

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

SEAN MICHAEL REFSNIDER
(CRD No. 4762963),

Respondent.

Disciplinary Proceeding
No. 2019063790901

Hearing Officer—RES

**ORDER DENYING RESPONDENT'S MOTION FOR RETURN OF HIS COMPUTER,
MOTION IN LIMINE TO PRECLUDE AND/OR TO PLACE CONDITIONS ON THE
TESTIMONY OF CUSTOMER A, AND MOTION RELATED TO DISCOVERY ISSUES**

I. Enforcement's Complaint and Respondent's Answer

FINRA's Department of Enforcement filed a Complaint against Respondent Sean Michael Refsnider, formerly a registered representative. The Complaint consists of two causes of action. The first cause of action alleges that shortly after Respondent was assigned as the new broker of record for an elderly customer ("Customer A"), Respondent converted \$42,092 from Customer A and used the funds to pay his mortgage and other personal expenses.¹ The second cause of action alleges that in connection with Enforcement's investigation into Respondent's alleged conversion, Respondent failed to provide Enforcement with documents and information that it had requested under FINRA Rule 8210.² According to the Complaint, the alleged conversion violated FINRA Rules 2010 and 2150, and the alleged failure to produce documents and information violated FINRA Rules 8210 and 2010.³

In his Answer, Respondent denies that he violated FINRA Rules. With regard to the first cause of action, Respondent contends that he did not convert \$42,092 of Customer A's funds. He states he withdrew a total of only \$4,300, these withdrawals were authorized by Customer A, and he gave the \$4,300 to Customer A.⁴ Furthermore, although Refsnider admits that he transferred \$475 from Customer A's brokerage account, he states this transfer was also authorized by

¹ Complaint ("Compl.") ¶¶ 1-2. All monetary amounts in this Order are rounded to the nearest dollar.

² Compl. ¶ 4.

³ Compl. ¶¶ 3-4, 36, 57.

⁴ Answer ("Ans.") ¶ 2.

Customer A, he gave some of the \$475 to Customer A, and he kept some of the \$475 as a gift and as authorized by Customer A.⁵ In response to the second cause of action, Respondent admits that he failed to provide documents and information requested under FINRA Rule 8210, but he is prepared to deliver the materials to his attorney now, for production to Enforcement.⁶

II. Respondent's Motions and Enforcement's Opposition

Respondent has filed three motions ("Motions"). First, Respondent moves for the return of his computer, which is in the possession of his former employer firm, Ameriprise Financial Services, Inc. ("Ameriprise"). Second, Respondent moves for an order in limine to preclude and/or to place conditions on the testimony of Customer A. Third, Respondent has filed a motion related to discovery issues, which seeks three forms of compelled discovery: (1) the production of interview notes taken August 14, 2019 by FINRA from any witness in this proceeding, including Customer A; (2) a list of any documents in the possession, custody, or control of FINRA that have not previously been provided to Respondent; and (3) Ameriprise, Venmo, and Paypal account documents of Customer A in the possession, custody, or control of FINRA.

Enforcement has filed an opposition to the Motions ("Opposition"). This Opposition includes a declaration executed by an Enforcement attorney representing that Enforcement has complied with its discovery obligations under FINRA Rule 9251. In its Opposition, Enforcement states that Respondent's counsel failed to meet and confer with Enforcement prior to making the Motions, as required by Section IV(D) of the Case Management and Scheduling Order ("CMSO") in this proceeding.⁷

III. Discussion

Having reviewed the Complaint, the Answer, Respondent's Motions, Enforcement's Opposition, the declaration of the Enforcement attorney, and the record of this case, I conclude that the Motions are not valid. For the reasons stated below, I **DENY** the Motions.

A. Respondent's Failure to Meet and Confer

Respondent did not comply with his meet-and-confer obligation under the CMSO.⁸ I can deny Respondent's Motions based on this failure alone. I nonetheless analyze Respondent's Motions below. I hereby remind Respondent's counsel that he must meet and confer with Enforcement before filing any future motions with the Office of Hearing Officers.⁹

⁵ Ans. ¶ 2.

