

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS  
Release No. 3442 / December 29, 2015

ADMINISTRATIVE PROCEEDING  
File No. 3-16155

In the Matter of  
  
NICHOLAS ROWE

ORDER DENYING MOTION TO INTRODUCE  
PRIOR SWORN TESTIMONY

The Division of Enforcement moves to introduce the prior sworn testimony of Mary Lambert at the hearing to commence on February 1, 2016, pursuant to Rule of Practice 235(a)(2), 17 C.F.R. § 201.235(a)(2). Attached to the motion is Lambert's testimony before a FINRA arbitration panel.

The Rules of Practice set a presumption in favor of live testimony. The hearing officer has the discretion to grant a motion to introduce a prior sworn statement of a non-party witness if, as relevant here, "[t]he witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the prior sworn statement." 17 C.F.R. § 201.235(a)(2). The Division represents that "Lambert will be out of the United States for an extended time," but provides no further details regarding such circumstances. Motion at 1. The Division further asserts that Lambert's testimony is "highly probative of the issues to be decided in this matter." *Id.* at 3. It summarizes: "Lambert was one of several former clients of Mr. Rowe who sued him in a 2011-12 FINRA arbitration. These clients alleged, among other things, that Mr. Rowe placed them in unsuitable investments and used inherently risky trading strategies." *Id.* at 2. The Division states that the allegations in the arbitration proceeding "overlapped considerably" with the allegations described in the consent order entered against Rowe by the New Hampshire Bureau of Securities Regulation, which serves as the basis for this follow-on proceeding. *Id.*

Given the nature of Lambert's allegations against Rowe, live testimony would be especially helpful for my assessment of witness credibility, an issue that Rowe has made central to his defense. The Division's motion provides no details regarding the circumstances of Lambert's absence from the country that would allow me to assess whether an alternative arrangement is possible. Also, the Division asserts that Rowe will not be prejudiced because his former counsel cross examined Lambert at the FINRA hearing, but does not address what topics were explored or how Rowe's interests were adequately protected in that prior proceeding.

Accordingly, the motion is DENIED without prejudice. By January 4, 2016, the Division shall submit a declaration that sets forth the specific dates when Lambert will be out of the country and the circumstances of her absence. The declaration also shall address whether it can be arranged for Lambert to testify by phone or video conference at the hearing if she cannot appear in person; and, if not, the feasibility of scheduling an additional hearing date to permit Lambert to testify in person either before the scheduled February 1, 2016, hearing or shortly thereafter. To the extent such declaration may include personally identifiable or sensitive information, the Division shall file sealed and redacted copies.

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Jason S. Patil  
Administrative Law Judge