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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Disciplinary Proceeding  
No. 20070077587

Hearing Officer – AWH

**ORDER RESOLVING CERTAIN PRE-HEARING MOTIONS**

Causes One and Three of the Complaint in this case allege that Respondent converted firm funds, using the funds for the personal use of an escort service on four separate occasions, and falsified expense reports by claiming that he used the funds for business expenses reimbursable by the firm. The Second Cause in the Complaint, pled in the alternative, alleges that on one of the four occasions, Respondent used the funds to pay for the use of the escort service by another person, and the payment was in relation to the business of the other person's employer.

Both parties have filed certain pre-hearing motions. In two motions, the Department of Enforcement seeks to amend the Complaint to delete the Second Cause in the Complaint, and to withhold from discovery documents that it asserts relate to the Second Cause and Respondent's defenses to the Second Cause. Respondent filed a motion to quash Enforcement's post-complaint 8210 request for documents, and seeks a protective order relating to any documents he may be required to disclose that pertain to certain of his affirmative defenses. Both parties filed Oppositions to each other's

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motions, replies to those Oppositions, and responses to the replies. In a pre-hearing conference held on October 29, 2007, the parties sought clarification of the Initial Pre-Hearing Order as it regards motions for leave to call an expert witness.

### **I. The Motion to Amend the Complaint and Motion to Withhold Documents**

Enforcement's Motion to Amend the Complaint will be *granted*. By deleting paragraphs 15 through 18 and omitting the Second Cause of the Complaint, the proceeding will be simplified, limiting the issues to only personal and not business expenses. As a result, the length of the hearing should be reduced. Respondent's opposition to the Motion to Amend alleges that he will be prejudiced because granting the Motion will allow Enforcement to withhold documents Respondent asserts are pertinent to his defense and necessary for a fair hearing.<sup>1</sup> However, because this Order will provide for production of additional documents by Enforcement that are pertinent to the remaining allegations in the Complaint, as amended, Respondent will not be prejudiced by an amendment to the Complaint, and production of the additional documents will assure a fair hearing.

Respondent states that, should the Motion to Amend be granted – limiting the issues to only personal, and not business, expenses – he should be granted leave to amend his Answer to include an affirmative defense, which in sum and substance would state: “Respondent's alleged conduct of filing false expense reports in order to recover from his employer personal expenses charged on his corporate credit card was, upon information and belief, pervasive in the securities industry and consistent with permissive standards and customs at \_\_\_\_\_ during the relevant time period.” Normally, an amendment to an

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<sup>1</sup> Respondent's Eighth Affirmative Defense is that Respondent's alleged conduct was “that of business entertainment of a client . . . Such business entertainment was consistent with permissive industry customs and permissive standards at [the firm] at the time.”

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Answer that is not based on newly discovered evidence would not be allowed at this stage of the proceeding. However, because Respondent's Eighth Affirmative Defense might have had limited spill-over affect on the issue of sanctions, should liability be established on the other two causes in the Complaint, the Hearing Officer will order the Department of Enforcement to produce, pursuant to Rule 9251(a)(3), any document prepared or obtained by Enforcement in connection with its investigation of Respondent or Respondent's former firm, \_\_\_\_\_, that relates to any permissive standards and customs, concerning the filing of false expense reports in order to recover personal expenses charged on a firm credit card, at the employer firm during the relevant time period.<sup>2</sup> There has been no showing that Enforcement's investigation of Respondent or his former firm encompassed any consideration of personal or business expense reporting in the securities industry as a whole, nor has Respondent shown that any alleged permissive standard or custom in the industry is relevant or material to the issues in this case. Enforcement shall produce any documents consistent with the Order on or before *November 16, 2007*. With the exception of the requirement that it produce any documents consistent the terms of this Order, Enforcement's Motion for Leave to Withhold Certain Documents and to Clarify its Obligations Pursuant to Rule 9251(a)(2) is *granted*.<sup>3</sup>

