

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 17-11 (2014041985401).

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

JAMES LARKIN POWERS
(CRD NO. 2450818),

Respondent.

Disciplinary Proceeding
No. 2014041985401

Hearing Officer—MC

**ORDER GRANTING RESPONDENT'S REQUEST
FOR AN ORDER OF PRODUCTION**

I. Background

The Complaint charges that Respondent James Larkin Powers engaged in fraudulent misconduct by booking 18 fictitious trades between his firm's average account and his personal brokerage account, without street side executions with a market counterparty. The Complaint alleges that nine of the 18 trades were booked with at least one price outside the prevailing market prices on those dates.

In his Answer, Respondent denies the allegations and claims that the trades at issue had corresponding street side executions that occurred in aftermarket trading or on prior trading days.

On March 27, 2017, Respondent filed a motion pursuant to Rule 9252 requesting an order to require a Nasdaq entity to produce certain trade data. He seeks data showing the range of prices from six a.m. to eight p.m. for eight securities on 36 days. Respondent's attempts to obtain the information have been unsuccessful. He states that the information is essential for his defense.

Enforcement opposes Respondent's request on three grounds, arguing that: (i) the request was filed ten days after the deadline set by the Case Management and Scheduling Order; (ii) the Nasdaq entity that Respondent wants to provide the information is not within FINRA's jurisdiction, so Enforcement cannot compel production through a Rule 8210 request; and (iii) some of the information is publicly available, or irrelevant to the Complaint.

The parties made additional arguments in two pre-hearing conferences held to discuss and clarify their positions concerning Respondent's request.

II. Discussion

Rule 9252 allows a respondent to request a hearing officer to order Enforcement to invoke Rule 8210 to compel the production of documents from entities or individuals that are subject to FINRA's jurisdiction. The Rule permits a hearing officer to grant the request if the information sought is relevant, material, and non-cumulative; the respondent has tried without success to obtain the information; and the possessor of the information is within FINRA's jurisdiction.

Although the entity from which Respondent seeks to obtain the data is not subject to FINRA jurisdiction, Enforcement represents that FINRA maintains a database containing the information Respondent seeks. Enforcement has declined to provide the information to Respondent, however, because it did not use the database to prepare the Complaint and did not include it in this case's investigative file. Enforcement represents that the volume of the data Respondent is asking for is not great and producing the information would not be unduly burdensome.

Respondent asserts that the information will enable him to show there were street side executions of the trades at issue, and demonstrate the trades were not fictitious. Enforcement disputes these contentions. It argues that the pre- and post-market pricing data Respondent seeks are irrelevant. Enforcement states that the data will not show that Respondent's trades had street side executions, but only that other market participants may have executed trades in the stocks at issue before, during, or after market hours. According to Enforcement, Respondent's firm's trade blotters recorded all of the relevant trade executions but show no executions for the allegedly fictitious trades. In addition, Enforcement argues that Respondent's request is overbroad because it encompasses trade dates before and after the dates of the trades at issue, and includes two securities not among those in the disputed trades.

Respondent insists the information he is seeking is essential for his defense. Respondent asserts that the trade blotters Enforcement has produced are inadequate for his needs because the firm may have booked trades at inaccurate times and dates. Respondent argues that he needs information for dates before and after those on which the disputed trades were booked because he believes the trades occurred during pre- and post-market hours on days prior to or following the dates the firm booked them on its blotters.

Giving deference to Respondent's claimed need for the information, its importance to his defense, and Enforcement's access to it, I overrule Enforcement's objections to the timeliness and scope of the request and the relevance of the information. Whether the data provides Respondent with facts relevant to his defense can be determined after he has been afforded the opportunity to review it.

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Therefore, Enforcement is directed to produce to Respondent no later than April 17, 2017, the data from the FINRA database relating to the stock trades from six a.m. to eight p.m. identified in the chart accompanying Respondent's request.

SO ORDERED.



Matthew Campbell
Hearing Officer

Dated: April 11, 2017