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**UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION**

**ADMINISTRATIVE PROCEEDING
File No. 3-16155**

**In the Matter of

Nicholas B. Rowe,

Respondent.**

**DIVISION OF ENFORCEMENT'S
CONSOLIDATED OPPOSITION TO RESPONDENT'S MOTIONS**

The Division of Enforcement ("Division") opposes Respondent's Motions to a) Clarify Scope of Trial; b) In Limine to Remove Witnesses or Exclude Witnesses' Testimony; and c) for Reconsideration of Certain of Respondent's Subpoenas. The Division requests leave to file an opposition to Respondent's Motion to Compel Certain Parties to Produce Subpoenaed Information after the subpoenaed parties have made their court-ordered submissions.

**Respondent's Motions to Clarify Scope of Trial and
In Limine to Remove Witnesses or Exclude Witnesses' Testimony**

The Division opposes both Respondent's Motion to Clarify Scope of Trial and Motion in Limine to Remove Witnesses or Exclude Witnesses' Testimony. In his Motion to Clarify the Scope of the Trial, he seeks to exclude "anything that is outside the scope of [the New Hampshire Consent] Order." In his Motion to Exclude Witnesses, Respondent seeks to exclude the testimony of three victimized investors who were not part of the FINRA arbitration against him.¹

¹ Confusingly, Rowe seeks to exclude witnesses because they were not part of the FINRA arbitration, then argues in his scope motion that this "action was not brought based on the FINRA arbitration" and therefore should be limited.

Respondent appears to misunderstand the subject of the upcoming hearing, the elements that will be at issue in that hearing, and the instructions from the Commission on the scope of that hearing. The Commission remanded this case for a “public interest determination” of whether Respondent should be barred. To make that determination “the law judge ... may admit and consider additional evidence from any relevant source, subject to challenge from either party, and, based on such additional evidence, determine an appropriate sanction, if any.” *Nicholas B. Rowe*, Commission Order Denying Motion for Summary Affirmance and Remanding for Additional Proceedings, Exch. Act Release No. 75982 (Sept. 24, 2015). In its Order Following Prehearing Conference and Setting Procedural Schedule, this Court stated that “the parties will be permitted to argue and put on evidence regarding whether a sanction is in the public interest and the extent to which sanctions would have a deterrent effect.” *Nicholas B. Rowe*, Admin. Proceedings Rulings Release No. 3224 (October 14, 2015) *citing Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979). Respondent’s proposed scope limitations and witness exclusions contradict these instructions.

The “public interest” inquiry is broader than the limited hearing outlined in Respondent’s motions. When a bar is sought, a court should “consider the record evidence to determine whether such a remedy is necessary or appropriate to protect investors and markets from the risk of future misconduct by the respondent and to preserve the fair and effective functioning of the securities markets.” *John W. Lawton*, Release No. 3513, 2012 WL 6208750 (Dec. 13, 2012). That consideration includes both Respondent’s conduct at the time of the Consent Order’s enumerated violations as well as more recent conduct by the Respondent.

In *Lawton*, the Commission held that the administrative court should look beyond the court order underlying that follow-on proceeding. The court order was the “statutory predicate

for instituting the follow-on proceeding, and ... may be considered as evidence of the future risk posed by the respondent.” *Id.* But the Commission also required “a broader inquiry into whether a person presents a future risk to the public interest because ... the degree of intentional wrongdoing evident in a defendant’s past conduct is an important indication of the defendant’s propensity to subject the trading public to future harm.” *Id. quoting Aaron v. SEC*, 446 U.S. 680, 701 (1980) (internal quotations omitted). That “broader inquiry” includes “more recent conduct, such as any assurances against future violations, subsequent disciplinary history, the likelihood that the respondent would be presented with opportunities for similar misconduct in a collateral capacity, and any other evidence of the public interest in limiting association in that capacity.” *Id.*

The Commission in *Lawton* included “post-injunction conduct” in its public-interest analysis. It determined that the later conduct was “further evidence of his lack of remorse and his failure to understand the duties of a securities professional.” *Id.* In fact, the Commission stated that improper conduct by a Respondent should be considered even if that conduct “is not related to the professional capacity in which the respondent was acting when he or she engaged in the conduct underlying the proceedings.” *Id.* at *11; *see also SEC v. Kornman*, 592 F.3d 173, 187 (D.C. Cir. 2010) (deferring to Commission’s consideration of “dishonest conduct unrelated to securities transactions or securities business” in imposing bar). Likewise, this Court has considered other acts of wrongdoing in determining whether a sanction was in the public interest. *Robert J. Lunn*, Release No. 887 (September 21, 2015) (Patil, J.) (considering other acts of wrongdoing such as violations of state and NASD rules when analyzing *Steadman* factors).

