

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

RESPONDENT,

Respondent.

Disciplinary Proceeding
No. 2012034936005

Hearing Officer—CC

**ORDER DENYING RESPONDENT'S MOTION TO COMPEL PRODUCTION OF
DOCUMENTS AND RULE 9252 MOTION**

I. Background

The Complaint in this matter alleges in cause one that Respondent knowingly or recklessly made false and misleading oral and written statements to customers in connection with the sales of the debentures of GWG, Inc. ("GWG"). Cause two of the Complaint alleges that Respondent negligently made the false and misleading statements alleged in cause one. Cause three of the Complaint alleges that Respondent made unsuitable recommendations to customers to purchase GWG debentures. Cause four of the Complaint alleges that Respondent distributed to customers a misleading sales brochure regarding GWG debentures. Cause five alleges that Respondent caused his firm to maintain inaccurate books and records. The Complaint alleges that the misconduct occurred between March 2012 and January 2013. Respondent denies that he engaged in the misconduct alleged and avers that he complied with the policies and procedures of member firm Center Street Securities, Inc. ("Center Street"), the firm with which he was associated during the relevant period.

On December 30, 2014, Respondent filed a motion to require the Department of Enforcement ("Enforcement") to produce documents pursuant to FINRA Rules 9251 and 9253. Respondent also requested in a separate filing that FINRA request documents from Arque Capital, LTD. ("Arque") pursuant to FINRA Rule 8210. Enforcement opposed both requests and states that it has fully complied with the discovery requirements of FINRA Rule 9251. Enforcement argues that many of the documents that Respondent seeks do not exist in Enforcement's files, that Respondent's requests are based on mere speculation, and that the requests exceed the scope of Rules 9251 and 9253.

II. Motion to Compel Production of Documents

A. Respondent's Request

Respondent contends that Enforcement failed to produce all documents required by FINRA Rule 9251. Respondent's motion seeks documents that fall into three categories. One category relates to documents from or involving GWG. The second category relates to documents in the possession of or from Arque. The third category relates to Enforcement's contact with Respondent's customers.

B. Discussion

FINRA Rule 9251(a) establishes "the outside limit of discovery in FINRA disciplinary proceedings, which is substantially less than the scope of discovery permitted in federal court under the Federal Rules of Civil Procedure."¹ Pursuant to FINRA Rule 9251(a), Enforcement is obligated to allow respondents to inspect and copy non-privileged "documents prepared or obtained by Interested FINRA Staff in connection with the investigation that led to the institution of proceedings."² Notwithstanding this obligation, Enforcement may withhold any documents protected by FINRA Rules 9251(b)(1) and (b)(2), which include: documents subject to attorney-client privilege; attorney work product; internal reports, memoranda, notes, and other writings prepared by FINRA staff that shall not be offered as evidence; documents that would reveal an enforcement technique or guideline, the identity of a source, or an action under consideration by a regulator; and documents prohibited from disclosure by federal law.

Enforcement's ability to withhold otherwise discoverable documents is limited by FINRA Rule 9251(b)(3), which requires Enforcement to produce any document it withheld if it contains "material exculpatory evidence." In a FINRA disciplinary proceeding, "material evidence" is evidence relating to liability or sanctions that might be considered favorable to the respondent's case, which, if suppressed, would deprive the respondent of a fair hearing.³ FINRA applies Rule 9251(b)(3) consonant with the principles enunciated by the United States Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963). 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."⁴

¹ OHO Order 09-04 (2006006259501) (Nov. 24, 2009), at 2, available at <http://www.finra.org/web/groups/industry/@ip/@enf/@adj/documents/ohodecisions/p120524.pdf>.

² The term "Interested FINRA Staff" is defined in FINRA Rule 9120(t)(1).

³ See OHO Order 12-04 (2010023367001) (Aug. 30, 2012), at 2-3, available at <http://www.finra.org/web/groups/industry/@ip/@enf/@adj/documents/ohodecisions/p229424.pdf>; OHO Order 07-29 (2005001919501) (July 13, 2007), at 7, available at <http://www.finra.org/web/groups/industry/@ip/@enf/@adj/documents/ohodecisions/p037091.pdf>.

⁴ *Brady*, 373 U.S. at 87. The Supreme Court later held that the duty encompasses impeachment evidence as well as exculpatory evidence. See *United States v. Bagley*, 473 U.S. 667, 676 (1985).

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Another constraint on Enforcement's right to withhold documents is Rule 9253, which requires Enforcement to produce certain types of "witness statements." Rule 9253(a)(1) requires Enforcement to produce any document containing a substantially verbatim transcription of a statement made by a potential witness, where the transcription was made contemporaneously with the making of the statement. Rule 9253(a)(1) is FINRA's analogue to the Jencks Act, 18 U.S.C. § 3500(e)(2). Rule 9253(a)(2) requires Enforcement to produce a contemporaneously written statement made by an interested FINRA staff member during a routine exam or inspection about the substance of oral statements made by a non-FINRA person if either person is called as a witness and the statement for which production is sought directly relates to that person's testimony.

