

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

LESLIE GEORGE MARKUS, JR.
(CRD No. 2688964),

Respondent.

Disciplinary Proceeding
No. 2015047069701

Hearing Officer—CC

**ORDER GRANTING IN PART AND DENYING IN PART ENFORCEMENT'S MOTION
IN LIMINE AND TO STRIKE PORTIONS OF RESPONDENT'S
PRE-HEARING BRIEF AND RELATED EVIDENCE**

I. Introduction

On March 23, 2018, FINRA's Department of Enforcement filed a motion to strike portions of Respondent's pre-hearing brief and related evidence. On March 30, 2018, Respondent opposed Enforcement's motion.

On March 23, 2018, the parties also filed objections to each other's exhibits. In this Order, I rule only on Enforcement's motion to strike. I defer until the hearing ruling on the parties' objections to the opposing party's exhibits.

II. Background

The Complaint contains three causes of action. Cause one alleges that, while associated with Ameriprise Financial Services, Inc. on August 4, 2015, Respondent Leslie George Markus, Jr., executed 11 unauthorized mutual fund purchases in the account of Ameriprise customer JW, in violation of FINRA Rule 2010. Cause two alleges that, on August 4, 2015, Markus falsely stated on Ameriprise's client note software system that he had spoken to JW about the 11 mutual fund purchases and that JW had authorized the purchases before Markus executed them. Cause two also alleges that, on August 5, 2015, while reversing the mutual fund purchases in JW's account, Markus stated falsely in Ameriprise's client note software that he understood he had a "mandate" from JW to execute the purchases, in violation of FINRA Rule 2010. Cause three alleges that, in an October 2015 response to a FINRA Rule 8210 request for information, Markus falsely stated that he possessed time and price discretion in JW's account, in violation of FINRA Rules 8210 and 2010.

Markus admits he entered 11 unauthorized mutual fund purchases in JW's account and falsely stated facts related to the purchases in Ameriprise's client note software. He denies he answered falsely in response to a FINRA Rule 8210 request for information and argues that several significant factors mitigate the seriousness of his misconduct. He also argues he should be credited for quickly admitting his misconduct to his branch manager and accepting responsibility for his actions.

III. Discussion

Enforcement's motion requests I strike from Respondent's pre-hearing brief and proffered testimonial and documentary evidence all references to (1) the parties' pre-hearing settlement negotiations; and (2) the collateral consequences of Markus' termination by Ameriprise.¹

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."² Rule 401 of the Federal Rules of Evidence, which does not apply in FINRA proceedings but may be instructive, 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."³ Pre-hearing motions to exclude evidence are generally disfavored and should be granted "only if the evidence at issue is clearly inadmissible for any purpose."⁴

A. Enforcement's Motion to Strike References to Settlement Negotiations

Enforcement argues that Markus' pre-hearing brief, several of his proposed exhibits, and, as proffered, portions of his anticipated testimony contain irrelevant references to the parties' unsuccessful settlement negotiations and should be struck.

Respondent opposes Enforcement's motion and contends that his references to the parties' settlement negotiations are meant to demonstrate that Enforcement did not believe Markus' alleged Rule 8210 violation was serious enough to even merit mention in its initial Wells Notice. Markus also contends that the parties' settlement negotiations support his argument that Enforcement added the third cause of action (the alleged Rule 8210 violation) to

¹ The Complaint alleges, and Markus admits in his Answer, that Ameriprise terminated Markus' association with the firm in September 2015.

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

³ Fed. R. Evid. 401. OHO Order 12-03 (2010024889501) (July 6, 2012), at 2, http://www.finra.org/sites/default/files/OHODecision/p150733_0_0_0.pdf.

⁴ OHO Order 16-18 (2014043020901) (May 24, 2016), at 2, <http://www.finra.org/sites/default/files/OHO-Order-16-18-2014043020901.pdf> (quotation omitted); OHO Order 16-04 (2012033393401) (Feb. 3, 2016), at 2, http://www.finra.org/sites/default/files/OHO_Order16-04_2012033393401_0.pdf.

the Complaint in order to justify a harsher sanction and in retaliation for Markus' earlier refusal to settle on Enforcement's terms.

