

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

RESPONDENT

Respondent.

Disciplinary Proceeding
No. 2013038333001

Hearing Officer—MJD

**ORDER DENYING RESPONDENT'S MOTION FOR REQUESTS
FOR DOCUMENTS AND INFORMATION UNDER RULE 9252**

On May 6, 2016, Respondent filed a motion under FINRA Rule 9252 requesting that I order the Department of Enforcement to issue requests, pursuant to FINRA Rule 8210, for documents and information to his former employer, ML, and six of its employees. On May 12, 2016, Enforcement filed its opposition.

For the reasons set forth below, I **DENY** Respondent's motion.

A. Allegations of the Complaint

The Complaint alleges that an imposter posing as a client of Respondent sent him two emails requesting that he send two wire transfers totaling \$127,200 to third-party bank accounts. According to causes one and two, Respondent falsely represented to a sales assistant and a supervisor that he verbally confirmed the wire transfer requests with the client, as ML's written procedures require. Respondent also falsely represented to the sales assistant that the client needed one of the transfers to pay medical expenses.

Cause three charges Respondent with structuring the first wire transfer request—for \$77,200—to evade ML's requirement that its personnel obtain a signed Letter of Authorization (LOA) from a customer for wire transfer requests exceeding \$50,000. The firm's procedures expressly prohibited its employees from structuring wire transfers to avoid obtaining an LOA. Enforcement alleges that Respondent structured the \$77,200 wire transfer by splitting it into two separate transfers of \$50,000 and \$27,200 over two consecutive days.

Enforcement alleges that Respondent's misconduct set forth in the first three causes of action constitutes separate violations of FINRA Rule 2010, which requires associated persons to

“observe high standards of commercial honor and just and equitable principals of trade.”¹
Respondent answered the Complaint and denied the charges.

B. Applicable Standards

Under Rule 9252, a respondent may request that the Hearing Officer order Enforcement to invoke Rule 8210 to compel the production of documents or testimony from entities or individuals that are subject to FINRA’s jurisdiction. Rule 9252(a) states that the request must describe with specificity the testimony, documents or category or type of documents sought, state why they are material, describe the requesting party’s previous good faith efforts to obtain the documents or testimony through other means, and state whether the custodian of the documents or the person requested to testify is subject to FINRA’s jurisdiction.

Pursuant to Rule 9252(b), “[t]he Hearing Officer may grant such a request only upon a showing that the information sought is relevant, material, and non-cumulative; that the requesting party has previously attempted to obtain the documents or testimony through other means, but has been unsuccessful; and that the person from whom the documents or testimony is sought is subject to FINRA jurisdiction.”² Rule 9252(b) also requires the Hearing Officer to consider whether the request is unreasonable, oppressive, excessive in scope, or unduly burdensome, and whether the request should be denied, limited, or modified.³ Rule 9252(c) gives the Hearing Officer the authority, after consideration of all the circumstances and after determining that a request is “unreasonable, oppressive, excessive in scope or unduly burdensome,” to grant the request “only upon such conditions as fairness requires.”

C. Background to Respondent’s Requests for Documents and Information

Respondent’s motion relates to a single issue – his alleged structuring of the first wire transfer request. He claims that the information he seeks from ML is “vital” to his defense and would rebut Enforcement’s structuring allegations. He denies that he was the “perpetrator” of the alleged structuring of the wire transfers, claiming that the structuring in the manner that occurred in this case was a common practice at ML’s Newport Beach branch office where Respondent worked.⁴ Reduced to its essence, Respondent’s argument is that because others engaged in or tolerated structuring, he should not be held liable.⁵

¹ A fourth and final cause of action charges that Respondent’s alleged misrepresentations to the sales assistant about the wire transfer requests—that he verbally confirmed them and one was for medical expenses—caused the sales assistant to record false entries in ML’s books and records, in violation of FINRA Rules 4511 and 2010.

² OHO Order 08-12 (2005003188901) (Aug. 27, 2008), at 2, http://www.finra.org/sites/default/files/OHODecision/p118011_0.pdf.

³ OHO Order 15-05 (2012034936005) (Jan. 27, 2015), at 7, http://www.finra.org/sites/default/files/OHO-Order-15-05-ProceedingNo.2012034936005_0.pdf.

⁴ Respondent’s Motion for Issuance of Rule 8210 Requests Pursuant to Rule 9252 (“Mot.”), at 4-5.

