

This Order has been published by FINRA’s Office of Hearing Officers and should be cited as OHO Order 16-08 (2014043020901).

**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 TO COMPEL
PRODUCTION OF DOCUMENTS**

I. Background

The Complaint contains two causes of action. Cause one alleges that Respondent, formerly an equity research analyst with Citigroup Global Markets Inc. (“CGMI”), selectively disclosed to an analyst at a CGMI hedge fund client that a medical device company (“Company A”) would be issuing a press release the following morning to confirm that it intended to proceed with a merger (with Company B) that it previously had announced, but for which 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 Respondent contacted the hedge fund analyst, advised him that CGMI was investigating Respondent, and asked the analyst to delete a voice mail that Respondent left for the analyst 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 misconduct.

On February 2, 2016, Respondent filed a motion to compel the Department of Enforcement (“Enforcement”) to produce documents pursuant to FINRA Rules 9251 and 9253. Respondent also requested a list of documents withheld. Enforcement opposes the motion and states that it has fully complied with the discovery requirements of FINRA Rules 9251 and 9253, and that Respondent’s motion should be denied.

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 16-08 (2014043020901).

II. Motion to Compel Production of Documents

Respondent contends that, beginning in late 2014, FINRA launched an investigation in tandem with the Securities and Exchange Commission ("SEC") concerning possible insider trading in connection with an announcement by Company A regarding its proposed acquisition of Company B.¹ Respondent contends that FINRA's investigation received at least two internal matter numbers, one pertaining to Respondent (No. 20140430209) ("the Respondent Investigation") and one pertaining to an unknown person (No. 20150440121) ("the Unknown Person Investigation"). Respondent believes that the unknown person may be MJW, an individual that Respondent identifies as a renowned sell-side equity research analyst who, like Respondent, covered Company A and Company B. Respondent asserts that MJW, like Respondent, also "reaffirmed his prior publicly stated views that the [Company A/Company B] transaction would occur" the evening before Company A's press release.² Respondent states that he believes, given the manner in which FINRA handled the investigation connected to his name, that FINRA initially conducted one broader investigation that included the suspicion of insider trading related to both Respondent and MJW. He states that the two investigations are so intertwined that Enforcement cited both investigation numbers when issuing Rule 8210 requests for information to at least one third party and that FINRA staff extensively questioned witnesses concerning MJW during testimony ostensibly taken in the course of the Respondent Investigation. Respondent contends that emails and voice mails from MJW to analysts at CGMI's hedge fund client were referenced in testimony from third parties in the Respondent Investigation, but not produced by Enforcement. Respondent argues that the views that he shared as part of an allegedly selective disclosure were derived from public information and that MJW's similar communications will support Respondent's claim.³

Respondent's motion seeks an order compelling Enforcement to produce (1) all documents contemplated by Rule 9251 from the investigative file in the Unknown Person Investigation and any other related investigation; (2) all witness statements, transcripts, notes, and exhibits contemplated by Rule 9253 for MJW and every other person or entity for which testimony was taken in the Unknown Person Investigation, the Respondent Investigation, and any other related investigation; and (3) a list of withheld documents.

Enforcement opposes Respondent's motion and submits the February 16, 2016 Declaration of William L. Thompson ("Thompson Decl."), in which Thompson declares, under penalty of perjury, that he oversaw Enforcement's compliance with its discovery obligations

¹ Enforcement's Addendum to the Complaint identifies Company A and Company B.

² Respondent states that, "[n]otwithstanding the identical nature of the issues relating to Respondent and [MJW] – both supposedly engaged in 'selective disclosure' – Enforcement has refrained from pursuing any charges against [MJW], yet is seeking to bar Respondent."

³ The Hearing Officer notes that, in a separate motion, Respondent requests that the Hearing Officer order Enforcement to issue Rule 8210 requests for information and testimony to MJW and other individuals and entities subject to FINRA's jurisdiction. The Hearing Officer will issue a separate order related to that motion.

