

**NASD OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Disciplinary Proceeding  
No. CLI050016

Hearing Officer – DMF

**ORDER DENYING RESPONDENT'S MOTION TO COMPEL DISCOVERY**

On December 30, 2005, Respondent filed a Second Motion to Compel Third-Party Discovery. The Department of Enforcement opposes the motion.

The Complaint charges that Respondent violated Rule 2110 by falsifying the customers' addresses on 21 variable annuity policy applications in order to sell New York customers annuities that were not approved for sale in New York. Respondent filed his initial discovery motion in July 2005, prior to the initial pre-hearing conference. In the motion, Respondent sought to obtain seven categories of documents from MONY Securities Corporation, his employer at the relevant time. At the conference, Enforcement volunteered to issue a Rule 8210 request to MONY seeking the documents, so it was unnecessary for the Hearing Officer to rule on the motion. Initially, MONY provided some responsive documents, but raised questions and concerns about the requests. Eventually, those issues were resolved as to six of the seven requests, but the parties and MONY reached an impasse as to the seventh, and Enforcement advised that it did not wish to attempt to compel MONY to provide those materials. Respondent then moved, pursuant to Rule 9252, for an order compelling MONY to provide the documents.

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Rule 9252 authorizes the Hearing Officer to invoke Rule 8210 to compel a person subject to NASD's jurisdiction to produce documents or provide testimony. The Hearing Officer may grant such relief "only upon a showing that: the information sought is relevant, material, and non-cumulative ...." Further, the rule provides that if the Hearing Officer "determines that a request submitted pursuant to this Rule is unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she shall deny the request, or grant it only under such conditions as fairness requires."

In this case, Respondent requests that MONY be ordered to produce: "All MONY documents relating to [19 named individuals], including, but not limited to, all of their complete employee files." Respondent contends that these materials are "likely to support [Respondent's] defenses in several ways. MONY documents may either exonerate [Respondent] and/or reinforce his defenses if they show or tend to show that MONY: (1) encouraged the alleged falsification conduct at issue; (2) encouraged similar conduct to pressure agents to keep business within MONY; or (3) terminated [Respondent] after he became embroiled in a political dispute with a colleague ... who was closely connected with high-ranking MONY officials ...."

With respect to the first two contentions, Respondent argues that Enforcement's charge rests on the premise that the alleged falsification of the applications deceived and damaged MONY, by causing it to issue contracts to New York residents that were not approved for sale in that state. Respondent urges that evidence that MONY knew of and encouraged such actions would seriously undermine this premise. As to his third contention, Respondent argues that evidence that MONY terminated Respondent for reasons unrelated to his falsification of applications would also undermine Enforcement's charge.

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Respondent has made no showing in his motion, however, that the 19 employee files contain, or are likely to contain, such evidence. In the absence of such a showing, it appears that Respondent wishes to engage in a fishing expedition, which is not permitted under Rule 9252. Moreover, Respondent's contention that the Complaint rests on the premise that the falsification of the annuity contract applications injured MONY is incorrect. As a self-regulatory organization, NASD has an independent responsibility to ensure that registered representatives fulfill their obligation under Rule 2110 to "observe high standards of commercial honor," and it is well established that the falsification of documents such as annuity applications is unethical conduct that violates that standard. Thus, even assuming, arguendo, that MONY "encouraged" Respondent to falsify applications,<sup>1</sup> or "pressured" its representatives to sell MONY products,<sup>2</sup> that would not preclude NASD from taking disciplinary action against Respondent. And evidence concerning MONY's motives for terminating Respondent would be neither relevant nor material to the charge in the Complaint.

Respondent further argues that his request is not oppressive or unduly burdensome, because MONY has isolated the responsive documents, which comprise no more than five boxes. He also contends that the request is not excessive in scope, because he "has only

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<sup>1</sup> The Hearing Officer notes that in Respondent's various statements submitted by the parties in support of or in opposition to Enforcement's pending motion for summary disposition, he has never stated that MONY "encouraged the alleged falsification at issue," or was even aware of it. He has asserted that MONY was aware of a practice of representatives arranging to have New York customers execute annuity applications "one-step-over-the-border" in a state where the annuities were available, but he also testified during NASD's investigation that MONY subsequently "changed their procedures. They now required, instead of just ... putting their New York address and simply signing, as if we were physically in New Jersey or Connecticut, they now came back to us [and] said it required either a residential address or they needed to be working there." Respondent did not claim that MONY ever approved or was aware of his practice of falsifying addresses on applications, and indeed testified that when he falsified the addresses he "thought it was an internal MONY policy issue rule that I was, you know, I was violating. But, you know, hindsight, obviously I know that was wrong."

<sup>2</sup> NASD member firms may legitimately limit the securities sold by their representatives. Pursuant to Rule 3040, if MONY allowed a MONY representative, such as Respondent, to sell a non-MONY securities product, such as a variable annuity, for compensation, MONY would have to record the transaction on its books and supervise the representative as if the transaction were executed on behalf of MONY.

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requested MONY documents specific to individuals that he believes may exonerate him and/or support his defenses.”

The volume of responsive documents, however, is only one measure of burden. Respondent's request, by its terms, encompasses, but is not limited to, MONY's "complete employee files" for 19 individuals who are not parties to this proceeding. Employee files typically include a variety of documents that may contain confidential or sensitive information about the employee. Requiring MONY to disclose such information to Respondent could only be justified if the request were narrowly tailored to obtain information that Respondent had shown was relevant and material to the issues in this proceeding. Instead, on its face Respondent's request requires the production of all materials in these employees' files, without regard to whether they have any bearing on the issues here.

Respondent contends that his counsel "made it quite clear on a December 8, 2005 conference call with the DOE and MONY representatives that the discovery demand was limited to MONY documents that would not reveal medical, financial, or otherwise sensitive personal information," but under Rule 9252 it was Respondent's obligation to articulate a clear, narrowly tailored demand seeking only relevant and material documents. He cannot impose on MONY the responsibility to reframe and interpret a request that is excessive on its face. Moreover, Respondent does not dispute Enforcement's representation that he rejected MONY's offer to allow his counsel to review all the documents in the employee files in order to identify which, if any, specific documents he believed would be potentially relevant to his defense. According to Enforcement, MONY proposed that it would then either produce the identified documents (redacting confidential information if necessary) or seek a protective order as to those identified documents that it believed could not be redacted to eliminate privacy concerns. Respondent has

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characterized this offer as “meaningless” and “a baseless delay tactic,” suggesting that if the files include documents containing confidential information, “one would argue that [Respondent’s] counsel should have no access.” The Hearing Officer agrees with this last observation. It appears that MONY has made extraordinary efforts to accommodate a request that is unreasonable and over-broad, but Respondent without justification rejected MONY’s more than reasonable proposal.

Thus, the Hearing Officer finds that Respondent has failed to demonstrate that the documents he seeks would include any relevant and material evidence. Moreover, even assuming that the 19 employee files might contain some relevant and material evidence, Respondent’s sweeping request for the files is unreasonable, excessive in scope and unduly burdensome. Respondent’s motion, therefore, is denied.

**SO ORDERED.**

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David M. FitzGerald  
Hearing Officer

Dated: January 10, 2005