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NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. Respondents.	Disciplinary Proceeding No. CAF000045 Hearing Officer—Andrew H. Perkins

ORDER DENYING RESPONDENTS' MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS AND FOR A LIST OF WITHHELD DOCUMENTS

In this proceeding, the Hearing Officer is called upon to determine the boundaries of the Department of Enforcement's obligations to produce documents relating to claims that this proceeding should be dismissed due to the Department's unwarranted and prejudicial delay in investigating and bringing this proceeding. The Respondents have moved for an order compelling the Department to search for and produce all documents within the files of the National Association of Securities Dealers, Inc. ("NASD"), NASD Regulation, Inc., and Nasdaq that would enable the Respondents to construct a chronology of the Department's

pursuit of the investigation that led to the filing of the Complaint and to determine when NASD Regulation first was on notice of the violations charged in the Complaint.

I. Background

The Department has charged _____ ("_____") and two individuals with violations of several NASD Conduct Rules in connection with the marketing of TCW/DW Term Trusts (the "Term Trusts") between October 1992 and November 1993. In essence, the Complaint alleges that _____'s internal sales materials, which it disseminated to its sales force, failed to disclose or obscured the true risks associated with investment in the Term Trusts. As a result, the sales force made misrepresentations in connection with sales of the Term Trusts and sold them to individuals for whom such an investment was not suitable. The individual Respondents are alleged to have been directly involved in the dissemination of this false information to the sales force.

As early as December 1995, the Department became "generally aware" that other regulatory agencies were looking into the sale of such securities by various broker-dealers, including _____. (Tr., Pre-Hearing Conference, Apr. 4, 2001, at 104-06.) In March 1996, the Department opened the investigation that led to the filing of the Complaint in this proceeding. The Department filed the Complaint in November 2000.

The Respondents have indicated through their Affirmative Defenses, motions, and arguments that they intend to file a motion to dismiss the Complaint on the grounds that the prosecution of this disciplinary proceeding is barred by the doctrine of laches and because the untimely prosecution of this matter is inherently unfair. To develop these affirmative defenses, the Respondents seek discovery of all documents falling within the following categories:

1) Documents obtained from and related to the investigation of the Term Trusts commenced by the New York Attorney General's Office in 1992.

2) Documents related to the investigation of individual customer complaints by the Florida Comptroller in 1995.

3) Documents evidencing and relating to any contacts between NASD Regulation staff and the SEC regarding other term trusts sold by other broker-dealers, as well as "possibly the TCW/DW Term Trusts." (_____ Aff. at 15.)

4) Documents regarding customer complaints sent to _____ in 1994 and 1995.

5) Documents relating to NASD Regulation's routine annual sales practice examinations, other examinations, or audits of _____ offices that sold Term Trust funds.

6) Documents regarding private civil actions containing allegations about the Term Trusts.

7) Investor questionnaires that were sent by Department staff to customers of the Term Trust funds, and the responses to such questionnaires.

8) Documents relating to interviews, meetings, and discussions between NASD Regulation staff and customers of the Term Trust funds.

9) Documents generated or maintained in NASD Regulation's district offices relating to customer complaints about the Term Trusts.

10) Documents from NASD Regulation's Advertising Department relating to the review of external sales literature for the Term Trusts.

11) Department internal notes and memoranda that reflect the chronology of the Department's investigation, before and after an official investigative file was opened, that would establish when and why delays occurred in the investigation.

II. Discussion

The Respondents assert that the foregoing documents contain material exculpatory evidence and hence are discoverable under NASD Code of Procedure Rule 9251 and the doctrine enunciated by the Supreme Court in Brady v. Maryland, 373 U.S. 83 (1963). For the reasons discussed below, the Hearing Officer finds that the Respondents' definition of the

Department's obligation to disclose material exculpatory evidence to be too broad. By incorporating the principles of Brady into Rule 9251(b)(2), the NASD did not intend to expand the Department's disclosure obligations beyond the bounds of Rule 9251(a).

