FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. LEK SECURITIES CORP. (CRD No. 33135) and SAMUEL FREDERIK LEK (CRD No. 1642936), Respondents.	Disciplinary Proceeding No. 2015045312501 Hearing Officer–DRS

SUPPLEMENTAL ORDER REGARDING DENIAL OF SECOND MOTION TO STAY PROCEEDINGS

A. Introduction

The hearing in this disciplinary proceeding is currently scheduled for September 9–13, 16–20, and 23–25, 2019. At Respondents' request, the Department of Enforcement contacted my office on July 12, 2019, and requested a pre-hearing conference to address a scheduling issue.[1] Later that day, I held a telephonic pre-hearing conference. At the conference, counsel for Respondents represented that a scheduling conflict had arisen between this proceeding and Respondents' ongoing federal district court litigation with the U.S. Securities and Exchange Commission ("SEC Action").[2] As a result, Respondents requested that I stay this disciplinary proceeding until the completion of the trial in the SEC Action, which is now scheduled to begin on October 21, 2019.[3] Enforcement opposed the stay request.[4] I made no ruling on the request at

[1] July 12, 2019 Pre-Hearing Conference Transcript ("Jul 12 PHC Tr.") at 4– 5.

[2] *SEC v. Lek Securities Corp.*, No. 1:17-cv-01789-DLC (S.D.N.Y., filed Mar. 10, 2017).

[3] Jul 12 PHC Tr. 5–6.

[4] July 12 PHC Tr. 14.

the pre-hearing conference.[5] Instead, I ordered Respondents to file a motion for stay and Enforcement to file a response.[6]

On July 15, 2019, Respondents filed their motion for a stay of proceedings ("Motion"). The Motion sought a four-month postponement of the hearing "until January 13, 2020, or as soon as practical thereafter should this date be inconvenient for the Hearing Panel."[7] The next day, Enforcement filed its opposition ("Opposition"). And on July 17, 2019, I issued an abbreviated order denying the Motion on the grounds that Respondents failed to establish good cause for a stay. The order explained that I was issuing it "now, so that the parties can plan accordingly in light of the upcoming July 22, 2019 deadline for filing pre-hearing submissions" and that I would set forth the basis for the denial in a supplemental order.[8] I issue this supplemental order for that purpose.

B. The Motion and Opposition

The Motion stems from alleged scheduling conflicts between this proceeding and the SEC Action. According to the Motion, those alleged conflicts arose because the Court in the SEC Action "recently rescheduled"[9] the trial, which will now begin on October 21 and is expected to last four and a half weeks. More specifically, Respondents assert that under the scheduling order ("Scheduling Order") in the SEC Action, "numerous submission deadlines for the SEC Action overlap with" this disciplinary proceeding.[10] This is problematic, Respondents claim, because "many of the critical pre-trial tasks will require Mr. Lek's personal involvement during the period encompassing this FINRA matter."[11] And in a declaration supporting the Motion, Lek identified those tasks that allegedly conflict "with critical preparations for, and [his] participation in, the FINRA Hearing . . . ."[12]

As a result, Respondents argue, "these overlapping requirements will prevent them from being able to devote the time and attention necessary to mount an effective defense for both

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[5] July 12 PHC Tr. 24.

[6] July 12 PHC Tr. 24–27.

[7] Motion at 1.

[8] Order Denying Respondents' Second Motion to Stay Proceedings (July 17, 2019).

[9] Motion at 1.

[10] Motion at 3.

[11] Motion at 2.

[12] Declaration of Samuel F. Lek in Support of Respondents' Motion for a Stay of Proceedings ("Lek Decl.") at 3, ¶ 12. Lek listed the following conflicting deadlines and tasks: (1) the August 30, 2019 deadline for the parties to exchange all summary exhibits and charts (Lek Decl. at 3, ¶ 12.a.); (2) the September 3 deadline for finalizing the trial witness list (Lek Decl. at 3, ¶ 12.c.); (3) the September 3 through October 18 period for completing depositions (Lek Decl. at 3–4, ¶ 12.d.); (4) the September 13 deadline for filing objections to exhibits and charts (Lek Decl. at 3, ¶ 12.b), motions in limine (Lek Decl. at 4–5, ¶ 12.g.), and filing the Joint Pretrial Order (Lek Decl. at 4, ¶ 12.e.); (5) the September 27 deadline for filing responses to the SEC's various pre-hearing submissions, including its motions in limine (Lek Decl. at 5, ¶ 12.h.); and (6) the October 11, 2019, final pre-trial conference (Lek Decl. at 5, ¶ 12.i.).

