

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

RESPONDENT

Respondent.

Disciplinary Proceeding
No. 2012032519101

Hearing Officer—CC

ORDER DENYING RESPONDENT'S MOTION FOR PRODUCTION OF DOCUMENTS

On September 15, 2014, Respondent filed a Motion for Production of Documents ("Motion"). On September 25, 2014, FINRA's Department of Enforcement ("Enforcement") opposed the Motion. As discussed in detail below, the Hearing Officer denies Respondent's Motion.

A. Background

Respondent's Motion asks that Enforcement be ordered to produce a wide variety of documents: (1) all documents prepared or obtained in response to or with respect to Respondent's Wells Submission and all documents that "provide the basis or support" for Enforcement's Motion to Strike Exhibits to Respondent's Answer, without regard for whether they are exculpatory; (2) any exculpatory document withheld pursuant to FINRA Rule 9251(b)(1), including notes of discussions with handwriting experts or customers whose signatures were allegedly forged, all communications between Enforcement and the FINRA Office of Disciplinary Affairs, notes indicating Enforcement's deliberate decision not to consult a handwriting expert, and all documents, including staff notes, regarding Enforcement's examination of the signatures on the documents produced by Respondent; (3) any statement of

This Order has been published by FINRA’s Office of Hearing Officers and should be cited as OHO Order 14-04 (2012032519101).

any person to be called as a witness by Enforcement that is a substantially verbatim recital of an oral statement made by the witness; and (4) contemporaneously written statements of interested FINRA staff and “non-associated persons” that Enforcement is required to produce pursuant to FINRA Rule 9253(a)(2). Respondent also requests that the Hearing Officer order Enforcement to file a list of withheld documents and conduct an inspection of the documents that Enforcement withheld.

Respondent’s argument is based largely on speculation that exculpatory documents must exist in Enforcement’s files because Enforcement refused to stipulate to the admissibility of documents in Respondent’s possession that purportedly include the signatures of customers referenced in the Complaint. Respondent argues that “[i]t is evident that Enforcement must have investigated the authenticity of the signatures in the signature documents produced by Respondent in his Wells Submission” because Enforcement objected to the admissibility and authenticity of the documents.¹ Respondent contends that Enforcement “must have documents evidencing or providing some basis for its opposition.”² Respondent argues that, because of the “central role that the authorization of these signature documents will play in the proceeding,” the Hearing Officer should require their production.³

Respondent also asserts that, because Enforcement initially indicated that customer [MZ] was a victim of [Respondent]’s forgery, but later chose not to name [MZ] in the Complaint, “[w]ithheld notes of enforcement’s investigation . . . have to exist and they must be at least in part exculpatory or [MZ] would not have been dropped from the case.”⁴ Respondent also argues

¹ Motion at 2.

² *Id.* at 3.

³ *Id.*

⁴ *Id.* at 4.

This Order has been published by FINRA’s Office of Hearing Officers and should be cited as OHO Order 14-04 (2012032519101).

that it is “inconceivable” that Enforcement has chosen not to consult with a handwriting expert and speculates that staff notes indicating “a deliberate decision not to consult a handwriting expert or to use customary methodologies for detecting forgeries in order to avoid creating evidence for the Respondent” must exist in Enforcement’s files.⁵ Respondent further hypothesizes that any such documents “would be exculpatory and tend to impeach the expected testimony.”⁶ Based on these claims, Respondent contends that Enforcement has withheld documents that, pursuant to FINRA’s Code of Procedure, it must produce to Respondent.

Enforcement submits that it has complied with all obligations to produce documents to Respondent under FINRA Rules 9251 and 9253. Enforcement notes that Respondent’s allegations are based on mere speculation and no concrete facts. Enforcement attached to its opposition the sworn declaration of Enforcement Director Carolyn Craig, counsel of record in this matter, dated September 25, 2014 (“Craig Decl.”). In it, Craig swears, under penalty of perjury, that she has conducted a review of the entire investigatory file in this matter and has not withheld any material exculpatory evidence or impeachment evidence.⁷ In addition, Craig asserts that statements and interview notes of FINRA staff are not “substantially verbatim” statements of witnesses, but rather cursory, generalized outlines of conversations with customers that reveal Enforcement’s mental impressions, opinions, and investigative processes.⁸ Craig also certifies that Enforcement staff’s notes of customer interviews contain no material exculpatory or impeachment evidence.⁹

⁵ *Id.* at 6.

⁶ *Id.*

⁷ Craig Decl. ¶¶ 3-7.

⁸ *Id.* ¶ 4.

⁹ *Id.* ¶ 5.

