

This Order has been published by the NASDR Office of Hearing Officers and should be cited as OHO Order 00-30 (C07000023).

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

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DEPARTMENT OF ENFORCEMENT,	:	
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Complainant,	:	Disciplinary Proceeding
	:	No. C07000023
v.	:	
	:	Hearing Officer - SW
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Respondent.	:	

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**PRE-HEARING ORDER**

At an October 6, 2000 pre-hearing conference, the Hearing Officer made a number of rulings with regard to discovery matters and other issues. Pursuant to Rule 9241(e), the following is a recitation of the rulings made.

**I. RESCHEDULED FINAL PRE-HEARING CONFERENCE**

With the approval of the Parties, the Hearing Officer has re-scheduled the final pre-hearing conference in this disciplinary proceeding for Thursday, October 12, 2000, at 11:00 a.m. to be held by telephone. At 11:00 a.m. **Eastern Time** on October 12, 2000, the Parties should call (712) 271-3436 and speak with the MCI conference operator. The pass code for this call is "Witherspoon." If any Party is unable to connect to the Conference using these instructions, the Party should immediately contact the Office of the Hearing Officers at (202) 728-8008.

## II. DEFERRED RULING ON THE DEPARTMENT OF ENFORCEMENT'S MOTION IN LIMINE

On September 28, 2000, the Department of Enforcement ("Enforcement") filed a Motion in Limine, alleging that it was necessary to prevent Respondents from introducing immaterial and irrelevant evidence at the Hearing regarding Enforcement's primary witness, customer \_\_\_\_\_. This proceeding was the result of \_\_\_\_\_ complaint of unauthorized trading in his securities account at \_\_\_\_\_ ("\_\_\_\_\_"). On September 13, 2000, counsel for Respondents \_\_\_\_\_ and \_\_\_\_\_ sent a letter requesting certain documents and information concerning \_\_\_\_\_, including, but not limited to the following:

- a. a listing of the names, addresses and telephone numbers of all persons related to \_\_\_\_\_;
- b. any and all records or accounts maintained or controlled by, in the name of or for the benefit of \_\_\_\_\_ since January 1, 1995 at any financial institution and/or security broker/dealer;
- c. any and all civil actions, administrative proceedings, disciplinary proceedings, investigations and or inquiries (including such matters brought by the Internal Revenue Service, the Securities and Exchange Commission and/or any state gambling commission) which relate to or concern \_\_\_\_\_ as a named party or material witness; and
- d. any and all records which reflect \_\_\_\_\_'s travel outside the South Florida area since January 1997, including, but not limited to, all trips to Las Vegas, Nevada, Atlantic City, New Jersey and Lake Tahoe, California (including, the dates of travel, the hotels or other lodging where \_\_\_\_\_ stayed and the telephone numbers of such locations.

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A second letter requesting similar information was sent to Enforcement on September 22, 2000. In addition, similar requests were sent directly to \_\_\_\_\_. Expressing a concern that the letters were a precursor of Respondents' cross examination of \_\_\_\_\_ and the letters indicated an intent to harass and embarrass the witness, Enforcement filed the Motion in Limine.

Respondent's response to the Motion in Limine argued that an order was unnecessary since the Hearing Officer is free to control the presentation of evidence at the Hearing itself, and may stop any areas of cross-examination if deemed appropriate at that time.

The Hearing Officer has decided to defer the decision on the Motion in Limine until the Hearing.

### **III. RULINGS ON RESPONDENTS' DISCOVERY MOTIONS**

Respondents \_\_\_\_\_ and \_\_\_\_\_ filed three discovery motions. Although the three motions substantially covered overlapping information, they were denoted under Rule 9252, Rule 9251 and Rule 9253. The following rulings address each of the motions separately.

#### **A. Order Granting in Part and Denying in Part Respondent's Rule 9252 Motion for Documents and Testimony**

On September 15, 2000, Respondents \_\_\_\_\_ and \_\_\_\_\_ requested, pursuant to Rule 9252, that the Association invoke Rule 8210 to compel the production of certain documents and testimony ("Rule 9252 Motion"). Enforcement filed an opposition, in part, to the Rule 9252 Motion on September 25, 2000. Respondents \_\_\_\_\_ and \_\_\_\_\_ filed a Reply to Enforcement's Opposition on September 27, 2000. After reviewing the Parties' written submissions

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and oral arguments at an October 6, 2000 pre-hearing conference,<sup>1</sup> the Hearing Officer, grants the Respondents Rule 9252 Motion as to the telephone records in part and denies it as to the other matters.

