1) below.

For electronic filing, the Case Administrator will provide the parties with instructions for uploading their exhibits to a secure file sharing platform. The parties shall also serve each other electronically by the deadline set for filing pre-hearing submissions.

After filing their exhibits electronically, the parties shall also prepare hard copy sets of their exhibits in three-ring binders that do not exceed three inches in width. Each exhibit binder shall be labeled on the cover and the spine, indicating the submitting party and the range of exhibits included in the binder. The Case Administrator will review the parties' electronic exhibits and instruct the parties to send their hard copy sets of exhibits to either the Office of Hearing Officers or the hearing venue.⁴

The CMSO details how parties are to number and paginate their proposed exhibits, as follows:

The parties must sequentially number and label all exhibits to identify the party offering the document and the exhibit number. For multiple page documents, each page shall be marked with the exhibit number followed by the page number and the total number of pages in the exhibit. For example, if Enforcement's first exhibit is a ten-page document, it should be marked as follows: CX-1, Page 1 of 10; CX-1, Page 2 of 10, etc. Similarly, if Respondent's first exhibit is a five-page document, it should be marked RX-1, Page 1 of 5; RX-1, Page 2 of 5, etc. Joint

³ CMSO, at 13.

⁴ CMSO, at 13-14. The CMSO also provides: "The parties must ensure that each exhibit is legible. When it is necessary to offer a poor quality copy, the offering party must note on the exhibit that it is the 'best available copy.'" CMSO, at 14.

exhibits shall be labeled and numbered in a similar manner using the prefix “JX.” Enforcement shall mark and submit joint exhibits.⁵

III. Respondent Failed to Comply with the CMSO

On December 15, 2023, four days after the status conference, the parties filed their pre-hearing submissions with the Office of Hearing Officers. Enforcement’s witness and exhibit lists complied with the CMSO, and its hearing exhibits were properly numbered and paginated. Respondent on the other hand failed to comply with the CMSO.

A. Respondent’s Exhibit List

Respondent did not file a proper exhibit list, and he did not file electronic or hard copies of any exhibits. In lieu of preparing a compliant exhibit list and submitting the exhibits themselves, he submitted “the list of documents in their native, originally-produced form as received exactly from Enforcement” during discovery.⁶ Respondent states that he is “under the assumption that the format of the list of documents produced to Respondent was an acceptable means of listing, referencing, and formatting the documents.”⁷ He adds that since Enforcement is the source of the documents, “there is no negative prejudice as to access or substance of the documents.”⁸

The exhibit list that Respondent submitted is in fact a collection of Excel spreadsheets, each of which contains tens of thousands of line entries, each presumably representing a potential document, which are themselves inadequately identified, much less legible. In effect, Respondent has submitted for his exhibit list all the documents Enforcement produced in discovery without properly identifying, paginating, numbering, and submitting them.

The purpose of the filing requirements included in the CMSO is to ensure that the Office of Hearing Officers maintains a complete and accurate record of the proceeding⁹ and that the three-person Hearing Panel has access to all of the parties’ proposed exhibits. Respondent claims that his submission is sufficient because Enforcement has access to the documents produced during discovery. His statement disregards that the actual adjudicators who will decide the outcome of the case—the three-person Hearing Panel—does not have access to Enforcement’s discovery production. The Hearing Panel will have access only to documents properly paginated, numbered, and filed with the Office of Hearing Officers. Accordingly, because Respondent has not complied with the requirements of the CMSO for filing proposed exhibits and an exhibit list,

⁵ CMSO, at 14.

⁶ Respondent’s Exhibit List, at 3 (Dec. 15, 2023).

⁷ *Id.*

⁸ *Id.*

⁹ *See* FINRA Rule 9235(a) (stating that the Hearing Officer shall have authority to do all things necessary and appropriate to create and maintain the official record of the disciplinary proceeding).

I will not allow him to offer any exhibits into the record at the hearing (except for exhibits that Enforcement has properly marked and identified), unless he re-files his proposed exhibits and exhibit list in a manner that complies with the CMSO.

B. Respondent's Witness List

The CMSO requires parties to file a witness list that includes the following information for all prospective witnesses: full name, home city and state, occupation, and a summary of the substance and scope of their anticipated testimony.¹⁰

Respondent filed a witness list on December 15 in which he lists all of Enforcement's witnesses and identifies for the first time by name three former customers. He also identifies "any other witness who may become relevant during the course of the hearing for purposes of impeachment." He further states that he "reserves the right" to call as a witness "individuals not listed above."¹¹ This could potentially encompass dozens of witnesses available for Respondent to call at the hearing—all of whom would be unknown to Enforcement.

Respondent's witness list is overbroad and also fails to comply with the CMSO. Although Respondent has properly identified some witness, I maintain the authority to refuse to allow any witness to testify at the hearing not specifically identified by name in Respondent's witness list.

IV. Order

For the foregoing reasons, Respondent's Motion to be exempted from the requirements of FINRA Rule 9242 is **DENIED**.

Furthermore, I reject Respondent's "exhibit list." If Respondent seeks to offer any exhibits into the record at the hearing, including exhibits he intends to use for impeachment purposes¹² (other than exhibits properly identified by Enforcement), I order him to re-file and serve on Enforcement his pre-hearing submissions, including his exhibit list and proposed hearing exhibits, in a manner compliant with the CMSO no later than **January 3, 2024**. As required by the CMSO, the exhibit list must include a brief description of each proposed exhibit, the date, the author, and a statement of the purpose for which the exhibit will be offered as evidence. He shall also file and serve on Enforcement the proposed hearing exhibits in proper electronic format and in hard copy in sets of three-ring binders. The exhibits shall be numbered and paginated as described in the CMSO.

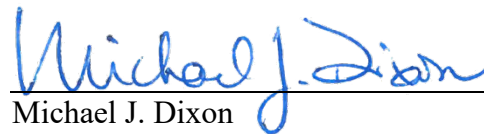
¹⁰ CMSO, at 13.

¹¹ Respondent's Witness List, at 2.

¹² The CMSO obligates parties to identify documents even if they are relevant only for impeachment purposes. CMSO, at 13.

If Respondent fails to comply with the CMSO, he will be precluded from offering any exhibits of his own at the hearing, other than exhibits included in Enforcement's pre-hearing submissions.¹³

SO ORDERED.


Michael J. Dixon
Hearing Officer

Dated: December 20, 2023

Copies to:

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¹³ See OHO Order 07-01 (E3A20050065) (Feb. 1, 2007), at 2, https://www.finra.org/sites/default/files/OHODecision/p018950_0_0.pdf (ordering that if respondent fails to file an exhibit list and hearing exhibits that comply with the CMSO, he will be precluded from offering exhibits at the hearing); OHO Order 19-09 (2017052760001) (Mar. 13, 2019), at 2, https://www.finra.org/sites/default/files/2019-10/OHO_Order_19-09_2017052760001.pdf (ordering respondent to submit revised exhibit list and hearing exhibits that comply with CMSO).