"Settlement negotiations and materials generally are not relevant to a FINRA disciplinary proceeding" and therefore should not be admitted into evidence.⁵ Respondent provides no justification for departing from that precedent here. Enforcement, like a prosecutor, has broad discretion to determine whether to pursue disciplinary charges and bears the burden of proving by a preponderance of the evidence the allegations it chooses to include in a complaint. Thus, Enforcement's determination to allege additional violations after the parties' settlement negotiations failed and after the initial Wells Notice is not a factor to support lesser sanctions and does not prove staff bias.⁶ "This is not to suggest that [Enforcement] may pursue disciplinary actions . . . with unfettered discrimination. Decisions to institute FINRA disciplinary proceedings may not be premised upon an unjustified standard such as race, religion, or other arbitrary classification."⁷ Here, Markus has not alleged this type of selective prosecution, and the parties' settlement negotiations do not support such a claim.⁸

Accordingly, Respondent is ordered to refile his pre-hearing brief with the following excerpt deleted:

- On page one, "It is, therefore, mystifying why the Department of Enforcement ("Department") initially sought to suspend Mr. Markus for a year for unauthorized trading or why – after Markus rejected that excessive and disproportionate penalty – the Department upped the ante"

⁵ *Dep't of Enforcement v. Paratore*, No. 2005002570601, 2008 FINRA Discip. LEXIS 1, at *13 n.9 (NAC Mar. 7, 2008); *see also* FINRA Rule 9270(h) (stating that rejected settlement offers and proposed orders of acceptance of settlement offers are not part of the record of any proceeding against a respondent); FINRA Rule 9270(j) (stating that rejected offers of settlement may not be introduced into evidence in connection with allegations in a pending complaint); OHO Order 11-11 (2007010398802) (June 8, 2011), at 3-4, <http://www.finra.org/web/groups/industry/@ip/@enf/@adj/documents/ohodecisions/p229422.pdf> (holding that proposed settlements and settlement negotiations generally are not admissible in FINRA disciplinary proceedings).

⁶ *See Richard A. Neaton*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719, at *36 (Oct. 20, 2011) ("We have previously held that [FINRA staff settlement] negotiations are not relevant to our determination of sanctions in a contested proceeding."); *North Woodward Fin. Corp.*, Exchange Act Release No. 60505, 2009 SEC LEXIS 2796, at *22 n.29 (Aug. 14, 2009) (rejecting argument that proceedings were unfair based on allegation that Enforcement threatened to seek higher sanctions if respondent did not accept the settlement offered); *Dep't of Enforcement v. Evansen*, No. 2010023724601, 2014 FINRA Discip. LEXIS 10, at *38-42 (NAC June 3, 2014) (rejecting as a defense respondent's claim that Enforcement acted with improper motives), *aff'd*, Exchange Act Release No. 75531, 2015 SEC LEXIS 3080 (July 27, 2015); *Dep't of Enforcement v. Sathianathan*, No. C9B030076, 2006 NASD Discip. LEXIS 3, at *51 (NAC Feb. 21, 2006) (rejecting as a defense respondent's claim of Enforcement bias), *aff'd*, Exchange Act Release No. 54722, 2006 SEC LEXIS 2572 (Nov. 8, 2006).

⁷ *Evensen*, 2014 FINRA Discip. LEXIS 10, at *40-41.

⁸ *See Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *53 (Jan. 30, 2009) (holding that, to establish a claim of selective prosecution, the respondent must demonstrate that he was unfairly singled out for prosecution based on improper consideration such as race, religion, or the desire to prevent the exercise of a constitutionally protected right); *John B. Busacca*, Exchange Act Release No. 63312, 2010 SEC LEXIS 3787, at *51 (Nov. 12, 2010) (same).

Respondent is further ordered to strike the following excerpts from his proposed exhibits:

- From proposed exhibit RX-2, on page one, “You separately extended to me a settlement proposal that included a suspension of one year and a \$5,000 fine.”
- From proposed exhibit RX-2, on page four, “Based on all these circumstances, as well as the types of penalties the staff has agreed to in the past, Mr. Markus believes that a \$5,000 fine and a three-week suspension would be far more reasonable and appropriate than what the staff has proposed.”
- From proposed exhibit RX-3, on page one, “and the one year you had offered Mr. Markus.”
- From proposed exhibit RX-3, on page two, “If the punishment in those cases ranged from ten to forty-five days and you are insisting on 10-12 months,” and “not the 10-12 months you are seeking.”

Enforcement may, during the hearing, object to Markus’ testimony on the grounds that it is inconsistent with this Order.⁹

Markus is ordered to file an amended brief and three sets of redacted pages for his proposed exhibits on or before Friday, April 6, 2018.