In addition, by asking to limit the witnesses the Division may call, Respondent attempts to have his cake and eat it too. This Court recognized that the “thrust of Rowe’s defense is that

he is the victim of a corrupt state government and clients who supposedly perjured themselves to inculcate him.” *Nicholas B. Rowe*, Init. Dec., *citing* Rowe Opp. to Summary Disposition, Ex. A at 13. At the hearing following remand, Respondent indicated he would pursue his theory that the FINRA claimants and the New Hampshire regulators conspired against him. The Division will rebut that contention, in part, by calling other clients who were similarly victimized by Respondent. Respondent wants to claim this matter is a conspiracy among a small number of his clients, but wants to exclude evidence from other clients he victimized. To do so would be unfairly prejudicial.

Finally, Respondent seeks to exclude witnesses because he cannot produce a “risk analysis” on their accounts. Respondent’s claimed inability to perform this analysis, or to hire an expert to do so, does not provide a basis for excluding relevant testimony. The Division should be able to call all witnesses who can testify to facts relevant to the public interest analysis and the *Steadman* factors.

For the reasons above, the Division respectfully requests that this Court deny Respondent’s Motion in Limine to Remove Witnesses and Motion to Clarify Scope of Trial.

Motion to Amend Witness List

Per the January 7, 2016 e-mail from Mr. Bruno on behalf of the Court, the Division understands that the Court has allowed Respondent’s requested addition to his witness list.

Motions to Compel Parties to Produce Subpoenaed Information

The Division takes no position on this motion at this time, as it has insufficient information regarding the third-party productions being challenged. On January 13, 2016, this Court ordered the subpoena recipients to make a proffer of documents provided to Respondent by January 15. The Division requests that this Court grant until January 20, 2016 to file an

opposition to Defendant's Motion. If the Division chooses not to submit an opposition, the Division will promptly inform the Court.

Motion for Reconsideration of Certain of Respondent's Subpoenas

Here, Respondent asks this Court to broaden what it previously narrowed: the scope of the disputes and controversies about which witnesses must produce documents. The Court previously held a document subpoena for disputes and controversies with "any person you have had any controversy with" to be unreasonable. Now—after casually accusing a witness of extortion—Respondent says he wants to show that a witness "uses litigation as a threat." He claims to have information about that witness's disputes with ministers and with a neighbor (without providing any of this information), and argues that the existence of these controversies would be "probative of the witness's lack of credibility."

The existence of a dispute with a neighbor or a minister does not undermine a witness's honesty, and is otherwise irrelevant to this proceeding. *See, e.g., Outley v. City of New York*, 837 F.2d 587 (2d Cir. 1988) (proper to exclude evidence of other lawsuits offered to show party has a litigious character); *Moessler v. Aetna Life Ins. Co.*, 2014 WL 3587511, at *13 (C.D. Cal., July 21, 2014) ("the Court is not convinced that being 'litigious' has any bearing on one's credibility").²

As Respondent fails to explain how the disputes he seeks to prove bear on the issues in this hearing, the Division respectfully ask this Court to deny Respondent's Motion for Reconsideration.

² This principle has limits however. *See Ramirez v. Sam's for Play Café*, 2013 WL 4428858, at *6 (August 15, 2013) (plaintiff's filing of 69 disability lawsuits could be used to challenge credibility of damage claims); *Tomaino v. O'Brien*, 315 F. App'x 369, 361 (2d Cir. 2009) (evidence of five prior lawsuits with "strikingly similar claims" to challenge similar claims in sixth suit.)

Conclusion

For the reasons set forth above, the Division respectfully requests that the Court deny Respondent's Motions to a) Clarify Scope of Trial; b) In Limine to Remove Witnesses or Exclude Witnesses' Testimony; and c) for Reconsideration of Certain of Respondent's Subpoenas. The Division requests leave to file an opposition to Respondent's Motion to Compel after the subpoenaed third-parties have made their court-ordered submissions.

Respectfully submitted,

/s/ Marc Jones
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Date: January 15, 2016

COUNSEL FOR DIVISION OF ENFORCEMENT

Certificate of Service

I certify that on January 15, 2016, I caused true and correct copies of the foregoing **Division of Enforcement's Consolidated Opposition to Respondent's Motions** to be served on the following parties and other persons entitled to notice to the following addresses:

Honorable Jason S. Patil (by electronic mail)
Office of Administrative Law Judges
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-2557

Nicholas Rowe (by electronic mail and overnight mail)
[REDACTED]
Hollis, NH [REDACTED]
(Respondent)

/s/ Marc Jones
Marc J. Jones, Senior Trial Counsel



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DIVISION OF ENFORCEMENT

Marc J. Jones
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January 15, 2016

Via Facsimile and Overnight Delivery

Mr. Brent Fields
Securities and Exchange Commission
Office of the Secretary
100 F Street, N.E.
Washington, DC 20549

Re: *In the Matter of Nicholas Rowe*
Administrative Proceeding File No. 3-16155

Dear Mr. Fields:

Enclosed please find an original and three copies of the Division of Enforcement's Consolidated Opposition to Respondent's Motions.

Very truly yours,

A handwritten signature in blue ink that reads "Marc J. Jones".

Marc J. Jones

Enclosures

cc: Honorable Jason S. Patil (by email)
Nicholas Rowe (by email and overnight delivery)