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<sup>2</sup> In its Reply to Respondent's Opposition to Enforcement's Motion for Leave to Withhold Certain Documents and Clarify Its Obligations Pursuant to Rule 9251(A)(2) of the Code of Procedure, Enforcement attached a Declaration, stating that the \_\_\_\_\_ investigative file "contains no documents relating to any policy or procedure in place at \_\_\_\_\_ authorizing the use of firm credit cards to pay for the use of escort services or the submission of falsified expense reports." That statement, however, does not completely resolve the wider issue of whether there are any documents relating to any permissive standards or customs at \_\_\_\_\_ concerning the filing of false expense reports in order to recover *any* personal expenses charged on a firm credit card during the relevant time period. If such documents exist, this Order covers those documents.

<sup>3</sup> Respondent's Opposition to the Motion to Amend the Complaint also requests that Enforcement be sanctioned for filing the Second Cause of the Complaint, knowing that the allegations were not "well

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## II. The Motion to Quash or Limit Enforcement's Post-Complaint 8210 Request and for a Protective Order

On August 30, 2007, Enforcement served Respondent with a Rule 8210 request for documents and a request for information which was in the form of an interrogatory. Enforcement seeks five categories of documents relating to his reimbursement of expenses by his former firm and the psychological disorders and marital stressors that allegedly led to the misconduct charged in the Complaint. The interrogatory asked Respondent to "describe the exact services that were received" in exchange for the expenses that were charged to the firm.

Respondent moves to quash or limit the post-complaint 8210 request on the grounds that the 8210 request (1) impinges upon privileged attorney work-product, (2) encroaches on privileged psychotherapist-patient communications, and (3) interferes with the Hearing Officer's orderly management of the proceeding. In addition, Respondent argues that the interrogatory that seeks a description of the "exact services that were received" is intended solely to harass, annoy, and humiliate Respondent and should be quashed. Finally, in view of his affirmative defenses concerning his psychological condition and/or mental state, Respondent moves for a protective order, pursuant to Rule

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grounded in fact," pursuant to Rule 9137. Moreover, Respondent requests the imposition of a fine and an order requiring reimbursement of reasonable attorneys' fees and costs incurred by Respondent for the preparation of his Answer and the Opposition to the Motion to Amend the Complaint, as might be ordered under Rule 11 of the Federal Rules of Civil Procedure. The Hearing Officer concludes that Rule 9137 does not apply to Complaints because Rule 9137(a) expressly refers to filings "[f]ollowing the issuance of a Complaint"; the allegations in the Second Cause of the Complaint had a basis in fact when alleged (*see* Enforcement's Reply to Respondent's Opposition to Enforcement's Motion to Amend the Complaint); and Rule 11 of the Federal Rules of Civil Procedure is not applicable to this forum. Accordingly, Respondent's request for sanctions and costs is *denied*. Respondent also seeks to strike from the Motion to Amend certain excerpts from Respondent's on-the-record interview and excerpts from his *Wells* submission. Those attachments purport to support Enforcement's Motion. They are not inappropriate and are not evidence in this proceeding unless and until they are admitted in evidence at the hearing. Accordingly, they will not be stricken from the Motion to Amend the Complaint. For the same reasons, the copy of the *Wells* submission attached to Enforcements Opposition to Respondent's Motion to Quash will not be stricken.

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9146(k) on all documents, information, and transcripts of testimony concerning his psychological condition and/or mental state.

