

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 11-11 (2007010398802).

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

DEPARTMENT OF ENFORCEMENT,	
	Complainant,
v.	
RESPONDENT	
	Respondent.

Disciplinary Proceeding
No. 2007010398802

Hearing Officer – LBB

**ORDER ON ENFORCEMENT'S OBJECTIONS TO RESPONDENT'S PROPOSED
EXHIBIT LIST AND MOTION IN LIMINE IN PART**

This matter concerns Respondent's falsification of records while he was a registered sales assistant at Citigroup Global Markets ("Firm"), by inserting his own e-mail address instead of customer e-mail addresses on customer electronic delivery consent forms and online profiles, and altering customer records or obtaining customer signatures on blank forms. The parties have stipulated that Respondent engaged in the conduct charged, and that he thereby violated NASD Conduct Rules 3110 and 2110.

The Department of Enforcement filed objections to certain exhibits on Respondent's exhibit list, and a motion in limine seeking to preclude Respondent from offering evidence on certain topics. Enforcement characterizes the evidence it seeks to preclude as relating to "(1) unsuccessful settlement discussions held between Enforcement and Respondent's counsel concerning this matter; (2) the discipline by FINRA of other individuals who are associated with Respondent's FINRA-registered employer and were involved in Respondent's misconduct; and (3) the discipline of these individuals by the firm." Respondent opposes the motion, arguing that the documents and testimony he seeks to offer will show that the sanctions that Enforcement

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seeks in this matter are excessive because they are disproportionate to the sanctions imposed on others and the sanctions to which the parties agreed. As discussed below, Respondent makes other arguments for certain of the documents.

In particular, Enforcement objects to the receipt in evidence of Letters of Caution issued by the Firm against other employees of the Firm (RX-2, RX-3, RX-4); memoranda imposing special supervisory procedures on the two heads of Respondent's group at the Firm, that had several provisions that applied to the entire group (RX-5, RX-6); an Acceptance, Waiver and Consent ("AWC") to which the parties agreed prior to the filing of the Complaint, but was rejected by FINRA (RX-9); an AWC that FINRA issued to two registered representatives in Respondent's firm for conduct allegedly similar to Respondent's (RX-10); and a Cautionary Action Letter that FINRA issued to a sales assistant who was employed by Respondent's firm and allegedly assisted Respondent with respect to a portion of his misconduct (RX-11).

Enforcement also seeks to preclude Respondent from offering testimony relating to the subject matter of the documents.

I. Documents Concerning FINRA's Settlements with Other Employees Are Excluded

Enforcement objects to two documents on Respondent's exhibit list that document FINRA's settlements with registered representatives at the Firm. RX-10 is an AWC concerning disciplinary action taken against two registered representatives at the Firm. RX-11 is a Cautionary Action Letter that FINRA issued to a sales assistant who was employed by the firm, and allegedly assisted Respondent with respect to some of the misconduct that is the subject of this proceeding.

Enforcement seeks to distinguish the conduct of the two registered representatives and the sales assistant from the charges against Respondent, and Respondent seeks to show the

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similarities. As settlements, the documents are inadmissible regardless of the apparent similarities and differences.

The SEC and the National Adjudicatory Council (“NAC”) have held that the sanctions imposed on others for allegedly similar actions, and the absence of disciplinary action against others, are irrelevant to a determination of the appropriate sanctions in a litigated matter. For example, the SEC has recently rejected an argument by a registered representative that the sanctions imposed by FINRA should be reduced because FINRA had not disciplined others who had allegedly engaged in similar conduct. In rejecting the argument, the SEC stated, “It is well established ... that the appropriateness of a sanction depends on the facts and circumstances of each particular case and cannot be precisely determined by comparison with the action taken in other proceedings. This is especially true with regard to settled cases ... where pragmatic factors may result in lesser sanctions.”¹ Similarly, the NAC has recently stated, “It is well settled, however, that the ‘appropriate sanction[s] [in a FINRA disciplinary proceeding] depend on the facts and circumstances of each particular case, and cannot be precisely determined by comparison with the action taken in other proceedings.’ ... In addition, the Commission consistently has discounted the relevance of settled matters to the sanctions imposed in litigated cases.”²

RX-10 and RX-11 are excluded from evidence.