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 16-08 (2014043020901).

under FINRA Rules 9251 and 9253.⁴ Thompson states that FINRA's Office of Fraud Detection and Market Intelligence ("OFDMI") opened the Respondent Investigation on October 20, 2014, in response to Respondent's resignation from CGMI on approximately October 8, 2014, while under investigation by CGMI for possible dissemination of material non-public information.⁵ Thompson asserts that he consulted with FINRA staff who conducted the investigation in the Unknown Person Investigation and familiarized himself with the information obtained in that investigation.⁶ Thompson states that OFDMI commenced the Unknown Person Investigation on January 9, 2015.⁷ The Unknown Person Investigation pertained to a registered person other than Respondent who was associated with a firm other than CGMI.⁸ Thompson contends that Respondent was not a party to any communications at issue in the Unknown Person Investigation and that the target of the Unknown Person Investigation was not a party to any communications underlying the allegations against Respondent in this matter.⁹

Thompson contends that, in connection with the Respondent Investigation, FINRA took testimony from five individuals and obtained documents from CGMI, Respondent, and the SEC.¹⁰ Thompson asserts that, on November 24, 2015, Enforcement produced to Respondent all documents that interested FINRA staff had obtained or prepared in connection with the Respondent Investigation, excluding documents protected by FINRA Rule 9251(b) and documents that the parties agreed did not have to be produced.¹¹ Thompson represented that the November 24 production included all documents that FINRA received from CGMI and the SEC and transcripts of all testimony taken in the Respondent Investigation.¹² Thompson also declared, under penalty of perjury, that he reviewed all documents withheld from production under FINRA Rule 9251(b) and that none contains material exculpatory evidence.¹³

Enforcement argues that Respondent's motion, in essence, requests that Enforcement produce the investigative file of a separate FINRA matter that does not involve Respondent and witness statements of an individual (MJW) that Enforcement does not intend to call as a witness. Enforcement contends that it has fully complied with its discovery obligations.

⁴ Thompson Decl. ¶ 4.

⁵ *Id.* at ¶¶ 6-7.

⁶ *Id.* at ¶ 30.

⁷ *Id.* at ¶¶ 31-33.

⁸ *Id.*

⁹ *Id.* at ¶ 34.

¹⁰ *Id.* at ¶¶ 8-13.

¹¹ *Id.* at ¶¶ 17-18. Thompson states that Enforcement made supplemental productions to Respondent on February 1 and 12, 2016. *Id.* at ¶ 22.

¹² *Id.* at ¶ 19.

¹³ *Id.* at ¶ 21.

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 16-08 (2014043020901).

III. Discussion

FINRA Rule 9251(a) establishes “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.”¹⁴ 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.”¹⁵ 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 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.¹⁶

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 and relates to his or her direct testimony.¹⁷ Rule 9253(a)(2) requires Enforcement to produce a contemporaneously written statement made by an interested FINRA staff member during a routine 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 withheld documents must be produced.¹⁸ In order to justify such a request, a respondent must “first establish a basis

¹⁴ OHO Order 09-04 (2006006259501) (Nov. 24, 2009), at 2, http://www.finra.org/sites/default/files/OHODecision/p120524_0.pdf

¹⁵ The term “Interested FINRA Staff” is defined in FINRA Rule 9120(t)(1).

¹⁶ See OHO Order 15-05 (2012034936005) (Jan. 27, 2015), at 2, http://www.finra.org/sites/default/files/OHO-Order-15-05-ProceedingNo.2012034936005_0.pdf; OHO Order 12-04 (2010023367001) (Aug. 30, 2012), at 2-3, <http://www.finra.org/sites/default/files/OHODecision/p229424.pdf>. 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).

¹⁷ Rule 9253(a)(1) is FINRA's analogue to the Jencks Act, 18 U.S.C. § 3500(e)(2).

¹⁸ 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 15-05 (20120349360), at 3; OHO Order 12-04 (2010023367001), at 3.

