

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

SHOPOFF SECURITIES, INC.
(CRD No. 142866),

WILLIAM A. SHOPOFF
(CRD No. 1273471),

and

STEPHEN R. SHOPOFF
(CRD No. 5276325),

Respondents.

Disciplinary Proceeding
No. 2016048393501

Hearing Officer-CC

**ORDER DENYING IN PART AND GRANTING IN PART RESPONDENTS'
MOTION TO COMPEL PRODUCTION OF METADATA**

I. Background

FINRA's Department of Enforcement ("Enforcement") filed a four-cause Complaint on January 10, 2019.¹ Cause one alleges that, between December 2010 and March 2017, Respondents William Shopoff ("W. Shopoff"), Stephen Shopoff ("S. Shopoff"), and Shopoff Securities, Inc. ("SSI") willfully violated Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Exchange Act Rule 10b-5, and FINRA Rules 2010 and 2020, by misrepresenting and omitting material information in connection with sales of TSG Fund IV, L.P. ("Fund IV") notes. Specifically, cause one alleges that Respondents intentionally distributed or directed others to distribute the private placement memorandum ("PPM"), subscription agreement, and guaranty for the Fund IV notes, all of which included material misrepresentations and omissions. Cause one also alleges that, in the course of selling the Fund IV notes, Respondents verbally misrepresented and omitted material information.

¹ On April 1, 2019, Enforcement filed a First Amended Complaint that did not change the substance of the allegations against Respondents.

Cause two alleges that, during the same period, W. Shopoff, S. Shopoff, and SSI willfully violated Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and FINRA Rules 2010 and 2020, by intentionally misrepresenting and omitting material information in connection with sales of Shopoff Enterprises notes. Specifically, cause two alleges that Respondents intentionally distributed or directed others to distribute sales materials for the Shopoff Enterprises notes that included material misrepresentations and omissions. Cause two also alleges that, in the course of selling the Shopoff Enterprises notes, Respondents verbally misrepresented and omitted material information.

Cause three alleges that Respondents' sales of Fund IV and Shopoff Enterprises notes, as alleged under causes one and two, were unsuitable because Respondents lacked a reasonable basis to believe that the investments were suitable for any investors, in violation of NASD Rule 2310(b) (until July 8, 2012) and FINRA Rules 2111(a) (from July 9, 2012 onward) and 2010.

Cause four alleges that, during the period from September 2014 through October 2015, W. Shopoff and SSI willfully violated Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and FINRA Rules 2010 and 2020, in connection with sales of the Shopoff Land Fund III and Shopoff Land Fund IV private placements. Cause four alleges that SSI and W. Shopoff intentionally misrepresented and omitted material information related to W. Shopoff's personal financial liquidity to potential investors and brokerage firms soliciting potential investors in the two private placements.

On February 25, 2019, Respondents filed an Answer in which they deny violating FINRA's rules and the federal securities laws.

In early April 2019, Enforcement completed an electronic production under FINRA Rule 9251 of more than 1.4 million documents. Including document attachments, Enforcement produced more than two million documents.²

II. Motion to Compel Production of Metadata

On May 17, 2019, Respondents moved to compel Enforcement to produce 13 types of metadata related to Enforcement's electronic production of documents, identified in Appendix A to their Motion to Compel. Respondents contend that Enforcement's electronic production did not include any discernible organization or file-source information and included a variety of file types and individually labeled emails with embedded attachments. They argue that Enforcement's production included Respondents' voluminous Rule 8210 productions, transcripts of interviews with individuals in addition to Respondents, documents and information obtained in post-Wells Rule 8210 requests, and portions of the investigative file from an examination of Courtlandt Securities. They state that Enforcement failed to include customary file data fields and other information typically included in large-volume electronic discovery productions in civil matters in federal courts. Respondents argue that, without the metadata identified in Appendix A, Respondents cannot properly and efficiently sort and review the voluminous discovery produced

² May 31, 2019 Declaration of attorney Carolyn O'Leary ("O'Leary Decl.") ¶ 22.

by Enforcement. Respondents also contend in their motion that they are unable to locate in Enforcement’s production 750 documents they provided to Enforcement.³

Respondents argue that they “could not ‘match up’ their previously produced emails and files with the documents in the production set, and that they were unable to confirm which third party documents were produced in response to which third party 8210 requests.”⁴ Respondents contend that Enforcement admitted that the production included materials relating to a separate investigation (Courtlandt Securities) and that Enforcement had conducted a “de-duplication process” on the production, meaning that Respondents received only one copy of each “de-duped” document.⁵ Respondents argue that they therefore do not have metadata indicating file location and production information for each version of a de-duped document.⁶ They argue that Enforcement’s de-duplication process hindered their review of Enforcement’s production.

