

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 05-01 (CAF040058).

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent 1

And

Respondent 2

Respondents.

Disciplinary Proceeding
No. CAF040058

Hearing Officer – DRP

**ORDER DENYING RESPONDENTS' MOTION PURSUANT TO RULE 9252
AND FOR AN EXTENSION OF TIME**

On November 19, 2004, Respondents moved pursuant to Rule 9252 for the Hearing Officer to compel production of documents and testimony from CIBC World Market Corp. (CIBC) that Respondents deem "essential in the preparation of their defense." Respondents contend that their application is neither oppressive nor burdensome, and they will restrict their use of the information requested to this proceeding. Respondents further assert that they have attempted to obtain the information directly from CIBC, which has not responded to their request. Alternatively, they ask that Enforcement be directed to issue an 8210 request to CIBC for the documents and testimony Respondents seek.

Respondents also requested an additional 60 days from the date of the last compelled documents and testimony to review all discovery materials and, if necessary, move for production of additional documents and testimony, if needed.

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On December 6, 2004, Enforcement filed its response to the motion. Enforcement opposes the motion and represents that all documents Respondents seek have been the subject of Rule 8210 requests to CIBC. Enforcement further notes that Rule 9252 is limited to compelling the production of documents and testimony at the hearing and opposes Respondents' request for an extension to move for additional discovery.

For the reasons stated below, Respondents' motion is denied in its entirety.

NASD rules are not as broad as federal rules regarding discovery. Essentially, Enforcement is required to produce documents "prepared or obtained by . . . staff in connection with the investigation that led to the institution of proceedings." These documents shall include requests for information pursuant to Rule 8210 and documents provided in response to those requests. Rule 9251(a). The staff may withhold documents that are privileged or would disclose an examination, investigatory or enforcement technique, unless such documents (or a part thereof) contain material exculpatory evidence.¹ Rule 9251(b).

Respondents have incorrectly invoked Rule 9252 for discovery purposes. The rule provides that respondents may request NASD to invoke Rule 8210 to compel the production of documents or testimony *at the hearing*. (emphasis added) NASD Rules do not afford Respondents an opportunity to depose witnesses.

Furthermore, in light of Enforcement's representation that it has sought all of the requested documents from CIBC pursuant to Rule 8210, the Hearing Officer declines to order

¹ The obligation to turn over exculpatory evidence derives from *Brady v. Maryland*, 373 U.S. 83 (1963), which holds that a prosecutor may not withhold evidence that would tend to exculpate a defendant or reduce his penalty.

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CIBC to produce these documents.²

Finally, Respondents' request for additional time to move for production of documents and testimony is denied.

SO ORDERED.

Dana R. Pisanelli
Hearing Officer

Dated: January 14, 2005
Washington, DC

² Counsel for Enforcement states that some of the requested documents were the subject of a post-Complaint Rule 8210 request to CIBC. Pursuant to Rule 9251(a)(2), Enforcement must provide to Respondents all material and relevant documents obtained in response to the post-Complaint 8210 request not later than 14 days after receiving those documents.