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FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. KANE H. WALLER (CRD No. 4537969), Respondent.	Disciplinary Proceeding No. 2017055164001 Hearing Officer–MJD

ORDER DENYING RESPONDENT'S MOTIONS *IN LIMINE*

I. Background

The Department of Enforcement brought this action alleging that Respondent Kane H. Waller engaged in front running of block orders on three occasions, in violation of FINRA Rules 5270 and 2010. The Complaint charges that Waller, a sales trader on his former firm's institutional trading desk, improperly shared material, non-public market information about three customer block orders with an investment fund ("Fund"), a customer of the firm's prime brokerage unit. In each case, according to the Complaint, after giving the information to the Fund's trading representative, Waller executed trades for the Fund in the same securities that were the subject of his improper disclosure. In his Answer, Waller denies that he made any improper disclosures or that he engaged in misconduct.[1]

Waller filed two motions *in limine* to preclude evidence concerning: (i) information about the existence of a block order for a fourth security—PharmAthene, Inc. (PIP)—that Waller allegedly shared with the Fund but was not charged with in the Complaint,[2] and (ii) Waller's entertainment of Fund personnel and his attendance at the wedding of a principal of the Fund.[3] The motions also seek to exclude eight of the 27 exhibits (or a portion of exhibits) proposed by Enforcement: (1) instant messages ("IM") between Waller and the Fund concerning PIP (CX-6); (2) Waller's former firm's responses to FINRA Rule 8210 requests that refer to the PIP IMs, contain PIP trade confirmations, or provide details surrounding trading in PIP (pages 3-4, 18-21,

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[1] *See* Complaint ¶¶ 14, 17, 22-23; Answer ¶¶ 14, 17, 22-23.

[2] Respondent's Motion *in Limine* to Exclude Evidence Relating to PharmAthene, Inc. (PIP) ("PIP Mot.").

[3] Respondent's Motion *in Limine* to Exclude Evidence of Respondent's Business Entertainment of [the Fund] Advisors and Attendance at [Principal's] Wedding ("Entertainment Mot.").

and 54-55 of CX-9, CX-10, CX-19, CX-20); and (3) references in the transcript of Waller's on-the-record investigative testimony (OTR) and FINRA's Rule 8210 requests to his former firm and its responses concerning Waller's entertaining of Fund persons and attendance at the wedding (CX-12, pages 42-46 of CX-13, CX-15).

Waller generally argues that the evidence Enforcement wants to offer at the hearing has no probative value and is unfairly prejudicial and irrelevant. Enforcement argues that the PIP-related evidence is, at a minimum, relevant to sanctions and the entertainment-related evidence is relevant to demonstrating Waller's close relationship with the Fund.[4]

For the reasons set forth below, I deny the Motions.

II. Motions *in Limine*

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] FINRA Rule 9235(a)(2) authorizes Hearing Officers "to do all things necessary and appropriate to discharge [their] duties," which include "regulating the course of the hearing." Rule 401 of the Federal Rules of Evidence, which does not apply in FINRA proceedings but is consulted for guidance, 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."[6]

Motions *in limine* may serve an important function in litigation because they prevent the presentation of irrelevant and immaterial information at a hearing.[7] However, FINRA Hearing Officers generally disfavor motions *in limine* seeking to exclude broad categories of evidence and testimony.[8] A hearing officer "should grant such motions only if the evidence at issue 'is clearly inadmissible for any purpose.'"[9] "Unless evidence meets this high standard, evidentiary

[4] Department of Enforcement's Opposition to Respondent's Motions *in Limine* ("Opp.") 2.

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

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

[7] OHO Order 16-04 (2012033393401) (Feb. 3, 2016), at 2, http://www.finra.org/sites/default/files/OHOOrder16-04_2012033393401.pdf.

[8] *See* OHO Order 16-04, at 2.

