

NASD OFFICE OF HEARING OFFICERS

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DEPARTMENT OF ENFORCEMENT,	
Complainant,	
v.	Disciplinary Proceeding
	No. 20050000720-02
RESPONDENT 1, ¹	
	Hearing Officer – SW
and	
RESPONDENT 2,	
Respondents.	
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**ORDER DENYING RESPONDENT 2'S
MOTION TO COMPEL PRODUCTION OF DOCUMENTS
AND DIRECTING RESPONDENT 2 TO SUPPLEMENT HIS
MOTION FOR A RULE 9252 ORDER**

I. Background

On June 1, 2007, Respondent 2 filed an omnibus motion, which included (a) a motion to compel production of documents, and (b) a motion for a Rule 9252 order.²

The June 1, 2007 motion to compel included, but was not limited to, a demand for (i) any notes or contemporaneous writings relating to the calls between NASD and Mr. S. and/or Ms. G., the complaining customers, (ii) drafts of affidavits for Mr. S., (iii) copies of all notes of statements, made to NASD by Mr. S. and/or Ms. G. with respect to the allegations of the Complaint, (iv) all documents received from [], counsel to Mr. S. and

¹ On April 25, 2007, the Hearing Officer deemed Respondent 1 in default pursuant to Rule 9241(f).

² The omnibus motion also included a request that the Hearing Officer authorize the issuance of subpoenas pursuant to New York Civil Practice Law and Rules. The Hearing Officer denied that request in a June 13, 2007 Order.

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Ms. G., and (v) any exculpatory statements made by persons that the Department of Enforcement ("Enforcement") intends to call as witnesses.

The June 1, 2007 motion for a Rule 9252 order requested that _____ be directed to provide account information for Respondent 1, Mr. S. and Ms. G.

On June 15, 2007, Enforcement filed an opposition to Respondent 2's June 1, 2007 motion to compel on the grounds that the motion was overbroad and included documents that had already been provided to Respondent 2. With respect to the motion for the Rule 9252 order, Enforcement argued that Respondent 2 had not satisfied the prerequisites for a Rule 9252 order.

II. Motion to Compel Production of Documents Denied

Rule 9251(a)(1) provides that Enforcement must make available to respondents for inspection and copying documents prepared or obtained by NASD staff in connection with the investigation that led to the institution of this proceeding, including, but not limited to: (i) all requests for information issued pursuant to Rule 8210; (ii) all other written requests directed to persons not employed by NASD to provide documents or to be interviewed; (iii) the documents provided in response to either type of request; (iv) all transcripts and transcript exhibits; and (v) all other documents obtained from persons not employed by NASD.

Rule 9251(b)(1) authorizes Enforcement to withhold various categories of documents that it would otherwise be required to produce under Rule 9251(a)(1), including: (i) attorney work product; (ii) examination or inspection reports; (iii) **internal memoranda, or other notes or writings prepared by NASD staff that will not be**

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offered in evidence; and (iv) documents reflecting various types of regulatory information and communications. (Emphasis added).

Even if Enforcement does not plan to offer particular notes or writings as evidence, Enforcement may not withhold a document or a portion of a document that contains material exculpatory evidence. Furthermore, pursuant to Rule 9253, a respondent may move for production of any statement made by any person who Enforcement will call as a witness at the Hearing, if the statement pertains to the witness' expected direct testimony and is "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, **which is a substantially verbatim recital of an oral statement made by said witness** and recorded contemporaneously with the making of such oral statement," as that phrase is used in 18 U.S.C. §3500(e)(2). (Emphasis added).

Enforcement's June 15, 2007 opposition represented that, in compliance with NASD Procedural Rules 9251 and 9253, Enforcement produced to Respondent 2 the documents in its investigative file required to be disclosed. For example, drafts of the affidavit signed by Mr. S. have been produced, and any written requests for information sent to the [customers' counsel] were produced. In addition, Enforcement represented that it had no exculpatory statements made by persons that it intends to call as a witness at the Hearing.

Respondent 2 has provided no evidence to indicate to the Hearing Officer that Enforcement's representations are untrue or incorrect, or that Enforcement is withholding exculpatory information.

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Accordingly, Respondent 2's June 1, 2007 motion to compel production of documents is denied because the Hearing Officer has determined that the motion is (i) moot as to those requests that Enforcement has already met, and (ii) overly broad as to the remaining requests.

III. Respondent 2 Directed to Supplement his Rule 9252 Motion

Rule 9252 provides, in part, that a request to compel the production of documents or testimony at a hearing (i) describe with specificity the testimony and documents sought, (ii) state whether the testimony is material, (iii) describe the requesting party's previous efforts to obtain the testimony and documents through other means, and (iv) state whether each proposed witness is subject to NASD's jurisdiction. Respondent 2's motion for a Rule 9252 order does not meet each of the above requirements, specifically how Respondent 1's account records are relevant, and what efforts were made to obtain the documents through other means.

Respondent 2 must supplement his motion to include the above requested information no later than July 13, 2007. Enforcement will then have until July 20, 2007 to file an objection to Respondent 2's Rule 9252 motion, as supplemented.

SO ORDERED.

Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
June 26, 2007