matters."[13] They emphasize that "[t]he stakes in both this matter and the SEC Action are extraordinarily high for Mr. Lek and the firm" and, therefore, "[t]he principles of basic fairness for FINRA disciplinary proceedings mandated by the Securities Exchange Act of 1934" require that I grant the Motion.[14]

Enforcement opposed the Motion. According to Enforcement, Respondents find themselves in a predicament "of their own making"[15] and the relevant factors "militate[] in favor of finding that the Hearing proceed as scheduled."[16] For the reasons discussed below, I denied the Motion.

C. The Applicable Standard

FINRA Rule 9222 governs extensions of time, postponements, and adjournments. Its primary purpose is to ensure the prompt resolution of FINRA disciplinary proceedings so that FINRA can "carry out its regulatory mandate and fulfill its responsibilities in protecting the public interest."[17] The Rule requires that hearings "begin at the time and place ordered, unless the Hearing Officer, for good cause shown, changes the place of the hearing, postpones the commencement of the hearing, or adjourns a convened hearing for a reasonable period of time . . . ."[18] Additionally, "[p]ostponements, adjournments, or extensions of time for filing papers shall not exceed 28 days unless the Hearing Officer states on the record or provides by written order the reasons a longer period is necessary."[19]

The Rule directs the Hearing Officer to consider the following factors when determining whether to postpone the start of a hearing: "(A) the length of the proceeding to date; (B) the number of postponements, adjournments, or extensions already granted; (C) the stage of the proceedings at the time of the request; (D) potential harm to the investing public if an extension of time, adjournment, or postponement is granted; and (E) such other matters as justice may require."[20] Hearing Officers have broad discretion in deciding whether to grant a continuance.[21]

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[13] Motion at 3.

[14] Motion at 2.

[15] Opposition at 1.

[16] Opposition at 7.

[17] OHO Order 06-01 (CLI050004), at 3 (Jan. 6, 2006), http://www.finra.org/sites/default/files/OHODecision/p016216_0_0_0_0_0_0.pdf; OHO Order 06-28 (CLI050007), at 3 (Mar. 24, 2006) (same), http://www.finra.org/sites/default/files/OHODecision/p017538_0_0.pdf.

[18] FINRA Rule 9222(b).

[19] FINRA Rule 9222(b)(2).

[20] FINRA Rule 9222(b)(1).

[21] *Richard Allen Riemer*, Exchange Act Release No. 84513, 2018 SEC LEXIS 3022, at *20 (Oct. 31, 2018) ("In [FINRA] proceedings, the trier of fact has broad discretion in determining whether to grant a request for a

D. Discussion

Only one of the five FINRA Rule 9222 factors favors a stay here: the hearing has not been previously postponed. That factor, however, is not dispositive.[22] And all other factors weigh against granting the requested stay. The Complaint was filed eight months ago (November 26, 2018); the hearing has been scheduled for over five months (since February 15, 2019); and Respondents requested a stay at a late stage in the proceedings (ten days before the deadline for filing pre-hearing submissions and less than two months before the hearing is scheduled to begin).

Moreover, given the nature and extent of the misconduct alleged in the Complaint, granting a stay would pose a significant potential risk to the investing public.[23] The requested stay is lengthy (at least four months) and would result in a hearing no sooner than over a year (14 months) after the Complaint was filed; the charges are serious (six causes of action alleging violations of anti-money laundering, supervisory, and securities registration provisions); Respondents are still in the securities industry; and Enforcement contends that to its knowledge, Respondents "are still engaged in the same micro cap [sic] activity alleged in the complaint, although some of the customers may have changed."[24]

Additional considerations also weigh against granting the stay. First and foremost, Respondents helped create, or failed to avoid creating, the alleged scheduling conflicts. On April 10, 2019, the Court placed the SEC Action on the July 22, 2019 trial ready calendar.[25] One month later, on May 10, 2019, counsel for the SEC in that action wrote to the Court requesting that it reschedule the start of the trial to one of two proposed dates in November because several of the SEC's witnesses had scheduling conflicts during the anticipated trial period.[26] The SEC represented that the defendants did not oppose the request.[27]