¹ *Richard G. Cody*, Exchange Act Rel. No. 64565, SEC Slip Op. at 34-35 (May 27, 2011) (citations omitted) (available on SEC website at www.sec.gov/litigation/opinions.shtml).

² *DOE v. Branff*, No. 2007011937001, slip op. at 11, n.19 (N.A.C. May 13, 2011) (available on FINRA website at www.finra.org/Industry/Enforcement/Adjudication/NAC/DisciplinaryDecisions/2011/P123682) (declining to consider the sanctions imposed in a settled matter), citing *Paz Sec., Inc.*, Exchange Act Rel. No. 57656, 2008 SEC LEXIS 820, at *30-31 (Apr. 11, 2008), and *Prime Investors, Inc.*, 53 S.E.C. 346, 349 (1997) (finding that applicants who offer to settle may receive lesser sanctions based on “pragmatic considerations such as the avoidance of adversary proceedings”).

II. The Rejected AWC Is Excluded

In November 2009, Respondent and the two principals who were in charge of his group at the Firm reached an agreement with the Department of Enforcement to settle this matter. The settlement was subsequently rejected by the Office of Disciplinary Affairs, and never became a final settlement. Respondent's exhibit list includes the AWC that was signed by Respondent and the principals (RX-9). Respondent argues that the Hearing Panel should consider the AWC because the proposed sanctions were substantially less than the sanctions that Enforcement is currently seeking against Respondent, the AWC included factual findings that Respondent deems favorable to his case, and because, Respondent argues, the AWC is evidence of Respondent's "cooperation and contrition." None of these rationales is a basis for admitting the rejected AWC.

Proposed settlements are generally inadmissible. The NAC has held that settlement negotiations and documents are irrelevant in a disciplinary proceeding, stating:

Settlement negotiations and materials generally are not relevant to a FINRA disciplinary proceeding. *See* NASD Rule 9216(a)(4) (stating that a rejected Acceptance Waiver and Consent "may not be introduced into evidence in connection with the determination of the issues set forth in any complaint"); NASD Rule 9270(h) (stating that rejected offers and proposed orders of acceptance do not constitute a part of the record "in any proceeding against the [r]espondent making the offer"); NASD Rule 9270(j) (stating that rejected offers of settlement "may not be introduced into evidence in connection with the determination of the issues involved in the pending complaint"). We rejected a respondent's request to compel consideration of his settlement offer in *Dep't of Enforcement v. Cipriano*, Complaint No. C07050029, 2007 NASD Discip. LEXIS 23, at *6 (NASD NAC July 26, 2007), finding that "such relief is not available . . . [under] NASD's rules." And we stated in *Dist. Bus. Conduct Comm. v. Stout*, Complaint No. CO2940038, 1995 NASD Discip. LEXIS 223, at *23 (NASD NBCC Sept. 7, 1995) that under "NASD's Code of Procedure, settlement negotiations are irrelevant."³

Furthermore, the NAC went on to note that it "has an independent obligation to determine sanctions based on the evidence in the record, not on how far alleged settlement

³ *Department of Enforcement, v. Paratore*, No. 2005002570601, 2008 FINRA Discip. LEXIS 1, at *13 n.9 (N.A.C. March 7, 2008); *see also Department of Enforcement v. Ricupero*, No. 20060049953-01, 2009 FINRA Discip. LEXIS 36 (N.A.C. Oct. 1, 2009), *aff'd*, *Joseph Ricupero*, Exchange Act Rel. No. 62891, 2010 SEC LEXIS 2988 (Sept. 10, 2010), *appeal filed*, No. 10-4566 (2d Cir. Nov. 15, 2010).

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negotiations have proceeded prior to the issuance of the complaint.”⁴ The Hearing Panel similarly determines sanctions based on the evidence in the record.