⁵ Respondent admits that he sent the following email to the client/impostor concerning the wire transfer request for \$77,200: “Our limit for verbal instructions is \$50,000 per transfer per day. If you’re okay with it, we can send \$50,000 today and the balance tomorrow. Let me know if that works and we’ll send it expeditiously. . . . If not, we’ll

Respondent states that he learned of the existence of the documents and information he requests in late April 2016, when ML produced in electronic form nearly 30,000 documents (which far exceed 30,000 total pages, according to Respondent).⁶ ML's production was its response to Enforcement's Rule 8210 letter to the firm, dated February 16, 2016, which Enforcement sent at Respondent's request. The 8210 request sought from ML's Southern California Private Wealth Complex ("Southern California Complex"), among other documents, copies of emails that relate to possible structuring of wire transfers from January 1, 2012, to August 31, 2013, a period of 20 months. (Respondent's alleged misconduct occurred August 7-9, 2013.) When ML objected that compiling documents from the entire Southern California Complex would be burdensome, Respondent conditionally consented to limiting the firm's production to the Newport Beach branch, pending his review of the documents the firm produced.

Using search terms provided by Respondent, ML produced among the 30,000 documents emails that, Respondent argues, provide evidence that five sales assistants at the Newport Beach branch structured ten separate customer wire transfer requests. At least two of the ten possible instances of structuring wire transfers—in December 2012 and February 2013—are evidenced by emails that involve Respondent in some manner.⁷ Building on this discovery, Respondent now wants to renew his request that the firm search the entire Southern California Complex, arguing that the ten instances of alleged structuring he uncovered at the Newport Beach branch "are likely just the 'tip of the iceberg' of a rampant practice amongst ML personnel to structure transfers."⁸ He further argues that if structuring was "fully embraced" by other firm employees "this will support Respondent's defense that his conduct was fully consistent with ML's common practices, whether or not such practices are accurately reflected in the [written supervisory procedures]."⁹ Respondent says he relied on his sales assistants to advise him how to comply with the firm's policies on handling wire transfers, and whether they believed that structuring wire transfers was consistent with firm policies "is highly relevant and material to Respondent's defense."¹⁰

require a signed letter of authorization. . . ." Complaint ("Compl."), ¶ 18; Answer ("Ans."), ¶ 18. Respondent denies that he structured the wire transfer or violated FINRA Rule 2010. Compl., ¶¶ 48-50; Ans., ¶¶ 48-50.

⁶ Mot., at 3.

⁷ Mot., Ex. A-1.

⁸ Mot., at 6-7. For example, in one email uncovered by Respondent, dated March 12, 2012, a sales assistant told a customer, "In the message I left you I had mentioned that I would do the transfer in two parts as I can only move up to \$50,000 without something signed by you." In another email, dated May 1, 2013, a different sales assistant told a customer "In order to move the full \$200k I would need to get your verbal authorization over our recorded line. I can also move \$50K each day over the next 4 business days if that is more convenient." Mot., at 5-6, and Ex. F.

⁹ Mot., at 7.

¹⁰ Mot., at 8.

D. Discussion

Respondent's motion contains separate requests for documents and information directed at ML and six of its employees.¹¹ The six employees are: (i) AL, Respondent's former sales assistant; (ii) TL, another former assistant of Respondent's; (iii-v) TG, TH, and HH¹²—sales assistants who purportedly had a hand, based on a review of emails, in structuring five of the ten suspected wire transfers Respondent uncovered in ML's Rule 8210 production; and (vi) BH, the Operations Manager for the Southern California Complex, which included the Newport Beach branch office. BH is the supervisor whom Respondent allegedly told that he had verbally confirmed the wire transfer requests with the customer.¹³

Enforcement opposes the motion on the grounds that it does not meet the requirements of Rule 9252 because it seeks documents and information that are not relevant or material to the allegations of the Complaint and is unduly burdensome on ML.

As discussed below, I deny Respondent's requests on the grounds that they do not comply with various requirements contained in Rule 9252. Most importantly, Respondent's requests are not relevant or material to this action. In a FINRA disciplinary proceeding, "material evidence" is evidence relating to liability or sanctions that might be considered favorable to a respondent, which, if suppressed, would deprive the respondent of a fair hearing.¹⁴ Although the Federal Rules of Evidence do not apply in this disciplinary proceeding, I find the federal rule defining relevancy instructive. Under Federal Rule of Evidence 401, evidence is relevant if it has "any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Whether other ML personnel and branch offices structured other customer wire transfer requests to avoid the firm's written supervisory procedures is neither relevant nor material to the issue of whether Respondent engaged in structuring.

