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documents responsive to Request No. 2 were properly withheld under Rule 9251(b)(1)(B).<sup>2</sup>

Thereafter, on June 12, \_\_\_\_\_ filed a Motion To Compel Department of Enforcement To Comply With Section 9251 Request, which specifically requested the documents described in Request No. 2, and on June 27, 2000, \_\_\_\_\_ filed a supplemental motion to compel the production of those documents. Enforcement filed an opposition to the motions on July 12, 2000, and the Hearing Officer heard oral argument on the motions on July 14, 2000. Following the oral argument, on July 21, 2000, \_\_\_\_\_ filed a letter submission further supporting his demand that the documents responsive to Request No. 2 be made available for inspection and copying. For the reasons set forth below, the Respondent's motion to compel is denied.

### **Introduction**

Enforcement filed the original eight-cause Complaint against Respondent \_\_\_\_\_ and Respondent \_\_\_\_\_ on March 20, 2000. The Complaint alleged that Respondent \_\_\_\_\_ falsified records, engaged in pre-selling in the aftermarket, failed to execute trades, failed to respond truthfully to staff requests for information, and failed to respond truthfully during an on-the-record interview with Enforcement. At issue in Respondent's motions is Cause Six, which alleges that in response to questioning by the NASD staff at an on-the-record interview on May 13, 1999, Respondent "knowingly or recklessly failed to disclose the existence" of a prior customer complaint lodged by RM against the Respondent. The Complaint further alleges that at the time of the on-the-record interview the Respondent was aware of RM's complaint. (Compl. ¶¶ 29-30.)

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<sup>2</sup> With respect to Request No. 1, Enforcement informed the Respondent that there were no documents responsive to that request.

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Respondent requests that Enforcement be compelled to make available all documents showing that \_\_\_\_\_, the NASD staff member who examined Respondent during his on-the-record interview, had “accessed and/or searched any NASD computer database, on or before May 13, 1999, for information concerning \_\_\_\_\_.” \_\_\_\_\_ has suggested, and Enforcement has agreed, that the documents will show that \_\_\_\_\_ was involved in and had knowledge of RM’s complaint prior to the Respondent’s on-the-record interview in May 1999. Thus, \_\_\_\_\_ contends that the documents must be produced because they contain material exculpatory evidence. \_\_\_\_\_ advances three grounds in support of this argument. First, \_\_\_\_\_ claims that the documents are exculpatory concerning the issue of his alleged guilt because they could help him disprove an essential element of the charge that he violated Rules 2110 and 8210 by giving false testimony in his May 13, 1999, on-the-record interview—“that the allegedly false statement was ‘material’.” Second, \_\_\_\_\_ claims that the documents may be exculpatory on the issue of sanctions. Third, \_\_\_\_\_ claims that the documents will enable him to impeach \_\_\_\_\_’s credibility should he testify at the hearing.<sup>3</sup>

Enforcement, on the other hand, contends that it has complied fully with the production of discoverable documents, withholding only those documents that are not discoverable under Rule 9251(b). Enforcement further states that the documents are irrelevant to the charge against the Respondent because there is no materiality requirement under Rules 2110 and 8210, and therefore \_\_\_\_\_’s knowledge of RM’s complaint is irrelevant. Enforcement asserts generally that the requested documents do not contain material exculpatory evidence under the Supreme Court’s analysis in Brady v. Maryland.<sup>4</sup>

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<sup>3</sup> \_\_\_\_\_ is on Enforcement’s witness list.

<sup>4</sup> 373 U.S. 83 (1963).