Enforcement opposes this motion. Enforcement states that it produced all electronic documents in the format in which FINRA obtained or prepared them and scanned hard copies of documents in .pdf format.⁷ Enforcement gave each document a Bates production number.⁸ Enforcement produced all documents as electronic files, which included any metadata already embedded in each file and attachment.⁹ By way of example, Enforcement indicates that the document-embedded metadata includes creation date, modified or edited dates, title, and author.¹⁰ Enforcement asserts that it did not remove document-embedded metadata from the document files it produced to Respondents.¹¹ Enforcement represents that it did not randomize or scramble its production of documents.¹²

³ *Id.* ¶ 26. On this point, Enforcement states that Respondents subsequently revised the “missing document” count down to 172 documents, consisting of 167 email documents with attachments and five .pdf documents. *Id.* Enforcement represents that it located all of the email documents in its production using simple date and word searches and provided Respondents with the Bates numbers for all of the email documents. *Id.* Enforcement withheld the five .pdf documents from production in accordance with FINRA Rule 9251(b)(2), which states that Enforcement shall withhold a document from production if federal law prohibits disclosure. Enforcement contends that Respondents originally produced the five documents to Enforcement and therefore already possess the documents. *Id.* The parties participated in oral argument on June 10, 2019. At oral argument, Respondents indicated that they no longer believe that Enforcement failed to produce documents. Rather, they argued that Enforcement’s failure to produce metadata made it difficult for them to locate and search the documents.

⁴ May 17, 2019 Declaration of attorney Bruce Kelson (“Kelson Decl.”) ¶ 6.

⁵ *Id.* ¶ 7.

⁶ *Id.*

⁷ O’Leary Decl. ¶¶ 14, 16, 19, 21.

⁸ *Id.* ¶¶ 19-21.

⁹ *Id.* ¶ 16.

¹⁰ *Id.* ¶ 23.

¹¹ *Id.* Enforcement represents that 99 percent of the documents it produced to Respondents are email files, each of which includes document-embedded metadata such as date, time, sender, recipient, and subject. *Id.* ¶ 24.

¹² *Id.* ¶ 18.

Enforcement argues that, in effect, Respondents have requested FINRA’s system metadata—information that is not embedded in the documents, but rather is stored externally in FINRA’s own document production system. Enforcement argues that FINRA does not maintain all of the information requested in the manner requested by Respondents. Enforcement contends that, in its current format, it also includes attorney work product and investigative process information. Additionally, Enforcement argues that Respondents have not demonstrated a need for this additional information. Enforcement also states that it would be unduly burdensome and prejudicial for Enforcement to have to review its system metadata, remove privileged material from documents that are protected from production by FINRA Rule 9251(b), and generate the information requested by Respondents.

III. Discussion

“FINRA disciplinary proceedings have ‘unique characteristics’ and are governed by FINRA’s own procedural Rules, the Rule 9000 Series.”¹³ FINRA Rule 9251(a) establishes “the outside limit of discovery in FINRA disciplinary proceedings, which is substantially less than the scope of discovery permitted in federal court under the Federal Rules of Civil Procedure.”¹⁴ Pursuant to FINRA Rule 9251(a), Enforcement is obligated to allow respondents to inspect and copy non-privileged “documents prepared or obtained by Interested FINRA Staff in connection with the investigation that led to the institution of proceedings.”¹⁵

Notwithstanding this obligation, Enforcement may withhold any documents protected by FINRA Rules 9251(b)(1) and (b)(2), which include: documents subject to attorney-client privilege; attorney work product; internal reports, memoranda, notes, and other writings prepared by FINRA staff that shall not be offered as evidence; documents that would reveal an enforcement technique or guideline, the identity of a source, or an action under consideration by a regulator; and documents prohibited from disclosure by federal law. Enforcement’s ability to withhold otherwise discoverable documents is limited by FINRA Rule 9251(b)(3), which requires Enforcement to produce any document it withheld if it contains “material exculpatory evidence.” In a FINRA disciplinary proceeding, “material evidence” is evidence relating to liability or sanctions that might be considered favorable to the respondent’s case, which, if suppressed, would deprive the respondent of a fair hearing.¹⁶ A respondent bears the burden of establishing a basis for claiming that Enforcement’s withheld documents must be produced.¹⁷

¹³ OHO Order 14-03 (No. 2010023218601) (Jan. 24, 2014), at 3, http://www.finra.org/sites/default/files/OHO_Order_14-03_ProceedingNo.2010023218601_0.pdf (citation omitted).