The Motion to Quash

As to the five categories of documents relating to his reimbursement of expenses by his former firm and the psychological disorders and marital stressors that allegedly led to the misconduct charged in the Complaint, the Motion to Quash will be *denied*. First, the documents requested are pertinent to the factual bases for the allegations in Respondent's affirmative defenses and do not ask for opinion attorney work-product. Enforcement has demonstrated a substantial need for any such documents because they may bear on the validity and strength of Respondent's defenses and they are not elsewhere obtainable. Second, insofar as a psychotherapist-patient privilege might be recognized in this forum, because Respondent has placed his mental and medical conditions at issue, any privilege that may have been asserted has been waived. Finally, the 8210 request does not interfere with the Hearing Officer's ability to manage the proceeding in an orderly fashion. Prompt production of the documents (1) will not be inconsistent with existing Orders in this proceeding and (2) will assist Enforcement in its decisions whether to oppose any request Respondent may have for expert witnesses and to determine whether it will call its own expert witnesses. Respondent shall produce the documents sought in the Rule 8210 request on or before *November 16, 2007*, the same day Respondent is to file any motion for leave to call an expert witness.

Respondent's Motion to Quash will be *granted* to the extent that it seeks to quash the interrogatory that seeks a description of the "exact services that were received" for the payment to the escort service he patronized. The issue in this case is conversion of firm

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funds and use of those funds for personal expenses. The Complaint alleges use of an escort service; the Answer admits the use of an escort service. A particularization of the services is not necessary to prove the issue of liability. Neither is it relevant to the issue of sanctions. Although Enforcement argues that FINRA Sanctions Guidelines Principal Consideration # 18 requires an adjudicator to assess the "character of the transactions at issue," the character of the transactions is at issue only as to whether they were personal rather than business and as to whether they were improperly expensed to the firm; beyond that, the allegations of the Complaint do not put the underlying nature of the personal expenses at issue. However, should Respondent call an expert witness whose anticipated testimony places "the exact services that were received" at issue with regard to affirmative defenses, an 8210 request for information relating to those exact services may become relevant and appropriate.

#### The Protective Order

Procedural Rule 9146(k) provides that a party may file a motion for a protective order to limit or prohibit disclosure to other parties, witnesses or other persons, documents or testimony that contain confidential information. As pertinent to this case, the motion shall be granted only upon a finding that disclosure would involve an unreasonable breach of the movant's personal privacy. Here, it is clear that disclosure of any document, information, and transcript of testimony concerning Respondent's psychological condition and/or mental state would constitute an unreasonable breach of his personal privacy.

Accordingly, subject to the limitations and exceptions contained in Rule 9146(k)(2), all documents, information, and transcripts of testimony concerning

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Respondent's psychological condition and/or mental state shall be treated as confidential during the pendency of this proceeding and shall be used solely for the purposes of this disciplinary proceeding, including any appellate proceedings. The documents and information may be disclosed to attorneys who represent Respondent in this proceeding, any person(s) consulted or retained by counsel for Respondents to assist in the preparation and trial of this proceeding, including experts and paralegals or other employees; any such person consulted or retained by Enforcement; any witness in this proceeding; Hearing Panelists in this proceeding; and any court reporter in this proceeding.

### **III. Amendment to the Initial Pre-Hearing Order**

During the pre-hearing conference held on October 29, 2007, the parties indicated their agreement to stagger the dates by which they are required to file any motions for leave to call expert witnesses. For good cause shown, the Initial Pre-Hearing Order is amended to provide as follows:

On or before *November 16, 2007*, Respondent may file a motion for leave to call an expert witness. The motion shall include the expert's qualifications, a listing of other proceedings in which the expert has given expert testimony, a list of the expert's publications, copies of those publications that are not readily available to Enforcement and the Hearing Panel, and a detailed summary of the substance of the expert's expected testimony.

On or before *December 7, 2007*, Enforcement shall file any response to Respondent's motion for leave to call an expert witness. In addition, Enforcement may file, by that same date, a motion for leave to call its own expert witness. The motion

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shall state the expert's qualifications, a listing of other proceedings in which the expert has given expert testimony, a list of the expert's publications, copies of those publications that are not readily available to Respondent and the Hearing Panel, and a detailed summary of the substance of the expert's expected testimony.

On or before *December 28, 2007*, Respondent shall file any response to Enforcement's motion for leave to call an expert witness.

**SO ORDERED.**

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Alan W. Heifetz  
Hearing Officer

Dated: October 31, 2007