A. The Department's Disclosure Obligations 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 "Documents prepared or obtained by Interested Association Staff in connection with the investigation that led to the institution of proceedings." For the purposes of a disciplinary proceeding such as this, Interested Association Staff are defined in Rule 9120(r)(1) as:

> (A) the Head of Enforcement;
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> (B) an employee of the Department of Enforcement who reports, directly or indirectly, to the Head of Enforcement;
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> (C) an Association employee who directly participated in the authorization of the complaint; [or]
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> (D) an Association employee who directly participated in an examination, investigation, prosecution, or litigation related to a specific disciplinary proceeding, and a district director or department head to whom such employee reports.

The Code of Procedure does not, on the other hand, define the phrase "in connection with the investigation that led to the institution of proceedings." However, it clearly limits disclosure to documents that are in some way linked to a specific disciplinary proceeding. Thus, for example, the Department is not obligated to disclose documents from a separate, unrelated investigation into alleged sales practice violations simply because the same security is involved in the current investigation.

From the foregoing universe of documents, the Department may withhold specific categories of documents. See Rule 9251(b)(1). These include documents falling within traditional definitions of privilege, such as documents subject to attorney-client privilege, as well as the following:

> (1) examination and inspection reports, internal memoranda, and other notes or writings prepared by an Association employee that shall not be offered in evidence;
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> (2) documents that would disclose (i) an examination, investigatory or enforcement technique or guideline of the Association, a federal, state, or foreign regulatory authority, or a self-regulatory organization; (ii) the identity of a source, including a federal, state, or foreign regulatory authority or a self-regulatory organization that furnished information or was furnished information on a confidential basis regarding an investigation, an examination, an enforcement proceeding, or any other type of civil or criminal enforcement action; or (iii) an examination, an investigation, an enforcement proceeding, or any other type of civil or criminal enforcement action under consideration by, or initiated by, the Association, a federal, state, or foreign regulatory authority, or a self-regulatory organization; and
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> (3) documents that the Hearing Officer permits the Department to withhold as not relevant to the subject matter of the proceeding, or for other good cause shown.

Rule 9251(b)(1). The NASD considered it essential that it be able to withhold the foregoing documents to ensure that the NASD's enforcement efforts are not impaired while at the same time protecting respondents' discovery rights. See Order Approving Proposed Rule Change, Exchange Act Release No. 38,908, 1997 SEC LEXIS 1617, at *134 n.194 (Aug. 7, 1997).

The Department's right to withhold documents under Rule 9251(b)(1) is itself limited by Rule 9251(b)(2), which states: "Nothing in subparagraph (b)(1) authorizes the Department of Enforcement . . . to withhold a document, or a part thereof, that contains material exculpatory evidence." "This provision is intended to be consistent with the doctrine enunciated in Brady."

Notice of Filing of Proposed Rule Change, Exchange Act Release No. 38,545, 1997 SEC LEXIS 959, at *14 n.99 (Apr. 24, 1997). However, the NASD has not provided guidance on how Brady, a criminal law doctrine, is to applied in NASD disciplinary proceedings. Hence, to set a standard for its application, it is necessary to review the origins of Brady and the manner in which it has been applied in other proceedings.

B. The Brady Doctrine

In Brady, the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. The Court later held that the duty encompasses impeachment evidence as well as exculpatory evidence. United States v. Bagley, 473 U.S. 667, 676 (1985). Arguably, Brady applies to all material exculpatory evidence regardless of whether its relevance derives from a defendant's affirmative defense. Cf. Bowen v. Maryland, 799 F.2d 593, 612-613 (10th Cir. 1986) (prosecutors violated Brady obligation by failing to reveal information about other suspects where defendant relied on alibi defense).

1. The Origin of Brady

In setting forth the principle that the government may not suppress material exculpatory evidence, the Supreme Court in Brady drew upon the "early 20th-century strictures against misrepresentation," Kyles v. Whitley, 514 U.S. 419, 423 (1995), and the Due Process Clause of the Fourteenth Amendment. See Brady, 373 U.S. at 86. Consistent with this doctrinal underpinning, in Brady the Supreme Court was not concerned with the defense's ability to prepare for trial, it was concerned with the prosecutor's ability to corrupt the trial by allowing

the introduction of false testimony. The Supreme Court stated that Brady was the extension of two prior cases: First, Mooney v. Holohan, 294 U.S. 103 (1935), in which the Supreme Court found a due process violation in a conviction that was based on perjury solicited by the government; and second, Napue v. Illinois, 360 U.S. 264 (1959), in which the Supreme Court found a similar violation when the government, although not soliciting false evidence, allows it to go uncorrected. See Brady, 373 U.S. at 86-87.

