FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. JAMES RANDALL CLAY (CRD No. 5748560), Respondent.	Disciplinary Proceeding No. 2014039775501 Hearing Officer—CC

ORDER REGARDING ENFORCEMENT'S MOTION TO STRIKE RESPONDENT'S WITNESSES AND EXHIBIT AND RESPONDENT'S MOTION TO STRIKE ENFORCEMENT EXHIBITS

On April 25, 2018, FINRA's Department of Enforcement ("Enforcement") filed a motion to strike two witnesses from Respondent James Randall Clay's ("Clay") witness list. Enforcement moves to strike FINRA Enforcement attorneys Kevin Pogue ("Pogue") and Tiffany Buxton ("Buxton"), both counsel of record for Enforcement. Enforcement also moves to strike proposed exhibit RX-1, which is a decision of the Tennessee Department of Labor and Workforce Development to grant Clay unemployment benefits.

Also on April 25, 2018, Clay filed a motion to strike several of Enforcement's exhibits and excerpts from Enforcement's pre-hearing brief. Specifically, Clay objects to "a letter purported to be written by Dr. John Bruce Wilson," which is proposed exhibit CX-2. Clay also moves to strike "items pertaining to Christina Clay (Pace),"[1] Clay's sibling. Although not specified, Clay's motion appears to refer to proposed exhibits CX-8 through CX-12. Clay further moves to strike information regarding Pace from Enforcement's pre-hearing brief.

I. Background

The Complaint contains three causes of action. Cause one alleges that Clay engaged in outside business activities without providing the firm with which he was associated, U.S. Bancorp Investments, Inc. ("Bancorp"), prior written notice of the outside business in the manner required by the firm's procedures. The outside business in which Clay allegedly participated involved purchasing rental properties from his customer, Dr. John Bruce Wilson ("Wilson"), and

[1] Clay's Answer implies that his sister, Christina Clay, is also identified as "Christina Pace." *See* Answer at 1. The parties' proposed exhibits also suggest that Christina Clay is also identified as "Christina Christy." In this order, I refer to her as "Pace."

managing the properties.[2] Cause two alleges that Clay made false statements to the firm in connection with outside business activities. Cause three alleges that Clay made false statements to FINRA in response to Rule 8210 requests for information and testimony.

In accordance with the December 1, 2017 Case Management and Scheduling Order, Enforcement filed a pre-hearing brief, exhibit and witness lists, joint exhibits, Stipulations, and Enforcement's proposed exhibits on April 13, 2018. Clay also filed exhibit and witness lists on April 13, 2018, but he did not file proposed exhibits and a pre-hearing brief.

II. Enforcement's Motion to Strike Witnesses

Clay's witness list includes: Pogue, Buxton and Pace. Clay represents that he intends to elicit from Pogue testimony regarding Pogue's receipt of a sworn affidavit from Pace and Pogue's subsequent interview of Pace. Clay represents that he intends to elicit from Buxton testimony regarding FINRA's investigation of this matter and her receipt of a sworn affidavit from Pace.

Enforcement argues that, because Pogue and Buxton have appeared as counsel for Enforcement in this proceeding, Clay must demonstrate a compelling need for their testimony, which Enforcement argues Clay has not done. Enforcement contends that the testimony that Clay seeks to elicit from Buxton and Pogue—whether and when they received Pace's sworn affidavit, facts related to Pogue's interview of Pace, and details on FINRA's investigation—is not relevant to whether Clay engaged in outside business activities and whether he misrepresented facts to Bancorp and FINRA. Enforcement also contends that the testimony is cumulative in that Enforcement has stipulated to its receipt of Pace's affidavit, Clay has represented that Pace will testify, and FINRA Principal Investigator Stephen Littman ("Littman") will testify about Enforcement's investigation.

Enforcement represents that Clay opposes the motion, but Clay did not file a written opposition.

An attorney who is likely to be a witness at a trial is generally prohibited from acting as an advocate at the trial.[3] Thus, a party may call opposing counsel as a witness only when doing so is justified by a compelling need.[4] Clay has not demonstrated a compelling need.

First, Clay has not demonstrated that Pogue's and Buxton's proposed testimony is relevant to the allegations of the Complaint. FINRA Rule 9263 states that the Hearing Officer

[2] The Complaint alleges that Clay entered into an agreement with Wilson, his 86-year-old customer, to purchase rental properties from Wilson for $1 million and that Wilson agreed to finance Clay's purchase and loan Clay $500,000 for repairs and upgrades to the properties. Clay contends that he was not purchasing the properties himself, but was instead facilitating a purchase between Pace and Wilson.

[3] OHO Order 13-04 (2009019042402) (June 3, 2012), at 3, http://www.finra.org/sites/default/files/OHODecision/p296314_0_0_0.pdf.