B. Discussion

FINRA Rule 9251 establishes the outside limits of discovery in FINRA disciplinary proceedings, which is substantially less than the scope of discovery permitted in federal courts under the Federal Rules of Civil Procedure. Pursuant to FINRA Rule 9251(a), Enforcement is obligated to allow respondents to inspect and copy non-privileged “documents prepared or obtained by Interested FINRA Staff in connection with the investigation that led to the institution of proceedings.”¹⁰ Notwithstanding this obligation, Enforcement may withhold any documents protected by FINRA Rules 9251(b)(1) and (b)(2), which include: documents subject to attorney-client privilege; attorney work product; internal reports, memoranda, notes, and other writings prepared by FINRA staff that shall not be offered as evidence; documents that would reveal an enforcement technique or guideline, the identity of a source, or an action under consideration by a regulator; and documents prohibited from disclosure by federal law.

Enforcement's ability to withhold otherwise discoverable documents is limited by FINRA Rule 9251(b)(3), which requires Enforcement to produce any document it withheld pursuant to Rule 9251(b)(1) if it contains “material exculpatory evidence.” 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.¹¹ FINRA applies Rule 9251(b)(3) consonant with the principles enunciated by the United States Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963). In

¹⁰ The term “Interested FINRA Staff” is defined in Procedural Rule 9120(t)(1).

¹¹ See OHO Order 12-04 (2010023367001), at 2-3 (Aug. 30, 2012), available at <http://www.finra.org/web/groups/industry/@ip/@enf/@adj/documents/ohodecisions/p229424.pdf>; OHO Order 07-29 (2005001919501), at 7 (July 13, 2007), available at <http://www.finra.org/web/groups/industry/@ip/@enf/@adj/documents/ohodecisions/p037091.pdf>.

This Order has been published by FINRA’s Office of Hearing Officers and should be cited as OHO Order 14-04 (2012032519101).

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.”¹²

Another constraint on Enforcement’s right to withhold documents is Rule 9253, which requires Enforcement to produce certain types of “witness statements.” Rule 9253(a)(1) requires Enforcement to produce any document containing a substantially verbatim transcription of a statement made by a potential witness, where the transcription was made contemporaneously with the making of the statement. Rule 9253(a)(1) is FINRA’s analogue to the Jencks Act, 18 U.S.C. § 3500(e)(2). Rule 9253(a)(2) requires Enforcement to produce a contemporaneously written statement made by an interested FINRA staff member during an exam or inspection about the substance of oral statements made by a non-FINRA person if either person is called as a witness and the statement for which production is sought directly relates to that person’s testimony.

Respondent bears the burden of establishing a basis for claiming that Enforcement’s withheld documents must be produced.¹³ Mere speculation from the Respondent that FINRA documents may contain material exculpatory information is not sufficient to require in camera review or warrant production.¹⁴ In order to justify such a request, a respondent must “first establish a basis for claiming that the documents contain material exculpatory evidence” by

¹² *Brady*, 373 U.S. 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).

¹³ See *In re Jett*, 52 S.E.C. 830, 830-831 (1996) (vacating an order for the SEC’s Division of Enforcement to produce memoranda for in camera review based on mere speculation); OHO Order 12-04 (2010023367001), at 3 (placing burden on respondent to make a plausible showing that Enforcement’s files contain material exculpatory information).

¹⁴ See *Jett*, 52 S.E.C. at 830.

This Order has been published by FINRA’s Office of Hearing Officers and should be cited as OHO Order 14-04 (2012032519101).

making a “plausible showing” that the requested documents contain information that is both favorable and material to its defense.¹⁵

With this background, the Hearing Officer addresses each of Respondent’s requests.

1. Respondent’s request for all documents prepared or obtained in response to or with respect to Respondent’s Wells Submission and all documents that “provide the basis or support” for Enforcement’s Motion to Strike Exhibits to Respondent’s Answer, without regard for whether they are exculpatory.

Rule 9251(a)(1) directs Enforcement to make available to Respondent documents prepared or obtained by interested FINRA staff in connection with the investigation that led to the institution of proceedings. Rule 9251(b) enables Enforcement to withhold from production attorney work product, privileged materials, and certain staff-prepared internal documents that will not be offered as evidence, unless they are material to Respondent’s defense and exculpatory. FINRA Rule 9251(b) does not entitle Respondent to conduct a “fishing expedition” through Enforcement’s file.¹⁶ “Nor is the defense entitled to receive every scintilla of evidence that might be beneficial.”¹⁷

Respondent’s request, which is supported by nothing more than conjecture, seeks to discover attorney work product and staff-prepared notes and memoranda. These documents fall within the categories of documents that Enforcement is entitled to withhold from production unless they are material to [Respondent]’s defense and exculpatory. Respondent requests production regardless of whether the documents are exculpatory. FINRA Rule 9251(b)(1), however, clearly enables Enforcement to withhold certain categories of documents unless they

¹⁵ 52 S.E.C. at 831.

