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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

RESPONDENT

Respondent.

Disciplinary Proceeding
No. 2014043020901

Hearing Officer–CC

**ORDER DENYING RESPONDENT’S MOTION
PURSUANT TO FINRA RULE 9252 AND
GRANTING RESPONDENT LEAVE TO SUPPLEMENT**

I. Background

The Complaint contains two causes of action. Cause one alleges that on October 2, 2014, Respondent, formerly an equity research analyst with Citigroup Global Markets Inc. (“CGMI”), selectively disclosed to analyst NN at CGMI hedge fund client Citadel LLC that medical device company Medtronic, Inc. (“Medtronic”) would be issuing a press release the following morning to confirm that it intended to proceed with a merger with Covidien plc. (“Covidien”). Medtronic previously had announced the merger, but merger plans subsequently stalled. Cause one alleges that the disclosure was material and non-public, and that Respondent had not previously disclosed it in published reports. Cause one alleges that Respondent’s disclosure violated FINRA Rule 2010 by breaching the duties imposed in CGMI’s policies and procedures and failing to observe high standards of commercial honor and just and equitable principles of trade. Cause two alleges that on October 4, 2014, Respondent contacted NN, advised him that CGMI was investigating Respondent, and asked NN to delete a voice mail that Respondent left for him regarding the merger press release referenced in cause one. Cause two alleges that Respondent knew or should have known that the voice mail message could potentially serve as evidence in an investigation of possible rule violations and that, by seeking the deletion of the voice mail message, Respondent failed to observe high standards of commercial honor and just and equitable principles of trade, in violation of FINRA Rule 2010. Respondent generally denies allegations of wrongdoing.

On February 8, 2016, Respondent filed a motion pursuant to FINRA Rule 9252 to request that the Hearing Officer direct the Department of Enforcement (“Enforcement”) to issue FINRA Rule 8210 requests for information and testimony to various individuals and entities. Enforcement opposes the motion and states that Respondent has failed to demonstrate that the

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information and testimony are relevant to this proceeding, he previously attempted in good faith to obtain the information and testimony through other means, and the intended recipients of the Rule 8210 requests are subject to FINRA's jurisdiction.

II. Motion Pursuant to FINRA Rule 9252

Respondent requests that the Hearing Officer order Enforcement to issue Rule 8210 requests for information and testimony as follows: (1) to J.P. Morgan Securities LLC ("JPM"), a request for all non-privileged electronic communications sent or received by MJW for the time period of October 2, 2014, through October 9, 2014; (2) to MJW, a request that he appear to testify at the hearing; (3) to Citadel Securities LLC, a request for voicemail messages received from MJW during the time period of October 2, 2014, through October 9, 2014, concerning Medtronic and Covidien; (4) to Citadel Securities LLC, a request for all non-privileged documents describing the basis for the suspension and termination of NN's employment with Citadel LLC; and (5) to T. Rowe Price Investment Services, Inc., a request for voicemail messages received from MJW during the time period of October 2, 2014, through October 9, 2014, concerning Medtronic and Covidien.

III. Discussion

Respondent's request for the Hearing Officer to order Enforcement to invoke Rule 8210 is governed by FINRA Rule 9252. Under Rule 9252, a respondent may request that FINRA invoke Rule 8210 to compel the production of documents or testimony from entities or individuals that are subject to FINRA's jurisdiction. Rule 9252(a) states that the request must describe with specificity the testimony, documents or category or type of documents sought, state why they are material, describe the requesting party's previous good faith efforts to obtain the documents or testimony through other means, and state whether the custodian of the documents or the person requested to testify is subject to FINRA's jurisdiction. Pursuant to Rule 9252(b), "[t]he Hearing Officer may grant such a request only upon a showing that the information sought is relevant, material, and non-cumulative; that the requesting party has previously attempted to obtain the documents or testimony through other means, but has been unsuccessful; and that the person from whom the documents or testimony is sought is subject to FINRA jurisdiction."¹ In addition, Rule 9252(b) requires the Hearing Officer to consider whether the request is unreasonable, oppressive, excessive in scope, or unduly burdensome, and whether the request should be denied, limited, or modified.²

¹ OHO Order 08-12 (2005003188901) (Aug. 27, 2008), at 2, http://www.finra.org/sites/default/files/OHODecision/p118011_0.pdf.