In Brady, the government presented the testimony of a witness who claimed that the defendant murdered a man. Despite the defendant's request, the government did not disclose that the witness had earlier confessed to the murder. The Supreme Court held that suppression of that evidence could violate due process. In the context of Mooney and Napue, it is clear that the Supreme Court in Brady was concerned about the danger that a witness may testify at a trial, with the jury accepting the testimony as true, when the government has in its possession evidence that is relevant to the credibility of the witness. Such a result undermines the system of administration of justice. In the words of the Supreme Court:

> A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice . . . .

Brady, 373 U.S. at 87-88.

Ultimately, Brady and its progeny are concerned with the "special role played by the American prosecutor in the search for truth in criminal trials." Strickler v. Greene, 527 U.S. 263, 281 (1999). As the Supreme Court explained in Strickler,

> the United States Attorney is "the representative not of an ordinary party to controversy, but of a sovereignty whose obligation to govern impartially is as

> compelling as its obligation to govern at all; and whose interest, therefore, in criminal prosecution is not that it shall win a case, but that justice shall be done."

(Id.) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)). "This special status explains both the basis for the prosecution's broad duty of disclosure and [its] conclusion that not every violation of that duty necessarily establishes that the outcome was unjust." (Id.) Although the term "Brady violation" is used to refer to any breach of the broad obligation to disclose exculpatory evidence, in a real sense Brady is not violated "unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." (Id.)

Given the Supreme Court's concern with the special role prosecutors play in the American criminal justice system, it is not surprising to find that Brady has not been applied to administrative proceedings. Because administrative proceedings are civil in nature, the same constitutional concerns are not present. Indeed, as the SEC has recognized, there is no constitutional requirement that administrative agencies apply Brady.[1] See In re City of Anaheim, 70 S.E.C. Docket, 1999 SEC LEXIS 1662 (July 30, 1999) (discussing federal agencies' application of Brady); see also Nicholaou v. SEC, 1996 U.S. App. LEXIS 10125, at *11 (6th Cir. Mar. 27, 1996) (on appeal of SEC approval of NYSE proceeding: "To our knowledge, that rule [Brady] has never been applied outside the criminal constitutional context in which it arose."); Gilbert v. Johnson, 419 F. Supp. 859, 877 (N.D. Ga. 1976) (procedural due process requirements in a criminal trial are not applicable in full to an administrative hearing). Nevertheless, some agencies have incorporated the principles set forth in Brady into their

procedural rules. See, e.g., SEC Rule 230(b)(2). In such cases, Brady's reach is defined by the applicable rule and not by due process analysis.

2. The Materiality Standard Governing the Discoverability of Evidence

Materiality typically is defined in criminal cases by examining the suppressed evidence in post-trial proceedings. From this perspective, information is considered material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 682.

This post-trial standard does not work well in the discovery phase of a proceeding. Seldom will a trial court be able to determine, before hearing all the other evidence bearing on the defendant's guilt, whether a piece of suppressed evidence was of such importance that it would have altered the trial's outcome. Accordingly, in the pre-trial phase of a proceeding, it is preferable to use a broader standard. As the Supreme Court recognized in Agurs, materiality is "inevitably [an] imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure." Agurs, 427 U.S. at 108. See also, e.g., United States v. Van Brandy, 726 F.2d 548, 552 (9th Cir. 1984). Brady emphasized the requirement that the prosecutor provide the defense with "evidence favorable to an accused." Brady, 373 U.S. at 87. "Favorable" evidence is that which relates to guilt or punishment and which tends to help the defense by either bolstering the defense's case or impeaching

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[1] Generally, the level of constitutional due process required varies with the nature of the proceeding and the possible consequences. E.g. Arnett v. Kennedy, 416 U.S. 134, 155 (1974).

prosecution witnesses. See Giglio v. United States, 405 U.S. 150, 154-55 (1972). Accordingly, the government is obligated to disclose all evidence relating to guilt or punishment that might reasonably be considered favorable to the defendant's case, which, if suppressed, would deprive the defendant of a fair trial. Bagley, 473 U.S. at 675. As a matter of fundamental fairness, this same standard should apply to pre-hearing disclosure in NASD disciplinary proceedings relating to liability and sanctions.

