

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

SANDLAPPER SECURITIES, LLC  
(CRD No. 137906),

TREVOR LEE GORDON  
(CRD No. 2195122),

and

JACK CHARLES BIXLER  
(CRD No. 22331),

Respondents.

Disciplinary Proceeding  
No. 2014041860801

Hearing Officer—DW

**ORDER GRANTING IN PART AND DENYING IN PART  
RENEWED MOTION TO COMPEL**

**A. Background**

In this action FINRA member firm Sandlapper Securities, LLC, along with its CEO Trevor Gordon, and the firm's Capital Markets Division President Jack Bixler (collectively "Respondents"), are charged with securities fraud and other violations in connection with certain sales of saltwater disposal wells to investors. By order of February 22, 2018, I denied Respondents' motion to compel production of documents and witness statements. During a subsequent pre-hearing conference, Respondents stated that they had just received a proposed hearing exhibit list from the Department of Enforcement ("Enforcement") that identified as exhibits materials that were never produced to Respondents, including certain documents and a witness memorandum of interview.

Respondents objected to: (1) Enforcement's failure to produce documents (both those exhibited and others not exhibited) that Enforcement obtained through voluntary production from third parties after filing the complaint; and (2) Enforcement's failure to produce the witness memorandum, as well as other undisclosed witness statements that should have been earlier

produced. I construed Respondents' objections at the conference as an oral motion to produce both the documents and the memoranda and ordered Enforcement to explain its basis for withholding the materials, and to identify any other witness memoranda or notes of interviews it is presently withholding.

By written submission, Enforcement explained its basis for withholding the materials and argued that neither category need be produced. Respondents then filed a written response to Enforcement's submission, maintaining that production should be ordered. Having considered the arguments of the parties, I grant Respondents' motion in part.

## **B. Legal Standard**

Discovery in FINRA disciplinary proceedings is governed by FINRA Rules 9251 through 9253. As relevant here, FINRA Rule 9251 requires Enforcement to make available to a respondent the materials that it prepared or obtained in connection with its investigation, though Enforcement is permitted to withhold certain categories of documents.<sup>1</sup> But even documents that fall within these categories must be produced if the materials contain "material exculpatory evidence."<sup>2</sup> A Hearing Officer has discretion to order production of "any other Document," even if production is not otherwise required under the rule.<sup>3</sup>

Enforcement must also produce certain witness statements upon a motion pursuant to Rule 9253. A respondent may move to obtain: (1) "any statement of any person . . . to be called as a witness [by Enforcement] that pertains, or is expected to pertain, to his or her direct testimony and which is a 'stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such statement'"; and (2) "any contemporaneously written statement made by an Interested FINRA Staff member during a routine examination or inspection about the substance of oral statements made by a non-FINRA person" when either is called as a witness by Enforcement and the portion of the statement for which production is sought relates to either person's testimony.

## **C. Enforcement Must Produce Third-Party Documents**

The first category of materials sought by Respondents consists of documents obtained by Enforcement from voluntary third party productions after filing the complaint. According to Enforcement, because Rule 9251(a) requires production of only those documents that led to the institution of the proceedings, it "did not produce documents voluntarily provided by third

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<sup>1</sup> FINRA Rule 9251(a) requires production of "Documents prepared or obtained by Interested FINRA Staff in connection with the investigation that led to the institution of proceedings." FINRA Rule 9251(b) provides the categories of materials excluded from production.

<sup>2</sup> FINRA Rule 9251(b)(3).