² OHO Order 15-05 (2012034936005) (Jan. 27, 2015), at 7, http://www.finra.org/sites/default/files/OHO-Order-15-05-ProceedingNo.2012034936005_0.pdf.

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A. From JPM, All Non-Privileged Electronic Communications Sent or Received by MJW Between October 2, 2014, and October 9, 2014, concerning Medtronic or Covidien

Respondent has not established that the information and documents that he seeks from JPM are relevant and material. Respondent contends that on-the-record ("OTR") testimony produced during discovery suggests that MJW, like Respondent, contacted analysts at Citadel LLC and T. Rowe Price Associates, Inc., on October 2, 2014, the evening before Medtronic issued a press release reaffirming its merger with Covidien, and communicated to those analysts that Medtronic intended to proceed with the merger. Respondent contends that, because he has not heard the actual voice mail messages or seen the emails that MJW may have sent to the analysts, he seeks to obtain them through Rule 8210.³ He argues that the emails and voice mail messages will serve as evidence to support Respondent's claim that his peers (such as MJW) reached conclusions regarding the Medtronic/Covidien merger similar to his on October 2, 2014, based on information that fell outside the definition of "material, non-public information." Respondent also argues that the evidence is relevant as to sanctions. Enforcement argues that the views of other analysts, like MJW, as to the merger between Medtronic and Covidien have no bearing on whether Respondent's communications with NN on October 2, 2014, were disclosures of material, non-public information.

In a FINRA disciplinary proceeding, "material evidence" is evidence relating to liability or sanctions that might be considered favorable to the respondent's case, which, if suppressed, would deprive the respondent of a fair hearing.⁴ The Federal Rules of Evidence provide that evidence is relevant if it has a tendency to make a fact of consequence more or less probable. Fed. R. Evid. 401. Whether or not MJW communicated something similar to Respondent's October 2, 2014 communications is neither relevant nor material to the issue of whether the information that Respondent communicated to NN was in fact material, non-public information. If Respondent claims that the information was public and that he and MJW learned of it from the same public source (corroborating Respondent's claim that the information was public), it would be MJW's testimony regarding the public availability of the information, not the content of MJW's communications with third parties, that could be relevant.

Respondent also has not demonstrated that the information and documents that he seeks would be relevant or material as to sanctions. "The appropriateness of the sanctions imposed depends on the facts and circumstances of the particular case and cannot be determined precisely by comparison with action taken in other cases."⁵ As such, the sanctions that FINRA does or does not impose on MJW are irrelevant. Additionally, in order for Respondent to establish a claim that he was selectively prosecuted while others similarly situated (such as MJW) were not,

³ Respondent represents, and Enforcement does not dispute, that MJW is a registered person associated with FINRA member firm JPM.

⁴ See OHO Order 15-05 (2012034936005), at 2.

⁵ *Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at 874 n. 75 (Jan. 30, 2009).

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he must prove that his prosecution was motivated by improper considerations such as race, religion, or the desire to prevent the exercise of a constitutionally protected right.⁶ Respondent has offered no such evidence of selective prosecution. Thus, even if MJW's October 2, 2014 communications are similar to the communications at issue in this case, and Enforcement chooses not to pursue disciplinary action against MJW, none of these facts are relevant to the Hearing Panel's decision in this matter.

Respondent also has not demonstrated that he "has previously attempted in good faith to obtain the desired [d]ocuments" through other means and has been unsuccessful, as Rule 9252(b) requires. Although Respondent claims that he was rebuffed when he requested the documents and information from Enforcement, he does not indicate that he made any effort to obtain the information directly from JPM. Finally, Respondent's request is expansive and overbroad. The communications at issue in the Complaint occurred prior to Medtronic's issuance of a press release at 9:16 a.m. on October 3, 2014.⁷ Yet Respondent seeks to obtain electronic communications sent or received by MJW during the period from October 2, 2014, through October 9, 2014.

For these reasons, Respondent's motion for the Hearing Officer to order Enforcement to issue a Rule 8210 request to JPM for all non-privileged communications sent or received by MJW for the time period of October 2, 2014, through October 9, 2014, is denied.