## Discussion

Under Rule 9251(a), Enforcement is required to produce “[d]ocuments prepared or obtained by Interested Association Staff in connection with the investigation that led to the institution of proceedings.” In addition, under Brady, Enforcement has a duty to disclose exculpatory documents and information material to the guilt or the punishment of the accused.<sup>5</sup> Enforcement must also disclose information that could impeach a witness testifying against the accused if the witness’ testimony is material to the guilt of the accused.<sup>6</sup> This Brady obligation exists for Enforcement independent of work product or other exceptions noted under Rule 9251(b).<sup>7</sup> But there is no duty to disclose evidence that would be inadmissible at trial, or for which there is not a reasonable probability that it will affect the result of the proceeding.<sup>8</sup>

At the pre-hearing stage, to determine if the Brady doctrine applies, the Hearing Officer must evaluate the importance as well as the function of each piece of information sought by the respondent.<sup>9</sup> Here, Enforcement has identified the following withheld documents that are covered by \_\_\_\_\_’s document request and motions: (1) an internal memorandum dated February 22, 1999, drafted by \_\_\_\_\_ regarding his recommendation to file the RM complaint without action; (2) an internal chronology written by \_\_\_\_\_ detailing his work on the investigation of RM’s complaint; (3) an internal administrative examination report prepared by \_\_\_\_\_ dated February 26, 1999, regarding

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<sup>5</sup> 373 U.S. 83, 87 (1963) (“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>6</sup> See Rector v. Johnson, 120 F.3d 551, 558 (5th Cir. 1997) (the State has an affirmative duty to disclose evidence that is exculpatory and material to the defendant’s guilt, including impeachment evidence); United States v. Wong, 78 F.3d 73, 79 (2d Cir. 1996) (favorable evidence includes impeachment evidence).

<sup>7</sup> See OHO Order 99-12, at 6 (June 21, 1999), <[http://www.nasdr.com/pdf-text/99\\_12oho.txt](http://www.nasdr.com/pdf-text/99_12oho.txt)>.

<sup>8</sup> See, e.g., United States v. Beckford, 962 F. Supp. 780 (E.D. Va. 1997).

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the closing of the examination file pertaining to RM's complaint; (4) two internal undated computer screen shots of an NASD computer database reflecting that \_\_\_\_\_ viewed administrative information regarding the District 10 investigation of RM's complaint; and (5) various administrative correspondence between District 10 and District 9B regarding the transfer of the examination of RM's complaint between these two offices.

Initially, \_\_\_\_\_ contends that these documents are Brady material because they would tend to prove that the alleged false statements made by \_\_\_\_\_ were not material and therefore did not impede the NASD's investigation. \_\_\_\_\_ claims that for Enforcement to prove the violations alleged in Cause Six of the Complaint, it must show that the allegedly false testimony was materially important by illustrating how the false statement impeded Enforcement's ability to perform its self-regulatory function. Respondent claims that the documents will show that Enforcement's ability to proceed with the investigation was not hampered because, in fact, they already had access to the information. Thus, Respondent contends that he is entitled to the production of the documents because they are exculpatory on the issue of guilt.

Rules 2110 and 8210, however, do not contain a "materiality" requirement. The function of Rule 8210 is to "provide[ ] a means, in the absence of subpoena power, for the NASD to obtain from its members information necessary to conduct investigations."<sup>10</sup> It is a key element in the NASD's efforts to police its members."<sup>11</sup> Furthermore, the Rules are guided by "broad ethical principles that implement

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<sup>9</sup> See, e.g., United States v. Bloom, 78 F.R.D. 591 (E.D. Pa. 1977).

<sup>10</sup> In re Richard Rouse, 51 S.E.C. 581, 1993 SEC LEXIS 1831, \*7 (1993).

<sup>11</sup> Id.

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the requirements of Section 15(A)(b) of the Securities Exchange Act of 1934.”<sup>12</sup> Enforcement may ask “whatever information” it deems necessary during the course of its investigation,<sup>13</sup> requiring members to fulfill this “basic obligation” unconditionally.<sup>14</sup> While providing false information often frustrates the NASD’s investigation efforts,<sup>15</sup> it is not necessary for Enforcement to establish the negative impact of the false statement in order to prove Rule 2210 and 8210 violations. Accordingly, the evidence \_\_\_\_\_ seeks is not material to the issue of guilt, and, therefore, its disclosure is not required under Brady. They are neither exculpatory nor material on this core issue.