¹⁶ See OHO Order 04-01 (CAF030014) (Mar. 18, 2004), at 9, *available at* <http://www.finra.org/web/groups/industry/@ip/@enf/@adj/documents/ohodecisions/p014459.pdf>.

¹⁷ OHO Order 01-14 CAF000013) (May 21, 2001), at 10, *available at* <http://www.finra.org/web/groups/industry/@ip/@enf/@adj/documents/ohodecisions/p007866.pdf>.

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 14-04 (2012032519101).

contain material exculpatory evidence. Enforcement's counsel states, under penalty of perjury, that she reviewed all documents prepared or obtained by FINRA staff in connection with the investigation that led to this proceeding and that none of the documents that Enforcement withheld contain material exculpatory or impeachment evidence.¹⁸ Enforcement's counsel further asserts that her co-counsel conducted a review of Enforcement's files and concluded the same.¹⁹ Respondent has presented nothing to support his claim that additional discovery is warranted or to countermand Enforcement's affidavit. Respondent's request is denied.

2. Respondent's request for any exculpatory document withheld pursuant to FINRA Rule 9251(b)(1), including notes of discussions with handwriting experts or customers whose signatures were allegedly forged, all communications between Enforcement and the FINRA Office of Disciplinary Affairs, notes indicating Enforcement's deliberate decision not to consult a handwriting expert, and all documents, including staff notes, regarding Enforcement's examination of the signatures on the documents produced by Respondent.

FINRA Rule 9251(b)(1) enables Enforcement to withhold from production attorney work product and FINRA staff notes, memoranda, internal reports and other staff-prepared documents that will not be offered as evidence, if not material to Respondent's defense and exculpatory.

FINRA Rule 9253(a)(1) enables respondents in disciplinary proceedings to request a copy of the statement of any person to be called as a witness if that statement pertains to his or her direct testimony and is a substantially verbatim recital of an oral statement made by the witness and recorded contemporaneously with the making of the statement.

Enforcement represents that the investigative file in this matter contains notes that FINRA staff took during interviews with customers and other potential witnesses and that these notes reflect the staff's mental impressions, analysis, and summaries of conversations and are not

¹⁸ Craig Decl. ¶¶ 1-5, 7.

¹⁹ *Id.* ¶¶ 5-6.

This Order has been published by FINRA’s Office of Hearing Officers and should be cited as OHO Order 14-04 (2012032519101).

verbatim transcriptions of statements.²⁰ Because these notes are not “substantially verbatim recitals,” Enforcement is not required to produce them.²¹ Likewise, written communications between FINRA Enforcement and FINRA’s Office of Disciplinary Affairs are internal documents prepared by a FINRA employee and are not discoverable unless they will be offered as evidence or are material to Respondent’s defense and exculpatory.²² Furthermore, many of the documents that Respondent seeks to obtain also qualify as attorney work product and therefore are not discoverable.²³ Respondent’s request covers documents containing Enforcement counsels’ thought processes and opinions as to the use of an expert witness and therefore constitute attorney work product.

Enforcement’s counsel, under penalty of perjury, swore that none of the documents that Enforcement withheld contain material exculpatory or impeachment evidence.²⁴ Respondent’s claims are insufficient to overcome Enforcement’s sworn declaration, and Respondent’s request is denied.

²⁰ *Id.* ¶ 4.

²¹ *See Palermo v. U.S.*, 360 U.S. 343, 350 (1959) (finding that “disclosure of memoranda containing the investigative agent’s interpretations and impressions might reveal the inner workings of the investigative process” and that it would be “grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness’ own rather than the product of the investigator’s selections, interpretations and interpolations”).

²² FINRA permits Enforcement to withhold internal reports, memoranda, and other investigative documents to protect FINRA’s enforcement techniques and to ensure that FINRA’s enforcement efforts are not impaired. OHO Order 07-29 (2005001919501), at 7.

²³ *SEC v. Nacchio*, 2007 U.S. Dist. LEXIS 5435, at *15 (D. Colo. Jan. 25, 2007) (holding that the attorney work product doctrine “protects from discovery documents or tangible things obtained or prepared in anticipation of litigation, as well as the attorney’s thought processes, opinions, conclusions and legal theories”).

²⁴ Craig Decl. ¶¶ 1-5, 7.

3. Respondent's request for any statement of any person to be called as a witness by Enforcement that is a substantially verbatim recital of an oral statement made by the witness.

FINRA Rule 9253(a)(1) allows respondents in disciplinary proceedings to request copies of statements of any person to be called as a witness that pertain to his or her direct testimony and which is a substantially verbatim recital of an oral statement made by the witness and recorded contemporaneously with the making of the statement. Enforcement's counsel swears, under penalty of perjury, that she has complied with FINRA Rule 9253(a)(1).²⁵ Enforcement's counsel also declares that documents of this nature in Enforcement's files are not substantially verbatim statements of witnesses, but rather are "only cursory, generalized outlines of conversations with customers that reveal Enforcement staff's mental impressions, opinions and investigative process."²⁶

Respondent failed to make a plausible showing sufficient to overcome Enforcement's sworn declaration that Enforcement is not withholding documents in violation of Rule 9253. Respondent's request therefore is denied.