3. Limitations on the Scope of Brady

Although Brady generally should be applied to effect its purpose of assuring a fair hearing and a resulting decision which is "worthy of confidence," Smith v. Holtz, 210 F.3d 186, 196 (3d Cir. 2000), the extensive body of case law applying Brady in criminal trials has established certain limitations to its scope. First and foremost, Brady is not a discovery rule, Pennsylvania v. Ritchie, 480 U.S. 39, 59 (1987); it is a rule of fairness and minimum prosecutorial obligation. See United States v. Beasley, 576 F.2d 626 (5th Cir. 1978), cert. denied, 440 U.S. 947 (1979). Accordingly, the defense is not entitled to engage in a "fishing expedition" through the prosecutor's files in the hope of finding something helpful to their defense. See, e.g., In re Jett, 50 S.E.C. 830, 1996 SEC LEXIS 1683, at *1-2 (1996). Nor is the defense entitled to receive every scintilla of evidence that might be beneficial. See, e.g., Lieberman v. Washington, 128 F.3d 1085, 1092 (7th Cir. 1997). Second, there is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case," Moore v. Illinois, 408 U.S. 786, 795 (1972), or to disclose merely cumulative evidence, United States v. Gonzales, 121 F.3d 928, 946 (5th Cir. 1997), cert. denied, 522 U.S. 1063 (1998). Ultimately, Brady seeks to protect

the quality and completeness of the evidence upon which a proceeding is determined. Therefore, Brady does not require the disclosure of information that would only assist the defense in creating its trial strategy. See, e.g., United States v. LeRoy, 687 F.2d 610, 619 (2d Cir.), cert. denied, 459 U.S. 1174 (1983). Finally, because Brady is concerned with the suppression of evidence unknown to the defense, Brady is not violated by failing to disclose information already known to the defense. See United States v. Morris, 80 F.3d 1151, 1170 (7th Cir.), cert. denied, 519 U.S. 868 (1996); see also LeRoy, 687 F.2d at 618.

4. The Department's Obligation to Search for and Review Documents

The Respondents contend that Brady requires the Department to search throughout NASD and its affiliates for all documents that could possibly fall within the ambit of Brady. (Mot. at 3.) The Department, on the other hand, takes as narrow an approach as the Respondents' is wide. The Department argues that it need only review those documents that were prepared or obtained by Interested Association Staff and that are contained in the "investigative file" in the hands of the "team" working on this case. (Revised Opp'n at 13.) Both approaches overlook the disclosure framework in Rule 9251. The scope of the Department's search for documents is governed by Rule 9251(a), not Rule 9252(b)(2) or Brady. As discussed above, the universe of documents subject to disclosure is defined as those "[d]ocuments prepared or obtained by Interested Association Staff in connection with the investigation that led to the institution of proceedings." Rule 9251(b)(2), which incorporates Brady, does not expand this universe. Thus, the Respondents' contention that Rule 9251(b)(2) requires the Department to conduct an entity-wide search is misplaced.

On the other hand, the Department's approach is too restricted. The Department argues that it must only review those documents that made their way into the formal "investigatory file." Adoption of this standard would allow the Department (intentionally or unintentionally) to avoid disclosure of Brady evidence by limiting the contents of the "investigatory file,"[2] which could result in the suppression of evidence that Brady condemned. Cf., e.g., United States v. Morris, 80 F.3d at 1169 (Prosecutors may not "compartmentalize information so that only investigatory officers, and not the prosecutors themselves, would be aware of it."). Rule 9251(a)(1) does not permit such a limited approach.[3]

First, the Hearing Officer interprets the phrase "in connection with the investigation that led to the institution of proceedings" in Rule 9251(a)(1), to include any document specified in Rule 9251(a)(1) that is obtained or generated during the course of an investigation or inquiry by any Association employee. The fact that the documents may have been generated or gathered by Association employees outside of the Department is of no consequence. Second, under Rule 9251(a)(1), counsel for the Department is obligated to disclose evidence that is in the possession, custody, or control of either (1) any employee of the Department or (2) any employee of the Association[4] who directly participated in an examination, investigation, prosecution, or litigation related to this proceeding, the existence of which is known, or by the exercise of due diligence may become known, to counsel for the Department. Thus, counsel for

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[2] The Department has not explained its definition of the "investigatory file."