B. MJW's Compulsory Appearance to Testify at the Hearing

MJW is a registered person currently associated with FINRA member firm JPM. FINRA therefore has jurisdiction to issue a Rule 8210 request compelling MJW to appear to testify at the hearing. Respondent argues that MJW's testimony may be relevant for the same reasons that electronic communications to and from MJW in October 2014 may be relevant. Enforcement disagrees.

As stated in subsection III.A of this Order, the Hearing Officer does not find relevant the content of any electronic communications that MJW sent to or received from other analysts on October 2, 2014, or any other day between October 2 and October 9, 2014. The Hearing Officer finds that MJW's testimony as to whether FINRA is investigating his conduct and if FINRA has commenced an action against him is not relevant to liability or sanctions. Respondent offers as a defense to the allegations of cause one that the information that he communicated to NN on October 2, 2014, was publicly available information. MJW's testimony could be relevant as corroboration of testimony from Respondent that information at issue was available publicly before Medtronic's October 3, 2014 press release. Respondent has not, however, demonstrated that he "previously attempted in good faith" to obtain MJW's testimony through other means and has been unsuccessful, as Rule 9252(b) requires. Indeed, Respondent makes no representation as

⁶ See *David Kristian Evansen*, Exchange Act Release No. 75531, 2015 SEC LEXIS 3080, at *44 (July 27, 2015).

⁷ See October 19, 2015 Complaint ("Compl.") at ¶ 31.

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to whether he attempted to contact MJW and whether MJW refused to testify voluntarily. As such, the Hearing Officer denies Respondent's request.⁸ The Hearing Officer grants Respondent leave to supplement his Rule 9252 Motion to address his good faith efforts to secure MJW's appearance at the hearing. If Respondent chooses to supplement his Rule 9252 Motion in this regard, he must do so **on or before March 14, 2016**. Thereafter, Enforcement may respond by **March 25, 2016**.

C. From Citadel Securities, LLC, All Voice Mail Messages Received From MJW Between October 2, 2014, and October 9, 2014, concerning Medtronic or Covidien

Respondent has not demonstrated that the content of MJW's voice mail messages regarding Medtronic or Covidien are relevant or material to a determination of liability or sanctions with respect to the allegations of the Complaint. The Complaint alleges that, during a telephone call at 9:23 p.m. on October 2, 2014, Respondent disclosed to NN material non-public information regarding the Medtronic/Covidien merger. Voice mail messages from MJW to individuals at Citadel Securities, LLC or Citadel LLC, even if related to the Medtronic/Covidien merger, are not relevant to allegations regarding Respondent's conduct.

Furthermore, Respondent has made no showing that he attempted in good faith to obtain these voice mail messages by reaching out to Citadel Securities, LLC directly. Additionally, Respondent has not demonstrated that FINRA has jurisdiction over the intended target of the Rule 8210 request. Respondent asserts that the voice mail messages that he seeks are voice mail messages that MJW left for analysts who work for Citadel LLC, an entity that is not a FINRA member firm. Respondent therefore requests that Enforcement issue a Rule 8210 request to Citadel LLC's affiliated entity, Citadel Securities, LLC, which is a FINRA member firm. But the individuals for whom Respondent alleges MJW left voice mail messages were not employed by the FINRA member firm. They were employed by non-FINRA member Citadel LLC. Respondent has not satisfactorily demonstrated that FINRA has jurisdiction over the entity from which Respondent could reasonably expect to obtain these voice mail messages. Finally, Respondent's request is expansive and overbroad. The communications at issue in the Complaint occurred prior to Medtronic's issuance of a press release at 9:16 a.m. on October 3, 2014. Yet Respondent seeks to obtain electronic communications sent or received by MJW during the period from October 2, 2014, through October 9, 2014.

For these reasons, Respondent's motion for the Hearing Officer to order Enforcement to issue a Rule 8210 request to Citadel Securities, LLC for all voice mail messages received from MJW for the time period of October 2, 2014, through October 9, 2014, is denied.

⁸ See OHO Order 06-18 (CAF040058) (Feb. 8, 2006), at 3, <http://www.finra.org/sites/default/files/OHODecision/p017565.pdf> (denying Rule 9252 request for witness testimony, in part, because respondents offered no evidence of their efforts to secure the testimony).

