

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

LEK SECURITIES CORP.  
(CRD No. 33135),

and

CHARLES FREDERIK LEK  
(CRD No. 4672129),

Respondents.

Disciplinary Proceeding  
No. 2021071137001

Hearing Officer–DDM

**ORDER DENYING RESPONDENTS' DISCOVERY REQUESTS**

**I. Introduction**

In its Complaint, the Department of Enforcement alleges that Respondents Lek Securities Corp. (“LSC” or the “Firm”) and Charles F. Lek violated an Order Accepting an Offer of Settlement (“Order”) dated December 20, 2019, in three ways. Specifically, Enforcement alleges that Respondents: (1) did not comply with a business-line suspension in the Order; (2) failed to implement some recommendations of the Independent Consultant (“IC”) in the IC’s report, as required by the Order; and (3) made false certifications to FINRA about the Firm’s compliance with the Order. Separate from the alleged violations of the Order, Enforcement alleges in the Complaint that Respondents did not establish and implement a reasonable anti-money laundering program, and failed to supervise the Firm’s microcap securities business. Finally, the Complaint alleges that LSC willfully failed to retain certain business-related communications.

Respondents made two discovery filings. In a motion, Respondents asks that I order Enforcement under FINRA Rule 9251(c) to provide me with a list of withheld documents (“Motion”). Respondents also request that I determine whether Enforcement must disclose that list, or any documents on it, to Respondents, along with any other relief that I deem appropriate. Enforcement opposes the Motion, supported by a Declaration from its lead trial counsel, Gregory

R. Firehock.<sup>1</sup> Enforcement argues that Respondents offer no reason to believe that any document has been withheld from production, and therefore I should not order Enforcement to produce a withheld document list.

Respondents' second discovery filing is a request pursuant to FINRA Rule 9252 ("Rule 9252 Request"). In the Rule 9252 Request, Respondents ask that I require Enforcement to provide the testimony of two Enforcement attorneys, Firehock and Perry Hubbard, and to produce documents related to the IC's work for Lek Securities under the Settlement Order. Enforcement opposes the Rule 9252 Request as unjustified and attached Declarations from Firehock and Hubbard to its opposition.

For the reasons below, I deny the Motion and the Rule 9252 Request. Respondents have not met the standards under Rule 9251(c) for me to order a withheld document list. Respondents also failed to show that they are entitled to the documents and information requested under Rule 9252.<sup>2</sup>

## **II. Discussion**

### **A. The Motion**

The FINRA Rule 9250 series governs discovery. FINRA Rule 9251(a)(1) requires Enforcement to make available for inspection and copying to a respondent the documents that were "prepared or obtained by Interested FINRA Staff in connection with the investigation that led to the institution of proceedings."<sup>3</sup> If Enforcement wants to withhold documents because they are irrelevant or for other good cause, it must obtain leave from the Hearing Officer.<sup>4</sup> Otherwise, all documents within the scope of the Rule must be produced unless Enforcement is authorized to withhold them under FINRA Rule 9251(b)(1). That provision permits Enforcement to withhold certain documents from production, including privileged documents or documents that constitute attorney work product,<sup>5</sup> internal memoranda or other notes or writings prepared by FINRA employees that shall not be offered into evidence,<sup>6</sup> or documents that would reveal an

<sup>1</sup> In this Order, I cite to Firehock's Declaration as "Firehock Decl."

<sup>2</sup> According to Enforcement, Respondents failed to meet and confer in good faith prior to filing the Motion and Rule 9252 Request. Respondents also failed to certify that they "made a reasonable, good-faith effort to meet and confer with the opposing party to informally resolve each issue" prior to filing the Rule 9252 Request. See Case Management and Scheduling Order ("CMSO") 9. I remind the parties of their pre-filing obligation to meet and confer. And as the CMSO provides, I may reject any filing that does not certify that the parties have met and conferred about the issues in the filing.

<sup>3</sup> FINRA Rule 9120(t) defines the term "Interested FINRA Staff."

<sup>4</sup> FINRA Rule 9251(b)(1)(D).

<sup>5</sup> FINRA Rule 9251(b)(1)(A).