⁶ Ans. ¶ 4.

⁷ Opposition 3-4.

⁸ CMSO § IV(D).

⁹ The meet-and-confer requirement also applies to any objections Respondent makes to Enforcement's hearing exhibits and witnesses. CMSO § VI(D)(4).

B. Respondent's Motion for the Return of His Computer

Respondent claims that Ameriprise confiscated his computer on August 23, 2019, and moves for an order requiring Enforcement to obtain and return the computer. Respondent represents that “[t]here is information on said computer which respondent needs in connection with his defense in this matter.”¹⁰ Respondent does not cite a FINRA rule giving me the authority to order the requested relief, and I find that such a rule does not exist. As such, I conclude that I do not have authority to order the requested relief.

Although I do not find that FINRA Rule 9252 applies to Respondent's motion, it is the closest analogy, and I have therefore analyzed Respondent's motion under this rule as well. FINRA Rule 9252 allows a respondent to request a Hearing Officer to order Enforcement to invoke FINRA Rule 8210 to compel the production of documents from entities or individuals subject to FINRA's jurisdiction.¹¹ A respondent's FINRA Rule 9252 request must describe with specificity the documents sought; why the documents are material; the respondent's previous efforts to obtain the documents through other means; and whether the custodian of the documents is subject to FINRA's jurisdiction.¹²

Here, Respondent fails to meet the requirements of FINRA Rule 9252. First, he does not describe the documents on his computer with specificity or show that the documents are material to this case. Second, he does not represent that he has previously attempted in good faith to obtain the computer through other means but has been unable to do so. This requirement is particularly salient in this case because, as the Enforcement attorney represents in his declaration, Ameriprise has expressed its willingness to return the computer. According to the Enforcement attorney, Respondent “has not requested that Ameriprise return his work computer; however, Ameriprise will return the computer upon request by Respondent subject to the Firm's right to remove any proprietary information, such as software, client information or trading data.”¹³

Because FINRA's rules do not grant me the authority to order the relief requested, Respondent's motion for the return of the computer is **DENIED**. Furthermore, Respondent is able to obtain the computer through other means, and he has not met the other requirements of FINRA Rule 9252.¹⁴

¹⁰ Respondent's Motion for Return of His Computer 1.

¹¹ OHO Order 19-25 (2017054405401) (July 8, 2019), at 3, http://www.finra.org/sites/default/files/2019-10/OHO_Order_19-25_2017054405401.pdf.

¹² FINRA Rule 9252(a); *accord* OHO Order 19-23 (2016051493704) (June 25, 2019), at 2, http://www.finra.org/sites/default/files/2019-10/OHO_Order_19-23_2016051493704.pdf.

¹³ Declaration of Joseph E. Strauss, executed July 31, 2020 (“Decl.”) ¶ 10.

¹⁴ My discussion in this Order should not be construed as a determination that FINRA Rule 9252 applies to the relief requested.

C. Respondent's Motion In Limine to Preclude and/or to Place Conditions on the Testimony of Customer A

Respondent moves for an order directing that if he is not given the opportunity to depose Customer A before the hearing, she be precluded from testifying at the hearing. Otherwise, Respondent contends, he will be denied basic due process fairness.

A respondent in a FINRA disciplinary proceeding has no due process right to take the pre-hearing deposition of a potential hearing witness. A respondent's discovery opportunities are encompassed in FINRA Rules 9251 (production of documents by Enforcement), 9252 (production of documents and hearing testimony by FINRA members and associated persons), and 9253 (production of virtually verbatim witness statements and interview notes taken in routine examinations). There is no provision in FINRA Rules comparable to Rule 30 of the Federal Rules of Civil Procedure, providing for depositions by oral examination.¹⁵ Jurisdictional issues are also implicated. Customer A is not associated with a FINRA member firm and cannot be compelled to testify in a FINRA deposition (or at the hearing, for that matter).