<sup>3</sup> FINRA Rule 9251(a)(3) ("Nothing in paragraph (a)(1) shall limit the . . . authority of the Hearing Officer to order the production of any other Document.").

parties after issuance of the Complaint.”<sup>4</sup> As to those documents, Enforcement maintains that it is only obliged to produce materials that contain material exculpatory information. Enforcement states that there is no authority for the proposition that it is obligated to produce documents obtained on a voluntary basis after issuance of a complaint unless the documents contain material, exculpatory evidence, and I should not set new precedent here “that would contravene the plain text of Rule 9251 and disrupt the scheme of production set forth in FINRA’s Code of Procedure.”<sup>5</sup>

Enforcement is correct that Rule 9251(a)(1) requires production of materials gathered in the investigation “that led to the institution of proceedings.”<sup>6</sup> But even assuming this section of the rule contemplates production of only those materials Enforcement possesses at the time it brings the case, it does not foreclose production of other relevant materials obtained after filing. Indeed, the rule elsewhere provides for such materials, explaining that “[n]othing in paragraph (a)(1) shall limit the discretion of the Department of Enforcement . . . to make available any other Document or the authority of the Hearing Officer to order the production of any other Document.”<sup>7</sup>

So even after initial production, Enforcement is afforded discretion to produce to a respondent almost<sup>8</sup> any other document. And the rule goes on to spell out the specific categories of materials Enforcement “may withhold.” It can choose to withhold materials that are privileged or work product; internal memos, notes, reports or writings not intended to be offered into evidence; materials that would disclose investigative or enforcement techniques of FINRA or another regulatory or self-regulatory authority; and the identity of a source, or that an investigation or action was underway or under consideration by FINRA or another regulator.<sup>9</sup>

The third-party documents at issue here fit *none* of these categories. Enforcement does not argue otherwise. Rule 9251 also permits Enforcement to withhold materials where “the Hearing Officer grants leave to withhold a Document or category of Documents as not relevant

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<sup>4</sup> Enforcement’s Response to Order Following Pre-Hearing Conference, at 1.

<sup>5</sup> Enforcement’s Response to Order Following Pre-Hearing Conference, at 4.

<sup>6</sup> As Respondents point out, the language of Rule 9251(a)(1) is slightly different from the SEC Rule of Practice upon which it is based. *See* Exchange Act Release No. 38545, 1997 SEC LEXIS 959 (Part 2 of 6), at \*14, (April 24, 1997) (“Proposed Rule 9251 is modeled on and is substantially the same as SEC Rules of Practice 230”). While the SEC rule requires production of only those documents obtained by the Division of Enforcement “prior to the institution of proceedings,” Rule 9251(a)(1) has no such limiting language and applies to all documents prepared or obtained by Enforcement “in connection with the investigation that led to the institution of proceedings.” *Compare* 17 C.F.R. § 201.230(a) *with* FINRA Rule 9251(a)(1). That said, given the time by which Enforcement must make its Rule 9251(a)(1) disclosures, discovery under the rule appears to contemplate production of only those materials obtained before the case is filed.

<sup>7</sup> FINRA Rule 9251(a)(3).

<sup>8</sup> The only documents Enforcement must withhold are those prohibited from disclosure by federal law. FINRA Rule 9251(b)(2).

<sup>9</sup> FINRA Rule 9251(b)(1).

to the subject matter of the proceeding, or for other good cause shown.”<sup>10</sup> No such leave has been granted here.

Although voluntarily produced, post-complaint third-party documents are not among the materials Enforcement “may withhold” from production under Rule 9251, Enforcement persists that the rule so intended. It posits that if the rule generally required production of documents obtained after issuance of a complaint, there would be no need for the specific requirement of Rule 9251(a)(2) for Enforcement to produce documents obtained pursuant to post-complaint Rule 8210 requests, only upon a showing that materials are “material” and “relevant.”<sup>11</sup>

Enforcement misperceives the significance of this provision. The clear overall intent of Rule 9251 is to “grant respondents documentary discovery rights to all non-privileged materials in [FINRA’s] possession (including exculpatory evidence) directly relevant to the dispute, sufficiently far enough in advance of the hearing to permit the respondent to prepare its defense.”<sup>12</sup> True, the rule contemplates that this discovery will typically be provided at the time the complaint is filed. “This scheme assumes that in the usual case the Department will have completed its investigation and information gathering before it files its complaint.”<sup>13</sup> In this context, the provision governing materials obtained pursuant to Rule 8210 does not contemplate ongoing investigative steps in the present matter—it is instead calculated to preserve the integrity of an ongoing investigation where new materials are obtained as a part of that distinct inquiry.<sup>14</sup> In that circumstance, production to the respondent is “subject to a material relevance standard so that the Department of Enforcement must turn over only documents that are relevant to the proceeding initiated and not other documents that may relate to a person soon to be named as a respondent as a part of the same investigation file.”<sup>15</sup>

