

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent 1

and

Respondent 2,

Respondents.

Disciplinary Proceeding
No. C05050015

Hearing Officer—Andrew H. Perkins

ORDER DENYING MOTIONS TO QUASH

The Respondents filed motions to quash the requests by the Department of Enforcement (“Enforcement”), issued pursuant to NASD Procedural Rule 8210, that the Respondents provide information about certain of their affirmative defenses. The Hearing Officer stayed the information requests temporarily because they required the Respondents to answer the requests before the filing deadline for Enforcement’s opposition. Enforcement filed an opposition to both motions on June 14, 2005.

For the reasons discussed below, the motions are denied.

Discussion

The Respondents’ motions to quash meld several challenges to Enforcement’s use of NASD Procedural Rule 8210 to obtain information and documents the Respondents contend support their affirmative defenses. In substance, the Respondents contend that Enforcement

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issued the information requests to obtain privileged workproduct, the disclosure of which will have the intended effect of chilling future communications between the Respondents and their attorneys. The Respondents argue that such use of Procedural Rule 8210 deprives them of their right to fundamental fairness and creates an undue advantage in favor of Enforcement. In addition, the Respondents complain that Enforcement has not yet produced the documents underlying the Complaint, as it is required to do pursuant to Procedural Rule 9251.¹ Hence, the Respondents argue that Enforcement's discovery request is unfairly premature and an attempt to lock the Respondents into their defenses before they can complete their own discovery. Accordingly, the Respondents ask that the information requests be quashed in their entirety.

I. Background

This is not a complex case. The Complaint alleges that the Respondents engaged in private securities transactions in violation of NASD Conduct Rules 2110 and 3040. In essence, Enforcement alleges that both Respondents participated in the sale of securities issued by e2 Communications, Inc. The Respondents' Answers deny the charges and interpose nine identical affirmative defenses, which include allegations that Enforcement is barred from pursuing this case because Enforcement knowingly based the Complaint on "corrupt, fabricated corporate documents."²

Immediately upon receipt of the Respondents' Answers — and before the completion of Enforcement's obligation under Rule 9251 to make the documents in its possession that gave rise to the filing of the Complaint available to the Respondents for inspection and copying, and before the Initial Pre-Hearing Conference could be scheduled — Enforcement issued identical

¹ Procedural Rule 9251 requires Enforcement to make available for inspection and copying by any respondent non-privileged documents prepared or obtained by NASD staff in connection with the investigation that led to the institution of proceedings. Absent the Hearing Officer setting a different schedule, Enforcement must produce these documents within 21 days after the filing of the last timely answer in a multi-party case.

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information requests to each Respondent demanding the disclosure of certain information regarding several of the affirmative defenses. The disputed information requests are:

1. Regarding [your] second affirmative defense, please provide a detailed explanation of how the Department of Enforcement is barred and/or estopped based upon "unclean hands." Please provide a detailed explanation of how Enforcement has "unclean hands" and provide copies of any documents that support [the Respondents'] claim that Enforcement brought the instant disciplinary action with "unclean hands."
2. Regarding [your] second affirmative defense, please provide a detailed explanation of [the Respondents'] assertion that Enforcement has "knowingly predicated its case on corrupt, fabricated corporate documents which are wholly misleading." Please provide copies of the documents that you claim are "corrupt, fabricated corporate documents." [T]he written explanation should explain in detail how any such documents are "misleading" and how Enforcement "knowingly predicated its case upon" such documents.
3. Regarding [your] second affirmative defense, please provide a detailed explanation of [the Respondents'] assertion that Enforcement has engaged in "willful blindness." Please provide copies of any documents that support this assertion.
4. Regarding [your] fifth affirmative defense, please identify all investors who assert that [you] "did not participate in any manner in the underlying

² Respondent 1 Ans., Second Affirmative Defense; Respondent 2 Ans., Second Affirmative Defense.

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securities transactions.” [Your] response must include the investors’ names, home addresses and telephone numbers.

5. Regarding [your] ninth affirmative defense, and to the extent not explained in response to Request number one above, please provide a detailed explanation of [your] assertion that the Complaint in this matter is the “product of unclean hands.”
6. Regarding [your] ninth affirmative defense, please provide a detailed explanation of [your] assertion that the Complaint is the product of “deliberate disregard of key evidentiary points.” Please identify and explain the “evidentiary points” to which [you] refer[] and provide copies of any documents that evidence such “evidentiary points.”
7. Regarding [your] ninth affirmative defense, please provide a detailed explanation of [your] assertion that the Complaint is the product of “the intentional violation of agreements and understandings by NASD personnel.” Your response to this request must include the names and positions of any “NASD personnel” with whom such agreements were made and the date and substance of such agreements and understandings. Your response must also include a detailed explanation of how Enforcement has “intentionally violated” any such agreements and understandings.

II. Respondents' Objections

The Respondents' broad assault on Enforcement's ability to use Procedural Rule 8210 to discover the facts a respondent contends support his affirmative defenses is unfounded. Although Enforcement's use of Procedural Rule 8210 after the Complaint is filed is not unbridled,³ this case does not present a situation where the early use of Rule 8210 to uncover the bases for the Respondents' affirmative defenses is unfair. Unlike the case Respondent 2 cites, this case does not involve either complex legal issues or a vast number of documents. The Respondents' concerns regarding the timing of the requests can be addressed adequately by postponing the response dates until after Enforcement has completed its production of documents pursuant to Procedural Rule 9251.

The Hearing Officer also rejects the Respondents' arguments that the requests for information unduly infringe upon their attorneys' workproduct.⁴ In large measure, the requests for information seek the factual bases for the Respondents' affirmative defenses, which Enforcement cannot obtain from another source. Such material is not absolutely protected from discovery, and, in this case, the Hearing Officer concludes that Enforcement has a substantial need for the requested information.⁵ In addition, the Respondents have not demonstrated that any of the requested documents contain their attorneys' opinions.

³ OHO Redacted Order 01-04, CAF000045, (Feb. 2, 2001) at http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&ssDocName=NASDW_007894.

⁴ In *Hickman v. Taylor*, 329 U.S. 495, 511 (1947), the Supreme Court recognized that the "[p]roper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." This has become known as the attorney workproduct doctrine, which, in its essence, shields the mental processes of the attorney, "providing a privileged area within which he can analyze and prepare his client's case." *Alexander v. F.B.I.*, 192 F.R.D. 12, 21, (D.D.C. 2000).

⁵ Cf. *Baker v. Gen. Motors Corp.*, 209 F.3d 1051, 1054 (8th Cir. 2000) (holding generally that a party seeking discovery of ordinary workproduct must show a "substantial need" and "undue hardship" in obtaining the subject materials or their substantial equivalent by other means).

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For the foregoing reasons, the Hearing Officer denies the Respondents' motions to quash the requests for information. The Respondents shall respond to the requests for information no later than July 18, 2005.

IT IS SO ORDERED.

Andrew H. Perkins
Hearing Officer

June 20, 2005