Later that day, counsel for defendants Lek Securities Corp. and Samuel Lek (the "Lek Defendants") sent a letter to the Court clarifying the Lek Defendants' position regarding the SEC's rescheduling request. In the letter, counsel requested a scheduling accommodation for the Lek Defendants' experts and further stated that subject to that condition—and "as a matter of courtesy to opposing counsel"—the Lek Defendants did not oppose the SEC's request. Counsel

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continuance.") (quoting *Robert J. Prager*, Exchange Act Release No. 51974, 2005 SEC LEXIS 1558, at *51 (July 6, 2005)).

[22] OHO Order 06-01, at 3; OHO Order 06-28, at 3–4.

[23]. OHO Order 06-01, at 3; OHO Order 06-28, at 3.

[24] July 12 PHC Tr. 14, 24; *see also* Opposition at 7.

[25] Lek Decl., Ex. A, Letter to the Honorable Denise L. Cote from David J. Gottesman, Esq. (May 10, 2019), ("SEC Letter").

[26] SEC Letter at 1–2.

[27] SEC Letter at 1.

for the Lek Defendants made it clear, however, that the Lek Defendants were prepared to go to trial on the July 22 hearing date.[28]

The Court addressed the SEC's request the next month at a June 10, 2019 pre-trial conference.[29] At the conference, the Court informed the parties that it could not reschedule the trial to start on one of the two proposed November dates.[30] Continuing, the Court explained that "[t]here are basically two windows of opportunity to schedule this trial if we're not going to proceed on my suggested trial date of July 22."[31] The first window was either July 29 or August 5, 2019.[32] The second window was September 30, October 7, or October 15, 2019.[33] The Court, however, did not insist that the SEC Action go to trial during either of those two windows. Rather, the Court simply pointed out that "[i]f we don't do it in one of those two windows . . . we are looking at next February."[34] The conference then recessed so the parties could try to agree upon a trial date.

After the recess, SEC counsel reported that while the parties "were not entirely successful in finding dates" among those proposed by the Court, a trial beginning "the week of October 21, seems to be viable for the parties . . . . It was October 21 that we all found to be viable from our calendars."[35] This start date, however, was not optimal for the Court; it created potential scheduling conflicts with the Court's criminal trial schedule, which, the Court emphasized, took priority over the trial of the SEC Action.[36] Even so, the Court did not reject an October 21 start date. Instead, the Court informed the parties that given its criminal docket, an October 21 start date was "likely, but not certain," but that if the trial of the SEC Action did not begin on that date "because [of] these criminal trials I have scheduled during this block to occur," then the trial would be "pushed over until February."[37] The parties then told the court that they were fine with

[28] Lek Decl., Ex. B, Letter to the Honorable Denise L. Cote from Steve Dollar, Esq. (May 10, 2019).

[29] The Lek Defendants were represented at the conference by five attorneys from two law firms. June 10, 2019 Pre-Trial Conference Transcript ("June 10 PTC Tr.") at 1. One of those law firms also represents Respondents in this proceeding.

[30] June 10 PTC Tr. at 3. The Court did not address the second proposed November date.

[31] June 10 PTC Tr. at 3.

[32] June 10 PTC Tr. at 3.

[33] June 10 PTC Tr. at 3.

[34] June 10 PTC Tr. 3.

[35] June 10 PTC Tr. 4–5.

[36] June 10 PTC Tr. 5.