Respondent bears the burden of establishing a basis for claiming that Enforcement's withheld documents must be produced.⁵ Mere speculation from the Respondent that FINRA documents may contain material exculpatory information is not sufficient to warrant production.⁶ In order to justify such a request, a respondent must "first establish a basis for claiming that the documents contain material exculpatory evidence" by making a "plausible showing" that the requested documents contain information that is both favorable and material to its defense.⁷

With this background, the Hearing Officer addresses each of Respondent's requests.

1. GWG-Related Documents

Respondent avers that, in selling the GWG debentures, he obtained and relied upon written marketing materials from GWG. Respondent states that the allegedly misrepresentative sales brochure that he provided to customers was provided to Center Street and its brokers by GWG in a GWG-created sales kit. He also contends that the paperwork for his customers' debenture purchases included the completion of GWG forms and that GWG reviewed and approved the paperwork. Respondent contends that the SEC conducted an informal investigation of GWG and that it is his belief that Enforcement obtained documents related to the investigation. Respondent requests that the Hearing Officer order Enforcement to produce all documents that it received from GWG and its affiliated entities and subsidiaries. Respondent also requests that the Hearing Officer order Enforcement to produce all documents that it received from the SEC relating to the SEC's investigation of GWG and its affiliated entities and subsidiaries.

Enforcement states that it has already produced documents prepared by GWG and that any additional GWG-related documents that Respondent requests were not prepared or obtained

⁵ See *In re Jett*, 52 S.E.C. 830, 830-831 (1996) (vacating an order for the SEC's Division of Enforcement to produce memoranda for in camera review based on mere speculation); OHO Order 12-04 (2010023367001), at 3 (placing burden on respondent to make a plausible showing that Enforcement's files contain material exculpatory information).

⁶ See *Jett*, 52 S.E.C. at 830.

⁷ 52 S.E.C. at 831.

in connection with the investigation that led to the institution of this proceeding, and therefore are not required to be produced under Rule 9251. Enforcement notes that GWG is not a FINRA member and that Enforcement therefore does not have jurisdiction to require GWG to produce documents pursuant to Rule 8210. Furthermore, Enforcement submits in the sworn declaration of Michael J. Rogal, Esq. ("Rogal Declaration") that it does not have any documents from the SEC in its investigative file in this matter.

Respondent's request is based largely on speculation that Enforcement's investigative file includes documents that it obtained from the SEC or GWG directly, even though Enforcement possessed no authority to require GWG to produce documents to FINRA. The Rogal Declaration states that Enforcement does not have any documents from the SEC in its investigative file.⁸ As to Respondent's speculation that Enforcement possesses documents that it received directly from GWG and that it has not produced, Enforcement asserts that it has produced all documents required by Rule 9251. It further states that any additional documents from GWG in its possession, if any, are not documents prepared or obtained in connection with the investigation that led to the institution of this proceeding.

The Hearing Officer denies Respondent's request for GWG-related documents. FINRA Rule 9251 does not entitle Respondent to conduct a "fishing expedition" through Enforcement's records.⁹ Enforcement states that it has complied with Rule 9251 and produced all GWG-related materials obtained in connection with the investigation that led to this proceeding. Respondent has presented nothing to support his claim to the contrary or that additional discovery is warranted.

2. Arque-Related Documents

Respondent states that it is his understanding that Arque acted as the managing broker-dealer for GWG in connection with the sales of the GWG debentures and that Arque was responsible for conducting due diligence and reviewing all advertising related to the GWG debentures. Respondent states that FINRA conducted an investigation of Arque and that Arque signed a Letter of Acceptance, Waiver, and Consent, which Respondent appended to his motion (AWC No. 2012033994701), in which it agreed to findings related to its distribution of the same GWG sales brochure that is at issue in this case. Respondent states that, upon information and belief, Arque produced to Enforcement in connection with AWC No. 2012033994701 its due diligence files and other files related to its review and approval of GWG's advertising. Respondent requests that the Hearing Officer order Enforcement to produce any and all documents that Enforcement received from Arque in connection with AWC No. 2012033994701.

⁸ Rogal Declaration ¶ 7.

⁹ See OHO Order 04-01 (CAF030014) (Mar. 18, 2004), at 9, *available at* <http://www.finra.org/web/groups/industry/@ip/@enf/@adj/documents/ohodecisions/p014459.pdf>.

Enforcement argues that documents it received from Arque in response to an unrelated FINRA investigation are beyond the scope of what Enforcement is required to produce under Rule 9251. Additionally, Enforcement states in the Rogal Declaration that the investigative file in Enforcement's Arque investigation does not contain material exculpatory information.