¹⁴ OHO Order 17-10 (2014042524301) (Apr. 11, 2017), at 2, http://www.finra.org/sites/default/files/OHO_Order_17-10_2014042524301_0_0.pdf (citing OHO Order 15-05 (2012034936005) (Jan. 27, 2015), at 2, http://www.finra.org/sites/default/files/OHO-Order-15-05-ProceedingNo.2012034936005_0_0_0.pdf).

¹⁵ FINRA Rule 9120(t)(1) defines the term “Interested FINRA Staff.”

¹⁶ OHO Order 17-04 (2015044921601) (Mar. 6, 2017), at 4, http://www.finra.org/sites/default/files/OHO_Order-17-04_2015044921601.pdf; OHO Order 16-07 (2014043020901) (Feb. 29, 2016), at 2, http://www.finra.org/sites/default/files/OHO-Order-16-07-2014043020901_0_0_0.pdf.

¹⁷ OHO Order 17-10, at 3.

The discovery Respondents seek in their motion is metadata. “Metadata is defined as ‘information describing the history, tracking, or management of an electronic document.’”¹⁸ FINRA Rule 9251 does not address metadata and does not require Enforcement to produce metadata to respondents in disciplinary proceedings. As such, under FINRA’s Rule 9200 Series, absent a specific order to compel production, Enforcement is not required to produce metadata to comply with its discovery requirements.

In interpreting FINRA’s Rule 9200 Series, Hearing Officers may consult the Federal Rules of Civil Procedure and the case law analyzing those rules. “Neither the Federal Rules of Civil Procedure nor the Federal Rules of Evidence apply in a FINRA disciplinary proceeding, although they may be consulted to the extent useful and not inconsistent with FINRA’s own procedural rules.”¹⁹ Because FINRA Rule 9251 is silent as to metadata, I consulted the Federal Rules. Fed. R. Civ. P. 34(b)(2)(E)(ii) applies to the production of electronically stored information. It states that a party must produce electronically stored information in the form in which it is ordinarily maintained or a reasonably usable form.

Enforcement contends that it has in fact produced all electronic documents in the format in which FINRA obtained or prepared them.²⁰ In addition, Enforcement contends that it has produced metadata (other than FINRA system metadata) naturally embedded in the documents it produced.²¹ Enforcement represents that, in its current format, Respondents can use search terms to identify and review the documents produced. Enforcement states that it did not remove the “document-embedded metadata in the produced documents,” which can include “creation date, modified or edited date, and title and author.”²²

Notwithstanding Enforcement’s objection to producing FINRA system metadata, Enforcement offered to produce the following information:

- 1) An index for the production that identifies by Bates ranges documents produced by Respondents, documents produced by third parties, and documents from FINRA’s files, including on-the-record testimony transcripts and exhibits.²³
- 2) For documents produced by parties other than the Respondents, identify by Bates range the Courtlandt Securities-produced email documents that were part of the Courtlandt Securities examination, all of which included document-embedded metadata; re-produce the remaining third-party productions in exactly the format that the third parties produced the documents to

¹⁸ *Wyeth v. Impax Labs., Inc.*, 248 F.R.D. 169, 171 (D. Del. 2006) (citing *Shirley Williams, et al., v. Sprint/United Management Co.*, 230 F.R.D. 640, 646 (D. Kan. 2005)).

¹⁹ OHO Order 17-10, at 2 & n.4; *See also* OHO Order 16-16 (2014041724601) (Feb. 26, 2016), at 10 & n.25, http://www.finra.org/sites/default/files/OHO-Order-16-16-2014041724601_0.pdf.

²⁰ O’Leary Decl. ¶¶ 14, 16, 19-21.