So given this background, Rule 9251(a)(2)’s limitation on Enforcement’s production obligations to only those Rule 8210 materials that are relevant and material is best understood to

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<sup>10</sup> FINRA Rule 9251(b)(1)(D).

<sup>11</sup> FINRA Rule 9251(a)(2).

<sup>12</sup> OHO Order 00-24 (C3A990071), (Aug 28, 2000), at 2, [http://www.finra.org/sites/default/files/OHODecision/p007930\\_0\\_0.pdf](http://www.finra.org/sites/default/files/OHODecision/p007930_0_0.pdf) (citing *Report of the NASD Select Committee on Structure and Governance to the NASD Board of Governors*, September 15, 1995); *accord, e.g.*, OHO Order 03-02 (CAF020007), (Jan. 17, 2003), at 3, [http://www.finra.org/sites/default/files/OHODecision/p007739\\_0\\_0.pdf](http://www.finra.org/sites/default/files/OHODecision/p007739_0_0.pdf) (“the various provisions of Rule 9251 governing discovery should be interpreted in accordance with this general principal of openness.”).

<sup>13</sup> OHO Order 00-24, at 3.

<sup>14</sup> The analogous rule under the SEC’s Rules of Practice requires an SEC administrative law judge to “order such steps as necessary and appropriate to assure that the issuance of investigatory subpoenas after the institution of proceedings is *not* for the purpose of obtaining evidence relevant to the proceedings and that any relevant documents that may be obtained through the use of investigatory subpoenas in a continuing investigation are made available to each respondent for inspection and copying on a timely basis.”<sup>17</sup> C.F.R. § 201.230(g) (emphasis supplied). The SEC understood Rule 9251(a)(2) to similarly apply to distinct ongoing investigations when it approved the rule. *See* Exchange Act Release No. 38908, 1997 SEC LEXIS 1617, at \*132 n.193 (Aug. 7, 1997).

<sup>15</sup> OHO Order 00-24, at 2.

simply acknowledge that there may be materials obtained in this manner that are not relevant to the present proceeding. I find no support for Enforcement's suggestion that by limiting Rule 8210 productions to only those materials that are relevant, Rule 9251 intended to shield other relevant third-party documents from any disclosure. In fact, statements made by FINRA<sup>16</sup> in connection with the rule's approval suggest the contrary. "Special attention was devoted to the Rule 9250 Series to assure that Documents received by the Department of Enforcement after a Respondent had inspected and copied Documents would be made available expeditiously to Respondents (Proposed Rule 9251(a)(2)) and that evidence that becomes available shortly before or during a hearing on the merits would be produced expeditiously to Respondents (Proposed Rule 9252(c))."<sup>17</sup>

Here, it is undisputed that Enforcement obtained documents from third parties that it expects to call as witnesses. There is also no dispute that these documents contain relevant evidence, as Enforcement has designated certain of these materials as proposed exhibits, while declining to produce to Respondents other available documents that Enforcement elected not to use at the hearing. And there is no colorable assertion that any of these materials are subject to any claim of privilege or confidentiality. There is no support for Enforcement's apparent belief that relevant, non-privileged evidence that would be produced if obtained before filing should be exempt from disclosure because of the coincidence of when the materials were obtained.