**(1) Standards for Invoking Rule 8210 to Compel Production of Documents And Testimony Pursuant to Rule 9252**

Rule 9252(a) affords respondents the right to request that the Association invoke its Rule 8210 powers to compel the production of documents for hearing.<sup>2</sup> Pursuant to Rule 9252(b), a request shall be granted only upon a showing that: (1) the information sought is relevant, material, and non-cumulative; (2) the requesting Party has previously attempted in good faith to obtain the desired documents through other means but has been unsuccessful in such efforts; and (3) each of the persons from whom the documents are sought is subject to the Association's jurisdiction.

In addition, Rule 9252 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.

**(2) Respondents' Request**

As referenced above, the Complaint alleges that Respondent \_\_\_\_\_ violated Rule 2110 by executing nine unauthorized trades in the \_\_\_\_\_ Corporation account of customer \_\_\_\_\_ from January 16, 1998 to February 12, 1998. Count two of the Complaint alleges that

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<sup>1</sup> At the October 6, 2000 Pre-Hearing Conference, the Haring Officer afforded the Parties the opportunity to present oral augment on these motions.

<sup>2</sup> A request under Rule 9252(a) must be in writing and "describe with specificity the Documents, [or] the category or type of Documents . . . sought; state why the Documents, [or] the category or type of Documents . . . are material; describe the requesting Party's previous efforts to obtain the Documents, [or] the category or type of Documents . . . through other means; and state whether the custodian of each Document, or the custodian of the category or type of Documents . . . is subject to the Association's jurisdiction." Rule 9252(a) also affords respondents the right to request that the Association invoke Rule 8210 to compel testimony at the hearing.

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Respondent \_\_\_\_\_ violated Rule 2110 by executing one unauthorized trade in the account of \_\_\_\_\_ on January 16, 1998.

Respondents \_\_\_\_\_ and \_\_\_\_\_ admit executing the trades for \_\_\_\_\_, but they stated that the trades were authorized, and, in fact, asserted that some of the trades were unsolicited. In order to support this argument, the Respondents' counsel requested the following records and testimony:

- a. the telephone records of the Boca Raton, Florida office of Bear Stearns Securities Corp. ("Bear Stearns")<sup>3</sup> between December 1997 and June 1998;
- b. testimony of a custodian of records of Bear Stearns to authenticate any telephone records produced;
- c. testimony of \_\_\_\_\_, the \_\_\_\_\_ at Bear Stearns' Boca Raton, Florida office;
- d. testimony of \_\_\_\_\_, the complaining customer;
- e. documents listed in Exhibit 1 in the custody of \_\_\_\_\_;
- f. testimony of Todd Nellis, NASD staff examiner; and
- g. testimony of any other NASD staff members who participated in the investigation that resulted in this proceeding.

### **(3) Enforcement's Response to Respondent's Rule 9252 Motion**

In its September 26, 2000 response to the Rule 9252 Motion, Enforcement did not object to providing the information or testimony requested on several matters.

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<sup>3</sup> When the alleged unauthorized transactions occurred, \_\_\_\_\_ occupied office space in Boca Raton, Florida, within Bear Stearns' office. It is alleged that \_\_\_\_\_ used Bear Stearns' telephone systems at that time.

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Enforcement did not object to requesting telephone records of telephone calls for \_\_\_\_\_'s phone lines at Bear Stearns for the months of January 1998 and February 1998. However, arguing that Bear Stearns' telephone records for the months of December 1997 and March through June of 1998 are irrelevant to the issues presented by the Complaint, Enforcement objected to requesting the telephone records for December 1997 and March through June of 1998. Specifically, Enforcement argued that evidence of subsequent conversations in telephone records March through June 1998, even if they are evidence that the customer ratified the prior trades, does not negate an earlier unauthorized trade.

Enforcement argued that it was willing to stipulate to the authenticity of and admissibility of the telephone records and, consequently, testimony from a custodian of records is unnecessary.

