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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Disciplinary Proceeding  
No. 2006006259501

Hearing Officer – RSH

**ORDER DENYING RESPONDENT'S MOTION TO COMPEL  
PRODUCTION OF LIST OF WITHHELD DOCUMENTS**

The Respondent moved for entry of an order compelling the Department of Enforcement to produce a list of all documents Enforcement withheld from discovery pursuant to Procedural Rule 9251(b)(1) that may contain "material exculpatory evidence," as that term is defined by Procedural Rule 9251(b)(2) and the principles enunciated by the Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963), commonly referred to as the Brady Doctrine. Specifically, the Respondent believes that Enforcement has withheld notes of interviews that contain *Brady* material.

Enforcement opposed the Respondent's motion, and attached to its opposition the sworn Declaration of David Utevsky, the Enforcement counsel of record in this proceeding. Mr. Utevsky stated, under penalty of perjury, that he had personally conducted a search for all documents encompassed by Procedural Rule 9251(a), including those that may not have been kept as part of the investigatory file. Mr. Utevsky further declared that he had personally reviewed all of the documents prepared or obtained by FINRA staff in connection with the investigation that led to the commencement of this disciplinary proceeding, for the purpose of identifying any

documents that might contain material exculpatory evidence. The documents he reviewed included, but were not limited to, all notes and memoranda related to interviews of prospective witnesses. Mr. Utevsky confirmed that, based on his personal review of those documents, and on his consultations with his supervisor, "none of the documents that have not been produced to Respondent [] contain any material exculpatory evidence subject to production under Procedural Rule 9251(b)(2)." Mr. Utevsky further stated that he is aware of Enforcement's continuing obligation to produce to the Respondent any material exculpatory evidence it may discover in the course of this proceeding.

For the reasons discussed below, the Hearing Officer denies the Respondent's motion.

Procedural Rule 9251(a) sets the outside limit of discovery in FINRA disciplinary proceedings, which is substantially less than the scope of discovery permitted in federal court under the Federal Rules of Civil Procedure. FINRA Procedural Rule 9251(a) obligates Enforcement to allow respondents to inspect and copy non-privileged "documents prepared or obtained by Interested Association Staff in connection with the investigation that led to the institution of proceedings."<sup>1</sup> Notwithstanding the obligation under Procedural Rule 9251(a), Enforcement may withhold any document protected by Procedural Rule 9251(b)(1). They include documents subject to attorney-client privilege, as well as internal reports, memoranda, notes, and other writings related to an investigation or examination, and documents that would reveal an enforcement technique or guideline.<sup>2</sup> FINRA permits such documents to be withheld to ensure that FINRA's enforcement efforts are not impaired.<sup>3</sup>

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<sup>1</sup> The term "Interested Association Staff" is defined in Procedural Rule 9120(r)(1).

<sup>2</sup> See Procedural Rule 9251(b)(1).

<sup>3</sup> See Order Approving Proposed Rule Change, Exchange Act Release No. 38,908, 1997 SEC LEXIS 1617, at \*134 n.194 (Aug. 7, 1997).

Enforcement’s ability to withhold otherwise discoverable documents is limited, however, by Procedural Rule 9251(b)(2), which requires Enforcement to produce any document it withheld pursuant to Rule 9251(b)(1) if it contains “material exculpatory evidence.”<sup>4</sup> FINRA applies Procedural Rule 9251(b)(2) consonant with the principles enunciated by the Supreme Court in *Brady*.

In *Brady*, the Supreme Court held “that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”<sup>5</sup> The Supreme Court later held that the duty encompasses impeachment evidence as well as exculpatory evidence. In the pre-hearing phase of 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.<sup>6</sup> However, mere speculation that FINRA documents might contain material exculpatory information is not sufficient to warrant their production.<sup>7</sup> Instead, a respondent must make a “plausible showing” that the requested documents contain information that is both favorable and material to its defense.<sup>8</sup> In addition, the Brady Doctrine is not violated by failing to disclose information already known to the defense.<sup>9</sup>

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<sup>4</sup> See Procedural Rule 9251(b)(2).

<sup>5</sup> 373 U.S. 83 at 87. The Supreme Court later held that the duty encompasses impeachment evidence as well as exculpatory evidence. See *United States v. Bagley*, 473 U.S. 667, 676 (1985).

<sup>6</sup> OHO Redacted Order 01-13, CAF000045, at 11 (May 17, 2001), available at [http://www.FINRA.org/RegulatoryEnforcement/Adjudication/OfficeofHearingOfficersDecisionsandProceedings/OHODisciplinaryOrders/2001Orders/FINRAW\\_007867](http://www.FINRA.org/RegulatoryEnforcement/Adjudication/OfficeofHearingOfficersDecisionsandProceedings/OHODisciplinaryOrders/2001Orders/FINRAW_007867) (citing *United States v. Bagley*, 473 U.S. 667, 675 (1985)).

<sup>7</sup> See *In re Jett*, 52 S.E.C. 830, 1996 SEC LEXIS 1683, at \*1-2 (1996) (vacating an SEC order for the Division of Enforcement to produce memoranda for in camera review, finding that defendant’s proposal amounted to a “fishing expedition” through confidential documents, in the hope of finding something useful to his case).

<sup>8</sup> *Id.* at 2.

<sup>9</sup> *United States v. Morris*, 80 F.3d 1151, 1170 (7th Cir. 1996).

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Here, the Respondent has 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 under Procedural Rule 9251(b)(2) and the Brady Doctrine. The Respondent merely states that it is "implausible" that Enforcement proceeded with this disciplinary proceeding without conducting interviews with certain witnesses, and that "it is highly probable" that any documents relating to such interviews "would fall within the scope of Rule 9251(b)(2)." Although Enforcement might have documents relating to its interviews of certain witnesses, that does not mean the documents contain *Brady* material. Without more, the Respondent's request amounts to a "fishing expedition." Therefore, the Respondent's motion for production of a list of the documents Enforcement withheld pursuant to Procedural Rule 9251(b)(1) is denied.

**SO ORDERED.**

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Rochelle S. Hall  
Hearing Officer

Dated: November 24, 2009