

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

LEK SECURITIES CORP.
(CRD No. 33135),

and

SAMUEL FREDERIK LEK
(CRD No. 1642936),

Respondents.

Disciplinary Proceeding
No. 2015045312501

Hearing Officer—DRS

ORDER REGARDING DISCOVERY

A. Background

At a pre-hearing status conference I held on June 19, 2019, the Department of Enforcement represented that after filing the Complaint, it received certain documents from a Lek Securities Corporation customer voluntarily and on an unsolicited basis.¹ Enforcement represented that these documents “are relevant to his case,” though “not directly.”² “We are not going to prove or disprove any of the allegations in the complaint based upon the materials we received so far as far as I know from my cursory review of them,” Enforcement stated.³ “With that said, we do think that is an issue that could come up in the case. I mean it may spur a few questions during the examination of some of the witnesses. It’s a side issue.”⁴

¹ Enforcement stated that based on these documents, it has opened a new, separate investigation. Transcript of June 19, 2019 Pre-Hearing Conference (“Tr. ___”) 26–31. Enforcement’s counsel stated that he believed the documents were produced by an attorney for the customer. Tr. 55.

² Tr. 32.

³ Tr. 32.

⁴ Tr. 32.

Although Enforcement concluded that these customer-provided documents are relevant, it has not produced them to Respondents. “[O]ur position remains the same that whether they are documents that came in that Enforcement went out, dug out and contacted third parties and obtained documents from them and even if those documents are directly related to the issues in the case,” Enforcement asserted, “the documents that we obtain post complaint generally do not need to be turned over.”⁵

Enforcement elaborated that it is only required to produce documents received after the filing of a complaint if it received them in response to a FINRA Rule 8210 request and if they are relevant.⁶ Enforcement added, however, that under Enforcement’s “longstanding policy” that “goes beyond the rule,” it will also immediately make available to respondents any materials obtained post-complaint if they contain material exculpatory evidence⁷ or if Enforcement intends to use them as exhibits.⁸ But otherwise, Enforcement claims, it may withhold documents it receives after a complaint is issued.⁹ Finally, Enforcement urges me not to use my discretion and order it to produce documents outside these parameters; doing so, it maintains, is unnecessary to prevent unfairness and would “completely upend a carefully crafted discovery scheme.”¹⁰

Respondents disagree with Enforcement’s position. They argue that Enforcement should produce all documents obtained post-complaint as part of continuing investigative efforts regarding the case, even if those documents were not obtained through a FINRA Rule 8210 request, and that Respondents would then review the documents to determine if they are relevant.¹¹ Enforcement’s interpretation of its obligations, they argue, creates “an artificial distinction where [Respondents] would not get the benefits or the opportunity to assess that material for its impact on [their] defense.”¹²

In other words, according to Respondents, whether the “materials are something that would be incorporated in [their] defense is something that should be left to [their] judgment,” and they “should be given the opportunity to review and attest that themselves and not have Enforcement . . . tak[e] advantage of something just because of a temporal difference” regarding when it received the materials.¹³ In Respondents’ view, fundamental fairness requires that

⁵ Tr. 32–33.

⁶ Tr. 35, 44, 51.

⁷ Tr. 33–34.

⁸ Tr. 35.

⁹ Tr. 34–35. Enforcement added that in certain circumstances—e.g. in the interest of fairness—it may exercise discretion and produce documents that, in its view, it is not required to produce. Tr. 24.

¹⁰ Tr. 46–47.

¹¹ Tr. 25–26, 37–38.

¹² Tr. 25–26.

¹³ Tr. 36.

Enforcement produce these documents.¹⁴ “We are trying to vigorously defend our clients against very serious charges,” Respondents’ counsel said. “[A]nd we should be afforded the opportunity to review that information, assess its significance and then determine what, if any, use that may have at the hearing.”¹⁵

The parties’ contrasting positions regarding Enforcement’s discovery obligations raise the following issue: If Enforcement obtains documents relevant to a pending disciplinary proceeding, should it be permitted to withhold those documents on the basis that it did not receive them in response to a FINRA Rule 8210 request?

At the pre-hearing conference, I made certain preliminary rulings on this issue, which I memorialize and modify here. As explained below, I reject Enforcement’s arguments and require it to produce (with certain exceptions) all material and relevant documents received by Interested FINRA Staff, post-Complaint, in connection with this proceeding.

B. Discussion

I begin with a brief overview of the discovery scheme in FINRA disciplinary proceedings. The FINRA Rule 9250 series governs discovery. FINRA Rule 9251(a)(1) addresses discovery of documents prepared or obtained before the filing of a complaint. The Rule 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.”¹⁶ FINRA Rule 9251(a)(1) does not contain a relevance or materiality requirement. If Enforcement wants to withhold documents on the grounds that they are irrelevant “or for other good cause,” it must obtain leave from the Hearing Officer.¹⁷ 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).