The rejected AWC would also be inadmissible under Rule 408 of the Federal Rules of Evidence⁵, which states, in part,

- (a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:
 - (1) furnishing or offering or promising to furnish or accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise the claim; and
 - (2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.⁶

The prohibition extends to factual statements.⁷ Respondent's argument that the rejected AWC is admissible as evidence of the factual recitations in the AWC is rejected.

Respondent's argument that the rejected settlement shows his cooperation and contrition is also without merit. Under the FINRA Sanction Guidelines, cooperation is relevant only when

⁴ *Dep't of Enforcement v. Paratore*, 2008 FINRA Discip. LEXIS 1, at *13 n.9, citing, e.g., *Dist. Bus. Conduct Comm. v. Guevara*, No. C9A970018, 1999 NASD Discip. LEXIS 1, at *39 n.16 (N.A.C. Jan. 28, 1999) (stating that the NAC's de novo review is independent from the proceedings below and is intended to insulate the proceedings from procedural unfairness), *aff'd*, *Maximo Justo Guevara*, 54 S.E.C. 655 (2000); NASD Rule 9346(a) (Evidence in National Adjudicatory Council Proceeding).

⁵ See OHO Order 11-04 (2009017798201) (March 24, 2011) (“While the Federal Rules of Evidence are not applicable to FINRA proceedings per se, those rules and the case law applying them can provide helpful guidance.”)

⁶ The Advisory Committee Notes to FRE 408 state that there are two rationales for the Rule, both of which support the exclusion of the rejected AWC:

- (1) The evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position. The validity of this position will vary as the amount of the offer varies in relation to the size of the claim and may also be influenced by other circumstances.
- (2) a more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes. McCormick §§ 76, 251. While the rule is ordinarily phrased in terms of offers of compromise, it is apparent that a similar attitude must be taken with respect to completed compromises when offered against a party thereto.

⁷ See Advisory Committee Notes to Rule 408.

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a Respondent provided “substantial assistance to FINRA in its examination and/or investigation of the underlying misconduct. ...”⁸ Attempting to settle a matter does not evidence substantial assistance in FINRA’s investigation.

RX-9 is will not be received in evidence.

III. Documents Showing the Firm’s Suspensions of Other Employees Are Excluded, but Documents Imposing Special Supervision of Respondent’s Group Are Not Excluded

Enforcement objects to the admission of five documents relating to actions taken by the Firm in response to misconduct by others within the Firm that was allegedly similar to Respondent’s misconduct. There are two categories of such documents on Respondent’s exhibit list to which Enforcement objects: internal letters of caution issued by the Firm to other employees, suspending them for conduct allegedly similar to Respondent’s conduct (RX-2, RX-3, and RX-4); and internal memoranda issued by the Firm, imposing special supervision on the principals in charge of Respondent’s group, including certain restrictions that also applied to the support staff for the principals (RX-5 and RX-6).

A. Documents Showing the Firm’s Suspensions of Other Employees Are Excluded

Respondent argues that documents showing the disciplinary action taken by the Firm against others “demonstrate the unjustified and punitive nature” of the sanctions that Enforcement recommends against Respondent. The disciplinary actions by a firm on its other employees are irrelevant to a determination of the sanction that is appropriate for Respondent in

⁸ *FINRA Sanction Guidelines* at 7, Principle Consideration No. 12 (2011); *see, e.g., Dep’t of Enforcement v. Neaton*, No. 2007009082902, 2011 FINRA Discip. LEXIS 1, at *31 n.33 (N.A.C. Jan. 7, 2011); *Phillippe N Keyes*, Exchange Act Rel. No. 54723, 2006 SEC LEXIS 2631, at *23 (Nov. 8, 2006).

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this matter. Enforcement's objections are sustained with respect to RX-2, RX-3, and RX-4.⁹

The documents will not be received in evidence.