This Order has been published by FINRA’s Office of Hearing Officers and should be cited as OHO Order 16-08 (2014043020901).

for claiming that the documents contain material exculpatory evidence” by making a “plausible showing” that the requested documents contain information that is both favorable and material to its defense.¹⁹

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

A. All Documents Contemplated by Rule 9251 for the Unknown Person Investigation and Other Related Investigations

Respondent argues that the issues in this matter and the Unknown Person Investigation (which Respondent believes relates to MJW) are identical. He argues that both individuals are alleged to have engaged in selective disclosure of the same or similar information on the same day at similar times to similar or related individuals. He asserts that the two investigations are inextricably intertwined and that information learned in the Unknown Person Investigation may have led to the filing of the Complaint in this matter.²⁰ Respondent avers that the two investigations were so intertwined that Enforcement cited both investigation numbers on at least one Rule 8210 request for information to a third party and Enforcement extensively questioned witnesses regarding MJW during multiple on-the-record (“OTR”) interviews taken pursuant to the Respondent Investigation.

“Consistent with the proper construction of Rule 9251, only documents prepared or obtained in the course of investigations directly and proximately leading to the institution of particular proceedings must be produced.”²¹ To determine whether the contents of the Unknown Person Investigation led to the institution of this proceeding, the Hearing Officer has considered “the degree of identity between the subject matter of the [Unknown Person] [I]nvestigation and the allegations of the [C]omplaint.”²² Enforcement may have the obligation to search for and produce non-exempt documents in the possession of any FINRA employee who directly

¹⁹ *Jett*, 52 S.E.C. 830, 831.

²⁰ Respondent also contends that materials contained in the Unknown Person Investigation may be pertinent as to sanctions in this matter because, if the Unknown Person Investigation relates to MJW’s activities, it can be noted that Enforcement chose not to pursue disciplinary action against MJW while simultaneously filing this action against Respondent. The Hearing Officer rejects this argument. First, “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.” *Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at 874 n.75 (Jan. 30, 2009). Thus, sanctions that FINRA did or did not impose on MJW are irrelevant to this proceeding. Second, in order for Respondent to establish a claim that he was selectively prosecuted while others similarly situated (such as MJW) were not, 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. See *David Kristian Evansen*, Exchange Act Release No. 75531, 2015 SEC LEXIS 3080, at *44 (July 27, 2015). In this matter, FINRA initiated its investigation in response to Respondent’s resignation from CGMI and CGMI’s investigation of the potential dissemination of material non-public information. Thompson Decl. ¶ 7. Respondent has offered no evidence of selective prosecution.

²¹ OHO Order 13-03 (2009017529101) (May 2, 2013), at 3, <http://www.finra.org/sites/default/files/OHODecision/p259184.pdf>.

²² OHO Order 13-03 (2009017529101), at 3.

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 16-08 (2014043020901).

participated in the Respondent Investigation or a related investigation, regardless of whether the documents are contained in the Respondent Investigation file, if the related investigation is one that necessarily led to the institution of this proceeding.²³

Enforcement represents that OFDMI commenced the Respondent investigation in October 2014 in response to Respondent's resignation from CGMI that same month and CGMI's internal investigation into the possible dissemination of material non-public information.²⁴ OFDMI did not commence the Unknown Person Investigation until January 2015, three months after the Respondent Investigation had already begun.²⁵ The Unknown Person Investigation, while related in part to the Company A/Company B merger, did not involve Respondent, CGMI, or the communications at issue in this case.²⁶ Enforcement states that, in connection with the Unknown Person Investigation, it took testimony from only two individuals, JW and the target of the investigation.²⁷ The only Rule 8210 request for information or testimony that FINRA issued in the Unknown Person Investigation containing both that investigation number and the Respondent Investigation number was the request that Enforcement propounded to JW.²⁸ Enforcement provided Respondent with the transcript of JW's testimony.²⁹

