

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent 1,

Respondent 2,

and

Respondent 3,

Respondents.

Disciplinary Proceeding
No. CAF030011

Hearing Officer—Andrew H. Perkins

ORDER GRANTING IN PART RESPONDENT 1 AND RESPONDENT 2'S MOTION FOR PRODUCTION OF DOCUMENTS UNDER RULE 9251(a)(3)

On September 29, 2003, the Respondents 1 and 2 (the "Respondents") filed a motion seeking the production of documents relating to NASD's examinations of Respondent 1 during the time at issue in this proceeding.¹ The Respondents represent that at least one examination specifically addressed Respondent's sale of Brady Bonds, the sales of which underlie this disciplinary proceeding. The Respondents alternatively contend that the Department of Enforcement (the "Department") should produce the documents either pursuant to NASD Procedural Rule 9251(b)(2), because they contain material exculpatory evidence, or pursuant to NASD Procedural Rule 9251(a)(3), which grants the Hearing Officer the authority to order the production of "any other document."

¹ Mot. 5.

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 03-21 (CAF030011).

The Department opposes the Respondents' motion. In brief, the Department contends that it complied with Rule 9251(a)(1) by providing all of the documents directly related to the institution of this proceeding.² Moreover, the Department contends that Rule 9251(b)(1)(B) permits it to withhold examination or inspection reports, internal memorandum, and other notes or writings prepared by NASD staff that shall not be offered in evidence.³ At a pre-hearing conference on October 21, the Department confirmed that it did not intend to offer in evidence any of the documents the Respondents now seek. The Department also contends that the requested documents do not contain material exculpatory evidence and that *Brady v. Maryland*⁴ does not permit the Respondents to conduct discovery of the Department's files.

Under Rule 9251(a)(3), the Hearing Officer has the discretionary authority to require the Department to produce the documents the Respondents seek although they do not fall under Rule 9251(a)(1). Moreover, if those documents contain material exculpatory evidence, the Department may not withhold them under Rule 9251(b) (2).

Here, the Respondents have made a sufficient showing that certain internal NASD documents might contain material exculpatory evidence. The Respondents are not asking to conduct a "fishing expedition" of the Department's files. Instead, the Respondents have identified specific categories of documents that address Respondent 1's sale of the securities in question in this proceeding and which might be exculpatory as to some of the charges in the Complaint. In addition, the Department concedes that NASD conducted many examinations of

² Rule 9251(a)(1) requires the Department to "make available for inspection and copying by any Respondent, Documents prepared or obtained by Interested Association Staff in connection with the investigation that led to the institution of proceedings."

³ Rule 9251(b)(1)(B) provides that the Department may withhold a document if "the Document is an examination or inspection report, an internal memorandum, or other note or writing prepared by an [NASD] employee that shall not be offered in evidence."

⁴ 373 U.S. 83 (1963).

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Respondent 1 during the relevant period, but the Department has not reviewed those documents because they fall outside the mandatory disclosure requirements of Rule 9251(a)(1)—they were not “prepared or obtained by Interested Association Staff in connection with the investigation that led to the institution of proceedings.” Consequently, the Department has not completed a review of the documents to determine if they should be produced under *Brady v. Maryland*. Accordingly, the Hearing Officer orders the Department to conduct a search for *Brady* material in the files relating to the various examinations of Respondent 1 for the period and securities in question in this proceeding. The Hearing Officer further orders the Department to produce all material exculpatory evidence as soon as possible and to file an affidavit or declaration evidencing compliance with this Order.

The Respondents also argue that the Department should be required to disclose the names of all staff members who worked on the examinations. The Hearing Officer denies this request. The Respondents may not use *Brady* to discover evidence that merely assists their defense. The identity of the persons involved in the Respondent 1 examinations is not material exculpatory evidence.

If the Department has not completed the search and production of documents by November 18, it then shall file a status report with the Office of Hearing Officers detailing its progress and estimating the date it will complete the search.

IT IS SO ORDERED.

Andrew H. Perkins
Hearing Officer

October 27, 2003