[3] Cf. Rule 9251(a)(2), which requires disclosure of documents obtained by the Department pursuant to post-complaint requests for information issued "under the same investigatory file number."

[4] The term "Association," as used in Rule 9251(b)(2), means, "collectively, the NASD, NASD Regulation, and Nasdaq." Rule 0120(b).

the Department has a duty to search for and review documents that may be in the possession of these other persons who also participated in some manner in this or a related proceeding, irrespective of whether they are maintained in the formal "investigatory file." Counsel for the Department, however, is not required to search for documents outside the Association, such as those that may be in the possession of other self-regulatory organizations, the SEC, or the Department of Justice.

C. The Background of the Present Dispute

The Respondents argue that the eleven "gaps" or categories of documents they identified fall within the Brady doctrine because they bear directly upon their affirmative defenses that this proceeding should be barred under the doctrine of laches and the principle recently set forth by the Securities and Exchange Commission ("SEC") in In re Hayden, 2000 SEC LEXIS 946 (May 11, 2000). The SEC in Hayden overturned disciplinary sanctions imposed by the New York Stock Exchange ("NYSE") on the grounds "that the delay in the underlying proceedings was inherently unfair." Id. at *6. The SEC cited several factors in support of its holding: (1) when the misconduct occurred; (2) when the NYSE was "informed about significant misconduct" by the respondent through a "'voluminous' sales practice examination report;" (3) when the NYSE began its investigation; and (4) when the charges were brought. Id. at *5. Thus, the Respondents contend that they are entitled to all documents that shed any light on these elements. (Mot. at 6.)

According to the Respondents, on or about January 11, 2001, the Department produced documents to the Respondents pursuant to Rule 9251. The production consisted of 38 boxes of documents containing approximately 80,000 pages. (_____ Aff. at ¶ 2.) Upon

review, the Respondents determined that a substantial portion of the documents produced were the same documents _____ had given to NASD Regulation and the New York State Attorney General. (Id. ¶ 6.) The Respondents estimate that only about 8% of the entire body of documents the Department produced came from the Department's own files. (Id. ¶ 8.) Missing from the production were any documents demonstrating when the NASD was put on notice of alleged problems with the sale and suitability of the Term Trusts. (Id. ¶ 4.) The Respondents then contacted counsel for the Department and requested the Department to supplement its production to include these materials.

At the Initial Pre-Hearing Conference on January 22, 2001, the Respondents raised this issue with the Hearing Officer, indicating that these documents were vital to their Hayden and laches defenses. In addition, the Respondents indicated that they intended to file a motion to dismiss the Complaint under the rationale of Hayden once the Department completed its disclosure under Rule 9251. In response, counsel for the Department stated that he "hadn't really thought about this issue before [the Respondents] mentioned it, [namely, the issue of whether the documents withheld by [the Department] could be exculpatory in relation to Hayden and Respondents' other defenses], because it really pertains to their affirmative defenses. . . ." (Jan. 22 Tr. 6-7.) The Hearing Officer, therefore, directed counsel for the Department to review the documents they had withheld from production for any exculpatory evidence that would be covered by the Brady doctrine.

Upon further review, the Department reported that it had not withheld any exculpatory documents that should have been produced under Rule 9251(b)(2) and Brady. This led to the

filing of the present motion by the Respondents, which was argued at a pre-hearing conference in New York City on April 4, 2001.

The Department opposes this request on the grounds that the request is really a discovery request for a far broader category of documents than the Respondents are entitled to under Brady. The Department also argues that the Respondents' request is an attempt on the Respondents' part to overburden the Department with improper requests to avoid resolution of the case on the merits. (Revised Mot. at 13.)

