

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

MARK SAM KOLTA
(CRD No. 5324620),

Respondent.

Disciplinary Proceeding
No. 2018057297102

Hearing Officer–MJD

**ORDER DENYING RESPONDENT'S MOTION
FOR WITHHELD DOCUMENTS LIST**

Respondent Mark Sam Kolta filed a Motion for a List of Withheld Documents (“Motion”) asking that I order the Department of Enforcement to identify documents it did not produce in discovery.¹ Kolta believes that Enforcement may have withheld documents involving customers that are not identified in the Complaint. Enforcement filed an Opposition, supported by a sworn declaration from Payne L. Templeton, its lead counsel in this proceeding, denying that it improperly withheld documents.²

For the reasons set forth below, I **DENY** the Motion. Kolta has not met the standard required under FINRA Rule 9251(c) for me to order a withheld document list.

I. Background

The Complaint contains four causes of action. Cause one alleges that Kolta made unsuitable recommendations to 16 customers to purchase \$4.8 million in a non-traded real estate investment trust (“REIT”), in violation of FINRA Rules 2111 and 2010. According to the Complaint, the REIT was unsuitable based on the customers’ investment profiles, including their net worth, income, investment objectives, risk tolerance, and, for some customers, their ages. The recommended purchases also allegedly over-concentrated the customers’ investment portfolios in non-traded REITs. The customers allegedly lost more than \$4.1 million from their investments in the REIT.

¹ Respondent’s Motion for List of Withheld Documents (“Mot.”).

² Enforcement’s Opposition to Respondent’s Motion for List of Withheld Documents (“Opp.”).

Causes two and three allege that Kolta violated FINRA Rules 4511 and 2010 by causing his customers' account records, updates to their records, and their REIT investment subscription documents to contain false and inaccurate information so they could qualify to purchase the REIT. Cause four alleges that Kolta circulated email communications to customers about the REIT that were not fair and balanced and contained misleading, unwarranted, and promissory statements and claims that violated FINRA Rules 2210 and 2010.

II. FINRA Rule 9251

Enforcement's discovery obligations are governed by FINRA's Rule 9250 series. 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."³ If Enforcement wants to withhold documents because they are not relevant to the subject matter of the proceeding, or for other good cause, it must obtain leave from the hearing officer.⁴ Otherwise, Enforcement must produce all documents within the scope of Rule 9251(a) unless Enforcement is authorized to withhold them under Rule 9251(b)(1).⁵

Rule 9251(b)(1) allows Enforcement to withhold certain categories of documents: (a) privileged documents or documents that constitute attorney work product;⁶ (b) examination or inspection reports, internal memoranda, or other notes or writings prepared by a FINRA employee that will not be offered into evidence;⁷ or (c) documents that would reveal an examination, investigatory or enforcement technique or guideline.⁸ Notwithstanding this provision, pursuant to Rule 9251(b)(3), Enforcement must produce any exempt documents that contain material exculpatory evidence.⁹

³ "Interested FINRA Staff" is a defined term in FINRA's Code of Procedure. FINRA Rule 9120(t).

⁴ FINRA Rule 9251(b)(1)(D).

⁵ While Rule 9251(a) obligates Enforcement to produce certain documents, it does not prevent the production of additional documents. Enforcement retains the discretion "to make available any other Document" and a Hearing Officer is authorized "to order the production of any other Document." Rule 9251(a)(3).

⁶ FINRA Rule 9251(b)(1)(A).

⁷ FINRA Rule 9251(b)(1)(B).

⁸ FINRA Rule 9251(b)(1)(C). Rule 9251(b)(1)(C) also permits Enforcement to withhold additional documents. These include those that would disclose the identity of a source, including a federal, state, or foreign regulatory authority or a self-regulatory organization that furnished, or was furnished, information on a confidential basis about an investigation, examination, an enforcement proceeding or any other type of civil or criminal action or an examination, investigation, enforcement proceeding or a civil or criminal action under consideration by, or initiated by, FINRA, a federal, state, or foreign regulatory authority.

⁹ FINRA Rule 9251(b)(3) ("Nothing in paragraph (b)(1) authorizes the Department of Enforcement to withhold a Document, or a part thereof, that contains material exculpatory evidence.").