<sup>6</sup> FINRA Rule 9251(b)(1)(B).

enforcement technique or guideline.<sup>7</sup> Nevertheless, if any exempt documents contain material exculpatory evidence, then Enforcement must produce them.<sup>8</sup>

Under FINRA Rule 9251(c), a Hearing Officer may require Enforcement to submit a list of withheld documents to the Hearing Officer for review. After reviewing the list, the Hearing Officer may order that Enforcement make the list or any withheld document available to the other party, unless federal law prohibits the disclosure of the document or its existence. But a motion to require Enforcement to produce a list of withheld documents must “be based upon some reason to believe” that Enforcement has improperly withheld a document.<sup>9</sup>

In his Declaration, Firehock stated that he oversaw Enforcement’s production of documents. To his knowledge, Enforcement timely produced all required documents under Rule 9251(a) and properly withheld documents from production pursuant to Rule 9251(b).<sup>10</sup> Firehock also affirmed that, to the best of his knowledge, Enforcement complied with its responsibility to produce material exculpatory evidence.<sup>11</sup>

Respondents say that they have “serious concerns”<sup>12</sup> that Enforcement has improperly withheld two categories of documents. First, Respondents seek “notes or materials”<sup>13</sup> that an Enforcement investigator “used or prepared in creating or analyzing”<sup>14</sup> two summary exhibits used by Enforcement in investigative testimony. Without the investigator’s notes and analysis, “and a more specific identification of the underlying documents supporting the summaries,” Respondents argue, they cannot test the accuracy of the summaries or the method by which they were created.<sup>15</sup> Enforcement points out, however, that the two summary exhibits “are composed of data and entries taken directly from documents produced by Respondents to Enforcement in spreadsheet form, and those documents are listed under ‘Source’ on each exhibit.”<sup>16</sup> Further, the columns in the exhibits “were taken directly from identically named columns in the underlying material, and none of them contain any sort of narrative or commentary prepared by

<sup>7</sup> FINRA Rule 9251(b)(1)(C). Enforcement has discretion to withhold documents that fall under these enumerated categories except in one circumstance: if a document “is prohibited from disclosure by federal law,” then Enforcement has no discretion and “shall withhold” it. FINRA Rule 9251(b)(2).

<sup>8</sup> FINRA Rule 9251(b)(3).

<sup>9</sup> FINRA Rule 9251(c).

<sup>10</sup> Firehock Decl. ¶ 13.

<sup>11</sup> Firehock Decl. ¶ 13.

<sup>12</sup> Motion Regarding Request for List of Withheld Documents (“Mot.”) 2.

<sup>13</sup> Mot. 2.

<sup>14</sup> Mot. 2.

<sup>15</sup> Mot. 2.

<sup>16</sup> Firehock Decl. ¶ 16.

Enforcement.”<sup>17</sup> That leaves the internal notes and material of Enforcement’s investigator, which fall within the scope of documents that Enforcement may withhold under Rule 9251(b).

Second, Respondents express concern that Enforcement has withheld documents and communications relating to the IC. According to Firehock, Enforcement has produced emails between FINRA and the IC regarding the IC’s work for LSC, and “all other written communications between FINRA and either the IC or Charles Lek in its production of documents in [this case].”<sup>18</sup> That leaves Respondents’ request for “internal communications within FINRA regarding [the IC]’s work and communications relating to LSC.”<sup>19</sup> Again, Respondents have not shown why Enforcement did not properly withhold its internal notes and communications, which Enforcement is permitted to do under FINRA Rule 9251(b).

### **B. Rule 9252 Request**

Respondents invoke Rule 9252 and ask that I invoke Rule 8210 to require Enforcement to do three things:

- Make Firehock and Hubbard available to testify;<sup>20</sup>
- Produce documents and communications between “all FINRA personnel and all persons associated with” the IC concerning the IC’s work pursuant to the Settlement Order and any disputes and concerns between the IC and LSC; and
- Produce FINRA’s internal documents and communications about the IC’s work under the Settlement Order.

Respondents argue that these documents and information are critical to their defense because they are “entitled to know to what extent FINRA influenced [the IC]’s findings, directed [the IC] to reach certain conclusions, and promoted [the IC]’s ultimate conclusion that LSC must close its microcap business.”<sup>21</sup> According to Respondents, “[w]hat influence FINRA had over the manner in which [the IC] conducted an allegedly ‘independent’ analysis is a salient fact that goes to [the IC]’s bias in issuing its report.”<sup>22</sup>

Rule 9252 allows a Respondent to request that FINRA compel the production of documents or testimony from persons subject to FINRA jurisdiction. According to Rule 9252(b),

<sup>17</sup> Firehock Decl. ¶ 16.

<sup>18</sup> Firehock Decl. ¶ 8.

<sup>19</sup> Mot. 2.

<sup>20</sup> It is unclear from their filing whether Respondents want Firehock and Hubbard to testify at the hearing, before the hearing as part of discovery, or both.

<sup>21</sup> Rule 9252 Request 2.

