

NASD OFFICE OF HEARING OFFICERS

<p>DEPARTMENT OF ENFORCEMENT,</p> <p style="text-align: center;">Complainant,</p> <p style="text-align: center;">v.</p> <p style="text-align: center;">Respondents.</p>	<p>Disciplinary Proceeding No. C3B020015</p> <p>Hearing Officer—Andrew H. Perkins</p>
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**ORDER GRANTING IN PART AND DENYING IN PART
RESPONDENTS' MOTION TO COMPEL DISCOVERY**

On March 18, 2003, the Respondents filed a Motion in Support of Respondents' Request for Discovery ("Motion"). The Respondents attached to their Motion a "Request for Discovery" that they had served on the Department of Enforcement ("Department") the day before. On March 18, 2003, the same day the Respondents filed their Motion, the Department filed a response opposing the Respondents' requested relief. For the following reasons, the Hearing Officer grants the Respondents' Motion in part.

I. Background

The Department filed the Complaint against the Respondents on August 9, 2002, charging the Respondents, in general, with violations of NASD Conduct Rules governing books and records, net capital, and advertising. The Respondents answered the Complaint

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on September 17, 2002, by letter sent to counsel for the Department. Afterwards, the Department learned that _____ (“_____”) had filed a voluntary petition in bankruptcy before the Department filed the Complaint. _____ did not mention this fact in his Answer. Once the Department learned of the bankruptcy proceeding, it moved to stay this proceeding against _____. The Hearing Officer granted the Department's motion and continued the case as to _____ Financial Services, Inc. (“_____ Financial”).

On October 10, 2002, the Hearing Officer conducted an Initial Pre-Hearing Conference, at which, with the agreement of the Department and _____ Financial, the Hearing Officer set the case for hearing on February 5, 2003.

On January 6, 2003, the Department moved to vacate the stay as to _____ on the grounds that the United States Bankruptcy Court for the Western District of Washington had entered an Order Annuling and Modifying the Automatic Stay in _____'s bankruptcy case. The Order permitted the Department to proceed against _____ for non-monetary sanctions. On January 22, 2003, Respondents' present counsel entered his appearance on their behalf and moved for a continuance of the hearing. On January 27, 2003, the Hearing Officer terminated the stay and set a revised pre-hearing schedule. The hearing was continued to May 13–14, 2003.

On March 18, 2003, six months after the Respondents answered the Complaint and more than five months after the Department first offered to make documents available to the Respondents for inspection and copying, the Respondents filed the present Motion. The Respondents' first request to inspect the documents was made on February 2, 2003, by _____ after Respondents' counsel had entered his appearance.

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Counsel for the Department properly informed _____ that all communication should be made through counsel. Nevertheless, Respondents' counsel did not make a request of any type before filing the Motion.¹

II. Discussion

A. Motion to Compel Discovery Under Rule 9251

The Department's obligations under Code of Procedure Rule 9251 are not as broad as discovery in federal court. Rule 9251(a) requires the Department to make available to the defense for inspection and copying "[d]ocuments prepared or obtained by Interested Association Staff in connection with the investigation that led to the institution of proceedings." Generally, the Department may satisfy this obligation by informing the respondent that the covered documents are available at NASD's office where they are ordinarily maintained,² which the Department did in this case last October. Accordingly, the Hearing Officer finds that the defense has not been denied access to the documents subject to inspection and copying under Rule 9251 and that Respondents' Motion to compel their production is premature. The Hearing Officer therefore denies that portion of Respondents' Motion.

On the other hand, the Department has not pointed to any prejudice that will accrue to the Department if the Respondents are permitted now to inspect and copy the documents covered by Rule 9251. Accordingly, the Hearing Officer grants the Respondents until April 10, 2003, to complete their inspection of documents at NASD's office and to designate any documents they want copied at their expense.

¹ See Utevsky Decl. ¶¶ 2-5.

² See Rule 9251(e).

B. Motion for Production of Witness Statements Under Rule 9253

In addition to their request for production of documents under Rule 9251, the Respondents seek production of two categories of documents under Rule 9253. First, the Respondents request that the Hearing Officer enter an order compelling the Department to produce “all statements of any persons to be called by the Department of Enforcement which pertains or is expected to pertain to his or her direct testimony as defined by NASD Rule 9253(a)(1)” (Jencks Act³ material). Second, the Respondents request that the Hearing Officer enter an order compelling the Department to produce “all contemporaneously written statements made by an Interested Association Staff member during routine examination or inspection about the substance of oral statements made by a non-Association person when (a) either the Interested Association Staff member or non-Association person is called as a witness by the Department of Enforcement and (b) that portion of the statement for which production is sought directly relates to the Interested Association Staff members testimony or the testimony of the non-Association witness pursuant to NASD Rule 9253(b).” The Department does not oppose these requests on other than procedural grounds. Chiefly, the Department argues that the Respondents’ Motion is vague, and the Respondents did not make a good-faith effort to resolve the dispute before filing the present Motion.

The Hearing Officer overrules the Department’s objections to the Respondents’ request for production of witness statements under Rule 9253. The Department shall produce to the Respondents no later than April 28, 2003, copies of all witness statements covered by Rule 9253 that do not disclose NASD Staff’s “recording of mental

³ 18 U.S.C. § 3500.

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impressions, personal beliefs, trial strategy, legal conclusions, or anything else that could not fairly be said to be the witness's own statement."⁴ If there is a dispute as to any document, the Department shall submit the document for *in camera* review.

IT IS SO ORDERED.

Andrew H. Perkins
Hearing Officer

March 31, 2003

⁴ *Goldberg v. United States*, 425 U.S. 94 (1976).