

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 08-12 (2005003188901).

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Disciplinary Proceeding
No. 2005003188901

Hearing Officer - DMF

**ORDER DENYING RESPONDENT'S MOTION
TO COMPEL PRODUCTION OF DOCUMENTS**

On July 7, 2008, Respondent filed a motion to extend the deadline for filing motions to compel testimony pursuant to Rule 9252, or in the alternative to compel the production of certain testimony and documents. The Hearing Officer previously assigned to this matter extended the deadline for Respondent to seek to compel testimony pursuant to Rule 9252 and ordered the Department of Enforcement to respond to the motion insofar as it sought to compel the production of documents. Enforcement filed its opposition to the motion in that regard on July 22, and on August 1 this case was reassigned to the undersigned Hearing Officer.

In his motion, Respondent requests that FINRA member [the "Firm"] be ordered, pursuant to Rule 8210, to produce two categories of documents: (1) "Bloomberg Communication between [Firm] employees and the various bond trading desks [the Firm] conducted business with from October 2002 through May 2005 that contain information regarding" a specified security; and (2) "regarding bond trades in [Respondent's] client

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accounts order tickets. Upon information and belief, the transaction was approved by a supervisor which was then evidenced by initials on paper order tickets.”

Pursuant to Rule 9252, a respondent may request that FINRA compel the production of documents or testimony from persons that are subject to FINRA jurisdiction. The Hearing Officer may grant such a request only upon a showing that the information sought is relevant, material, and non-cumulative; that the requesting party has previously attempted to obtain the documents or testimony through other means, but has been unsuccessful; and that the person from whom the documents or testimony is sought is subject to FINRA jurisdiction. In addition, the Hearing Officer must consider whether the request is unreasonable, oppressive, excessive in scope, or unduly burdensome, and whether the request should be denied, limited, or modified. In its opposition, Enforcement argues that it would be unreasonable and unduly burdensome to require the Firm to comply with Respondent's requests, “particularly when, as here, Respondent has not articulated any clear rationale as to why these records are material to this case.”

Respondent's first request appears to relate to the Fifth Cause of the Complaint, which charges that, in February 2003, Respondent recommended that two customers invest in certain Collateralized Mortgage Obligation (CMO) securities without having a reasonable basis to believe that the investments were suitable for the customers “in view of, among other things, the risks associated with CMOs and the customer's financial situation, investment objectives and needs.” Respondent's motion asserts that his first request “relates to the quality of an instrument which is a subject of the Complaint. It

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also will address where that information came from, how it was disseminated to [Firm] employees, the reasons for the decline in value and how that was addressed.”

The Hearing Officer notes, first, that this request is extraordinarily sweeping in scope as to both subject matter and time period. The “quality of an instrument” at the time of the recommendation is certainly relevant to a suitability analysis, but Respondent has not explained how the Bloomberg communications he seeks, containing “information regarding” the CMO securities and covering a period of some two and a half years, relate to that issue. Respondent’s additional explanation that the documents would show “where that information came from, how it was disseminated to [Firm] employees, the reasons for the decline in value and how that was addressed,” is both vague and unpersuasive because, ordinarily, such issues are not material to a suitability analysis.

Respondent’s second request is cryptic, but apparently relates to the charges that Respondent recommended unsuitable and excessive transactions in the accounts of the same two customers. Respondent appears to seek all order tickets relating to all bond trades that Respondent placed on behalf of all his customers; the request is not limited to the customers or time period at issue. Respondent contends that the requested documents “will demonstrate the supervision of bond transactions which was separate and distinct from any other transaction at [the Firm] which also speaks to the level of involvement by [Firm] management prior to Respondent making an investment recommendation.” But while order tickets for Respondent’s trades might reflect supervisory approvals of the trades, Respondent has not explained how they could explicate “the level of involvement by Leerick management prior to Respondent making an investment recommendation.” In

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any event, the issue in this case is whether Respondent fulfilled his suitability obligations, not whether the Firm exercised appropriate supervision over those transactions.

The Hearing Officer therefore finds that Respondent has failed to demonstrate that the documents he seeks would be relevant and material to the issues in this proceeding. Moreover, even assuming that his requests might encompass some documents with tangential relevance to the issues, Respondent's requests are vague and overbroad; he has failed to demonstrate that he is unable to obtain any relevant documents by other means; and it appears that the requests would impose a substantial and undue compliance burden on the Firm. In that regard, the Hearing Officer notes that when Respondent asked the Firm to provide the documents voluntarily, the Firm did not simply refuse. Instead, it explained, as to the first request, that due to technology issues, "it will be extremely difficult to retrieve [responsive] emails [from the requested period] as it would likely require the visual screening of all the emails in an attempt to locate any that you have requested. We will not undertake such unless you are prepared to pay the cost of this request." As to the second request, the Firm stated that it "could locate no such paper tickets at the office. It appears that most registered reps during the period were using an electronic order system. While it is possible that some paper tickets have been retained, they would have been archived at the company's storage facility, Iron Mountain. There would be a substantial effort involved in looking for such paper tickets if any exist relative to [Respondent]'s trades, and without further definition, and a representation by you that you would pay for such search, [the Firm] declines to do so at this time."

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Given that Respondent's requests are vague and overbroad and appear to seek documents with little or no relevance to the issues, the Firm's insistence that Respondent pay the cost of retrieving the documents was reasonable. In contrast, to require the Firm to produce the documents at its own expense, pursuant to Rule 8210, would be unreasonable.

For all the foregoing reasons, Respondent's motion is denied.

SO ORDERED.

David M. FitzGerald
Hearing Officer

Dated: August 27, 2008