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FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. RESPONDENT, Respondent.	Disciplinary Proceeding No. 2014043020901 Hearing Officer—CC

ORDER RULING ON WITNESS OBJECTIONS

I. Introduction

On April 22, 2016, FINRA's Department of Enforcement ("Enforcement") filed a motion to strike and objections to certain of Respondent's proposed witnesses and exhibits. On April 22, 2016, Respondent filed objections to one of Enforcement's proposed witnesses and one of its proposed exhibits.

On May 2, 2016, the parties participated in a prehearing conference and presented argument on their evidentiary objections. In a May 3, 2016 Order, I denied Enforcement's motion to strike Respondent's proposed exhibits and deferred ruling (until the hearing) on whether Respondent's and Enforcement's proposed exhibits will be accepted into evidence.

On May 17, 2016, the parties presented argument on witness objections.

II. Background

The Complaint contains two causes of action. Cause one alleges that on October 2, 2014, Respondent, formerly an equity research analyst with Citigroup Global Markets Inc. ("CGMI"), selectively disclosed to analyst, NN that medical device company Medtronic, Inc. ("Medtronic") intended to issue a press release the following morning to confirm that it would proceed with a merger with Covidien plc. ("Covidien").[1] Cause one alleges that the disclosure was material and non-public and that Respondent had not previously disclosed it in published reports. Cause one further alleges that Respondent's disclosure violated FINRA Rule 2010 by breaching the duties

[1] At the time, CGMI hedge fund client Citadel LLC employed NN.

imposed in CGMI's policies and procedures and failing to observe high standards of commercial honor and just and equitable principles of trade.

Cause two alleges that on October 4, 2014, Respondent contacted NN, advised him of a CGMI investigation of Respondent, and asked NN to delete a voice mail message that Respondent left for him regarding the merger press release referenced in cause one. Cause two alleges that Respondent knew or should have known the voice mail message could potentially serve as evidence in an investigation of possible rule violations and, by seeking the deletion of the voice mail message, Respondent failed to observe high standards of commercial honor and just and equitable principles of trade, in violation of FINRA Rule 2010. Respondent generally denies all allegations of wrongdoing.

III. Discussion

FINRA Hearing Officers generally disfavor motions in limine seeking to exclude broad categories of evidence and testimony.[2] A Hearing Officer "should grant such motions only if the evidence at issue 'is clearly inadmissible for any purpose.'"[3] Conversely, such motions may serve an important function because they prevent the presentation of irrelevant and immaterial information to the Hearing Panel.[4]

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."[5] The Federal Rules of Evidence, which do not apply in FINRA proceedings but may be instructive for a FINRA Hearing Officer deciding an evidentiary motion, define 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."[6]

A. Enforcement's Motion to Limit the Testimony of MW

Respondent represents that proposed witness, MW, will testify about "the Medtronic and Covidien deal," interactions with JW1 (a Medtronic employee), communications with buy-side analysts on or about October 2, 2014, and his on-the-record testimony before FINRA. Enforcement contends that it does not object to MW's testifying about whether the information

[2] *See* OHO Order 16-04 (2012033393401) (Feb. 3, 2016), at 2, http://www.finra.org/sites/default/files/OHO_Order16-04_2012033393401.pdf.

[3] *Id.* (citing *Miller UK Ltd. v. Caterpillar, Inc.*, 2015 U.S. Dist. LEXIS 156874, at *5 (N.D. Ill. Nov. 20, 2015)).

[4] *Id.*

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

[6] Fed. R. Evid. 401. OHO Order 12-03 (2010024889501) (July 6, 2012), at 2, http://www.finra.org/sites/default/files/OHODecision/p150733.pdf.

selectively disclosed by Respondent on the evening of October 2, 2014 was publicly available, but that other areas of MW's proposed testimony, such as his private communications and his opinions on the Medtronic/Covidien merger, are not relevant to this proceeding.

As stated in my March 29, 2016 Order, MW may testify regarding whether, on October 2, 2014, he reached conclusions regarding the Medtronic/Covidien merger similar to Respondent's conclusions, based on publicly available information. Additionally, MW may be allowed to offer testimony in other areas. At this time, I deny Enforcement's motion to limit the scope of MW's testimony. I defer until the hearing ruling on the admissibility of MW's testimony in other subject areas.

B. Enforcement's Motion to Limit the Testimony of CH and JW2

Respondent represents that proposed witnesses, CH and JW2, will testify about their employment with Citadel and T. Rowe Price, respectively, their interactions with Respondent, their interactions with MW, the Medtronic/Covidien merger, and their on-the-record testimony before FINRA. Enforcement does not object to their testifying about their October 2 and 3, 2014 interactions with Respondent. Enforcement argues that their testimony regarding their interactions with MW, however, is not relevant to this proceeding.

At this time, I deny Enforcement's motion to limit the scope of CH's and JW2's testimony. I defer until the hearing ruling on Enforcement's objections to CH's and JW2's testimony in specific subject areas.

C. Enforcement's Motion to Exclude Proposed Witness RJ

Respondent seeks to offer the testimony of proposed witness, RJ, on matters related to his employment with Citadel, his interactions with Respondent, his interactions with MW, the Medtronic/Covidien merger, and his on-the-record testimony before FINRA. Enforcement contends that there is no evidence and no allegations that Respondent contacted or attempted to contact RJ on October 2 or 3, 2014, and that testimony concerning RJ's interactions with Respondent at other times is not relevant to this proceeding. Additionally, Enforcement argues that RJ's testimony concerning his interactions with MW and his general impressions regarding the Medtronic/Covidien merger are equally irrelevant because they do not relate to whether, on October 2, 2014, Respondent communicated material, nonpublic information to NN regarding the Medtronic/Covidien merger and whether Respondent subsequently requested that NN delete a voice mail message.

