

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 04-26 (CAF040002).

**NASD OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent 1,

Respondent 2,

and

Respondent 3,

Respondents.

Disciplinary Proceeding  
No. CAF040002

Hearing Officer—Andrew H. Perkins

**ORDER GRANTING RESPONDENTS' THIRD MOTION TO COMPEL COMPLIANCE WITH PROCEDURAL RULE 9251 AND DENYING THE RESPONDENTS' MOTIONS FOR SANCTIONS AND FOR LEAVE TO FILE A REPLY**

On May 3, 2004, the Respondents filed a Motion to Compel Compliance with Procedural Rule 9251 (the "Motion"). In summary, the Motion sought the production of three categories of documents the Respondents claim the Department of Enforcement (the "Department") withheld improperly. The Motion also asked that the Hearing Officer enter an order requiring the Department to document its efforts to comply with Procedural Rule 9251.

On May 25, 2004, the Hearing Officer granted the Motion in part. Specifically, the Hearing Officer ordered the Department to produce for inspection and copying all documents

**This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 04-26 (CAF040002).**

relating to the factual allegation in paragraph 48 of the Complaint that more than 1400 exchanges were likely to result in the customers losing money.<sup>1</sup>

On June 28, 2004, the Respondents filed a motion to compel the Department to comply with the Hearing Officer's May 25, 2004 Order. In the second motion, the Respondents complained that the Department had refused to produce the documents in electronic form. On July 6, 2004, the Department responded that it would provide the relevant spreadsheets in electronic form, as the Respondents requested. Accordingly, the Hearing Officer denied the second motion on the ground that it had been rendered moot by the Department's response.

Now, the Respondents have filed their Third Motion to Compel Compliance with Rule 9251, alleging that the Department failed to produce all of the documents covered by the May 25, 2004 Order and the Department's July 6, 2004 Response. On October 4, 2004, the Respondents also filed an application for leave to file a reply in support of the Motion. In its September 15, 2004 response, the Department contends that it complied fully with its discovery obligations and the Hearing Officer's May 25, 2004 Order.

For the reasons discussed below, the Hearing Officer grants the Respondents' Third Motion to Compel.

### **Discussion**

In connection with the investigation that led to the filing of the Complaint in this matter, the Department analyzed the suitability of more than 6000 transactions using a complex

---

<sup>1</sup> The Department was not obligated to produce documents that reflect the opinions of counsel and that qualify for protection from disclosure under Rule 9251(b)(1)(A).

**This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 04-26 (CAF040002).**

mathematical model.<sup>2</sup> The analysis directly relates to the factual allegation in paragraph 48 of the Complaint that 1400 of the reviewed transactions were likely to cause customer losses.

Nevertheless, the Department contends that it can withhold all of the documents relating to this analysis on the ground that the analysis constitutes attorney work product. The Department argues that the analysis is protected by the attorney work product doctrine because the staff prepared the analysis at the direction of counsel in anticipation of litigation. In addition, the Department contends that the determination as to which transactions to allege as presumptively unsuitable was a critical litigation decision.<sup>3</sup>

The Department has failed to show that the documents, including the electronic documents that are the subject of the current motion, are protected work product. Indeed, from the Department's vague description of the documents, the Hearing Officer concludes that they contain factual information that was reviewed by the Department in connection with the investigation that led to the filing of the Complaint. Moreover, the Department intends to introduce the analysis and selected results of that analysis at the hearing during its case-in-chief. As such, the analysis and related factual material must be produced under Procedural Rule 9251(a)(1). In addition, the documents pertaining to the approximately 4600 transactions that the Department concluded "were not unsuitable" fall within the ambit of *Brady v. Maryland*, 373 U.S. 83 (1963). From the information the Department submitted, it appears that the requested material is vital to the Respondents' ability to question the Department's witnesses about the

---

<sup>2</sup> The Department has proffered three expert witnesses to explain the technique it employed.

<sup>3</sup> Response to Third Discovery Mot. at 5.

**This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 04-26 (CAF040002).**

analysis. Accordingly, the Department immediately shall make available to the Respondents for inspection and copying all documents relating to the suitability analysis referenced in the Complaint, including all related electronic data, spreadsheets, and results.

The Hearing Officer denies the Respondents' alternative motion for sanctions. The Hearing Officer also denies the Respondents' October 4, 2004 application to file a Reply in further support of the Motion.

**IT IS SO ORDERED.**

---

Andrew H. Perkins  
Hearing Officer

October 6, 2004