As to the testimony of the target of the Unknown Person Investigation, Enforcement attorney Thompson represents that he has reviewed the transcript and that it does not contain any references to communications to which Respondent was a party, any references to Respondent, or any material exculpatory evidence related to Respondent.³⁰ Moreover, FINRA took the testimony of the target of the Unknown Person Investigation on April 9, 2015, more than one month after Enforcement's February 24, 2015 service on Respondent of a "Wells" notice indicating that it intended to recommend disciplinary action against him.³¹ Given these facts, the Hearing Officer finds that the Unknown Person Investigation did not lead to the institution of this proceeding and that Enforcement met its discovery obligations under Rule 9251 when it produced any non-privileged documents it obtained that led to the institution of this proceeding and any material exculpatory evidence.³² Furthermore, the Thompson Declaration asserts that,

²³ See OHO Order 13-03(2009017529101), at 3-4; OHO Order 07-36 (E112005002003) (Aug. 16, 2007), at 4, <http://www.finra.org/sites/default/files/OHODecision/p037082.pdf>.

²⁴ Thompson Decl. ¶¶ 6-7.

²⁵ *Id.* at ¶ 31.

²⁶ *Id.* at ¶¶ 32-34.

²⁷ *Id.* at ¶ 35.

²⁸ *Id.*

²⁹ *Id.* at ¶ 19.

³⁰ *Id.* at ¶¶ 36-39.

³¹ *Id.* at ¶¶ 15, 36.

³² See *Dep't of Enforcement v. Sturm*, No. CAF000033, 2002 NASD Discip. LEXIS 2, at *19 n.14 (NAC Mar. 21, 2002) (holding that documents obtained in connection with a different and broader investigation of respondent are not relevant and need not be produced when they do not fall within the scope of Rule 9251(a)).

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 16-08 (2014043020901).

based on Enforcement staff's consultation with OFDMI staff handling the Unknown Person Investigation, the Unknown Person Investigation file contains no material exculpatory information related to Respondent.³³

Respondent also requests documents contemplated by Rule 9251 contained in other unidentified, but purportedly related investigations. Respondent's request in this regard is based largely on speculation that other such investigations exist. Mere speculation from the Respondent that FINRA documents may contain material exculpatory information is not sufficient to warrant production.³⁴ Thompson represents, under penalty of perjury, that "Enforcement produced all documents that had been obtained or prepared by 'Interested FINRA Staff' in connection with the Respondent Investigation ..."³⁵ FINRA Rule 9251 does not entitle Respondent to conduct a "fishing expedition" through Enforcement's records related to other investigations based on nothing more than the hope of finding relevant evidence.³⁶ Enforcement states that it complied with Rule 9251, and Respondent has presented nothing to contradict this claim.

The Hearing Officer denies Respondent's motion to compel documents contemplated by Rule 9251 for the Unknown Person Investigation and unidentified, related investigations.

B. Witness Statements, Transcripts, and Notes Contemplated by Rule 9253 for MJW, All Other Persons Asked to Testify in the Unknown Person Investigation and Other Related Investigations, and All Individuals Identified in the Respondent Investigation, Including in the Addendum to the Complaint

Respondent seeks, pursuant to FINRA Rule 9253, three categories of documents: (1) witness statements, transcripts, and interview notes related to MJW; (2) witness statements, transcripts, and interview notes of all other persons asked to testify in the Unknown Person Investigation and all other related, unidentified investigations; and (3) witness statements, transcripts, and interview notes of all individuals identified in the Respondent Investigation, including in the Addendum to the Complaint.³⁷

Respondent states that, because the Complaint in this matter alleges that he contacted or attempted to contact seven analysts with five different CGMI clients (identified in the Addendum to the Complaint), Enforcement must have interviewed these analysts. Additionally, Respondent contends that MJW communicated on October 2, 2014, with an analyst at the same firm as the

³³ Thompson Decl. ¶¶ 40-42.

³⁴ *See Jett*, 52 S.E.C. 830, 830.

³⁵ Thompson Decl. ¶ 18.

³⁶ OHO Order 15-05 (2012034936), at 4.