FINRA Rule 9251(b)(1) permits Enforcement to withhold certain documents from production, including privileged documents or documents that constitute attorney work product,¹⁸ internal memoranda or other notes or writings prepared by FINRA employees that shall not be offered into evidence,¹⁹ or documents that would reveal an enforcement technique or guideline.²⁰ Nevertheless, if any exempt documents contain material exculpatory evidence, then

¹⁴ Tr. 42.

¹⁵ Tr. 43.

¹⁶ “Interested FINRA Staff” is a defined term in the Code of Procedure. FINRA Rule 9120(t).

¹⁷ FINRA Rule 9251(b)(1)(D).

¹⁸ FINRA Rule 9251(b)(1)(A).

¹⁹ FINRA Rule 9251(b)(1)(B).

²⁰ 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).

Enforcement must produce them.²¹ Also, upon motion, a respondent may receive witness statements (as defined in FINRA Rule 9253).²²

While FINRA Rule 9251(a)(1) requires Enforcement to make available certain documents in discovery, it does not foreclose the production of additional documents. Enforcement retains discretion “to make available any other Document . . . ,” and a Hearing Officer is authorized “to order the production of any other Document.”²³

In contrast to FINRA Rule 9251(a)(1), which addresses the production of documents prepared or obtained before the issuance of a complaint, another rule deals with the production of a category of documents obtained post-complaint. Under FINRA Rule 9251(a)(2), Enforcement must make available for inspection and copying any documents “material and relevant to the disciplinary proceeding in which such Respondent is a Party” obtained in response to a post-complaint FINRA Rule 8210 request “issued under the same investigative file number under which the investigation leading to the institution of disciplinary proceedings was conducted.”

No other discovery provision in the FINRA Rule 9250 series explicitly authorizes or mandates the production of documents received by Enforcement post-complaint. Thus, Enforcement concludes that not only is it not required to produce documents unless obtained by FINRA Rule 8210 (unless they contain material exculpatory evidence or will be used as exhibits), but requiring it to do so contravenes the discovery scheme. In other words, because the Rule mentions one category of documents that must be produced, other categories are excluded by implication. This interpretive approach is akin to the long-disfavored rule of statutory construction, *expressio unius est exclusio alterius* (“the expression of one thing is the exclusion of another”).²⁴ And I reject it. Instead, I interpret the discovery rule “in conformity with its dominating general purpose.”²⁵

The dominating general purpose of FINRA Rule 9251, as explained by FINRA when it proposed the rule,²⁶ is to expand “[t]he documentary discovery rights in [FINRA] disciplinary

²¹ FINRA Rule 9251(b)(3).

²² FINRA Rule 9253.

²³ FINRA Rule 9251(a)(3).

²⁴ “Courts and legal scholars disfavor the *expressio* maxim,” according to the SEC. *David C. Ho*, Securities Exchange Act Release No. 54481, 2006 SEC LEXIS 2100, at *14 n.16 (Sept. 22, 2006). It has been described as “an especially feeble helper in an administrative setting, . . . having been long subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose.” *Id.* (internal quotations and citations omitted).

²⁵ *Id.* See also *Dep’t of Enforcement v. Morgan Stanley*, No. CAF000045, 2002 NASD Discip. LEXIS 11, at *13 (NAC July 29, 2002) (“We are also mindful of the maxim that adjudicators should ‘construe the details of an act in conformity with its dominating general purpose.’”) (quoting *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n.23 (1983)).

²⁶ The rule was formerly known as NASD Rule 9251. NASD was FINRA’s predecessor. References to FINRA in this Order also include NASD.

proceedings . . . to furnish respondents, at a reasonable time in advance of the initial hearing, with all non-privileged materials in the [FINRA’s] possession (including exculpatory evidence) directly relevant to the dispute.”²⁷ Therefore, I interpret “the various provisions of Rule 9251 governing discovery . . . in accordance with this general principal of openness,”²⁸ including the provision regarding post-complaint discovery.

The discovery “scheme assumes that in the usual case the Department will have completed its investigation and information gathering before it files a Complaint.”²⁹ Even so, FINRA recognized that Enforcement might obtain relevant documents after it files a complaint and adopted FINRA Rule 9251(a)(2) to address such a situation. This provision, the SEC observed, reflected FINRA’s “[s]pecial attention . . . to assure that Documents received by the Department of Enforcement after a Respondent had inspected and copied Documents would be made available expeditiously to Respondents . . . and that evidence that becomes available shortly before or during a hearing on the merits would be produced expeditiously to Respondents.”³⁰ In other words, FINRA adopted this provision to further FINRA Rule 9251’s general purpose of providing respondents “with all non-privileged materials in [FINRA’s] possession (including exculpatory evidence) directly relevant to the dispute.”³¹

But producing to a respondent all documents obtained through a post-complaint FINRA Rule 8210 request issued in the same investigation that led to the pending disciplinary proceeding could create certain complications. For example, that document production could compromise a further investigation of others not named in the pending proceeding. So, when seeking adoption of FINRA Rule 9251, FINRA informed the SEC that it “believe[d] that a secondary production of documents should be subject to a material relevance standard so that the Department of Enforcement only has to turn over documents that are relevant to the proceeding initiated and not other documents that may relate to a potential, but yet-to-be named respondent as part of the same investigation file.”³² By including a “material relevance standard” for producing documents obtained post-complaint through FINRA Rule 8210, FINRA struck a