[37] June 10 PTC Tr. 6.

an October 21 trial date.[38] The Court next addressed the scheduling of pre-trial events. The Court proposed various deadlines to which the Lek Defendants either agreed[39] or did not object.[40]

Two days later, on June 12, 2019, the Court incorporated those deadlines into the Scheduling Order.[41] The next month, on July 11, 2019, the Court denied the Lek Defendants' motion in limine to preclude certain testimony ("July 11 Order").[42] The Court's July 11 Order also instructed the parties to exchange any summary exhibits or charts by no later than two weeks before the deadline for filing the Joint Pretrial Order,[43] which effectively made them due by August 30, 2019.[44]

Respondents' conduct in connection with rescheduling the trial, as described above, undermined their good cause argument. The SEC Action had been scheduled to begin on July 22, 2019, which did not create scheduling conflicts with this disciplinary proceeding. Respondents then chose to accommodate the SEC's request to reschedule the trial and opted for a "likely, but not certain" trial commencement date. Rescheduling the trial resulted in the allegedly problematic pre-trial deadlines, and Respondents agreed to or acquiesced in all but one of them.[45] Additionally, a February 2020 trial of the SEC Action would have avoided the purported pre-trial scheduling conflicts that form the basis for the Motion. The record does not reflect that either the SEC or the Court balked, or would have balked, at holding the trial that month. Yet, there is no indication that once Respondents realized the Court could not hold the trial in November, that they sought to reschedule it for February or another time that would have avoided scheduling conflicts with the FINRA disciplinary proceeding. In fact, there is no evidence in the record that Respondents ever informed the Court (or the SEC) about the FINRA hearing and related scheduling conflicts—either before or after the Court issued its Scheduling Order or July 11 Order.[46] In short, Respondents' acts and omissions are largely responsible for creating the situation about which they now complain, and this is fatal to their Motion.

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[38] June 10 PTC Tr. 6.

[39] June 10 PTC Tr. 7–8 (including a September 13 deadline for filing pre-trial order and motions in limine; a September 27 deadline for filing an opposition or responsive memorandum; an October 2 deadline for filing replies to motions in limine; and an October 11 pre-trial conference).

[40] June 10 PTC Tr. 13 (a September 3 deadline for exchanging witness lists and an October 18 deadline for taking depositions).

[41] Lek Decl., Ex. E., Scheduling Order.

[42] Lek Decl., Ex. D., July 11 Order.

[43] July 11 Order at 11.

[44] *See* Scheduling Order at 1 (setting a deadline of September 13 for the filing of the Joint Pretrial Order).

[45] The only exception is the August 30, 2019 deadline for the parties to exchange any summary exhibits or charts based on the Court's July 11 Order.

[46] In the Motion, Respondents concede that "[t]he parties did not discuss the FINRA Hearing on the record during the pre-trial conference." Motion at 3. The Motion is silent as to whether the parties did so off the record at the pre-trial conference or at any other time.

Finally, Respondents Motion is untimely. By June 10 (the date of the pre-trial conference), Respondents knew about nearly all of the scheduling conflicts that form the basis for their Motion. Still, they waited over a month—and until the Court issued its July 11 Order creating an additional alleged conflict—to request a stay. At the July 12 pre-hearing conference, Respondents' counsel stated that he had "neglected to make this request until it became pretty clear to us these conflicts were going to be not feasible to reasonably manage."[47] He also stated that the Lek Defendants were engaged in settlement discussions with the SEC that, had they been successful, would have eliminated the scheduling conflicts.[48] These explanations, however, do not excuse the one-month delay in filing the Motion.

E. Conclusion

Respondents failed to establish good cause to grant the stay given that (1) they filed the Motion long after the Complaint was filed and at a late stage in the proceedings; (2) the potential risk to the public is substantial if I granted Motion; (3) Respondents' acts and omissions created or failed to avoid the alleged scheduling conflicts; and (4) they did not timely file the Motion.[49] Accordingly, I **DENIED** the Motion.

SO ORDERED.

David R. Sonnenberg
Hearing Officer

Dated: August 1, 2019

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[47] July 12 PHC Tr. 9.

[48] July 12 PHC Tr. 13–14.

[49] Respondents cite two orders by FINRA Hearing Officers in support of the Motion: OHO Order 06-37 **(**E102003025201) (Sept. 13, 2006), http://www.finra.org/sites/default/files/OHODecision/p018467_0_0_0.pdf and OHO Order (CAF030007) (May 31, 2006). Both are inapposite. Those orders do not indicate that the respondents' acts and omissions created, or failed to avoid creating, scheduling conflicts. Further, unlike here, the disciplinary proceeding that was the subject of OHO Order 06-37 had been pending for less than six months, key deadlines had not yet occurred, and the panelists had not yet been appointed. OHO Order 06-37, at 2.