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D. From Citadel Securities, LLC, All Non-Privileged Documents Describing the Basis for Citadel LLC's Suspension and Termination of NN

NN is scheduled to testify in this matter on the first day of the hearing, May 5, 2016. NN was an analyst employed by Citadel LLC. He was not employed by Citadel Securities, LLC, the FINRA member firm that is affiliated with Citadel LLC, and he was not registered in any capacity during the relevant period. The Complaint alleges that NN received material non-public information from Respondent during a five-minute telephone conversation on the evening of October 2, 2014.⁹

Respondent contends that documentation concerning the basis for NN's suspension and termination from Citadel LLC is relevant because, during OTR testimony, NN testified that Citadel LLC suspended him "due to compliance issues surrounding this event." Respondent acknowledges that Enforcement has already issued to NN a Rule 8210 request for documents pertaining to NN's termination.¹⁰ Enforcement contends that whether or not Citadel LLC terminated or suspended NN because of NN's October 2, 2014 communications with Respondent is irrelevant to the Hearing Panel's determination of whether Respondent communicated material non-public information to NN.

The Hearing Officer finds that Respondent has not demonstrated that the documents he seeks to obtain from Citadel LLC are material and relevant. The Hearing Panel must determine for itself, based on the evidence before it, whether Respondent possessed material non-public information regarding Medtronic or Covidien on October 2, 2014, and, if so, whether he disclosed it to NN. Citadel LLC's determinations in this regard and its basis for disciplining NN are not relevant to whether Respondent's October 2, 2014 statements to NN were material and non-public or whether Respondent actually made the statements alleged.

For the reasons stated in subsection III.C, Respondent also has not demonstrated that FINRA has jurisdiction over the entity that employed NN, Citadel LLC. Furthermore, Respondent has not demonstrated a good faith effort to obtain these documents directly from Citadel LLC.

For these reasons, Respondent's motion for the Hearing Officer to order Enforcement to issue a Rule 8210 request to Citadel Securities, LLC for all non-privileged documents describing the basis for Citadel LLC's suspension and termination of NN is denied.

⁹ See Compl. at ¶ 42.

¹⁰ Respondent represents that Enforcement issued the Rule 8210 request to NN on February 8, 2016, and NN has not yet responded.

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E. From T. Rowe Price Investment Services, Inc., All Voice Mail Messages Received From MJW Between October 2, 2014, and October 9, 2014, concerning Medtronic or Covidien

Respondent has not demonstrated that the content of MJW's voice mail messages regarding Medtronic or Covidien are relevant or material to a determination of liability or sanctions in this matter. The Complaint alleges that, during a telephone call at 9:23 p.m. on October 2, 2014, Respondent disclosed to NN material non-public information regarding the Medtronic/Covidien merger. Voice mail messages from MJW to individuals at T. Rowe Price Investment Services, Inc. or T. Rowe Price Associates, even if related to the Medtronic/Covidien merger, are not relevant to these allegations.

Furthermore, Respondent has made no showing that he attempted in good faith to obtain these voice mail messages by reaching out to T. Rowe Price Investment Securities, Inc. directly. Additionally, Respondent has not demonstrated that FINRA has jurisdiction over the intended target of the Rule 8210 request. Respondent asserts that the voice mail messages that he seeks are voice mail messages that MJW left for one or more analysts who work for T. Rowe Price Associates, Inc., an entity that is not a FINRA member firm. Respondent therefore requests that Enforcement issue a Rule 8210 request to T. Rowe Price Associates' affiliated entity, T. Rowe Price Investment Services, LLC, which is a FINRA member firm. But the individual for whom Respondent alleges MJW left voice mail messages was not employed by the FINRA member firm. He was employed by non-FINRA member T. Rowe Price Associates, Inc. Respondent has not satisfactorily demonstrated that FINRA has jurisdiction over the entity from which Respondent could reasonably expect to obtain these voice mail messages. Finally, Respondent's request is expansive and overbroad. The communications at issue in the Complaint occurred prior to Medtronic's issuance of a press release at 9:16 a.m. on October 3, 2014. Yet Respondent seeks to obtain electronic communications sent or received by MJW during the period from October 2, 2014, through October 9, 2014.

For these reasons, Respondent's motion for the Hearing Officer to order Enforcement to issue a Rule 8210 request to T. Rowe Price Investment Services, Inc. for all voice mail messages received From MJW for the time period of October 2, 2014, through October 9, 2014, is denied.

SO ORDERED.

Carla Carloni
Hearing Officer

Dated: February 29, 2016