²¹ *Id.* ¶¶ 16, 23.

²² *Id.* ¶ 23.

²³ Enforcement represents that it offered to Respondents to produce an index, but Respondents declined the offer. *Id.* ¶¶ 36-37.

FINRA; identify by Bates range all of the third-party productions that Enforcement received in email form; and identify by Bates range the produced .pdf documents that correspond to the third-party documents produced to Enforcement in hard copy.²⁴

- 3) During oral argument on June 10, 2019, Enforcement represented that it produced to Respondents on Friday, June 7, 2019, the FINRA system metadata containing the following categories of information identified in Appendix A to Respondents' Motion to Compel²⁵:
 - a) Fields responsive to requested fields (#1) "ProdNo" and (#2) "FileLoc."²⁶
 - b) The FINRA system metadata includes a field (Custodian) that is analogous to requested fields (#4) "Custodian" and (#5) "DupCustNames." FINRA generates the information in this field unless a producing party provides it. If the producing party does not provide "Custodian" metadata, FINRA populates the "Custodian" field with the name of the producing party. If multiple copies of a document are produced and FINRA de-duplicates them, the "Custodian" field will list all of the producing parties who provided the document to FINRA.²⁷
 - c) The FINRA system metadata includes two fields (Store Name and Folder Name) that are analogous to requested fields (#8) "IntPath" and (#9) "Source File." Enforcement possesses this information for the majority, but not all, of the documents produced.²⁸

Enforcement represents that it does not maintain the information identified on Appendix A as (#10) "Producing Party," (#11) "Production Date," (#12) "Dup Producing Party," and (#13) "Dup Production Date."²⁹

Thus, Enforcement appears to have complied with the requirements of Fed. R. Civ. P. 34. This is particularly so in light of Enforcement's recent production of additional data responsive to requested fields (#1) "ProdNo," (#2) "FileLoc," (#4) "Custodian," (#5) "DupCustNames," (#8) "IntPath," and (#9) "Source File."

²⁴ Enforcement represents that it offered to Respondents to produce this information, but Respondents declined the offer. *Id.* ¶ 38.

²⁵ The numbers indicated in this order correspond to the 13 numbered categories of metadata identified in Appendix A to Respondents' Motion to Compel Production of Metadata.

²⁶ O'Leary Decl. ¶ 39(a). Enforcement maintains that it provided this information to Respondents in its original production and re-produced it on June 7, 2019.

²⁷ *Id.* ¶ 39(b).

²⁸ *Id.* ¶ 39(c).

²⁹ *Id.* ¶ 29. By way of example, Enforcement states that FINRA maintains data corresponding to production dates, but this field actually identifies the date on which Enforcement received a document from another FINRA department and loaded the document into Enforcement's database, rather than the date when a third party produced the document to a FINRA department. *Id.*

Considering the information that Enforcement recently produced and the information that Enforcement does not maintain, the only information that is at issue in this motion is identified on Appendix A as (#3) “Original File Name,” (#6) “Original Folder Path,” (#7) “DupCustPaths.”

Under the Federal Rules of Civil Procedure, metadata is discoverable if a party specifically requests it and it is relevant to a claim or defense, and is not privileged.³⁰ The discovery of metadata is subject to the balancing test of Fed. R. Civ. P. 26(b)(2)(C), “which requires a court to weigh the probative value of proposed discovery against its potential burden.”³¹ Applying the balancing test, I find that Respondents have not demonstrated how and why FINRA’s system metadata is relevant to their defense, or the importance of this information to facilitating Respondents’ review and use of the information produced. Federal courts have required the party requesting production of metadata to show a particularized need, not just a generalized view that metadata is important or useful.³² Here, Respondents argue that FINRA should produce the requested metadata to provide them with an efficient means of sorting, searching, and reviewing the documents. Respondents have not, however, articulated a particularized need for the requested information. Nor have Respondents explained how and why the information Enforcement has produced is inadequate to enable them to sort, search, and review the discovery materials.