Respondent represents that RJ's anticipated testimony will confirm that MW knew on October 2, 2014, only that Medtronic intended to issue a press release on October 3, but that he did not know the substance of the press release. Respondent contends that RJ's testimony may support JW1's and MW's testimony about their communications with each other.

I grant Enforcement's motion to strike RJ from Respondent's witness list. Respondent's proffer as to RJ's proposed testimony does not demonstrate that his testimony would make a fact

that is of consequence in this action (whether JW1 or anyone shared material non-public information with Respondent on October 2, 2014, and if so, whether Respondent shared that information with NN) more or less probable.

D. Enforcement's Motion to Exclude Proposed Witness JR

Respondent seeks to offer the testimony of proposed witness, JR, on matters related to his employment with CGMI, the business practices of CGMI analysts when communicating with customers, CGMI policies and procedures related to analysts and account clinic calls, and his interactions with Respondent. Enforcement seeks to exclude RJ as a witness because he was not Respondent's supervisor or a CGMI compliance person when the conduct at issue occurred or the CGMI policies at issue took effect. Enforcement also represents that it intends to present the testimony of CGMI compliance personnel who were responsible for CGMI's policies and procedures, as applied to Respondent and other research analysts, during the relevant period.

Respondent argues that RJ interacted with him in 2014 in a management capacity, including conducting account clinic calls, which provided analysts, such as Respondent, with instructions as to CGMI's institutional clients' preferences regarding direct contact with analysts. He argues that, regardless of whether Enforcement presents the testimony of CGMI compliance personnel, personnel from CGMI's business side are better suited to discuss how CGMI put its policies into effect.

As stated in my April 4, 2016 Order, I do not find RJ's proffered testimony to be relevant to the matters at issue in this case. The pertinent issues under cause one are whether JW1 or anyone shared material non-public information about the Medtronic press release and merger with Respondent on October 2, 2014, and whether Respondent shared that information with NN the same evening. The Complaint alleges that Respondent's alleged sharing of material, non-public information is unethical and violates FINRA Rule 2010 and CGMI's policies. RJ's instructions to Respondent regarding institutional clients' preferences on when and how they receive information from analysts is not relevant to the issues of whether Respondent possessed material, non-public information on October 2 and, if so, whether he shared that information with NN. Respondent's contention that RJ conducted account clinic calls in 2014 and will testify about them is not relevant to this case. I therefore grant Enforcement's motion to strike RJ from Respondent's witness list.

E. Enforcement's Motion to Exclude Proposed Witness HS

Respondent seeks to offer the testimony of proposed witness, HS, to authenticate emails and discuss "a Medtronic investor meeting sponsored by Merrill Lynch on or about October 8, 2014." Respondent argues that he knew about Medtronic's plan to meet with investors on October 8, 2014, and that it signaled to him that the company was getting ready to issue a press release regarding the Medtronic/Covidien merger. Enforcement seeks to exclude HS's testimony. Enforcement notes that it is willing to stipulate as to the authenticity of HS's emails (about the October 8, 2014 Medtronic meeting). Enforcement also argues that neither HS's testimony nor

her emails is relevant because neither would establish whether or not Respondent was aware of Medtronic's October 8, 2014 meetings.

As indicated in my April 4, 2016 Order, I do not find HS's testimony to be relevant or material to the allegations of the Complaint. Respondent contends that he was aware before October 2, 2014, that Medtronic planned to meet with investors (on October 8, 2014) and that the meeting signaled to him that Medtronic would reaffirm its commitment to the merger with Covidien. HS's testimony, however, will not prove or disprove this assertion. There is no proffer that HS knows whether Respondent was aware of the meetings. Although Enforcement refuses to stipulate to the admissibility of HS's emails, it represents that it is willing to stipulate to their authenticity and to the fact that Medtronic hosted investor meetings in London on October 8, 2014. Thus, HS's testimony is unnecessary to authenticate the emails should Respondent choose to offer them into evidence.[7] I grant Enforcement's motion and strike HS from Respondent's witness list.

F. Respondent's Motion to Exclude Proposed Witness Kimberly Radtke

Enforcement seeks to offer the testimony of proposed witness Kimberly Radtke ("Radtke"), a team leader and investigator in FINRA's Office of Fraud Detection and Market Intelligence. Enforcement represents that Radtke will testify about the investigation that led to these proceedings, and authenticate documents obtained or prepared during the investigation. Respondent seeks to preclude Radtke from testifying. He argues that the investigation that led to these proceedings is not relevant and that Radtke is unlikely to possess personal knowledge regarding the content or authenticity of documents obtained during FINRA's investigation and therefore is not qualified to authenticate documents.

FINRA Rule 9268(b) states that the decision shall include a description of the investigative or other origin of the disciplinary proceeding. Thus, some testimony regarding FINRA's investigation that led to the institution of these proceedings is relevant. Additionally, Radtke may be allowed to offer testimony in other areas. At this time, I deny Respondent's motion to limit the scope of Radtke's testimony. I defer until the hearing ruling on the admissibility of Radtke's testimony in other subject areas.

SO ORDERED.

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Carla Carloni
Hearing Officer

Dated: May 24, 2016

[7] If Respondent offers the emails as evidence at the hearing, I will rule at that time as to their admissibility.