FINRA Rule 9251(c) authorizes a hearing officer to require Enforcement to submit a list of withheld documents to the hearing officer for review. After reviewing the list, the hearing officer may order Enforcement to make the list or any withheld documents available to a respondent, unless federal law prohibits disclosure of the document or its existence. A motion for a withheld document list “shall be based upon some reason to believe that” Enforcement has improperly withheld production of a document.¹⁰

III. Kolta’s Motion

As the basis for Kolta’s claim that a withheld document list is appropriate here, the Motion states that “[u]pon information and belief,” Kolta “has come to learn that Enforcement interviewed and reviewed the documents for significantly more” customers than those identified in the Complaint.¹¹ He therefore “is concerned” that Enforcement has improperly withheld documents.¹² Kolta adds that “[c]onsidering that Enforcement reviewed the files of many other” customers but does not intend to call them as witnesses, he “has concern[s] that favorable or . . . exculpatory evidence, has possibly been withheld.”¹³

Kolta therefore asks that I order Enforcement to submit to me a list of all withheld documents and after I review it, instruct Enforcement to make the list available for Kolta’s review.¹⁴

IV. Enforcement’s Opposition

Enforcement claims that Kolta’s Motion is without merit because Enforcement has complied with its discovery obligations under FINRA Rule 9251, and Kolta has not shown that there is any basis to contend that Enforcement has improperly withheld documents. Enforcement states that its production includes, contrary to Kolta’s belief, documents relating to customers whose investments are not at issue in the Complaint.¹⁵

In his Declaration, Templeton states that he is Enforcement’s lead counsel in this proceeding and is familiar with the investigation that led to this proceeding, including the documents that were obtained or prepared by FINRA staff as part of the investigation.¹⁶ He also

¹⁰ FINRA Rule 9251(c).

¹¹ Mot. ¶ 3.

¹² Mot. ¶ 3.

¹³ Mot. ¶ 4.

¹⁴ Mot. ¶ 5.

¹⁵ Opp. 2-3.

¹⁶ Templeton Decl. ¶ 2.

states that he participated in and oversaw Enforcement's production of documents, including its compliance with Rule 9251, which involved production of more than 1.6 million documents.¹⁷

Templeton states that, to the best of his knowledge, Enforcement has produced all documents that were required to be produced under Rule 9251(a), including documents relating to customers whose accounts and investments are not at issue in the Complaint.¹⁸ Templeton adds that, to the best of his knowledge, any documents that Enforcement did not produce were withheld consistent with Rule 9251(b). Templeton further represents that, to the best of his knowledge, Enforcement has complied with its obligation under Rule 9251(b)(3) to produce documents containing exculpatory evidence.¹⁹

Enforcement argues that the Motion is based solely on Kolta's speculation that exculpatory information must have been withheld because not every customer Enforcement interviewed and whose accounts Enforcement reviewed were not included in the Complaint. Kolta has failed to explain, Enforcement argues, how any documents relating to customers not mentioned in the Complaint could be exculpatory. Enforcement asserts that in any event it has not withheld any documents that contain material exculpatory evidence.²⁰

V. Enforcement Need Not Produce a Withheld Document List

Kolta states that he "is concerned" that Enforcement has improperly withheld documents and exculpatory evidence relating to customers not identified in the Complaint.²¹ The standard for requiring a withheld document list pursuant to Rule 9251(c) list is high.²² Kolta has not shown that Enforcement has withheld or failed to produce any documents that it is required to produce under Rule 9251. Kolta's assertions do not overcome Templeton's sworn statements that Enforcement has complied with its discovery obligations, including production of any materially exculpatory documents. Templeton also specifically states that Enforcement in fact produced documents relating to those Kolta customers who were not named in the Complaint.²³ Kolta has provided no reason to believe that this is not true.²⁴

¹⁷ Templeton Decl. ¶ 3.

¹⁸ Templeton Decl. ¶ 4.

¹⁹ Templeton Decl. ¶ 5.

²⁰ Opp. 3-4.

²¹ Mot. ¶¶ 3-4.

²² OHO Order 14-03 (2010023218601) (Jan. 24, 2014), at 7-8, https://www.finra.org/sites/default/files/OHO_Order_14-03_ProceedingNo.2010023218601_0.pdf (stating that "the standard is high" for requiring a withheld document list and denying respondent's motion for a withheld document list).

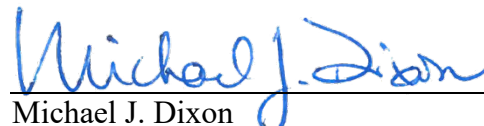
²³ Templeton Decl. ¶¶ 4-5.

²⁴ OHO Order 15-02 (2010024522103) (Feb. 23, 2015), at 4-5, https://www.finra.org/sites/default/files/OHO-Order-15-02-ProceedingNo.2010024522103_0.pdf (denying respondent's motion to compel documents and for a withheld documents list when respondent has failed to overcome Enforcement's sworn statements); OHO Order 09-04 (2006006259501) (Nov. 24, 2009), at 4, https://www.finra.org/sites/default/files/OHODecision/p120524_0_0_0.pdf

VI. Conclusion

I **DENY** Kolta's Motion because he failed to show that there is any reason to believe that Enforcement improperly withheld a document from its discovery production.

SO ORDERED.


Michael J. Dixon
Hearing Officer

Dated: October 11, 2023

Copies to:

Tosh Grebenik, Esq. (via email)
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(denying motion for withheld document list when respondent "failed to make a plausible showing that Enforcement is withholding material exculpatory evidence sufficient to overcome Enforcement's sworn declaration that it has complied with its disclosure obligations").