

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

RESPONDENT

Respondent.

Disciplinary Proceeding
No. 2011025444501

Hearing Officer—DRS

**ORDER DENYING RESPONDENT'S MOTION TO STRIKE PORTIONS OF
ENFORCEMENT'S POST-HEARING APPENDIX**

A. Background

Following the hearing, I ordered each party to file initial and reply post-hearing briefs containing proposed findings of fact and conclusions of law.¹ Among other things, the Order contained limitations on the length of the briefs: 35 pages for initial briefs, 15 pages for reply briefs. Additionally, it directed the parties to attach to their initial briefs an appendix containing a chronology describing: (1) any purported red flags indicative of potentially suspicious activity which Respondent detected or reasonably should have detected; and (2) the response, if any, Respondent made, or reasonably should have made, to the purported red flags. The Order also required the parties to support all proposed findings of fact or other factual statements in the briefs and chronologies by specific references to the record. Finally, the chronologies were not subject to, and did not count toward, any page limitations.

On April 30, 2015, the Department of Enforcement filed its initial brief. The brief was 35 pages in length. Enforcement attached to the brief a 38-page appendix. On May 20, 2015, Respondent moved to strike portions of the appendix, claiming that Enforcement improperly used it as a vehicle to avoid the briefing limitations. Specifically, Respondent asserts that Enforcement inserted proposed findings of fact, conclusions of law, and legal argument solely in the appendix "and not in its opening brief, where it belonged." Respondent requests that I strike these portions of the appendix because, otherwise, Enforcement will reap an unfair advantage.

¹ See Order Governing Post-Hearing Briefing (Mar. 16, 2015).

On May 26, 2015, Enforcement opposed the motion to strike, arguing that it complied with the Order.² Enforcement disputes that it removed facts, information and legal argument from the brief. To the contrary, it asserts that it discussed red flags of potentially suspicious activity at length, and with specificity, in its brief, “categorizing the types of red flags and giving specific examples.”

B. Discussion

Courts have found page limitations in pleadings to be important. Not only do they regulate the court's workload, but they also serve to “encourage litigants to hone their arguments and to eliminate excessive verbiage.”³ Additionally, in numerous cases, courts have rebuked parties for evading such limitations through computer-aided contrivances such as small or shrunken font, excessive use of lengthy footnotes (especially textual footnotes),⁴ and similar maneuvers, whether or not expressly prohibited by local rules or court order.⁵ These improper maneuvers have included transferring material to an appendix that properly belonged in the brief.⁶

The above principles governing adherence to page limitations apply equally in this forum. Therefore, I have considered them in ruling upon the instant motion to strike. Here, I find

² Enforcement also argued that I should deny the motion to strike because Respondent violated the Case Management and Scheduling Order by failing to consult with Enforcement before filing the motion. *See* Case Management and Scheduling Order (June 20, 2014) at 3–4. Enforcement further notes that denying the motion on this basis alone is appropriate because this is not the first time that Respondent has failed to comply with this provision and that I previously warned Respondent that failing to consult with Enforcement prior to filing a motion may result in its summary denial. *See* Order Denying Respondent's Motion to Quash (Oct. 16, 2014) at 4 n.11.

³ *Fleming v. County of Kane*, 855 F.2d 496, 497 (7th Cir. 1988).

⁴ The Order specifically instructed the parties to “minimize their use of lengthy textual footnotes.” *See* Order Governing Post-Hearing Briefing (Mar. 16, 2015) at 1.

⁵ *See, e.g., Freemanvibe v. Valley Arts & Sci. Acad.*, 2013 U.S. Dist. LEXIS 70131, at *2 (E.D. Cal. May 16, 2013); *Sanchez v. McClintock*, 2013 U.S. Dist. LEXIS 50899, at *17 n.5 (D. Puerto Rico. Apr. 8, 2013); *Condon v. City of Chicago*, 2011 U.S. Dist. LEXIS 131931, at *2 (N.D. Ill. E.D. Nov. 9, 2011); *Production & Maintenance Employee's Local 504 v. Roadmaster Corp.*, 954 F.2d 1397, 1407 (7th Cir. 1992); *TK-7 Corp. v. Estate of Barbouti*, 966 F.2d 578 (10th Cir. 1992); *Dogloo, Inc. v. Northern Ins. Co.*, 1995 U.S. Dist. LEXIS 20111, at *26 n.8 (C.D. Cal. Dec. 4, 1995); *Fleming*, 855 F.2d at 498.

⁶ *See, e.g., United States ex rel. Solis v. Millennium Pharms., Inc.*, 2014 U.S. Dist. LEXIS 41342, at *29 (E.D. Cal. Mar. 25, 2014); *CSR Ltd. v. CIGNA Corp.*, 2005 U.S. Dist. LEXIS 29319, at *55 n.15 (D.N.J. Nov. 21, 2005); *United States v. Boyd*, 2012 U.S. App. LEXIS 830, at *756 n.2 (10th Cir. Jan. 12, 2012); *AssociationVoice, Inc. v. AtHomeNet, Inc.*, 2011 U.S. Dist. LEXIS 1654, at *5 (D. Colo. Jan. 6, 2011).

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 15-10 (2011025444501).

that Enforcement violated neither the letter nor the spirit of the Order.⁷ The Order required the parties to address certain subjects in their appendices, which Enforcement did. The Order did not restrict the appendices to the facts or factual arguments contained in the briefs. Therefore, Enforcement did not violate the Order to the extent it addressed the specified subjects by going beyond what it included in its brief.

Second, Enforcement did not utilize the appendix improperly to avoid the page limitations applicable to the briefs. The Order did not prohibit the parties from citing to the appendices, and, therefore, the parties were entitled to do so. Further, the page limitations pertaining to the briefs are to be read in conjunction with the page limitation exemption granted to appendices. Thus, Enforcement did not circumvent the page limitations applicable to the briefs by referencing an authorized appendix that was exempt from those limitations.

Based on the foregoing, I **DENY** Respondent's motion to strike.⁸

SO ORDERED.

Andrew H. Perkins⁹
Chief Hearing Officer

Dated: June 4, 2015

⁷ The appendix did not contain legal conclusions and did not reference legal or similar authority except in two instances. First, Enforcement cited *Dennis S. Kaminski*, Exchange Act Rel. No 65347, 2011 SEC LEXIS 3225 (Sept. 16, 2011) in the appendix (*see* footnotes 40, 60, and 68) but not in its brief. Second, Enforcement cited Notice to Members 02-21 in the appendix (*see* footnotes 5, 15, 19, 19, 24, 46, 50, 66, 40, 68, 75, and 76) as well as in its brief (Brief at 23, 24). The appropriate place for Enforcement to have included such citations was in its brief, not in the appendix, which was to have been limited to facts and factual argument. But Enforcement's inclusion of these two citations, without corresponding legal argument, does not warrant my striking them from the appendix.

⁸ Additionally, I deny the motion for failure to comply with the pre-filing consultation requirement in the Case Management and Scheduling Order.

⁹ The Chief Hearing Officer issues this Order in the absence of the Hearing Officer, pursuant to Rule 9235(b).