[4] *Id.*

shall receive relevant evidence and may exclude all evidence that is irrelevant, immaterial, unduly prejudicial, or unduly repetitious. Clay does not allege that Pogue and Buxton have personal knowledge related to the specific allegations of the Complaint or the facts underlying the conduct at issue. Rather, Clay contends that these individuals would be called to testify as to the specifics of Enforcement's investigation of the alleged misconduct, Enforcement's receipt of Pace's affidavit, and its subsequent interview of Pace.

The value of Pogue's and Buxton's testimony is further lessened by the fact that it would be cumulative of other evidence in this matter. Enforcement does not dispute that it received Pace's affidavit, as it is one of Enforcement's proposed exhibits, and Enforcement has stipulated to the receipt of a notarized affidavit bearing Pace's signature.[5] Furthermore, Enforcement plans to call Principal Investigator Littman to testify about FINRA's investigation.[6] Finally, Clay plans to call Pace as a witness,[7] and she can testify as to when and under what circumstances she signed an affidavit, whether she provided a copy to Enforcement, and her interview with Pogue. Clay similarly can testify as to when and whether he provided Enforcement with Pace's affidavit. Additionally, the affidavit, which is one of Enforcement's proposed exhibits, speaks for itself.

Finally, to the extent that Clay seeks to present Pogue's and Buxton's testimony to demonstrate that Enforcement's staff has shown animus or bias towards him, it also is irrelevant and immaterial to this action. The Hearing Panel will hear arguments and consider relevant evidence from both parties with respect to the basis for the allegations. Based on the relevant evidence, the Hearing Panel will determine if Enforcement has met its burden of proof, regardless of any alleged bias or animus that resulted in Enforcement's commencing this action. "Moreover . . . '[a]bsent a showing of selective enforcement, the motives behind [Enforcement's decision to initiate an investigation and commence disciplinary proceedings] are irrelevant.'"[8]

I grant Enforcement's motion to strike Pogue and Buxton from Clay's witness list**.**

[5] Stipulations ¶ 44.

[6] Additionally, Enforcement represents that Littman participated in Pogue's interview of Pace, and could testify about the interview if necessary.

[7] Even if Pace were to become unavailable to testify, that would not necessitate the need to call Buxton and Pogue as witnesses. "Permitting a party to call opposing counsel to testify because a witness becomes unavailable would have undesirable consequences, because every attorney who interviews a potential witness or participant in a relevant event could be a witness, risking disqualification." OHO Order 13-04, at 3.

[8] *Dep't of Enforcement v. Mission Secs. Corp.*, No. 2006003738501, 2010 FINRA Discip. LEXIS 44, at *41 (NAC Feb. 24, 2010) (citing *Dep't of Enforcement v. Epstein*, No. C9B040098, 2007 FINRA Discip. LEXIS 18, at *78 (NAC Dec. 20, 2007), *aff'd*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217 (Jan. 30, 2009), *aff'd*, Exchange Act Release No. 63453, 2010 SEC LEXIS 4053 (Dec. 7, 2010)). *See also Terrance Yoshikawa*, Exchange Act Release No. 53731, 2006 SEC LEXIS 948, at *28-29 (Apr. 26, 2006) (holding that respondents must demonstrate that they were singled out for enforcement while others similarly situated were not and that such prosecution was motivated by arbitrary or unjust considerations (e.g., race, religion, or the desire to prevent the exercise of a constitutionally protected right)).

III. Enforcement's and Clay's Motions to Strike Exhibits

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 [has] broad discretion to accept or reject evidence under this rule."[9] The Federal Rules of Evidence, which do not apply in FINRA proceedings but may be instructive, 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."[10] Pre-hearing motions to exclude evidence are generally disfavored and should be granted "only if the evidence at issue is clearly inadmissible for any purpose."[11]

1. Proposed Exhibit RX-1

Clay's exhibit list identifies two documents, one of which is proposed exhibit RX-1, a decision of the Tennessee Department of Labor and Workforce Development to grant Clay unemployment benefits. Clay represents that the document will demonstrate that Tennessee ruled in favor of Clay's claim that there was insufficient evidence presented by Bancorp to deny Clay's unemployment claim.[12]

Enforcement seeks to strike proposed exhibit RX-1, which Clay failed to produce but which Enforcement appended to its opposition. Enforcement argues that the document is not relevant to the proceeding because it does not make any fact of consequence more or less probable. Enforcement assumes that Clay seeks, by offering the document, to demonstrate that the Tennessee Department of Labor found Clay had not engaged in work-related misconduct at Bancorp. Enforcement argues that the finding is neither binding in this forum nor relevant to the issues before the Hearing Panel.

Enforcement represents that Clay opposes the motion, but Clay did not file a written opposition.