Respondent's request for Arque-related documents is denied. "Consistent with the proper construction of Rule 9251, only documents prepared or obtained in the course of investigations directly and proximately leading to the institution of particular proceedings must be produced."¹⁰ Enforcement met its discovery obligations under Rule 9251 when it produced any Arque-related documents it obtained in the investigation that led to the institution of this proceeding.¹¹ Furthermore, the Rogal Declaration asserts that, based on Enforcement staff's consultation with Enforcement staff handling the Arque investigation, Enforcement's file in AWC No. 2012033994701 contains no material exculpatory information.¹²

3. Customer-Related Documents

Respondent cites to FINRA Rule 9253(a)(2) in support of his request that the Hearing Officer direct Enforcement to produce documents related to Enforcement's contact with Respondent's customers. Respondent avers that, because the Complaint alleges that the Respondent orally made false and misleading statements to customers, including statements that the GWG debentures were safe, low-risk, liquid, or guaranteed, Enforcement staff must have communicated directly with the seven customers at issue to learn of the alleged false statements. Respondent contends that, because Enforcement's communications with his customers must have formed the basis for the allegations in the Complaint, he is entitled to review notes and other documents related to these communications, including communications between Enforcement and Respondent's customers; documents or information sent to or received from Respondent's customers; and notes, reports, memoranda, recordings, logs, correspondence or other documents prepared by Enforcement staff regarding interviews or communications with Respondent's customers. Respondent contends that he believes that these items exist, and he requests that Enforcement be ordered to produce them.

Enforcement reiterates that it has already produced all items required to be produced under FINRA Rule 9251. Enforcement asserts that Rule 9251(b) allows Enforcement to withhold from production work product, internal memoranda, and examination or inspection reports not offered into evidence, documents that would disclose investigative techniques or guidelines, and documents that would disclose the existence of confidential examinations or

¹⁰ OHO Order 13-03 (2009017529101) (May 2, 2013), at 3, *available at* <http://www.finra.org/web/groups/industry/@ip/@enf/@adj/documents/ohodecisions/p259184.pdf>.

¹¹ *See Dep't of Enforcement v. Sturm*, Complaint No. CAF000033, 2002 NASD Discip. LEXIS 2, at *19 n.14 (NASD NAC Mar. 21, 2002) (holding that documents obtained in connection with a different and broader investigation of respondent are not relevant and need not be produced when they do not fall within the scope of Rule 9251(a)).

¹² Rogal Declaration ¶ 6.

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investigations if those documents do not include material exculpatory information. Enforcement represents in the Rogal Declaration that it has searched the investigative file in this matter and that it contains no material exculpatory evidence.¹³ The Rogal Declaration further asserts that Enforcement has complied fully with the discovery obligations of Rule 9251 and “produced all discoverable communications and correspondence with customers.”¹⁴ Enforcement states that the limited, hand-written and typed notes of telephone conversations with customers that do exist are work product and are not required to be produced under Rules 9251 and 9253 because they do not contain material exculpatory information and are not substantially verbatim recitals of oral statements.¹⁵

FINRA Rule 9251(b)(1) enables Enforcement to withhold from production attorney work product and FINRA staff notes, memoranda, internal reports and other staff-prepared documents that will not be offered as evidence, if not material to Respondent’s defense and exculpatory. FINRA Rule 9253(a)(1) enables respondents in disciplinary proceedings to request a copy of the statement of any person to be called as a witness if that statement pertains to his or her direct testimony and is a substantially verbatim recital of an oral statement made by the witness and recorded contemporaneously with the making of the statement. FINRA Rule 9253(a)(2) enables respondents in disciplinary proceedings to request a copy of any contemporaneously written statement made by interested FINRA Staff during a routine investigation or inspection about the substance of oral statements made by a non-FINRA person when either person is called as a witness by Enforcement and the portion of the statement sought directly relates to the testimony.

Respondent’s request is denied. Many of the documents that Respondent seeks to obtain qualify as attorney work product and therefore are not discoverable.¹⁶ Furthermore, Enforcement’s counsel, under penalty of perjury, swore that none of the documents that Enforcement withheld contain material exculpatory information, and Enforcement asserts that it has complied with its obligations under Rule 9251. Additionally, the Rogal Declaration states that Enforcement’s notes from conversations with customers are not “substantially verbatim recitals.” Enforcement therefore is not required to produce them under FINRA Rule 9253(a)(1). Finally, the documents that Respondent seeks are not discoverable under FINRA Rule 9253(a)(2) because notes and statements related to Enforcement’s conversations with

¹³ Rogal Declaration ¶¶ 4-5.

¹⁴ Rogal Declaration ¶ 8.