[9] *Id.* (citing *Miller UK Ltd. v. Caterpillar, Inc.*, 2015 U.S. Dist. LEXIS 156874, at *5 (N.D. Ill. Nov. 20, 2015)); *see also* OHO Order 16-18 (2014043020901) (May 24, 2016), at 2, http://www.finra.org/sites/default/files/OHO-Order-16-18-2014043020901.pdf.

rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context."[10]

III. Discussion

A. Respondent's PIP Motion

Waller argues that because the Complaint does not charge him with misconduct in connection with allegedly sharing information about a customer's block order in PIP, evidence about his communications with the Fund about it are not probative. Enforcement states that Waller disclosed to the Fund the order size and price of another firm customer's pending block order on the same side of the market, and then followed up by asking if the Fund wanted to change its limit price for the pending order.[11] The parties do not dispute that the Fund did not take any action based on the PIP block order information Waller allegedly shared. Enforcement acknowledges that this is the reason it did not charge Waller with front-running the PIP block order.[12]

According to Waller, Enforcement wants to use the PIP evidence to buttress a weak case involving just three instances of alleged front-running over a "wide chasm" of time spanning a five-year period from the first charged instance, in December 2011, to the third instance, in January 2017. Waller notes that in its pre-hearing brief, Enforcement describes the PIP-related information as evidence of "a fourth instance of improper information sharing" in February 2017.[13] He says that Enforcement is improperly attempting to show a pattern (in the form of "propensity" evidence) of improper sharing of information with the Fund "to tar Mr. Waller by

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[10] *WEL Cos. v. Haldex Brake Prods. Corp.*, No. 2:19-cv-912, 2020 U.S. Dist. LEXIS 106613, at *15 (S.D. Ohio June 17, 2020) (citing *Indus. Ins., Co. v. GE*, 326 F. Supp 2d. 844, 846 (N.D. Ohio 2004)).

[11] *See* Department of Enforcement's Pre-Hearing Brief ("Enf. Pre-Hrg. Br.") 16 n.90.

The following IM exchange between Waller and the Fund concerning PIP began before the market opened on February 10, 2017.

Waller: what kind of top you want to start w/ on the PIP cover? a buck maybe?

Fund: ok

Fund: yes

Waller: we had retail buyer yday 1.00 for 1 million shares. but they haven't come back yet today. hopefully they stay away.

About 20 minutes later, at 9:31 a.m., Waller sent another IM stating, "that PIP order just came back. 1.00 bid for 1 mill. you want to move up to 1.01?" The Fund did not respond to this IM.

See CX-6, at 1, 3. *See also* PIP Mot. 2.

[12] Opp. at 5. *See also* Enf. Pre-Hrg. Br. 16 n.90.

[13] PIP Mot. 3, 5. *See also* Enf. Pre-Hrg. Br. 16. In its exhibit list, Enforcement describes the purpose of CX-6 (which contains the IM communications) is to show an "Additional instance of Waller inappropriately sharing customer order information with [the Fund]."

inserting a fourth instance of uncharged conduct into the case to bias the Panel with respect to the charged counts."[14] Waller adds that he engaged in no wrongdoing in connection with the three charged instances, that his conduct was consistent with the training he received, and that he did nothing more than provide "market color" that did not include prohibited material information.[15]

Enforcement asserts that the PIP evidence is "an integral part of the story leading to Waller's termination" by his former firm in 2017. It is relevant also to show that Waller acted intentionally, even though the Fund did not act on the information, and is relevant for the purposes of determining sanctions, should the Panel find him liable for the alleged misconduct for the charged activity.[16]

Enforcement argues that even though his former firm warned him after being caught after the first alleged instance of misconduct (in December 2011), Waller improperly shared information with the Fund three more times, including the last time involving PIP.[17] Thus, the PIP evidence would rebut any argument by Waller that he acted negligently or recklessly, as opposed to intentionally. Also, says Enforcement, it counters Waller's argument that he was required to provide such information to the Fund because it shows that his employer terminated him when it learned of the PIP information sharing.