<sup>22</sup> Rule 9252 Request 2.

a Hearing Officer shall grant such a request only if the Respondent fulfills three requirements. First, the respondent must show that “the information sought is relevant, material, and non-cumulative[.]” Second, the Respondent must show a good-faith attempt to obtain the documents and information through other means. Third, the Respondent must show that FINRA has jurisdiction over each of the persons who would be the subject of the Rule 8210 request. Finally, even if the Respondent meets all three requirements, Rule 9252(b) states that “the Hearing Officer shall consider whether the request is unreasonable, oppressive, excessive in scope, or unduly burdensome, and whether the request should be denied, limited, or modified.”

Respondents failed to fulfill these requirements for their three requests. For their first request, they offer no detail about what testimony they would hope to elicit from Enforcement’s two attorneys, neither of whom is subject to FINRA Rule 8210. A party seeking to call as a witness an attorney defending or prosecuting a case must show a “compelling need” for the attorney’s testimony, and that there is no alternative witness or source available to provide the evidence the party seeks to elicit from the attorney.<sup>23</sup> Respondents have not shown why the testimony of the two Enforcement attorneys is necessary when Enforcement has produced all of its written communications with the IC,<sup>24</sup> and neither attorney had any oral communications with the IC about the substance of the report before the IC issued the report.<sup>25</sup> And Respondents cannot question Enforcement’s trial attorneys during testimony about their protected attorney work product.<sup>26</sup>

Respondents’ second request has already been satisfied by Enforcement. According to Firehock’s Declaration, Enforcement timely produced “written communications between FINRA and either the IC or Charles Lek in its production of documents” in this case.<sup>27</sup> Respondents have pointed to no evidence that Enforcement’s production of FINRA’s communications with the IC was somehow incomplete. They filed no motion concerning Enforcement’s production of documents under Rule 9251 by the deadline set forth in the CMSO. Respondents’ request is therefore moot.

Finally, Respondents’ request for FINRA’s internal documents and communications suffers from the same flaws as their request for a withheld document list that includes those items. Under FINRA Rule 9251(b)(1)(B), Enforcement is entitled to withhold “an internal

<sup>23</sup> *United States v. Watson*, 952 F.2d 982, 986 (8th Cir. 1991); *United States v. Thomson*, No. 5:11CR00002, 2011 U.S. Dist. LEXIS 70210, at \*3 (W.D. Va. June 24, 2011); OHO Order 21-14 (2018057274302) (Nov. 10, 2021), at 2, <http://www.finra.org/sites/default/files/2022-05/21-14-Order-Re-Attorney-Gary-Chodosh-Being-Called-As-A-Witness.pdf>.

<sup>24</sup> Firehock Decl. ¶ 8.

<sup>25</sup> Firehock Decl. ¶¶ 9-10.

<sup>26</sup> FINRA Rule 9251(b)(1)(A); see OHO Order 13-04 (2009019042402) (June 3, 2013), at 4 n.7, [http://www.finra.org/sites/default/files/OHODecision/p296314\\_0\\_0\\_0.pdf](http://www.finra.org/sites/default/files/OHODecision/p296314_0_0_0.pdf). (rejecting request for testimony of Enforcement lead trial counsel because it “might force disclosure of Enforcement’s work product”).

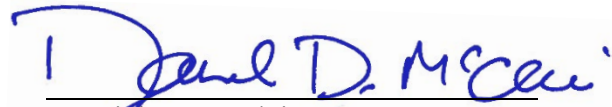
<sup>27</sup> Firehock Decl. ¶ 8.

memorandum, or other note or writing prepared by a FINRA employee that shall not be offered in evidence.” Respondents are not entitled to probe FINRA’s internal communications under the mere supposition that they will show that FINRA influenced the IC in preparing and issuing its report.<sup>28</sup>

### **III. Conclusion**

I deny Respondents’ Motion because they did not show that there is reason to believe that Enforcement improperly withheld a document during its discovery production. I deny Respondents’ Rule 9252 Request because they failed to meet the standards set forth in FINRA Rule 9252(b).

**SO ORDERED.**



Daniel D. McClain  
Hearing Officer

Dated: February 8, 2023

Copies to:

Ralph A. Siciliano, Esq. (via email)  
Adam F. Felsenstein, Esq. (via email)  
Amanda M. Leone, Esq. (via email)  
Gregory R. Firehock, Esq. (via email)  
David Monachino, Esq. (via email)  
Michael S. Geiger, Esq. (via email)  
Jennifer L. Crawford, Esq. (via email)

<sup>28</sup> Enforcement denies that it sought to influence the IC over its “direction, findings, conclusions, recommendations or anything else of substance prior to the issuance of the Final Report.” Firehock Decl. ¶ 9.