¹⁵ Specifically, the Rogal Declaration asserts that “FINRA staff notes related to this matter are limited, fragmentary notes and outlines that reveal the mental impressions, opinions, and investigative processes of Enforcement staff members.” Rogal Declaration ¶ 8. Enforcement further asserts in the Rogal Declaration that Enforcement staff’s notes do not contain substantially verbatim statements of potential witnesses recorded contemporaneously with the making of the statement and that any notes related to this matter were not made during a routine examination or inspection. *Id.*

¹⁶ *SEC v. Nacchio*, 2007 U.S. Dist. LEXIS 5435, at *15 (D. Colo. Jan. 25, 2007) (holding that the attorney work product doctrine “protects from discovery documents or tangible things obtained or prepared in anticipation of litigation, as well as the attorney’s thought processes, opinions, conclusions and legal theories”).

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Respondent's customers were not taken during a "routine examination or inspection."¹⁷ Respondent has offered nothing to countermand Enforcement's sworn declaration.

III. Rule 9252 Motion

Respondent seeks an order requiring Enforcement to issue a Rule 8210 request requiring Arque to produce nine categories of documents spanning the time period between January 1, 2012, and the present. The nine categories of documents include all documents that Arque obtained from GWG and its related entities, all documents that Arque received or reviewed as part of its due diligence related to all GWG securities offerings, marketing and advertising materials from GWG, all communications by or between anyone at Arque and anyone at GWG, all communications by or between anyone at Arque and any other entity regarding GWG, and all documents that Arque produced to FINRA in connections with AWC No. 2012033994701. Respondent's pleading does not include any explanation of the basis for its request.

Enforcement opposes Respondent's request. Enforcement asserts that Respondent has not complied with the requirements of Rule 9252 in that he has not explained why the documents are relevant, material and non-cumulative or stated his previous efforts to obtain the documents. Enforcement also contends that documents relating to Arque's involvement with GWG and its affiliated companies are irrelevant to this case, in that Respondent was never registered with Arque. Enforcement also argues that Respondent's request is overbroad.

Respondent's request for Enforcement to invoke Rule 8210 is governed by FINRA Rule 9252. Under Rule 9252, a respondent may request that FINRA invoke Rule 8210 to compel the production of documents or testimony from entities or individuals that are subject to FINRA jurisdiction. Rule 9252(a) states that the request must describe with specificity the documents or category or type of documents sought, state why they are material, describe the requesting party's previous efforts to obtain the documents through other means, and state whether the custodian of the documents is subject to FINRA jurisdiction. Pursuant to Rule 9252(b), "[t]he Hearing Officer may grant such a request only upon a showing that the information sought is relevant, material, and non-cumulative; that the requesting party has previously attempted to obtain the documents or testimony through other means, but has been unsuccessful; and that the person from whom the documents or testimony is sought is subject to FINRA jurisdiction."¹⁸ In addition, Rule 9252(b) requires the Hearing Officer to consider whether the request is unreasonable, oppressive, excessive in scope, or unduly burdensome, and whether the request should be denied, limited, or modified.

¹⁷ Rogal Declaration ¶ 8. See OHO Order 05-43 (C05050005) (Dec. 15, 2005), at 2, available at <http://www.finra.org/web/groups/industry/@ip/@enf/@adj/documents/ohodecisions/p016006.pdf>.

¹⁸ OHO Order 08-12 (2005003188901) (Aug. 27, 2008), at 2, available at <http://www.finra.org/web/groups/industry/@ip/@enf/@adj/documents/ohodecisions/p118011.pdf>.

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Respondent has failed to demonstrate that it would be appropriate for the Hearing Officer to exercise her authority under Rule 9252. First, Respondent has not established that the information and documents sought are relevant, material, and non-cumulative. Respondent's motion to compel the production of documents states that Arque acted as the managing broker-dealer for GWG in connection with the sales of the GWG debentures and that Arque was responsible for reviewing all advertising. Respondent does not, however, explain how the documents that he seeks are relevant or material to this proceeding. Neither the Complaint nor Respondent's Answer mention Arque, and at the time of the alleged misconduct, Respondent was registered with Center Street, not Arque. The allegations of the Complaint relate to Respondent's communications with his customers regarding GWG debentures while he was associated with Center Street. Respondent has not demonstrated how documents and information in the possession of Arque employees would be relevant to the allegations of the Complaint. Additionally, Respondent has not made the requisite showing that he previously attempted in good faith to obtain the documents and was unable to do so. Finally, Respondent's request is expansive and overbroad in that it covers a time period well in excess of the ten months during which the Complaint alleges that the misconduct occurred and it seeks documentation related to GWG's securities in addition to the GWG debentures at issue in the Complaint and information regarding communications between Arque personnel and all other persons or entities regarding GWG. For these reasons, Respondent's Rule 9252 request is denied.

SO ORDERED.

Carla Carloni
Hearing Officer

Dated: January 27, 2015