The Hearing Panel's function in this case is to determine if Clay violated FINRA's rules by engaging in undisclosed outside business activities and misrepresenting facts to Bancorp and

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

[10] Fed. R. Evid. 401.

[11] OHO Order 16-18 (2014043020901) (May 24, 2016), at 2, http://www.finra.org/sites/default/files/OHO-Order-16-18-2014043020901.pdf (quotation omitted); OHO Order 16-04 (2012033393401) (Feb. 3, 2016), at 2, http://www.finra.org/sites/default/files/OHO_Order16-04_2012033393401_0.pdf (citations omitted).

[12] The Case Management and Scheduling Order states that the deadline for the parties to submit pre-hearing submissions was April 13, 2018. The Order states that the pre-hearing submissions must include each party's witness and exhibit lists, pre-hearing brief, and copies of the proposed exhibits. On April 13, Clay filed a list of two proposed exhibits, but neglected to file copies of the actual exhibits or a pre-hearing brief. Enforcement's motion states that it also did not receive copies of the exhibits. By email dated April 18, 2018, the Office of Hearing Officers ("OHO") notified Clay that we had not received copies of his proposed exhibits and that, pursuant to the Case Management and Scheduling Order, he must file the hard copies immediately. To date, Clay has not done so.

FINRA, as alleged in the Complaint. The Tennessee Department of Labor's unemployment benefits determination does not address whether Clay violated FINRA's rules, nor could it as FINRA was not a party to, or involved in, the unemployment proceeding. The Tennessee Department of Labor decision stated only that Clay's employer failed to provide sufficient evidence to prove work-related misconduct. This finding is not binding on FINRA and does not address whether Clay violated FINRA rules. Although pre-hearing motions to strike are disfavored, in this instance, Clay offers no explanation for the relevance of this document, and it appears unrelated and irrelevant to the issues before the Hearing Panel.

Accordingly, I grant Enforcement's motion to strike proposed exhibit RX-1.

2. Proposed Exhibit CX-2

Clay moves to strike proposed exhibit CX-2, which is a letter purportedly written by Clay's now deceased customer, Wilson. Clay argues that Enforcement cannot authenticate the "time, purpose, author, and date the letter was written" or establish Wilson's intent because Wilson is now deceased.

Enforcement opposes Clay's motion. Enforcement contends that proposed exhibit CX-2 is a hand-written letter from Wilson stating that he sold rental properties to Clay. It argues that the exhibit is relevant because it is contemporaneous evidence refuting Clay's assertion that his sister, Pace, bought the rental property from Wilson and that Clay was not personally involved. Enforcement contends that Wilson's son, B. Wilson, is expected to authenticate the letter by testifying that his father wrote the letter.

According to Federal Rule of Evidence 901(a), to authenticate or identify an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is. Rule 901(b) states that such authentication may be the testimony of a witness with knowledge and that a non-expert's opinion that handwriting is genuine, based on a familiarity with it, may suffice. Thus, B. Wilson's testimony may be sufficient to authenticate CX-2.

CX-2 is hearsay evidence. "[H]earsay evidence is admissible in administrative proceedings."[13] In appropriate circumstances, hearsay may constitute the sole basis for findings of fact.[14] The Hearing Panel must, however, evaluate the probative value, reliability, and fairness of hearsay evidence by considering several factors, including "the possible bias of the declarant, the type of hearsay at issue, whether the statements are signed and sworn to rather than anonymous, oral or unsworn, whether the statements are contradicted by direct testimony, whether the declarant was available to testify, and whether the hearsay is corroborated."[15]

[13] *David C. Ho*, Exchange Act Release No. 54481, 2006 SEC LEXIS 2100, at *27 (Sept. 22, 2006) (citing *Robert Fitzpatrick*, 55 S.E.C. 419, 433 (2001)).

[14] *See Robin Bruce McNabb*, 54 S.E.C. 917, 926-27 (2000).

[15] *Rooney A. Sahai*, 58 S.E.C. 276, 290 (2005) (citations omitted).

Wilson's letter purportedly addresses the issues before us (Clay's alleged involvement in an outside business activity related to purchasing rental properties from Wilson) and is therefore relevant. The fact that the document is hearsay does not require me to strike it from Enforcement's exhibit list or deny admission of the document into evidence. Enforcement may offer evidence, including B. Wilson's testimony, to enable the Hearing Panel to assess the probative value, reliability, and fairness of the letter, and I will determine at the hearing whether to enter the document into evidence and, if it is accepted into evidence, the Hearing Panel will determine weight to accord it.

Accordingly, I deny Clay's motion to strike CX-2. My denial of the motion to strike should not be construed as a determination that CX-2 will be accepted into evidence. I defer ruling on the admission of Enforcement's proposed exhibits until the hearing.