Because there is no provision in FINRA Rules for a deposition, and because Customer A cannot be compelled to appear for a deposition without her consent, Respondent's motion in limine to preclude and/or to place conditions on the testimony of Customer A is **DENIED**.

D. Respondent's Motion Related to Discovery Issues

Respondent's motion related to discovery issues requests three different forms of compelled discovery. First, Respondent requests "[i]nterview notes taken August 14, 2019 by FINRA from any witness in this matter including [Customer A]."¹⁶ This request is moot because Enforcement represents that there are no interview notes taken on August 14, 2019 by FINRA.

Furthermore, the conditions necessary for the production of interview notes are not present. FINRA Rule 9253 enables respondents in disciplinary proceedings to request a copy of any contemporaneously written statement made by FINRA Staff in a routine investigation or inspection about the substance of an oral statement made by a non-FINRA person when either person is called as a witness by Enforcement and the portion of the statement sought directly relates to the testimony.¹⁷ Respondent has not established that any interview notes that might have been taken by Enforcement were in the course of a routine examination or inspection of Ameriprise or any other FINRA member.¹⁸ I therefore deny this request.

¹⁵ Fed. R. Civ. P. 30(a).

¹⁶ Motion Related to Discovery Issues 1.

¹⁷ FINRA Rule 9253(a)(2); *accord* OHO Order 19-22 (2016050957901) (June 20, 2019), at 3, http://www.finra.org/sites/default/files/2019-10/OHO_Order_19-22_2016050957901.pdf.

¹⁸ Insofar as Respondent contends he is entitled to production of interview notes on the ground that such notes are witness statements, his contention fails because he has made no showing that any such notes are substantially verbatim recitals of oral statements made by witnesses. FINRA Rule 9253(a)(1); *accord* OHO Order 19-16

Second, the motion related to discovery issues requests “[a] list of any documents in the possession, custody or control of FINRA that have not previously been provided to Respondent.”¹⁹ FINRA Rule 9251 provides that a motion to require Enforcement to produce a list of withheld documents must be based on some reason to believe one or more documents are being withheld in violation of the FINRA Code of Procedure.²⁰ Respondent does not show there is any reason to believe that Enforcement is withholding any documents in violation of FINRA Rules. Accordingly, I deny this request.

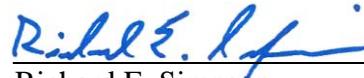
Third, the motion related to discovery issues requests production of “Ameriprise, Venmo, and Paypal accounts for [Customer A] in the possession, custody or control of FINRA.”²¹ As represented in the declaration executed by the Enforcement attorney, Enforcement has already complied with its discovery obligation in this regard. The Enforcement attorney states that “Enforcement’s production to Respondent included the July and August 2019 account statements for [Customer A’s] Ameriprise accounts. These are the only account statements that Enforcement obtained in connection with this investigation.”²² As such, I deny this request.

For these reasons, Respondent’s motion related to discovery issues is **DENIED**.

IV. Conclusion

For the reasons stated above, Respondent’s Motions are **DENIED**.

SO ORDERED.



Richard E. Simpson
Hearing Officer

Date: August 12, 2020

(2016051493704) (May 7, 2019), at 2, http://www.finra.org/sites/default/files/2019-10/OHO_Order_19-16_2016051493704.pdf.

¹⁹ Motion Related to Discovery Issues 1.

²⁰ FINRA Rule 9251(c); *accord* OHO Order 14-04 (2012032519101) (Sep. 30, 2014) (CC), at 10, http://www.finra.org/sites/default/files/OHO_Order_14-04_ProceedingNo.2012032519101_0_0_0_0.pdf.

²¹ Motion Related to Discovery Issues 1.

²² Decl. ¶ 4.

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