

**NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. CAF980002
v.	:	
	:	
	:	Hearing Officer - DMF
	:	
Respondents.	:	

**ORDER DENYING RESPONDENTS' MOTION
TO COMPEL PRODUCTION OF DOCUMENTS**

On May 27, 1999, respondents _____ (the “_____ Respondents”) filed a “Motion to Compel the Production of Documents in the Possession of the NASD.” The Department of Enforcement filed its opposition to the motion on June 10, 1999. For the reasons set forth below, the motion is denied.

In the motion, which they say is “[b]ased upon recently discovered information,” the _____ Respondents seek production of “testimony transcripts and other materials relating to persons associated with _____ and the securities issues which are the subject of the instant action.” The _____ Respondents contend that Enforcement has failed to produce for inspection and copying “[n]umerous transcripts ... which, upon information and belief, include transcripts which are exculpatory to the Respondents.” The transcripts that Enforcement has allegedly failed to produce include: (1) “_____ second day of testimony at the NASD in this investigation”; (2) “_____ testimony at the SEC regarding the SEC’s investigation of _____ demise”; (3) “_____ testimony at the NASD in this matter”; (4) “_____ testimony at the NASD in other matters”; (5) “_____ deposition testimony in

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[_____], although he has been identified as a DOE witness at the instant hearing”;

(6) “_____ deposition testimony in _____, although he has been identified as a DOE witness at the initial hearing”; and (7) transcripts in which, “[u]pon information and belief, additional _____ Associates have asserted their constitutional right under the fifth amendment against self incrimination and have refused to testify.” The _____ Respondents argue that Enforcement is required to produce these transcripts because they fall within Enforcement’s disclosure obligations under Rule 9251(a), and because the testimony may be “exculpatory.” The _____ Respondents also request that Enforcement be required to produce “the pleadings and resolution of NASD Complaint/Case/Docket numbers CMS950053, 10950061 and CMS 950109,” apparently on the ground that those proceedings involved persons who were associated with _____. The _____ Respondents contend that the materials in these files would be “exculpatory,” because they would show that _____ engaged in improper conduct “during the relevant time period.”

Enforcement opposes the motion. Enforcement contends that it has produced all of the materials required by Rule 9251(a). With regard to the transcripts identified by the _____ Respondents in their motion, Enforcement states: (1) “There was no second day of testimony of _____ in this investigation. Counsel for the Enforcement Department has been advised that _____ testimony was taken in another investigation, which does not relate to any of the securities involved in this case.” (2) “No transcript of testimony by _____ before the SEC was obtained by the NASD in connection with the investigation that led to the institution of this proceeding.” (3) “_____ testimony was never taken in this matter.” (4) “No testimony of _____ in another NASD matter was obtained in connection with the investigation that led to the institution of this proceeding. The _____ Respondents have offered no basis

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for any belief that there is a transcript of any testimony by _____ in another NASD matter.”

(5) “No such transcript [of _____ deposition testimony] was obtained in connection with

the investigation that led to the institution of this proceeding.” (6) “No such transcript [of

_____ deposition testimony] was obtained in connection with the investigation that led

to the institution of this proceeding.” (7) “No such transcripts [of _____ Associates who have

refused to testify] were obtained in connection with the investigation that led to the institution of

this proceeding.” Enforcement also argues that the _____ Respondents have not shown that

Enforcement has withheld any “exculpatory” information contained in the files relating to this

proceeding, or that any such information is likely to be contained in the files of the three other

NASD proceedings that the _____ Respondents have cited.

Discussion

As Enforcement points out, the applicable legal standards were discussed in an Order issued by the Hearing Officer in this proceeding on June 22, 1998, in response to an earlier motion to compel production of documents filed by the _____ Respondents. As explained in that Order, Enforcement’s obligation to produce documents to respondents for inspection and copying is set forth in NASD Rule 9251(a). Enforcement is required to produce documents “prepared or obtained by Interested Association Staff in connection with the investigation that led to the institution of proceedings” that fall within certain categories set forth in the Rule. In addition, Enforcement is required to notify the Hearing Officer and the other parties if it issues requests for information pursuant to Rule 8210 after the Complaint is filed “under the same investigative file number under which the investigation leading to the institution of disciplinary proceedings was conducted.” If Enforcement obtains documents in response to such requests that are “material and relevant to the disciplinary proceeding,” they must be made available to the

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respondent within 14 days. Rule 9251(b) authorizes Enforcement to withhold certain classes of documents from production.

The _____ Respondents have not offered any evidence that Enforcement has failed to comply with its obligations under Rule 9251(a). They have simply alleged, based on unspecified “recently discovered information,” that Enforcement has withheld documents improperly. In response, Enforcement states that none of the transcripts listed in the _____ Respondents’ motion fall within its Rule 9251(a) disclosure obligations, because Enforcement did not obtain the transcripts in the course of the investigation that led to the institution of this proceeding. There is nothing in the record that calls into question Enforcement’s representations.