4. Respondent's request for contemporaneously written statements of interested FINRA staff and "non-associated persons" that Enforcement is required to produce pursuant to Rule 9253(a)(2).

FINRA Rule 9253(a)(2) provides that respondents in disciplinary proceedings may request copies of:

any contemporaneously written statement made by an interested FINRA staff member during a routine examination or inspection about the substance of oral statements made by a non-FINRA person when (a) either the interested FINRA staff member or non-FINRA person is called as a witness by [FINRA], and (b) that portion of the statement for which production is sought directly relates to the interested FINRA staff member's testimony or the testimony of the non-FINRA witness.

²⁵ *Id.* ¶ 2.

²⁶ *Id.* ¶ 4.

Enforcement's counsel swears by affidavit that she has reviewed all of the documents contained in Enforcement's investigative file in this case, and she confirms that Enforcement has complied with the production obligations of Rule 9253.²⁷ Respondent has offered nothing to countermand this claim. Respondent's request is therefore denied.

5. Respondent's request for the Hearing Officer to order Enforcement to file a list of withheld documents and conduct an inspection of the documents that Enforcement withheld.

Respondent moved for the entry of an order compelling Enforcement to produce a list of all documents that Enforcement withheld from discovery pursuant to FINRA Rule 9251 and for the Hearing Officer to inspect the documents in camera. Rule 9251(c) states that a motion to require Enforcement to produce a list of withheld documents shall be based upon "some reason to believe that a [d]ocument is being withheld in violation of the [FINRA Code of Procedure.]"²⁸

Respondent's request for a withheld document list is based on his speculation that one or more exculpatory documents must exist because [Respondent]'s Wells Submission included documents signed by the complaining customers and that the customers' purported signatures are similar to the allegedly forged signatures. Respondent further argues that Enforcement must possess exculpatory material because it refused to stipulate to the admissibility of Respondent's signature documents and moved to strike those documents as attachments to [Respondent]'s Answer. Respondent also claims that Enforcement must have some documentation indicating why it has not consulted with a handwriting expert and that such documentation must be exculpatory. Finally, Respondent claims that these documents "must be exculpatory" or

²⁷ *Id.* ¶ 3.

²⁸ See OHO Order 08-01 (2005003437102) (Feb. 15, 2008), at 7, available at <http://www.finra.org/web/groups/industry/@ip/@enf/@adj/documents/ohodecisions/p038253.pdf> (denying respondent's motion to compel and finding that respondent had not shown any reason to believe that Enforcement withheld documents in violation of FINRA's Code of Procedure).

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 14-04 (2012032519101).

Enforcement would have already produced them.²⁹ Respondent's claims in this regard are mere conjecture and insufficient to overcome Enforcement's sworn statement that counsel of record has searched Enforcement's investigative files, found no exculpatory or impeachment evidence, and fully complied with FINRA Rules 9251 and 9253.³⁰

Respondent's request for a withheld document list and for the Hearing Officer to review the documents that Enforcement withheld are denied.

C. Conclusion

Respondent provides no persuasive basis for his speculative contention that he is entitled to additional discovery. Respondent's arguments are not sufficient to overcome Enforcement's sworn declaration that it has complied with its disclosure obligations under FINRA Rules 9251 and 9253. Mere suppositions that Enforcement is "holding back," that it is "inconceivable" that exculpatory evidence does not exist, and that documents that Enforcement did not produce must be "exculpatory or they would have been produced" are not enough to carry Respondent's Motion.

²⁹ Motion at 7.

³⁰ See OHO Order 10-06 (2008014621701) (Oct. 8, 2010), *available at* <http://www.finra.org/web/groups/industry/@ip/@enf/@adj/documents/ohodecisions/p122656.pdf> (finding that respondent failed to make a plausible showing that Enforcement withheld material exculpatory evidence where respondent's primary argument was that it was "simply implausible" that Enforcement did not have a single witness statement, note, or memo that contained material exculpatory evidence); OHO Order 09-04 (2006006259501) (Nov. 24, 2009), *available at* <http://www.finra.org/web/groups/industry/@ip/@enf/@adj/documents/ohodecisions/p120524.pdf> (denying respondent's request for a withheld document list because the request was based only on respondent's claim that it is "implausible" that witness interviews did not exist and that it is "highly probable" that documents related to the interviews would be exculpatory).

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 14-04 (2012032519101).

For the reasons discussed above, Respondent's Motion is denied.

SO ORDERED.

Carla Carloni
Hearing Officer

Date: September 30, 2014