In dismissing a similar argument nearly twenty years ago, this Office rejected the notion that a respondents' entitlement to relevant, unprivileged discovery should depend on the time that Enforcement collects the evidence. "[I]f by fortuity or design, the Department does not correspond with the customer witnesses until after the Complaint is filed, the correspondence would be forever shielded from discovery. Such a construction would permit gamesmanship and deprive the Respondents of documents that are highly relevant . . . ."<sup>18</sup> So too here. And because some of the document-producing third parties are likely Enforcement witnesses, their documents are needed by Respondents, at a minimum, to facilitate appropriate cross-examination.<sup>19</sup> Under the circumstances here, fundamental fairness requires production.<sup>20</sup> Accordingly, Respondents'

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<sup>16</sup> Throughout this order I refer to the NASD, FINRA's predecessor entity, as FINRA.

<sup>17</sup> 1997 SEC LEXIS 959 (Part 2 of 6), at \*10-11.

<sup>18</sup> OHO Order 00-24, at 6.

<sup>19</sup> OHO Order 07-09 (2005000316701) (Mar. 7, 2007), at 3, [http://www.finra.org/sites/default/files/OHODecision/p019011\\_0\\_0.pdf](http://www.finra.org/sites/default/files/OHODecision/p019011_0_0.pdf) ("discovery of the documents is necessary to assure 'the fairness of Respondents' ability to cross-examine a witness on information that may only be in the possession of that witness.'").

<sup>20</sup> See *Morgan Asset Mgmt., Inc., et al.*, Admin. Proc. Release No. 656, 2010 SEC Lexis 2256, at \*6-9, 17-19 (July 12, 2010) (SEC ALJ agreeing with respondents that "it is fundamentally unfair to require them to shoot at a moving target" in terms of the evidentiary record and ordering that newly obtained relevant materials either be shared with respondents or excluded); *Kirlin Sec., Inc.*, Exchange Act Release No. 61135, 2009 SEC LEXIS 4168, at \*81 (Dec. 10, 2009) (respondents not unfairly prejudiced where "the record demonstrates that [respondents] were given the data FINRA used to create its hearing exhibits."); *Michael Sassano, et al.*, Exchange Act Release No. 56874, 2007 SEC LEXIS 2779, at \*4 n.4 (Nov. 30, 2007) (Division of Enforcement ordered to "provide access to documents obtained in any other investigations that were not part of the [investigation leading to the proceeding], but yielded documents that may become Division exhibits in this proceeding").

motion to compel production of third-party documents is **GRANTED**, and Enforcement shall produce to Respondents all documents obtained from third parties (other than any materials withheld under Rule 9251(b)) in connection with this proceeding, forthwith.

#### **D. Enforcement Is Not Required to Produce Additional Witness Statements**

Respondents also seek production of witness statements pursuant to Rule 9253(a)(1), FINRA's analogue to the Jencks Act, 18 U.S.C. § 3500(e)(2).<sup>21</sup> Included in Enforcement's proposed exhibits is the memorandum of interview with witness RJ. Enforcement claims that Rule 9253 did not require production of the memo because it reflects only "fragmentary notes" and "general outlines of conversations," and was not a "substantially verbatim recital of an oral statement" made by RJ or any other witness.<sup>22</sup>

Enforcement represents that it offers the memorandum of interview as a potential exhibit because it cannot ensure that the witness will actually testify, and will presumably present the memo as substantive evidence through its investigator who conducted the interview.<sup>23</sup> As Respondents correctly point out, where, as here, the substance of an interview is offered through the testimony of an investigator, the Jencks Act generally requires the investigator's memorandum of interview to be disclosed as the statement *of the investigator*, even if not the statement of the interviewee.<sup>24</sup> Thus, interview memoranda would be discoverable under the Jencks Act with respect to any witness interviews that the investigator may testify about.

Under the original Rule 9253, that would be the end of the inquiry, as that rule incorporated the entirety of the Jencks Act by reference.<sup>25</sup> But Rule 9253 was amended in 2000, and the amendment altered its wholesale incorporation of Jencks Act provisions.<sup>26</sup> Now, Rule

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<sup>21</sup> As relevant here, disclosable witness statements under the Jencks Act include: (1) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; and (2) a written statement made by said witness and signed or otherwise adopted or approved by him. 18 U.S.C. § 3500(e)(2).