In addition to its arguments in opposition to the Respondents' motion, the Department also filed a sworn declaration with its Opposition ("Gokhale Decl.") affirmatively stating that it had produced: (1) the Department's requests for information issued pursuant to NASD Procedural Rule 8210, and the responses to those requests; (2) every other written request for information directed to non-regulatory persons and organizations, and the responses to those requests; (3) hundreds of customer complaint files; (4) prospectuses and promotional materials _____ used for each of the three Term Trusts; (5) transcripts of investigative testimony; and (6) the exhibits that were used during the taking of such investigative testimony. (Gokhale Decl. ¶ 3.) Further, the Department selectively pointed to several items the Respondents request to demonstrate that their request is improper. (Id. ¶ 5.) The Department urges the Hearing Officer to accept this declaration as conclusive evidence that the Department complied with its obligations under Rule 9251(b)(2). The Department's opposition and Declaration, however, do not show that the Department carried out a review consistent with the standard set forth in this Order. Accordingly, the Department shall supplement its declaration to reflect that it has conducted an appropriate search. Except as excluded below, the declaration should address

each of the categories of documents the Respondents identified. The Respondents shall then be granted leave to respond to the Department's supplemental filing.

D. The Respondents' Requests

1. Documents obtained from and related to the investigation of the Term Trusts commenced by the New York Attorney General's Office in 1992.

The Respondents seek full production of all documents showing when NASD Regulation obtained information from the New York Attorney General, including when NASD Regulation staff first discussed the Term Trusts with any representative of the New York Attorney General. (_____ Aff. ¶¶ 10-11.) At the pre-hearing conference on April 4, 2001, counsel for the Department stated that NASD Regulation did not obtain any documents from the New York Attorney General before 1996 when NASD Regulation initiated the investigation that led to the filing of the Complaint in this matter. (Tr., Pre-Hearing Conference, Apr. 4, 2001, at 104.) The Hearing Officer cannot determine from the Department's response, however, whether there are documents generated by Interested Association Staff relating to any contacts with the New York Attorney General (such as notes of telephone calls or meetings) that might arguably constitute Brady material. Accordingly, the Department shall supplement its declaration to clarify that it has searched for documents that arguably could reflect that NASD Regulation staff was informed of the misconduct alleged in the Complaint before it formerly opened the "investigatory file." But, because the relevant information under Hayden is limited to the when the Department was first "informed" of the alleged misconduct, the Respondents' request for documents obtained after the investigation commenced is denied. Such documents are not exculpatory within the meaning of Brady.

2. Documents evidencing and relating to any contacts between NASD Regulation staff and the SEC regarding other term trusts sold by other broker-dealers, as well as "possibly the TCW/DW Term Trusts." (_____ Aff. at 15.)

The request for documents related to other products and other broker-dealers is denied. While this material might prove helpful to the Respondents in developing their litigation strategy, it does not fall within Brady, and it need not therefore be produced.

3. Investor questionnaires that were sent by Department staff to customers of the Term Trust funds, and the responses to such questionnaires.

The Departments' declaration states that it has produced all of the documents falling within this category. (Gokhale Decl. ¶ 3.) Accordingly, the Respondents' motion for production of these documents is denied.

4. Department internal notes and memoranda that reflect the chronology of the Department's investigation, before and after an official investigative file was opened, that would establish when and why delays occurred in the investigation.

The final document request relates to the Respondents' laches defense. The equitable doctrine of laches can bar a claim when two elements are present: (1) lack of diligence by the party against whom the defense is asserted; and (2) prejudice to the party asserting the defense. Costello v. United States, 365 U.S. 265, 282 (1961). Although there are no reported cases where an NASD disciplinary proceeding has been dismissed due to laches, the SEC has indicated that laches could apply if the respondent established these two elements. See, e.g., In re Pinchas, Exchange Act Release No. 41,816, 1999 SEC LEXIS 1754, at *28 (Sept. 1, 1999).

In this case, the Respondents make the novel argument that since they bear the burden of showing that any delay in bringing the action was inexcusable, all documents relating to the Department's pursuit of the investigation that led up to the filing of the Complaint are Brady material. In effect, the Respondents seek a complete accounting of the Department's efforts in bringing this case, including access to all privileged materials in the Department's files. The Respondents cite no authority for their request, and the Hearing Officer finds that Brady does not entitle the Respondents access to this information.