The requests are also burdensome. One of Respondent's requests to ML—to expand the email and document search for possible instances of structuring to the Southern California Complex—imposes a significant burden on the firm. Some of Respondent's other requests to the firm and all of those to the six individuals are interrogatories, which are not permitted under Rule 9252.¹⁵

¹¹ Enforcement consented to issuing an additional Rule 8210 request to ML limited to documents and information relating to five of the ten instances of possible structuring at the Newport Beach branch that involve only Respondent and his sales assistants AL and TL. Enforcement's Opposition to Respondent's Rule 9252 Motion ("Opp."), at 4, n.8; Mot., Ex. B, at 3 (Enforcement counsel A. Kampel email to Respondent's counsel, dated May 5, 2016). The five additional instances of alleged structuring that involve AL, TL, or Respondent occurred on March 3, and December 3, 2012, and February 12, April 1, and July 30, 2013. Mot., Ex. A-1.

¹² According to Enforcement, TH and HH are no longer employed by ML. Opp., at 5, n.15.

¹³ Compl., ¶¶ 25-26; Opp., at 2, n.2.

¹⁴ See OHO Order 15-05 (2012034936005), at 2.

¹⁵ Although under Rule 9252(b) I have the authority to limit or modify Respondent's requests, I decline to do so in this case because they are not relevant to this action.

1. Respondent's Requests to ML

Respondent asks that ML respond to seven enumerated requests. The most burdensome of the requests (No. 7) renews Respondent's initial request for documents, including emails, "sufficient to show instances of structuring of wire transfers occurring" at the Southern California Complex (and using the same search terms¹⁶ that Respondent asked the firm use in its first production).

Respondent fails to show how possible instances of structuring at other ML branch offices are relevant to this action. Respondent argues that if structuring were "rampant" at other branch offices, this fact would be relevant to his defense. However, Respondent has not shown that he relied on practices at other ML branch offices for the way he handled his customers' wire transfer requests at his branch. Practices concerning the handling of wire transfer requests at other branch offices have no bearing on Respondent's alleged misconduct. Furthermore, it is not relevant that other ML branches and employees violated firm rules against structuring. FINRA and the SEC have held that associated persons cannot shift responsibility for their misconduct to others.¹⁷ The SEC has held that FINRA disciplinary actions involve prosecutorial discretion. Accordingly, it is not a defense that others have not complied with securities rules and regulations.¹⁸

Respondent's request for documents from the Southern California Complex is also extraordinarily burdensome. ML's search that was limited to the Newport Beach branch resulted in the production of 30,000 documents. A production expanded to include additional branch offices could total hundreds of thousands of documents. ML informed Respondent that it opposes his additional requests for information.¹⁹ The firm represented to Respondent that it has already incurred "direct costs of over \$93,000 in outside vendor and legal fees" to respond to his prior requests.²⁰ Respondent presupposes, based solely on the few instances he found at the Newport Beach branch, that other ML branch offices in the Southern California Complex engaged in possible structuring and that the practice would be evidenced in documents and emails. He does not know that such documents in fact exist. Respondent's renewed request

¹⁶ Respondent's search terms are "structure; structuring; split; splitting; \$50,000.00; \$50,000; 50,000; \$50k; 50k; verbal authorization." Mot., Ex. A-1.

¹⁷ *Dep't of Enforcement v. Zaragoza*, No. E8A2002109804, 2008 FINRA Discip. LEXIS 28, at *28 (NAC Aug. 20, 2008) (a respondent may not shift responsibility for complying with rules to a third party) (citing *Michael David Borth*, 51 S.E.C. 178, 181 (1992) (finding that a respondent may not "shift his responsibility to others")).

¹⁸ *Patricia H. Smith*, 52 S.E.C. 346, 348 (1995) ("[I]t is not a defense that others in the industry may have been operating in a similarly illegal or improper manner") (citing *Donald T. Sheldon*, 51 S.E.C. 59, 66 n.32 (1992), *aff'd*, 45 F.3d 1515 (11th Cir. 1995)).

¹⁹ Respondent's Supplement to Rule 9252 Motion, at 1 (May 10, 2016).

²⁰ Opp., at 8, n.25, and Ex. 1 (email from counsel for ML to counsel for Respondent, May 10, 2016).

effectively asks that the firm conduct the proverbial “fishing expedition” for helpful documents. A respondent may not invoke Rule 8210’s authority for that purpose.²¹

Respondent’s six other requests (Nos. 1-6) to ML also seek irrelevant information and three of them (Nos. 2, 5, and 6) also constitute impermissible interrogatories. Request Nos. 1 and 3 ask the firm to produce documents “reflecting ML’s internal processing and approval of” and “any inquiry and/or investigation, if any, into” the five of the ten wire transfers that involve sales assistants TG, TH, and HH.²² Request No. 4 asks the firm to produce documents reflecting the outcome of any “inquiry and/or investigation” into the five wire transfers allegedly involving TG, TH, and HH, including reprimands or formal or informal disciplinary action taken against any firm personnel.²³ Respondent fails to show how these persons, including documents relating to their involvement, are relevant to his alleged misconduct. Whether or not the firm investigated and disciplined anyone is also irrelevant.