<sup>22</sup> Enforcement's Response to Order Following Pre-Hearing Conference, at 4.

<sup>23</sup> Enforcement's Response to Order Following Pre-Hearing Conference, at 5.

<sup>24</sup> *E.g.*, *Clancy v. United States*, 365 U.S. 312 (1961) (memorandum of interview prepared by government agent was a "statement" as defined by the Jencks Act where the agent is called as a witness); *United States v. Jordan*, 316 F.3d 1215, 1252 (11th Cir. 2003) (agent statements may be Jencks material where agent is called as a witness); *United States v. Allen*, 798 F.2d 985, 994 (7th Cir. 1986). It is less likely that an investigator's raw notes constitute a "statement" under *Jencks*. See *United States v. Griffin*, 659 F.2d 932, 938 n.4 (9th Cir. 1981) ("[I]t will be the very unusual case where an agent's own thoughts will be recorded in rough interview notes with sufficient completeness or intent to communicate to be a Jencks Act statement. In the more typical case, only the formal interview report, through which the agent intends to communicate to others, will be a 'statement' under the Jencks Act.").

<sup>25</sup> See Exchange Act Release No. 38545, 1997 SEC LEXIS 959 (Part 6 of 6), at \*37 (Aug. 7, 1997) (Rule 9253 applies to "statements that would be required to be produced pursuant to the Jencks Act, 18 U.S.C. § 3500.").

<sup>26</sup> See Exchange Act Release No. 343102 2000 SEC LEXIS 1584, at \*6 (Aug. 1, 2000) (explaining that the purpose of the amendment was to "clarify that the only portions of routine examination or inspection reports, internal employee communications, and any other internal documents that are required to be produced, under this rule, are the portions outlining the substance of (and any conclusions regarding) oral statements made by persons who are not

9253 continues to require production of any “substantially verbatim” recitation of an oral statement, but there is *no* provision that generally requires disclosure of written statements made and adopted by FINRA staff witnesses. Instead, the rule now requires production of only contemporaneously written statements “made by an Interested FINRA Staff member during a *routine examination or inspection* about the substance of oral statements made by a non-FINRA person.”<sup>27</sup> This language appears to be limited to memorialized statements made to FINRA persons in the context of “routine examinations,” and not statements memorialized by staff members regarding witness interviews in the context of Department of Enforcement investigations.<sup>28</sup>

Thus, although an interview memorandum may fall within the ambit of the Jencks Act, it is not necessarily covered by Rule 9253. And in fact, Respondents do not argue that Rule 9253(a)(2) requires production of the statements at issue, and rely solely upon Rule 9253(a)(1), applicable only to “substantially verbatim” recitations of oral statements. But there is no showing to rebut Enforcement’s assertion that the materials are not “substantially verbatim” recitations of the witness’ statements.

Indeed, Enforcement has already produced the interview memorandum of witness RJ as a part of its proposed prehearing exhibits, and my review of the memorandum confirms that it is not a “substantially verbatim” recitation of the witness’ statements.<sup>29</sup> And Enforcement represents that while it maintains notes of other witness interviews, it has no other interview memoranda. Consequently, there do not appear to be witness statements required to be produced

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employees of the Association when evidence of those statements are offered by Association staff during disciplinary hearings”).

<sup>27</sup> FINRA Rule 9253(a)(2) (emphasis supplied).