Enforcement states that it generally does not store system metadata about produced documents with the documents and instead stores it externally on an information management system, such as FINRA’s document production software system.³³ Enforcement contends that the FINRA system metadata it has in its files in its current format includes attorney work product and in any event would not include all of the requested metadata.³⁴

³⁰ *U.S. ex rel. Carter v. Bridgepoint Educ., Inc.*, 305 F.R.D. 225, 245-46 (S.D. Cal. 2015); *Aguilar v. Immigration and Customs Enforcement Div.*, 255 F.R.D. 350, 355 (S.D.N.Y. 2008). Because parties in civil proceedings generally produce metadata in response to discovery requests, federal courts first consider whether the requesting party sought production of metadata in its original request. *Aguilar*, 255 F.R.D. at 358-59. This factor would not apply in FINRA proceedings.

³¹ *Aguilar*, 255 F.R.D. at 355; *see also AtHome Care, Inc. v. Evangelical Lutheran Good Samaritan Soc’y*, No. 1:12-cv-053-BLW, 2013 U.S. Dist. LEXIS 63154, at *4-6 (D. Idaho 2013) (applying balancing test to motion to compel production of system metadata); *U & I Corp. v. Advanced Med. Design, Inc.*, 251 F.R.D. 667, 674 (M.D. Fla. 2008) (“In deciding whether to permit discovery of electronically stored information, a court will consider whether the burden or expense of the proposed discovery outweighs the likely benefit, taking into account the needs of the case, the amount of (sic) in controversy, the parties’ resources, the importance of the issues at stake in the litigation and the importance of the proposed discovery in resolving the issues.”).

³² *U.S. ex rel. Carter*, 305 F.R.D. at 246 (citing *KY. Speedway, LLC v. NASCAR, Inc.*, No. 05-138-WOB, 2006 U.S. Dist. LEXIS 92028, at *23-24 (E.D. Ky. Dec. 18, 2006)).

³³ O’Leary Decl. ¶ 27.

³⁴ *Id.* In particular, Enforcement states that requested fields (#3) “Original File Name,” (#6) “Original Folder Path,” and (#7) “DupCustPaths” include attorney work product and reflect FINRA’s examination, investigatory, or enforcement techniques. *Id.* ¶ 31. Enforcement states that it maintains a single field, “Ingest Location,” that may include information that Respondents seek under fields (#6) “Original Folder Path” and (#7) “DupCustPaths,” but “[t]his field frequently references the location of the documents on Enforcement’s servers after they were collected and saved” and “describes in summary terms the type and nature of reviews of the documents conducted by Enforcement attorneys.” *Id.* ¶ 33. Similarly, field (#3) “Original File Name,” Enforcement contends, “may reflect

Balancing Respondents' request against Enforcement's time and effort to locate, review, and redact examination, investigatory, and enforcement techniques and attorney work product information, I find, with respect to several categories of information, that Respondents have not overcome the balancing test. Accordingly, based on the language of FINRA Rule 9251 and my review of cases analyzing Fed. R. Civ. P. 34(b)(2)(E)(ii), I deny in part, and grant in part, Respondents' motion to compel.

Enforcement represents that it would require less time and effort for it to review and redact information responsive to field (#3) "Original File Name." I also note that Enforcement has offered to produce or, as of June 7, 2019, has produced, the additional data identified in subparts (1) through (3) above. I therefore order Enforcement, to the extent it has not already done so, to complete production of the categories of information it previously offered to produce, as identified in subparts (1) through (3) above and ¶¶ 39(a)-(c) of the O'Leary Decl. I also order Enforcement to produce, to the extent possible, information responsive to field (#3) "Original File Name" on Appendix A. I deny Respondents' Motion to Compel production of all other information requested in Appendix A.

IV. Order

I deny in part and grant in part Respondents' Motion to Compel. I order Enforcement, to the extent it has not already done so, to produce the items that it offered to produce, as outlined in subparts (1) through (3) above and ¶¶ 39(a)-(c) of the O'Leary Decl. I also order Enforcement to produce, to the extent possible, information responsive to field (#3) "Original File Name" on Appendix A. I deny Respondents' Motion to Compel production of all other information requested in Appendix A.

SO ORDERED.



Carla Carloni
Hearing Officer

Date: June 14, 2019

work product for documents that were received in hard copy or generated by FINRA staff because those documents are saved and named by staff." *Id.* ¶¶ 31-32. Enforcement estimates it would take several weeks to locate, review, and redact the thousands of documents potentially responsive to requested fields (#6) "Original Folder Path" and (#7) "DupCustPaths," and less time to produce information potentially responsive to field (#3) "Original File Name."

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