

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

WILLIAM JAMES POTTER  
(CRD No. 1281826),

Respondent.

Disciplinary Proceeding  
No. 2017052871401

Hearing Officer–MC

**ORDER DENYING RESPONDENT'S MOTION FOR DISCOVERY  
AND MOTION PURSUANT TO RULE 9253**

**I. Introduction**

On November 9, 2018, Respondent filed a Motion for Discovery (“Discovery Motion”) and on November 19, an Amended Motion Pursuant to Rule 9253 (“Rule 9253 Motion”). On November 20, the Department of Enforcement filed objections to both motions. For the reasons given below, I deny Respondent’s motions.

**II. Background**

The Complaint in this case charges Respondent with conversion and misuse of monies entrusted to him by third parties involved in a real estate transaction.

**III. Discovery Motion**

**A. Respondent’s Motion and Enforcement’s Opposition**

After reviewing the discovery Enforcement produced pursuant to FINRA Rule 9251, Respondent filed his Discovery Motion seeking an order requiring Enforcement to provide a withheld document list identifying all documents not produced and explaining the basis for withholding any such documents. The Discovery Motion also requests that Enforcement provide a privilege log if it withheld any documents on the basis of privilege.

In the Discovery Motion, Respondent repeatedly states that there is no evidence that any party to the transaction underlying the Complaint contacted Enforcement complaining that

Respondent did something wrong.<sup>1</sup> This leads Respondent to surmise “documents are missing, or . . . there was no basis for the underlying investigation, or the filing of this complaint.”<sup>2</sup>

Enforcement filed an opposition and a supporting sworn declaration by its counsel.<sup>3</sup> In its filings, Enforcement asserts that it did not withhold any discovery in violation of Rule 9251, and it provided Respondent with “all materials providing the factual bases” supporting the Complaint.<sup>4</sup>

Enforcement explains that this case did not originate with a complaint from the parties to the real estate transaction, but a telephone tip from a United States Postal Inspection Service (“USPIS”) inspector investigating a possible wire fraud. The inspector contacted a FINRA surveillance director, who then prepared an internal staff memorandum documenting the tip, summarizing the call, and describing prior FINRA matters relating to Respondent.<sup>5</sup> Enforcement did not produce the internal staff memorandum, explaining that the memorandum contains no material exculpatory information, is an internal document, and concerns FINRA investigative procedures. For these reasons, and because Enforcement does not intend to offer it into evidence, it does not believe it is required to produce the memorandum.<sup>6</sup>

Enforcement states the discovery it provided consists of documents it gathered from the investigation of this matter and a prior matter. The prior matter also involved alleged misuse of funds and concluded with the issuance of a Letter of Caution to Respondent.<sup>7</sup> Enforcement asserts that it produced all documents within the purview of Rule 9251 relating to both matters.<sup>8</sup> Enforcement also details its communications with Respondent’s counsel and efforts to answer his questions about the materials.

## **B. Discussion**

Rule 9251 sets forth Enforcement’s discovery obligations. FINRA Rule 9251(a) requires Enforcement to produce documents it “prepared or obtained . . . in connection with the investigation that led to the institution of proceedings.” Rule 9251(b) permits Enforcement to withhold a document that is an internal memorandum or other writing by a FINRA employee that will not be offered in evidence. Rule 9251(c) permits a hearing officer to require Enforcement to submit a list of withheld documents upon motion of a respondent when there is “some reason to believe” Enforcement is improperly withholding documents.

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<sup>1</sup> Respondent’s Motion for Discovery ¶¶ 4, 7, 8, 9, 11, 13.

<sup>2</sup> *Id.* ¶13.

<sup>3</sup> Department of Enforcement’s Opposition to Respondent’s Motion for Discovery.

<sup>4</sup> *Id.* at 7.

<sup>5</sup> *Id.* at 3.

<sup>6</sup> *Id.* at 8.

<sup>7</sup> *Id.* at 3.

<sup>8</sup> *Id.* at 4.

In this case, Respondent's motion is predicated on the assumption that because Enforcement did not produce evidence of a formal complaint filed by parties to the transaction that led to the investigation of this matter, it must be improperly withholding documents. Respondent has provided nothing to substantiate the assumption.

In its sworn declaration and opposition motion, Enforcement gives a detailed account of its efforts to provide in discovery, on an accelerated basis, all documents that FINRA rules require it to produce. Enforcement also describes the answers it offered to Respondent's counsel about the origin of the investigation and the discovery related to it. Based on these representations, and the absence of any evidence supporting Respondent's assumption, I find no reason to believe Enforcement is improperly withholding any documents from Respondent.

For these reasons, I deny the Discovery Motion.

#### **IV. Rule 9253 Motion**

##### **A. Respondent's Motion and Enforcement's Opposition**

In his Rule 9253 Motion Respondent reiterates the arguments from his Discovery Motion and moves for an order directing Enforcement to produce all witness statements and contemporaneously written statements of any witness Enforcement expects to testify. Respondent argues that Enforcement "allegedly produced its investigative file" but it lacks "any documents to support some of the more significant allegations."<sup>9</sup> Respondent does not identify these allegations.

Enforcement filed an opposition supported by a sworn declaration by counsel representing that it does not possess any witness statements Respondent requests under Rule 9253.

Enforcement also points out that Respondent's counsel did not meet and confer with Enforcement before filing the motion, as the Case Management and Scheduling Order requires, and avers that had he done so, Enforcement would have informed him it does not possess the statements Respondent seeks.<sup>10</sup>

##### **B. Discussion**

FINRA Rule 9253 allows a respondent to file a motion requesting Enforcement to produce a substantially verbatim contemporaneous recital of a statement of the witness it will call pertaining to the expected direct testimony of that witness.

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<sup>9</sup> Rule 9253 Motion, at 1–2.

<sup>10</sup> *Id.* at 1–2.

Based on the representations in Enforcement's sworn declaration, it appears Enforcement has fully satisfied its discovery obligations and does not have any statements it should produce pursuant to Rule 9253.

Furthermore, it also appears that Respondent's counsel did not confer with Enforcement before filing the Amended Motion, as the Case Management Order issued in this case requires.

For these reasons, I deny the Rule 9253 Motion.

**SO ORDERED.**

A handwritten signature in blue ink that reads "Matthew Campbell". The signature is written in a cursive style and is positioned above the printed name.

Matthew Campbell  
Hearing Officer

Dated: November 23, 2018

Copies to:

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