

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 12-03 (2010024889501).

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

RESPONDENT 1,

RESPONDENT 2,

and

RESPONDENT FIRM,

Respondents.

Disciplinary Proceeding
No. 2010024889501

Hearing Officer – MC

**ORDER GRANTING DEPARTMENT OF ENFORCEMENT'S MOTION REGARDING
SEQUESTRATION OF FINRA STAFF WITNESSES**

During a pre-hearing conference on June 18, 2012, the Department of Enforcement requested that witnesses be sequestered from the room during the hearing of this case, except its expert and two investigators, Ryan Thomas and Perry Hubbard. Respondents did not object to excepting the expert from the sequestration requirement, but did object to the investigators being in the hearing room before they testify, arguing that their testimony would be susceptible to being shaped by the other witnesses' testimony.

On June 19, 2012, Enforcement filed a Motion for Leave to File Supplemental Memorandum Regarding Sequestration of Staff Witnesses ("Sequestration Memorandum"), supported by the Declaration of Paul M. Schindler. The same day, the Hearing Officer granted leave to file the Sequestration Memorandum.

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In the Declaration, Enforcement describes Thomas and Hubbard's long and extensive involvement in the investigation of this case, their review of thousands of pages of documents, and their involvement in the preparation of summary exhibits. Because of the investigators' intimate familiarity with the voluminous record, Enforcement contends that it would be severely prejudiced if the investigators were to be sequestered during the hearing and unable to assist counsel in identifying particular documents and understanding the transactions they relate to. Noting that the investigators' prospective testimony will focus primarily on their review of documents gathered during the investigation and the summary exhibits they have prepared, Enforcement argues that they are not "at risk of changing" their testimony "based on the claims and assertions of other witnesses."

As Enforcement notes in the Sequestration Memorandum, there is precedent for excepting Enforcement staff investigators from sequestration at hearings, and that doing so is consistent with Federal Rule of Evidence 615, which, although not binding on FINRA disciplinary proceedings, provides guidance.¹ Rule 615 specifically requires sequestration when requested by a party, but excludes from mandatory sequestration a person who is "essential to presenting" a claim or defense. The Notes accompanying Rule 615 specifically state that an investigative agent may be permitted to sit at counsel table during a trial despite being a witness, particularly in complex cases.²

In this case, based upon Enforcement's representations, it is clear that investigators Thomas and Hubbard are the equivalent of investigative agents whose presence at counsel table is permitted by Rule 615, and that Enforcement reasonably characterizes their presence as essential to the proper presentation of this document-intensive case. It is also clear that

¹ *See, e.g.*, OHO Orders 08-03, 06-53.

² Fed. R. Evid. 615 Notes, Notes of Committee on the Judiciary, Senate Report No. 93-1277.

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Enforcement should be permitted to have both investigators at counsel table, since they had differing investigative roles and prepared different summary exhibits. Although the goal of avoiding having witnesses shape their testimony based on what they hear from others is always a concern, based on Enforcement's proffer of their testimony, the risk of taint to their testimony stemming from the testimony of other witnesses, including Respondents, appears in this case to be minimal.

For these reasons, Enforcement's requests are granted, and Respondents' objection is overruled. Witnesses who expect to testify in this disciplinary proceeding will be excluded from the hearing room and shall not confer with other witnesses about their testimony until the proceeding has concluded. However, Enforcement's expert witness and Enforcement investigators Ryan and Hubbard are excepted from sequestration and will be permitted in the hearing room for the entire proceeding.

SO ORDERED.

Matthew Campbell
Hearing Officer

July 6, 2012