Request Nos. 2, 5, and 6 to ML are interrogatories, which are not permitted under Rule 9252.²⁴ For this reason alone, they are objectionable. But like Respondent’s other requests to the firm, they are also irrelevant to the charges against him. Respondent requests the firm to state whether the five sales assistants have ever structured other wire transfers in the past, and to describe each instance (and provide all related documents).²⁵ Request Nos. 5 and 6 ask the firm to state whether it intends to open an inquiry or investigation into the ten possible instances of structuring, and, if no such inquiry or investigation was or will be opened, to explain its reasons for not doing so.²⁶ None of these requests relate to relevant material.

For the foregoing reasons, I **DENY** each of Respondent’s requests directed at ML.

2. Respondent’s Requests to Five Sales Assistants and Supervisor

Respondent poses five identical questions to each of the five sales assistants and one question to supervisor BH. With respect to the purported instances of structuring in which they may have been involved, Respondent asks the five assistants—AL, TB, TG, TH, and HH—to answer the following questions:

- Provide a “detailed written explanation” as to why they purportedly structured the wire transfers.

²¹ See OHO Order 06-05 (CLI050016) (Jan. 10, 2006), at 3, <http://www.finra.org/sites/default/files/OHODecision/p016220.pdf>; OHO Order 06-08 (C07050029) (Jan. 12, 2006), at 3, <http://www.finra.org/sites/default/files/OHODecision/p016223.pdf>.

²² Mot., Ex. A-1, Request Nos. 1 and 3.

²³ Mot., Ex. A-1, Request Nos. 3 and 4.

²⁴ See OHO Order 98-24 (CAF970002) (May 18, 1998) at 9, <https://www.finra.org/sites/default/files/OHODecision/p007757.pdf>.

²⁵ Mot., Ex. A-1, Request No. 2.

²⁶ Mot., Ex. A-1, Request Nos. 5 and 6.

- Identify the names of the persons who approved each wire transfer.
- State whether they believed their “conduct in structuring the wire transfers . . . was consistent with ML’s formal or informal patterns and practices” for processing wire transfers.
- State whether they received a written or oral reprimand or were subject to formal or informal disciplinary action by the firm, and, if so, provide “all documents” relating to actions taken against them.
- State whether they have structured any other wire transfers in the past, and describe each instance and provide documents relating to the transfers.²⁷

Respondent’s questions constitute interrogatories, and are not permitted under Rule 9252. For this reason alone, Respondent’s requests to the five assistants are fatally deficient. The questions also seek to elicit information that is not relevant to this action.²⁸ Whether other persons committed violations of rules and regulations involving other customers and wire transfer requests is not relevant to Respondent’s defense.²⁹

Respondent posed one question to supervisor BH. He asked whether BH was aware of the ten instances of suspected structuring of wire transfers in the Newport Beach branch office and whether he approved them. Respondent argues that BH was in charge of ensuring that ML’s policies against structuring were complied with in the Southern California Complex. If he approved structuring in the other instances, according to Respondent, this would be relevant and material to Respondent’s defense that structuring was a common practice.³⁰ As with his questions to the five sales assistants, Respondent’s request to BH, too, is an interrogatory, and for this reason alone is improper under Rule 9252. It is also not relevant because evidence of misconduct by others is not a defense.³¹

For the foregoing reasons, I **DENY** each of Respondent’s requests to the five sales assistants and to supervisor BH.

²⁷ Mot., at 8-9, and Exs. A-2, A-3, A-4, A-5, A-6.

²⁸ TH and HH are no longer registered and presumably are not represented by counsel. Respondent has failed to demonstrate that he contacted them to learn if they would voluntarily respond to his requests for information, as required by Rule 9252(a). Opp., at 5, n.15; Mot., at 10.

²⁹ *Robert Conway*, Exchange Act Release No. 70833, 2013 SEC LEXIS 3527, at *24 (Nov. 7, 2013) (rejecting respondents’ arguments that their conduct was consistent with industry norms and they were made “scapegoats” for abuses committed by others who were not prosecuted on the grounds that FINRA’s “disciplinary proceedings are treated as an exercise in prosecutorial discretion.”) (quoting *Schellenbach v. SEC*, 989 F.2d 907, 912 (7th Cir. 1993)).

³⁰ Mot., at 9, and Ex. A-7.

³¹ Enforcement states that it intends to call AL and BH as witnesses at the hearing of this matter. Opp., at 6, n.16. To the extent deemed admissible at the hearing, Respondent can question them about the firm’s practices in handling wire transfer requests at the hearing.

E. Conclusion

Respondent's motion is **DENIED**.

SO ORDERED.

Michael J. Dixon
Hearing Officer

Dated: May 20, 2016