Similarly, \_\_\_\_\_ seeks production of the documents on the ground that they are material to the determination of sanctions should a violation be found. One of the principal considerations under the NASD Sanction Guidelines for determining the appropriate sanction for providing false testimony to the NASD is “the nature of the information requested.”<sup>16</sup> Thus, \_\_\_\_\_ contends that he is entitled to show that his alleged false testimony did not impede the NASD’s investigation. However, as discussed above, the requested documents do not contain material evidence because Enforcement has represented that it does not claim that \_\_\_\_\_ impeded the NASD. Moreover, Enforcement represented at the pre-hearing conference on July 14, 2000, that it would not base its sanction request

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<sup>12</sup> In re Brian L. Gibbons, 52 S.E.C. 791, 1996 SEC LEXIS 1291, \*9 (May 8, 1996) (citing In re William F. Rembert, 51 SEC 825, 826 n. 3 (Nov. 16, 1993)) (“The Exchange Act empowers self-regulatory organizations, such as the NASD, to discipline their members, and persons associated with them, for unethical behavior. Providing misleading and inaccurate information to the NASD is conduct contrary to high standards of commercial honor and is inconsistent with just and equitable principles of trade.”).

<sup>13</sup> In re Joseph Patrick Hannan, Exchange Act Release No. 40438, 1998 SEC LEXIS 1955, \*12 (Sept. 14, 1998).

<sup>14</sup> In re John J. Fiero, 1998 SEC LEXIS 49, \*5 (Jan. 13, 1998); see also In re Richard Rouse, 51 S.E.C. 581, 1993 SEC LEXIS 1831, \*10 (1993) (asserting that members cannot impose conditions for providing information to the NASD).

<sup>15</sup> District Bus. Conduct Comm. v. Doshi, Complaint No. C10960047, 1999 NASD Discip. LEXIS 6, \*12 (NAC Jan. 20, 1999).

<sup>16</sup> NASD Sanction Guidelines 31 (1998 ed.).

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on the nature of the false information \_\_\_\_\_ supplied. Accordingly, the evidence \_\_\_\_\_ seeks is not relevant or material to the issue of sanctions.

Finally, \_\_\_\_\_ contends that the documents must be produced because they contain evidence that may be used to impeach \_\_\_\_\_, who Enforcement has said it will call as a witness to testify at the hearing. Specifically, \_\_\_\_\_ states that the documents are needed to question \_\_\_\_\_ regarding his explanation that the RM investigation had slipped his mind at the time he questioned \_\_\_\_\_ at his on-the-record interview.

Evidence of impeachment is material if the witness whose testimony is attacked supplied the only evidence linking the defendant to the crime, or where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case.<sup>17</sup> The evidence \_\_\_\_\_ seeks does not meet this standard. Although Enforcement intends to call \_\_\_\_\_ as a fact witness, the underlying facts to Cause Six are not disputed. There is no genuine issue in question regarding the substance of \_\_\_\_\_'s testimony, which is contained in the transcript of his on-the-record interview. Moreover, as discussed above, \_\_\_\_\_'s knowledge and state of mind when he questioned \_\_\_\_\_ is

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<sup>17</sup> United States v. Wong, 78 F.3d 73, 79 (2d Cir. 1996) (quotations omitted). See also, Giglio v. United States, 405 U.S. 150 (1972); United States v. Dean, 55 F.3d 640, 663 (D.C. Cir. 1995) (reiterating the need to produce impeaching evidence of witnesses when the reliability of the witness is material to the determination of guilt).

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irrelevant. Thus, the evidence sought is not material under Brady, and \_\_\_\_\_'s motions to compel are therefore denied.

**SO ORDERED.**

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Andrew H. Perkins  
Hearing Officer

Dated: Washington, DC  
July 28, 2000