I find that, at a minimum, the PIP evidence could be relevant to a determination of appropriate sanctions even though Enforcement did not charge it as an additional violation of FINRA's Rules. The NAC has consistently held that uncharged misconduct is admissible in FINRA disciplinary proceedings for sanctions purposes.[18]

B. Respondent's Entertainment Motion

Waller also moves to preclude evidence that in 2016 (and at other times) he entertained representatives of the Fund at a sporting event and attended the wedding of a Fund principal. He argues that it is not probative of the underlying issue of whether he provided material non-public

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[14] PIP Mot. 5.

[15] PIP Mot. 5.

[16] Opp. 4.

[17] Opp. 3. Enforcement says that the PIP evidence is relevant to show that Waller wanted "to curry favor with his top customer." *See* Enf. Pre-Hrg. Br. 27-28.

[18] *See, e.g., Dep't of Enforcement v. Connors*, No. 2012033362101, 2017 FINRA Discip. LEXIS 2, at * 39 n.19 (NAC Jan. 10, 2017) ("Evidence of misconduct that is not alleged in a complaint, but similar to the misconduct that is charged, is admissible to determine sanctions.") (citing *Wanda P. Sears*, Exchange Act Release No. 58075, 2008 SEC LEXIS 1521, at *22 n.33 (July 1, 2008)).

information to the Fund to help it front run in the charged activity and thus would not assist the Panel in resolving those issues.[19]

Waller acknowledges that that he and his wife, together with a colleague, provided business-related entertainment to Fund employees when they attended the Fund principal's wedding. He argues that there is no claim in this proceeding that he inappropriately expensed travel or entertainment to his former firm. There is nothing wrong with expensing business entertainment, Waller asserts, which "exists to maintain and cement business relationships."[20] He also says that he provided business entertainment to other customers, besides Fund employees, but Enforcement does not refer to such entertainment or social interaction with his other customers.[21] Waller argues that any probative value the evidence he objects to may have is outweighed by the unfair prejudice to him because it "is nothing more than an attempt to show that Mr. Waller was unduly deferential and beholden to one of his customers."[22]

Enforcement argues that Waller has tried to portray the Fund "as just another customer" and therefore he has no motive to favor it over other customers. In fact, says Enforcement, the Fund was Waller's biggest customer and its value to Waller is demonstrated by his entertaining Fund principals. Enforcement therefore disputes that the entertainment-related information is prejudicial; it is being offered, it says, "to demonstrate that Waller actively maintained a close relationship with" the Fund.[23]

I find that at this stage of the proceeding Enforcement has shown that the entertainment-related evidence may be relevant to demonstrating the nature of the relationship that Waller maintained with the Fund.

IV. Conclusion

Respondent has failed to meet the high standard required to exclude either the PIP-related information or the entertainment evidence at this juncture—that the evidence at issue is "clearly inadmissible for any purpose." I find that the issues raised in the motions are best left for resolution at the hearing when they can be decided in proper context and based on a fuller record.

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[19] Entertainment Mot. 4. According to proposed exhibit CX-15, at 2-3, his former firm's response to a Rule 8210 request for information, to which Waller also objects, Waller also hosted Fund personnel at sporting events in approximately eight other instances between 2012 and 2017.

[20] Entertainment Mot. 2, 4.

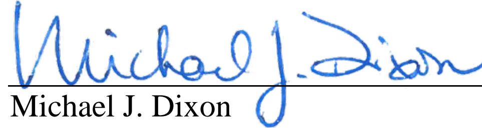
[21] Entertainment Mot. 2-3.

[22] Entertainment Mot. 5.

[23] Opp. 5-6.

Respondent's motions *in limine* are accordingly denied, subject to renewal at the hearing if the exhibits and related evidence are offered into evidence and subject to a determination as to whether they are relevant, material, authenticated, unduly repetitious, or unduly prejudicial.

SO ORDERED.



Michael J. Dixon
Hearing Officer

Dated: August 5, 2020

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