Enforcement also has an obligation to produce “exculpatory” information, in accordance with Brady v. Maryland, 373 U.S. 83 (1963). Under Brady, the prosecution must “disclose to an accused exculpatory information that is both favorable and material to guilt or punishment. This duty extends to evidence drawing into doubt the credibility of a witness when the witness’ reliability may be determinative of guilt or innocence.” United States v. Dean, 55 F.3d 640, 663 (D.C. Cir. 1995). Enforcement must follow these principles in NASD disciplinary proceedings. Rule 9251(b)(2) states that the provisions of Rule 9251(b)(1), which allow Enforcement to withhold certain classes of documents from production to respondents under Rule 9251(a), do not “authorize[] ... Enforcement to withhold a Document, or a part thereof, that contains material exculpatory evidence.”

Brady imposes certain affirmative disclosure obligations on Enforcement, but it is not an excuse for wide-ranging discovery.

[Brady] does not authorize respondents to engage in “fishing expeditions” through confidential Government materials in hopes of discovering something helpful to their defense. Unless defense counsel becomes aware that exculpatory evidence

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has been withheld and brings it to the judge's attention, the government's decision as to whether or not to disclose information is final. Mere speculation that government documents may contain Brady material is not enough to require the judge to make an in camera review. In order to justify such a review, a respondent must first establish a basis for claiming that the documents contain material exculpatory evidence. A "plausible showing" must be made that the documents in question contain information that is both favorable and material to the respondent's defense.

In re Orlando Joseph Jett, Release No. APR-514, 62 S.E.C. Docket 510 (June 17, 1996).

The _____ Respondents have offered nothing but speculation to support their contention that Enforcement has failed to disclose exculpatory evidence. They have pointed to some alleged transcripts, but have offered no plausible showing that those transcripts are in Enforcement's possession or that they contain Brady information. Similarly, they have cited some NASD file numbers, but have failed to make any plausible showing that those files are likely to contain "information that is both favorable and material" to their defense in this proceeding. As the Hearing Officer has previously pointed out, this proceeding concerns alleged misconduct by the respondents in this proceeding, not misconduct by _____ or persons associated with that firm. The Hearing Officer has not ruled that information about _____ could not possibly be material in this case, but for the _____ Respondents to establish that Enforcement is withholding exculpatory information based on testimony or files relating to other proceedings, they would have to show with some specificity what that information is, how it is material to this case, and how it is favorable to the _____ Respondents in defending against the charges at issue here. They have not made any of those showings.

Therefore, the _____ Respondents' motion will be denied. The Hearing Officer reminds Enforcement, however, that it has a continuing duty to disclose Brady materials. Brady does not permit suppression of information favorable to the respondent, regardless of the source of the

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information.¹ Thus, Enforcement must disclose Brady material even if it appears in documents that Enforcement would not otherwise have to disclose under Rule 9251(a). For example, if Enforcement should gain access to one of the transcripts identified by the _____ Respondents and find that it contains Brady material, Enforcement would have to disclose that material, even if Enforcement were otherwise obliged to disclose the transcript under Rule 9251(a).

Furthermore, Enforcement has an obligation to be aware of the contents of its files; failure to disclose exculpatory evidence cannot be excused on the ground that the exculpatory materials were overlooked. United States v. Agurs, 427 U.S. 97, 110 (1976). That does not mean Enforcement is required to search through every NASD file for possible exculpatory material, or that it is obliged to disclose “every possible shred of evidence that could conceivably benefit” the _____ Respondents. United States v Hamilton, 107 F.3d 499, 509 (7th Cir.), cert. denied, 521 U.S. 1127 (1997). But Enforcement “cannot compartmentalize an investigation, and must produce all [Brady] evidence in the hands of the ‘team’ involved.” United States v. Lovelace, 1998 U.S. App. LEXIS 21070 (7th Cir. 1998), citing United States v. Morris, 80 F.3d 1151, 1169-70 (7th Cir. 1996). At the Final Pre-Hearing Conference, the Hearing Officer will ask Enforcement to confirm that it has fulfilled its Brady obligations.

¹ There is no duty to furnish a respondent with exculpatory evidence if the evidence is already in the respondent’s possession, or if the respondent could obtain the evidence through the exercise of reasonable diligence. Rector v. Johnson, 120 F.3d 551, 558-59 (5th Cir. 1997), cert. denied, 140 L. Ed. 2d 122 (1998). Enforcement cannot suppress evidence, but it is not required “to conduct an investigation for the defense.” United States v. Senn, 129 F.3d 886, 893 (7th Cir. 1997).

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For the foregoing reasons, the _____ Respondents' motion is denied.

SO ORDERED

David M. FitzGerald
Hearing Officer

Dated: Washington, DC
June 21, 1999