As a threshold matter, the doctrine of laches does not require the degree of proof the Respondents suggest. Ultimately, the inquiry focuses on whether the complainant filed the case within a reasonable period of time. See Costello v. United States, 365 U.S. at 282. The determination of this issue does not hinge on a day-by-day analysis of the steps the complainant took to investigate and prepare its case. Moreover, to make the analysis the Respondents suggest would force the Hearing Panel to substitute its judgment for that of the complainant's attorneys, requiring the Hearing Panel to conduct a factual inquiry of all of the considerations that went into each step of the investigation. Such an invasion into the investigatory process and counsel's work product is unjustified and unworkable. Indeed, if applied in the manner the Respondents urge, anytime a respondent raised laches among its defenses, regardless of its merits, the respondent would be entitled to go on a fishing expedition through the complainant's confidential files. Neither Rule 9251(b)(2) nor Brady compel such a result.

Unlike a statute of limitations, the doctrine of laches does not mandate dismissal of an action. As an equitable doctrine, the existence of laches is a question primarily addressed to the discretion of the trial court. See, e.g., Mile High Industries v. Cohen, 222 F.3d 845, 857 (10th

Cir. 2000). The issue of laches depends on whether equitable relief cannot be afforded without doing injustice. (Id.) (quoting Penn Mutual Life Insurance Co. v. Austin, 168 U.S. 685, 687 (1898)). Laches is considered an equitable defense, controlled by equitable considerations. (Id.) (quoting Halstead v. Grinnan, 152 U.S. 412, 417 (1894)). Thus, application of laches does not depend upon the granular review the Respondents claim is needed.

However, even if the documents the Respondents seek were considered relevant and essential to the issue of laches, they are not discoverable under Rule 9251(b)(2) and Brady. As discussed above, Brady does not require the production of evidence known to or otherwise available to the defense. The Respondents' request falls within this category. For example, the Respondents point to the eleven-month gap between the Department's request for a Wells submission in September 1999 and the filing of the Complaint. (Mot. at 12.) The Respondents argue that, under Brady, they are entitled to all documents reflecting the reasons for this "inordinate delay." (Id.) Assuming that this delay is relevant to the issue of laches, it is the fact of the delay and its duration that is arguably exculpatory under Brady, not the causes. Thus, the Department cannot be found to be suppressing material exculpatory evidence known only to the Department. Accordingly, this material is not covered by Rule 9251(b)(2).

The Respondents also seek internal memoranda containing the opinions of Department staff concerning the progress of the investigation and the reasons for the perceived delays associated with the investigation. Such opinion material also is not covered by Brady, which requires the disclosure of facts. There is a significant distinction between the two in this context. If the Respondents' view were to prevail, virtually any statement in an Association memorandum that was not wholly laudatory of the staff's efforts during the investigation would be discoverable

on the theory that it is or could lead to evidence favorable to the Respondents. This would inhibit the written exchange of ideas among Department staff and thereby discourage the kind of candid, self-critical deliberation that should precede the request for the authorization of a Complaint.

For the foregoing reasons, the Hearing Officer denies the Respondents' request for "internal notes and memoranda that reflect the chronology of the Department's investigation, before and after an official investigative file was opened, that would establish when and why delays occurred in the investigation."

III. Order

The Hearing Officer orders the Department to file a supplemental declaration setting forth its compliance with this Order no later than May 31, 2001. The Department specifically shall certify that it has conducted a search for all documents encompassed by Rule 9251(a), regardless of whether they are within the official "investigatory file," and that it has made all those documents available to the defense for inspection and copying, which are not subject to protection under Rule 9251(b)(1). As to the documents that fall under Rule 9251(b)(1), the Department shall certify that it has reviewed those documents for Brady material in accordance with the standards set forth in this Order. The Department also should address each of the categories of documents the Respondents identified, except as modified by this Order. The Respondents shall have 14 days to file a response, if any.

This Order has been published by the NASDR Office of Hearing Officers and should be cited as OHO Order 01-13 (CAF000045).

The Hearing Officer denies the Respondents' motion to compel the Department to file a withheld document list.

SO ORDERED.

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Andrew H. Perkins
Hearing Officer

May 17, 2001