3. Proposed Exhibits CX-8 through CX-12

Clay also moves to strike CX-8 through CX-12, which he describes as "online news articles, background records and bankruptcy proceedings," and Enforcement's "obvious attempt at character assassination and witness intimidation."

Proposed exhibit CX-8 is an August 2013 civil complaint filed by Gateway Credit Union against Pace in the Circuit Court for Montgomery County, Tennessee, in which Gateway Credit Union alleges fraud, misappropriation, and breach of employment duties. Proposed exhibit CX-9 is a June 12, 2014 news report that the Tennessee Bureau of Investigation had obtained indictments against Pace for altering Gateway Credit Union monthly balance sheets while serving as chief executive officer. Proposed exhibit CX-10 is a January 22, 2016 criminal rule and execution docket for the Montgomery County, Tennessee Circuit Court. The document appears to indicate that 15 of the 17 counts of the indictment against Pace were dismissed and two were resolved through a pre-trial diversion program after Pace pled no contest to forgery. Proposed exhibit CX-11 is a June 19, 2015 Notice of Prohibition issued by the United States National Credit Union Administration stating that, in light of the criminal matter, Pace was prohibited from certain types of association with insured depository institutions. CX-12 is Pace's February 2015 voluntary petition for Chapter 11 bankruptcy.

Enforcement argues that Clay has placed Pace's background, financial situation, criminal history and credibility at issue in his stated defense. Enforcement asserts that proposed exhibits CX-8 through CX-12, which address Pace's employment history, criminal background, and financial condition during the relevant period, are relevant to Clay's assertion that Paced entered into a $1.5 million real estate contract with Wilson in November 2013. Enforcement claims they are also relevant to Pace's credibility as a witness.

Enforcement contends that, if admitted into evidence, these documents will demonstrate that, in January 2013, Pace was terminated as chief executive officer and manager of Gateway Credit Union in the wake of an internal audit related to credit card advances, for which she reimbursed the credit union $48,258 in February 2013. They will also show that, in May 2013,

the Tennessee Bureau of Investigations launched a criminal investigation of Pace for allegedly fraudulent bookkeeping, which led to her 2014 indictment and 2015 *nolo contendere* plea to felony forgery. Enforcement also argues that the documents show Pace filed a voluntary bankruptcy petition in February 2015, disclosing that she had only $300 in cash.

Clay argues as a defense that he participated in Wilson's November 2013 sale of rental properties solely for the purpose of facilitating Pace's purchase and subsequent management of the properties. He offers Pace as a witness to testify about the transaction with Wilson. Thus, Pace's financial situation in November 2013, her employment status, allegations of financial irregularities in her prior job, and the threat of a criminal indictment in November 2013 may be relevant to the credibility of Clay's defense. Furthermore, Clay intends to call Pace as a witness. Enforcement is allowed, on cross examination, to inquire into the matters addressed in CX-8 through CX-12 if they are probative of Pace's character for truthfulness.[16]

Accordingly, I deny Clay's motion to strike proposed exhibits CX-8 through CX-12. My denial of the motion to strike should not be construed as a determination that CX-8 through CX-12 will be accepted into evidence. I defer ruling on the admission of Enforcement's proposed exhibits until the hearing.

IV. Clay's Motion to Strike Portions of Enforcement's Brief

Clay seeks to strike statements describing the contents of CX-8 through CX-12 from Enforcement's pre-hearing brief.[17] Pages 15 and 16 of Enforcement's pre-hearing brief provide details of the allegations regarding Pace's conduct as chief executive officer of Gateway Credit Union to demonstrate that "Pace was in no position to purchase the [r]ental [p]roperties" because, at the time of the transaction, Pace was subject to a criminal investigation for fraud and named as a defendant in a civil suit.

By using Pace as part of his defense and stating that she, not Clay, in fact purchased the rental properties from Wilson, Clay made Pace's financial situation, employment background, and possible criminal indictment relevant. Enforcement's references to Pace's background in its brief involve matters that could be gleaned from publicly available sources and are not overly prejudicial to Clay. Accordingly, I deny Clay's motion to strike portions of Enforcement's brief.

[16] *See* Fed. R. Evid. 608(b).

[17] Clay does not identify specific statements that he seeks to strike from Enforcement's pre-hearing brief. For purposes of this order, I treat Clay's motion as a request to strike Enforcement's discussion of Pace on pages 15 and 16 of the pre-hearing brief.

V. Conclusion

Enforcement's motion to strike Respondent's witnesses Pogue and Buxton and to strike proposed exhibit RX-1 is granted. Respondent's motion to strike proposed exhibits CX-2 and CX-8 through CX-12 is denied. Respondent's motion to strike portions of Enforcement's brief is denied.

SO ORDERED.

Carla Carloni
Hearing Officer

Dated: May 3, 2018

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