³⁷ In the Addendum to the Complaint, Enforcement identifies one hedge fund, two analysts associated with the identified hedge fund, two medical device companies, one medical device company representative, and five additional analysts with five different CGMI hedge fund clients.

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 16-08 (2014043020901).

analyst to whom Respondent is alleged to have selectively disclosed material information and that other evidence suggests that the two analysts spoke with each other on October 2 and October 3, 2014, about the communications. Respondent argues that, given the interrelated nature of the two investigations, these statements and transcripts fall within the scope of Rule 9253.

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. FINRA Rule 9253(a)(2) enables respondents in disciplinary proceedings to request a copy of any contemporaneously written statement made by interested FINRA Staff during a routine investigation or inspection about the substance of oral statements made by a non-FINRA person when either person is called as a witness by Enforcement and the portion of the statement sought directly relates to the testimony.

1. Witness Statements, Transcripts, and Interview Notes Related to MJW

The Hearing Officer denies Respondent's request for witness statements, transcripts, and interview notes related to MJW. Enforcement represents that it has already produced to Respondent all substantially verbatim recitals of oral statements made by any person that Enforcement intends to call as a witness in this proceeding pertaining to that person's anticipated testimony.³⁸ Enforcement also represents that it does not intend to call MJW as a witness in this proceeding, thereby excluding the transcript of his OTR testimony from the production requirements of Rule 9253(a)(1).³⁹ Enforcement therefore is not required under Rule 9253 to produce MJW's OTR transcript or any other statements or interview notes related to MJW.

2. Witness Statements, Transcripts, and Interview Notes of All Other Persons Asked to Testify in the Unknown Person Investigation and All Other Related, Unidentified Investigations

The Hearing Officer denies Respondent's request for witness statements, transcripts, and interview notes of all other persons asked to testify in the Unknown Person Investigation. Enforcement represents in the Thompson Declaration that, in the Unknown Person Investigation, FINRA took the testimony of only two individuals—the target of the investigation and JW—and that Enforcement already produced JW's transcript to Respondent.⁴⁰ Enforcement represents that FINRA took the OTR testimony of the target of the Unknown Person Investigation on April 9, 2015.⁴¹ Thompson states in the Thompson Declaration that the target's testimony did

³⁸ Thompson Decl. at ¶ 25.

³⁹ *Id.* at ¶ 27.

⁴⁰ *Id.* at ¶¶ 8, 19, 35.

⁴¹ *Id.* ¶ 36.

This Order has been published by FINRA’s Office of Hearing Officers and should be cited as OHO Order 16-08 (2014043020901).

not pertain to Respondent or any communications to which Respondent was a party.⁴² Thompson also declares that he reviewed the transcript and it does not contain material exculpatory evidence related to Respondent.⁴³ Enforcement has neither confirmed nor denied Respondent’s belief that the target of the Unknown Person Investigation is MJW. Enforcement has, however, indicated that it does not intend to call MJW as a witness. The Hearing Officer therefore finds that there does not appear to be any transcripts or witness statements in the Unknown Person Investigation file that meet the disclosure requirements of Rule 9253 and denies Respondent’s request.⁴⁴

The Hearing Officer denies Respondent’s request for witness statements, transcripts, and interview notes of all persons asked to testify in all other purportedly related, unidentified investigations. As set forth in subsection III.A of this Order, Respondent’s “mere speculation” that other unidentified investigative files may contain written statements subject to production under Rule 9253 is insufficient to warrant the Hearing Officer to order production.⁴⁵

3. Witness Statements, Transcripts, and Interview Notes of All Persons Identified in the Respondent Investigation, Including in the Addendum to the Complaint

The Hearing Officer denies Respondent’s request for witness statements, transcripts, and interview notes of all individuals identified in the Respondent Investigation, including in the Addendum to the Complaint.