<sup>28</sup> See *Dep’t of Enforcement v. Sturm*, No. CAF000033, 2002 NASD Discip. LEXIS 2, at \*19 (NAC Mar. 21, 2002) (testifying investigator’s memorandum of interview with respondent need not be produced because testimony “did not relate to any oral statements made by [respondent] during a routine examination”); OHO Order 05-43 (C05050005) (Dec. 5, 2005), at 2, [http://www.finra.org/sites/default/files/OHODecision/p016006\\_0\\_0.pdf](http://www.finra.org/sites/default/files/OHODecision/p016006_0_0.pdf) (“because the notes were not taken during a routine examination or inspection, Rule 9253(a)(2) does not apply”). On the other hand, when it approved the amendment to the rule the SEC appeared to suggest that the amendment would *not* limit the application of Rule 9253(a)(2) to “routine examinations.” Exchange Act Release No. 343102, 2000 SEC LEXIS 1584, at \*6 (Aug. 1, 2000) (“The proposed modifications of [FINRA] Rule 9253 clarify that the only portions of routine examination or inspection reports, *internal employee communications*, and *any other internal documents* that are required to be produced, under this rule, are the portions outlining the substance of (and any conclusions regarding) oral statements made by persons who are not employees of the Association when evidence of those statements are offered by Association staff during disciplinary hearings.”). And see OHO Order 06-17 (C05050008) (Feb. 7, 2006), at 2, [http://www.finra.org/sites/default/files/OHODecision/p017573\\_0\\_0.pdf](http://www.finra.org/sites/default/files/OHODecision/p017573_0_0.pdf) (“The Notice to Members 00-56 (2000) explains that the language of Rule 9253(a)(2) means that the portions of routine examination or inspection reports, internal employee communications, and any other internal documents that outline the substance of (and any conclusions regarding) oral statements made by persons who are not employees of [FINRA] are required to be produced under the Rule if evidence of those statements is to be offered by the staff during a disciplinary hearing.”).

<sup>29</sup> The memorandum therefore cannot be regarded, without more, as a Jencks Act “statement” of the person being interviewed. See *Goldberg v. United States*, 425 U.S. 94, 104, 114-15 (1976) (Stevens, J., concurring) (“For if a witness could testify, without fear of contradiction, that the words used by the prosecutor were not his own, the document would not impeach his testimony and could not properly be offered for that purpose.”).

by Rule 9253(a)(1),<sup>30</sup> nor circumstances otherwise warranting disclosure of other notes,<sup>31</sup> and so this aspect of Respondents' motion is **DENIED**.<sup>32</sup>

### **E. Enforcement Need Not Produce Internal Legal Analysis**

In their written submission, Respondents also contend that Enforcement should be required to produce "material related to any determination that certain transactions were not 'complaint-worthy.'"<sup>33</sup> Respondents contend that such evidence, assuming it exists, is "materially exculpatory" and required to be produced under *Brady v. Maryland*, 373 U.S. 83 (1963).<sup>34</sup>

According to Respondents, only a portion of their saltwater disposal well transactions were alleged to be fraudulent in the complaint. Respondents complain that no documents have been produced that "reflect any analysis by Complainant or anyone else concerning why some saltwater disposal well transactions were Complaint-worthy and why others were not."<sup>35</sup>

Respondents thus appear to seek Enforcement's internal legal analysis concerning the charges it decided to bring based upon the transactions it investigated. To begin, Enforcement is permitted to withhold its internal legal analysis and assessment of evidence unless it contains materially exculpatory evidence.<sup>36</sup> So the question is whether there is reason to believe that the evidence Respondents seek is exculpatory.

I find that Respondents have offered no reason to believe the analysis it seeks is relevant, much less exculpatory. Even assuming Enforcement concluded that not every transaction Respondents engaged in was fraudulent, the law is clear that evidence that a respondent may *not* have committed a violation on another occasion is generally irrelevant to whether violations actually charged have been proven.<sup>37</sup> So, for instance, where a respondent allegedly engaged in fraudulent conduct, evidence from his "satisfied customers" in other transactions is "entire[ly]

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<sup>30</sup> Even assuming Respondents pressed the argument that interview memoranda were required to be produced under Rule 9253(a)(2), the production of the only memorandum in existence would moot the contention.