²⁷ Securities Exchange Act Release No. 38545, 1997 SEC LEXIS 959 (Part 1 of 6), at *14 n.16 (April 24, 1997) (quoting The Report of the NASD Select Committee on Structure and Governance to the NASD Board of Governors (Sept. 15, 1995)); *accord* OHO Order 18-06 (2014041860801), at 4; OHO Order 03-02 (CAF020007) (Jan. 7, 2003), at 3, http://www.finra.org/sites/default/files/OHODDecision/p007739_0_0.pdf; OHO Order 00-24 (C3A990071), (Aug. 28, 2000), at 2, http://www.finra.org/sites/default/files/OHODDecision/p007930_0_0.pdf. When adopting the Rule, the SEC found that “NASD’s proposed discovery provisions reasonably address the need for respondents subject to a disciplinary proceeding to have broader documentary discovery rights.” Securities Exchange Act Release No. 38908, 1997 SEC LEXIS 1617, at *131 (Aug. 7, 1997).

²⁸ OHO Order 03-02 (CAF020007), at 3.

²⁹ OHO Order 00-24 (C3A990071), at 3.

³⁰ Securities Exchange Act Release No. 34-38545, 1997 SEC LEXIS 959 (Part 2 of 6), at *10.

³¹ *Id.*

³² Securities Exchange Act Release No. 34-38908, 1997 SEC LEXIS 1617, at *76. The SEC found this rationale reasonable. *Id.*, at *132 n.193.

balance “between enhanced, automatic document disclosure and preserving [FINRA’s] ability to effectively meet its regulatory obligations”³³

FINRA Rule 9251 addressed no other situations in which Enforcement might obtain relevant documents, including the situation presented here: unsolicited, voluntarily produced relevant documents by a customer. Nevertheless, I find no basis for concluding, as Enforcement argues, that post-complaint, FINRA Rule 8210-obtained relevant documents constitute a special category of documents that must be produced, but that relevant documents obtained voluntarily may be withheld. This is a distinction without a difference. Withholding relevant documents—regardless of how Enforcement obtained them—would thwart the general purpose of FINRA Rule 9251. Further, adopting Enforcement’s position would make discovery dependent upon when Enforcement chose to obtain the documents, leaving relevant documents “forever shielded from discovery”³⁴ if it decided to obtain them after the complaint was issued and without using FINRA Rule 8210 to obtain them. “Such a construction would permit gamesmanship and deprive the Respondents of documents that” may be highly relevant to their defense.³⁵

Therefore, based on the foregoing, I reject Enforcement’s arguments³⁶ and find that consistent with the purposes of FINRA Rule 9251, and in order to further the interests of justice and ensure a fair hearing, Enforcement shall make available to Respondents for inspection and copying all documents material and relevant to this proceeding (subject to certain exceptions) that were received by Interested FINRA Staff, post-Complaint, in connection with this proceeding.

C. Order

Accordingly, under the general grant of authority to Hearing Officers under FINRA Rule 9135(a) “to do all things necessary and appropriate to discharge” their duties, coupled with the Hearing Officer’s authority under FINRA Rule 9251(a)(3) “to order the production of any other Document,” **I HEREBY ORDER** that:

1. Enforcement shall make available to Respondents for inspection and copying all documents material and relevant to this proceeding that were received by Interested FINRA Staff, after the filing of the Complaint, in connection with this proceeding.
2. Any documents, as described in C.1., that have been received by Interested FINRA Staff as of the date of this Order shall be made available to

³³ OHO Order 00-24 (C3A990071), at 3.

³⁴ *Id.*, at 6.

³⁵ *Id.*

³⁶ Last year, a FINRA Hearing Officer in another disciplinary proceeding also considered and rejected these arguments. OHO Order 18-06 (2014041840801) (Apr. 24, 2018), http://www.finra.org/sites/default/files/OHO_Order_18-06_2014041860801.pdf.

Respondents by **July 24, 2019**. Any documents, as described in C.1., received by Interested FINRA Staff after the date of this Order shall be made available to Respondents not later than 14 days after the Interested FINRA Staff receives such documents.

3. Documents, as described in C.1., shall be made available by Enforcement to Respondents not less than ten days before the hearing. If Interested FINRA Staff receives such documents ten or fewer days before the hearing on the merits is scheduled to begin or after the hearing begins, Interested FINRA Staff shall make the additional documents available immediately to Respondents.
4. Enforcement may withhold from production any documents that fall within the withholdable categories enumerated in FINRA Rule 9251(b).
5. If Enforcement wants to withhold any documents that do not fall within FINRA Rule 9251(b), it must seek and obtain prior leave from me. Leave will only be granted upon a showing of good cause. The filing of any such request for leave shall stay, until further order, Enforcement's production obligations under this Order regarding those documents.

SO ORDERED.


David R. Sonnenberg
Hearing Officer

Dated: July 10, 2019

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