Enforcement represents in the Thompson Declaration that the Respondent Investigation was not part of a routine exam or inspection and that there are no written statements made by interested FINRA staff during a routine inspection or exam regarding anyone that Enforcement intends to call as a witness in this proceeding.⁴⁶ Thus, there are no witness statements, transcripts, or interview notes that Enforcement must produce pursuant to Rule 9253(a)(2).

With respect to Rule 9253(a)(1), Enforcement represents in the Thompson Declaration that it has already produced to Respondent the transcripts of all OTR testimony taken in the Respondent Investigation.⁴⁷ Enforcement also states that FINRA’s staff notes related to the Respondent Investigation are fragmentary notes and outlines that reveal the mental impressions

⁴² *Id.* ¶ 38.

⁴³ *Id.* ¶ 39.

⁴⁴ If the target of the Unknown Person Investigation is someone other than MJW, and Enforcement intends to call that individual as a witness in this proceeding, then Rule 9253(a)(1) would require Enforcement to produce a copy of any statement made by that person that pertains to his direct testimony, is a substantially verbatim recital of his oral statement, and is recorded contemporaneously with the making of the statement.

⁴⁵ *Cf. Jett*, 52 S.E.C. 830, 830-831 (holding that “mere speculation” that government documents may contain material exculpatory information is insufficient to require a judge to make an in camera review).

⁴⁶ Thompson Decl. at ¶ 29.

⁴⁷ *Id.* at ¶¶ 8, 19.

This Order has been published by FINRA’s Office of Hearing Officers and should be cited as OHO Order 16-08 (2014043020901).

and investigative techniques of FINRA staff.⁴⁸ Enforcement represents that the withheld notes are not “‘substantially verbatim recitals’ of statements made by anyone Enforcement intends to call as a witness in this proceeding and do not contain material exculpatory evidence for Respondent.”⁴⁹

The Addendum to the Complaint identifies eight individuals. Enforcement represents that, in connection with the Respondent Investigation, it interviewed five individuals, only three of whom are included in the Addendum.⁵⁰ Thus, the Respondent Investigation file does not include transcripts related to the other five individuals identified in the Addendum to the Complaint, and Enforcement has already produced to Respondent the transcripts from the five individuals that it did interview.⁵¹

Respondent has offered nothing to countermand Enforcement’s sworn declaration, and the Hearing Officer accordingly denies Respondent’s motion.

C. Withheld Document List

Respondent requests that the Hearing Officer order Enforcement to produce a list of all documents that Enforcement has withheld from discovery pursuant to FINRA Rule 9251.

Enforcement states that creating a withheld document list would unduly burden Enforcement, and Respondent has not demonstrated that Enforcement wrongfully withheld documents. Enforcement also argues that a withheld document list would not address the real purpose of Respondent’s motion because many of the documents that he seeks are not withheld documents. Rather, Enforcement contends, they are documents that are beyond the scope of FINRA Rule 9251(a).

FINRA Rule 9251(c) states that a motion to request a document withheld list “shall be based on some reason to believe that a document is being withheld in violation of [FINRA’s Rules].” Respondent’s request for a list of withheld documents is based on speculation that the Unknown Person Investigation and the Respondent Investigation are related. Respondent’s claims in this regard are mere conjecture and insufficient to overcome Enforcement’s sworn statement that counsel of record has searched the Respondent Investigation file, found no exculpatory evidence, and fully complied with FINRA Rules 9251 and 9253.⁵²

⁴⁸ *Id.* at ¶ 28.

⁴⁹ *Id.*

⁵⁰ *Id.* at ¶¶ 8-12, 19.

⁵¹ *Id.*

⁵² Thompson Decl. ¶¶ 17-23, 25-29. *See* OHO Order 10-06 (2008014621701) (Oct. 8, 2010), at 5-6, http://www.finra.org/sites/default/files/OHODecision/p122656_0.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), at 4,

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 16-08 (2014043020901).

The Hearing Officer denies Respondent's request for a withheld document list.

SO ORDERED.

Carla Carloni
Hearing Officer

Dated: February 25, 2016

http://www.finra.org/sites/default/files/OHODecision/p120524_0.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).