B. Documents Showing the Special Supervision of Respondent's Group Are Not Excluded

Enforcement objects to the admission of documents showing special supervisory procedures imposed by the Firm on the two principals in charge of Respondent's group. Respondent contends that the special supervision applied to the entire group of which Respondent was a part, and not just to the supervisors, and are disciplinary actions imposed by the Firm on the entire group.¹⁰ Disciplinary actions imposed by Respondent's firm may be considered by the Hearing Panel in imposing sanctions.¹¹

Enforcement's objections are denied with respect to RX-5, and RX-6.¹²

IV. Motion in Limine

In its motion in limine, Enforcement asks for a ruling that Respondent may not in any way refer to the existence or terms of any of the settlements with other employees of the firm, or the proposed settlement with Respondent. This prohibition is too broad. As Federal Rule 408 recognizes, evidence related to settlements or settlement negotiations may be admissible under certain, limited circumstances, such as "proving a witness's bias or prejudice; negating a

⁹ Enforcement does not object to the admission of RX-1, a Letter of Caution issued to Respondent by the Firm.

¹⁰ The memoranda state that certain of the restrictions "also extend to those duties performed on your behalf by your support staff." In ruling on this motion, the Hearing Officer accepts, without deciding, Respondent's representation that the restrictions applied to him in connection with the types of violations that are charged in the Complaint.

¹¹ See FINRA Sanction Guidelines at 7 (2011) (Principle Consideration No. 14) ("Whether the member firm with which an individual respondent is/was associated disciplined respondent for the same misconduct at issue prior to regulatory detection."); see *Dep't of Enforcement v. Bukovcik*, No. C8A050055, 2007 NASD Discip. LEXIS 21, at *14 (N.A.C. July 25, 2007) (considering the firm's imposition of a fine, suspension, and special supervision); *Dep't of Enforcement v. Prout*, No. C01990014, 2000 NASD Discip. LEXIS 18, at *8-9 (N.A.C. Dec. 18, 2000) (crediting Respondent with the suspension imposed by his firm after the filing of the complaint).

¹² This Order does not preclude reference to Stipulation 18 of the Stipulations Between the Department of Enforcement and Respondent [], filed on March 15, 2011.

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contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.”

The Hearing Officer cannot anticipate all the bases for which Respondent might seek to refer to the existence or terms of the rejected documents. While the terms of the settlements with other employees of the Firm, and the terms of the rejected AWC, are inadmissible with respect to a determination of the appropriate sanctions, they might be relevant to other matters that arise at the hearing. Accordingly, Respondent is not, at this point, precluded from referring to those settlements or the rejected AWC, except that Respondent may not argue that the sanctions Enforcement is seeking are excessive because they are disproportionate to the settlements for other people, or the rejected settlement, and may not elicit testimony for that purpose. Enforcement is not precluded from objecting to any references to the terms of the settlements at the hearing.

Finally, Enforcement seeks to preclude testimony or argument about the mediation in this matter. Respondent has not argued that such testimony or argument is proper, and therefore it appears that Respondent does not intend to offer such testimony or make any such argument. Testimony concerning the mediation in this case, including any agreements or tentative agreements between the parties, will not be permitted. Not only would the testimony be inadmissible for the reasons stated above with respect to evidence concerning the rejected AWC, it would also be inconsistent with the terms on which this matter was referred to mediation.¹³

V. Conclusion

Enforcement's objections to CX-2, CX-3, CX-4, CX-9, CX-10, and CX-11 are sustained, and the documents will not be received in evidence. The objections are overruled with respect to CX-5 and CX-6.

¹³ See Pre-Hearing Conference of October 25, 2010, at Tr. 4-5.

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Respondent shall not attempt to elicit testimony concerning the terms of the settlements with other employees of the Firm, evidence of the terms of the letters of caution issued by the firm to other employees, or evidence of the terms of the rejected AWC, in support of any argument that the sanctions sought by Enforcement are disproportionate. Respondent shall not offer any evidence concerning the mediation in this matter, including the settlement positions of the parties, statements made during the mediation, or any agreements that were reached concerning settlement that were not accepted by FINRA.

The admissibility of testimony concerning the settlements with other employees, and suspensions imposed by the Firm, for other purposes, will be determined at the hearing if Respondent seeks to elicit such testimony. To the extent Respondent attempts to elicit testimony concerning the settlements at the hearing, Enforcement may object to such use when Respondent offers such evidence.

SO ORDERED.

Lawrence B. Bernard
Hearing Officer

Dated: June 8, 2011
Washington, DC