<sup>31</sup> See OHO Order 06-16 (C2040032) (Feb. 1, 2006), at 6, [http://www.finra.org/sites/default/files/OHODecision/p017574\\_0\\_0\\_0\\_0\\_0.pdf](http://www.finra.org/sites/default/files/OHODecision/p017574_0_0_0_0_0.pdf) (Hearing Officer ordered investigator's notes disclosed where investigator referred to notes during his testimony).

<sup>32</sup> Yesterday, the parties filed prehearing motions. Respondents again moved for production of interview memoranda and notes, but raised different arguments than those raised here. I take no position on these new arguments, and will await Enforcement's response before ruling on the latest application.

<sup>33</sup> Respondents' Opposition to Complainant's Response to Order Following Pre-Hearing Conference, at 8.

<sup>34</sup> In this forum, the requirement that Enforcement produce materially exculpatory evidence is memorialized by FINRA Rule 9251(b)(3).

<sup>35</sup> Respondents' Opposition to Complainant's Response to Order Following Pre-Hearing Conference, at 8.

<sup>36</sup> FINRA Rules 9251(b)(1), (b)(3).

<sup>37</sup> *Richard N. Cea*, 44 S.E.C. 8, 24 (1969) ("The credibility of the customers who testified in these proceedings and the validity of our findings based on their testimony would not be impaired even assuming that no fraudulent misrepresentations were made to other customers.").



irrelevant,” as misconduct in one instance “cannot be excused . . . by showing that others, even in large numbers, were satisfied with the treatment . . . accorded them.”<sup>38</sup>

Respondents rely upon OHO Order 04-26,<sup>39</sup> where a Hearing Officer required Enforcement to produce data and documents underlying a mathematical model that determined whether certain transactions were likely to cause customer losses, as alleged in the complaint in that case. But there, Enforcement intended to introduce the analysis and results of the challenged model at the hearing. So the details of the analysis, including the reliability of determinations that certain transactions were (or were not) unsuitable, was directly at issue. Not so here. Enforcement is inarguably vested with broad discretion as to what charges it may bring.<sup>40</sup> In the absence of any suggestion of selective prosecution, that discretion is not subject to serious challenge.<sup>41</sup>

Accordingly, the only transactions at issue here are those alleged in the Complaint, not others that Enforcement decided not to pursue. As I find no basis to compel the production of any internal analysis concluding “certain transactions were not ‘complaint-worthy,’” Respondents’ motion to compel such materials is **DENIED**.

## F. Conclusion

To the extent that Respondents seek an order compelling Enforcement to produce all documents obtained from third parties (other than any materials withheld under Rule 9251(b)) in connection with this proceeding, that application is **GRANTED**. Enforcement shall produce these materials forthwith. In all other respects, the application is **DENIED**.

**SO ORDERED.**



David Williams  
Hearing Officer

Dated: April 24, 2018

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<sup>38</sup> *Indep. Directory Corp. v. FTC*, 188 F.2d 468, 471 (2d Cir. 1951).

<sup>39</sup> OHO Order 04-26 (CAF040002), (Oct. 6, 2004), [http://www.finra.org/sites/default/files/OHODecision/p014432\\_0\\_0\\_0.pdf](http://www.finra.org/sites/default/files/OHODecision/p014432_0_0_0.pdf).

<sup>40</sup> *Dep't of Enforcement v. Olson*, No. 2010023349601, 2014 FINRA Discip. LEXIS 7, at \*15-16 (Bd. of Governors May 9, 2014), *aff'd*, Exchange Act Release No. 75868, 2015 SEC LEXIS 3629 (Sept. 3, 2015).

<sup>41</sup> *Eagletech Comm., Inc.*, Exchange Act Release No. 54095, 2006 SEC LEXIS 1534 at \*14-15 (Jul. 5, 2006) (Enforcement's decision not to prosecute is an exercise of “prosecutorial and regulatory discretion” that is “presumptively unreviewable”); *Dep't of Enforcement v. Merhi*, No. E072004044201, 2007 NASD Discip. LEXIS 9, at \*34 (NAC Feb 16, 2007) (FINRA has wide discretion in deciding against whom to proceed).

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