B. Enforcement’s Motion to Strike References to the Collateral Consequences of Respondent’s Misconduct and Related Evidence

Enforcement argues that the collateral consequences of Markus’ termination from Ameriprise are not mitigating and requests that I order Markus to strike from his pre-hearing brief and proposed exhibits such references. Markus argues that this information demonstrates that he has already paid a significant price for his misconduct to the point that recidivism will never be an issue and that this should be considered mitigating as to sanctions.

The Securities and Exchange Commission has made clear that the collateral consequences of an individual’s misconduct are not a mitigating factor as to sanctions.¹⁰

⁹ Respondent’s proposed exhibits also contain references to sanctions imposed in in other settled matters. Although I do not require Respondent to strike those references from his proposed exhibits, I note nonetheless that sanctions imposed in settled matters are not relevant to our consideration of sanctions in this matter. “It is well established that ‘comparisons to settled cases are inappropriate because respondents who offer to settle may properly receive lesser sanctions than they otherwise might have.’” *KCD Fin., Inc.*, Exchange Act Release No. 80340, 2017 SEC LEXIS 986, at *47 (Mar. 29, 2017) (citations omitted); *see also Dep’t of Enforcement v. Taboada*, No. 2012034719701, 2017 FINRA Discip. LEXIS 29, at *29 n.35 (NAC July 24, 2017), *appeal docketed*, No. 3-18138 (SEC Aug. 23, 2017). My failure to order Respondent to strike references to settlements in other cases should not be understood as my admitting these documents into evidence. I will determine which of the parties’ proposed exhibits are accepted into evidence at the hearing.

¹⁰ *See Keith D. Geary*, Exchange Act Release No. 80322, 2017 SEC LEXIS 995, at *44 (Mar. 28, 2017) (rejecting as mitigating collateral consequence of inability to pay a fine if suspended), *appeal docketed*, No. 17-9522 (10th Cir.

FINRA's Sanction Guidelines state that where a member firm has terminated a respondent based on the same conduct at issue in a subsequent disciplinary proceeding, Adjudicators should consider whether the respondent has demonstrated that the termination qualifies for any mitigation of sanctions and that the respondent bears the burden of proving that the firm's termination of the respondent has materially reduced the likelihood of misconduct in the future.¹¹ The Guidelines also state that Adjudicators may find that there is no guarantee of changed behavior and that "how long a respondent takes to regain employment, loss of salary, and other impacts of an employment termination are merely collateral consequences of being terminated and should not be considered as mitigating by Adjudicators."¹²

Respondent's pre-hearing brief properly cites to FINRA's Sanction Guidelines. The Hearing Panel will closely follow the recommendations and directives included in the Guidelines and, if it finds violations as alleged, impose sanctions consistent with the Guidelines. I deny Enforcement's motion to strike the portions of Respondent's brief that refer to the collateral consequences of Markus' conduct because the Hearing Panel is capable of following the Guidelines without striking particular phrases from Respondent's brief. The Hearing Panel will disregard and reject arguments that are not supported by applicable precedent or are inconsistent with the Sanction Guidelines.

Enforcement may, during the hearing, object to Markus' testimony if it relates in a manner inconsistent with FINRA's Sanction Guidelines to the collateral consequences of Ameriprise's termination of Markus.

IV. Conclusion

For the reasons stated, Enforcement's Motion *In Limine* and to strike portions of Respondent's pre-hearing brief is granted in part and denied in part as detailed above.

SO ORDERED.



Carla Carloni
Hearing Officer

Dated: April 2, 2018

May 24, 2017); *Michael Earl McCune*, Exchange Act Release No. 77375, 2016 SEC LEXIS 1026, at *35-36 (Mar. 15, 2016) (rejecting as mitigating collateral consequence of difficulty finding another job in the securities industry), *aff'd*, 672 F. App'x 865 (10th Cir. 2016); *Denise M. Olson*, Exchange Act Release No. 75838, 2015 SEC LEXIS 3629, at *19 (Sept. 3, 2015) (rejecting as mitigating collateral consequences of unemployment and reduced earnings).

¹¹ See FINRA Sanction Guidelines at 5 (General Principle No. 7), http://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf.

¹² *Id.*

Copies to: Matthew M. Ryan, Esq. (*via first-class mail and email*)
Richard A. Levan, Esq. (*via first-class mail and email*)
Ian J. McLoughlin, Esq. (*via email*)
Jon-Jorge Aras, Esq. (*via email*)
Jeffrey D. Pariser, Esq. (*via email*)