

This order has been published by the NASDR Office of the Hearing Officers and should be cited as OHO Order 98-2 (C10970158).

**NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	
	:	
v.	:	
	:	
	:	Disciplinary Proceeding
	:	No. C10970158
	:	
	:	Hearing Officer - DMF
	:	
	:	
Respondents.	:	

ORDER DENYING MOTION TO COMPEL DISCOVERY

On December 15, 1997, Respondents _____ and _____ (“Respondents”) filed a Motion to Compel Discovery. Specifically, Respondents requested an order compelling the Department of Enforcement to produce all documents concerning the pre-membership interview of _____, as well as a list of withheld documents. On December 29, 1997, Enforcement filed its response, in which it opposed Respondents’ motion.

Under Rule 9251(a)(1), Enforcement was required to make available to the Respondents for inspection and copying certain documents “prepared or obtained by Interested Association Staff in connection with the investigation that led to the institution of proceedings.” Respondents, however, are requesting documents generated during the pre-membership interview of _____, not documents prepared or obtained during the

This order has been published by the NASDR Office of the Hearing Officers and should be cited as OHO Order 98-2 (C10970158).

course of the investigation. Pre-membership interview documents are not within the scope of Rule 9251.

Assuming, for the sake of argument, that the Hearing Officer has discretionary authority to order production of pre-membership interview documents pursuant to Rule 9251(a)(3), Respondents have failed to establish good cause for the Hearing Officer to do so. Respondents state that they will attempt to defend certain charges in the complaint by proving that “the NASDR ratified the compliance and supervisory procedures of _____ – of which the NASD now complains – during the NASD’s pre-membership interview and approval of _____.” Enforcement responds that such a defense is without merit as a matter of law, citing SEC cases rejecting such “ratification” arguments, in a variety of circumstances.

It is unnecessary for present purposes to decide whether Respondents will be allowed to offer any evidence regarding the pre-membership interview and approval of _____ at the hearing, under the standards of Rule 9263(a). Even assuming that such evidence will be admissible, it can be provided through the testimony of witnesses who were involved in the process on behalf of _____, as well as any written communications generated or received by _____. Respondents have failed to establish a sufficient basis for requiring Enforcement to produce any additional documents that may be contained in NASD files.

Respondents have also failed to establish a basis for requiring Enforcement to produce a list of withheld documents. Rule 9251(c) provides that a motion to require Enforcement to produce such a list “shall be based upon some reason to believe that a Document is being withheld in violation of the Code.” The only “reason to believe” cited

This order has been published by the NASDR Office of the Hearing Officers and should be cited as OHO Order 98-2 (C10970158).

by Respondents in their motion is Enforcement's failure to produce pre-membership interview materials. As explained above, the Code does not require Enforcement to produce those materials, so they are not being withheld in violation of the Code.

In addition, the Hearing Officer notes that Enforcement has provided a declaration of the Enforcement attorney who is prosecuting this case attesting that she reviewed the NASD files relating to _____ most recent pre-membership interview and found no exculpatory materials, as defined in Brady v. Maryland, 373 U.S. 83 (1963). She also states that she is aware of, and intends to comply with, her obligation to turn over to Respondents any Brady material that she may discover at a later time. Finally, she states that she has produced all Jencks Act materials contained in the NASD files developed in connection with this proceeding. Respondents have offered nothing that would contradict or call into question these representations. Under these circumstances, the Hearing Officer will not order Enforcement to produce a list of withheld documents.

Therefore, it is ORDERED that Respondents' Motion to Compel Discovery is denied.

David M. FitzGerald
Hearing Officer

Dated: Washington, DC
January 2, 1998