Enforcement did not object to requesting \_\_\_\_\_ to appear at the hearing. In addition, Enforcement stated that it intended to make every effort to assure \_\_\_\_\_'s appearance at the Hearing, although it correctly noted that it had no power to compel \_\_\_\_\_ to appear and testify at the Hearing,

Enforcement objected to Respondents' request that it be ordered to compel \_\_\_\_\_ to produce additional documents because \_\_\_\_\_ is not a registered member or an associated person of a registered member as required by Rule 9252.

Enforcement reported that it intended to offer the testimony of Mr. Nellis at the Hearing. Enforcement also represented that Mr. Nellis was the only examiner involved in the investigation which resulted in this proceeding.

**(4) Discussion and Ruling on Rule 9252 Motion**

**a. Undisputed Issues**

Because Enforcement has agreed to request the Bear Stearns phone records from January and February, the testimony of \_\_\_\_\_, \_\_\_\_\_, and Mr. Nellis, and has represented that Mr. Nellis was the sole NASD examiner, Respondents' Rule 9252 Motion is moot on those issues. Consequently, the Hearing Officer denies the Rule 9252 Motion on those issues as moot.

**b. Records in \_\_\_\_\_'s Possession**

Despite Respondent's argument that \_\_\_\_\_ is within the defacto control of Enforcement by virtue of his being Enforcement's primary witness, Rule 9252 clearly provides that persons from whom documents are sought must be subject to the Association's jurisdiction. Respondents have admitted that \_\_\_\_\_ is not subject to the Association's jurisdiction. Consequently, Respondents' Rule 9252 Motion as to documents in \_\_\_\_\_'s possession is also denied.

**c. Mr. Nellis's Personnel Records**

Assuming for an instant that the Hearing Officer has authority to order access to such personnel records, Respondents failed to provide any evidence that the information in Mr. Nellis' personnel records could be relevant to the charges of unauthorized trades. The Hearing Officer denies Respondent's Rule 9252 Motion as to Mr. Nellis' personnel file.

**d. Disputed Telephone Records**

Enforcement correctly states that evidence of subsequent conversations cannot excuse prior unauthorized trades. However, Respondents argued that the customer falsely indicated he had made several calls to resolve the trades prior to filing a complaint in April 1998. The Hearing Officer believes

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evidence on this issue would be helpful in determining credibility of the witnesses and would not be unduly burdensome to produce. Accordingly, the Hearing Officer grants Respondent's Rule 9252 Motion as to the telephone records for March and April 1998 of Bear Stearns's Boca Raton office.

**B. Order Denying Respondents' Rule 9251 Motion**

On September 27, 2000, Respondents \_\_\_\_\_ and \_\_\_\_\_ filed a motion to compel Rule 9251 Discovery from Enforcement ("Rule 9251 Motion"). Enforcement filed an opposition to the Rule 9251 Motion. Respondents argued that upon a review of the previously produced documents, it appeared that Enforcement had not produced, and may have withheld production of, certain documents that are required to be produced under the rules, including certain exculpatory evidence in the possession of their principal witness, \_\_\_\_\_. Respondents also argued that the personnel file of Examiner Nellis although not specifically called for under the Rules, was necessary for a fair cross-examination of the witnesses.

Enforcement represented that all the documents in its investigative file subject to production had been produced. In fact, to ensure that there were no questions concerning what documents had been provided to Respondent's original counsel as opposed to the current counsel, Enforcement made a duplicate production of the investigative file to the current counsel.

The Hearing Officer concludes, having considered the Parties written submissions and having heard oral argument, that Respondents failed to make an adequate showing to justify the relief requested. In addition, the Hearing Officer concluded that Respondent's expansive request cannot be justified on the speculative hope of discovering evidence that is of limited substantive relevance and otherwise collateral.

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**C. Order Denying Respondents' Rule 9253 Motion for Witness Statements**

On October 4, 2000, Respondent's \_\_\_\_\_ and \_\_\_\_\_ filed a motion to require Enforcement to produce for inspection and copying any statement of any person called or to be called as a witness by Enforcement ("Rule 9253 Motion"). Enforcement filed a response stating that it has no statements within the scope of Rule 9253 that had not been previously produced. Respondent provided no evidence suggesting that Enforcement's representation was false. Consequently, Respondent's Rule 9253 Motion is also denied.

**SO ORDERED**

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Sharon Witherspoon  
Hearing Officer

Dated: Washington, DC  
October 9, 2000