

NASD OFFICE OF HEARING OFFICERS

<p>DEPARTMENT OF ENFORCEMENT,</p> <p style="text-align: center;">Complainant,</p> <p style="text-align: center;">v.</p> <p style="text-align: center;">Respondents.</p>	<p>Disciplinary Proceeding No. CAF040058</p> <p>Hearing Officer – DRP</p>
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ORDER PROHIBITING USE OF SUBPOENAS

On June 14, 2005, counsel for Respondents issued subpoenas duces tecum, pursuant to New York's Civil Practice Law and Rules (CPLR), to Harvard Business School, the University of Southern California, Bankers Trust Corp., JP Morgan Chase Bank, and Risk Magazine. In each instance, Respondents requested production of personnel files and records concerning Enforcement's proposed expert witness, Dr. _____.¹ Respondents' subpoenas bore the caption of this proceeding and stated that "production of these documents may waive the necessity for a personal appearance at the hearing in this matter, which is not yet scheduled."² A copy of each subpoena was sent to counsel for Enforcement.

¹ On June 13, 2005, the parties filed motions seeking leave to introduce expert testimony. After Respondents' proposed expert withdrew from the case, there was additional motion practice related to proposed testimony by Respondents' new expert, which concluded on September 27. On October 19, 2005, the Hearing Officer granted Enforcement's motion to introduce expert testimony by _____ and Respondents' motion to introduce expert testimony by _____.

² At the time the "subpoenas" were issued, the hearing in this matter was scheduled to commence in New York City on September 19, 2005. The hearing was postponed until February 13, 2006 in order to afford Respondents ample opportunity to prepare after their original expert withdrew from the case.

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On June 17, 2005, Enforcement filed with the Office of Hearing Officers a Notice regarding the issuance of these subpoenas. The Hearing Officer convened a pre-hearing conference on June 21, 2005, to address whether Respondents have the authority to issue subpoenas in NASD disciplinary proceedings.³ On July 8, 2005, each party submitted a memorandum of law regarding Respondents' use of subpoenas in this proceeding. After granting Enforcement's motion seeking leave to present Dr. _____'s testimony on October 19, 2005, the subpoena issue is now relevant.

Respondents rely on CPLR § 2302(a), which provides that "subpoenas may be issued ... by ... an attorney of record for a party to an action, an administrative proceeding or an arbitration," and cite *Crimmins v. American Stock Exchange, Inc.*, 368 F.Supp. 270 (S.D.N.Y. 1973) to support their position. Though *Crimmins* states that CPLR § 2302(a) "seems to empower administrative panels ... to issue subpoenas without a court order," this statement was clearly dictum and thus is not precedent on this issue. Furthermore, the Hearing Officer believes CPLR § 2302 refers to administrative proceedings authorized by New York law and is inapplicable to NASD disciplinary proceedings.⁴

Even if the CPLR is applicable to NASD disciplinary proceedings held in New York, § 2302 conflicts with NASD's procedural rules, which do not permit a party to issue a

³ Unbeknownst to the Hearing Officer, counsel sent letters to the subpoenaed entities on June 17, asking each to "refrain from responding to the June 14, 2004 (sic) subpoena duces tecum ... until further notice ... [to allow counsel to] review[] the legal issues attendant thereto."

⁴ NASD proceedings, which are authorized by federal law, are conducted throughout the United States. Respondents would not be treated uniformly if NASD procedural rules were ignored in favor of state law based on the hearing venue.

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subpoena.⁵ Respondents may ask NASD to invoke Procedural Rule 8210 “to compel the production of [d]ocuments or testimony at a hearing.”⁶ A Hearing Officer may grant such a request if the information sought is relevant, material and non-cumulative; the requesting party has made a good faith, but unsuccessful, effort to obtain the desired documents and/or testimony; and each person “from whom documents and testimony are sought” is subject to NASD’s jurisdiction.⁷

It is axiomatic that federal law preempts conflicting state law pursuant to the Supremacy Clause of the U.S. Constitution. The Securities Exchange Act of 1934, as amended, delegates to self-regulatory organizations (SROs), such as NASD, the authority to enforce federal securities laws and empowers SROs to promulgate rules and regulations subject to SEC oversight. NASD rules governing the disciplinary process (Rule 9000 and 9200 Series and amendments) have been approved by the SEC pursuant to 15 U.S.C. § 78s(b)(2), which requires a rule filing with, and approval by, the Commission after public notice, as well as a finding that the rules are consistent with the purposes of the Exchange Act.⁸ Thus, NASD rules that have been so approved and conflict with state law have preemptive force.⁹

Accordingly, NASD Rule 9252, which governs Respondents’ ability to seek production of documents or testimony at the hearing preempts CPLR § 3202. Respondents “subpoenas” are

⁵ It is well established that NASD lacks subpoena power and must rely on Procedural Rule 8210 to obtain documents and information from members and associated persons. There is no authority to compel testimony or production of documents from an individual or entity that is not subject to NASD jurisdiction.

⁶ Rule 9252(a).

⁷ Rule 9252(b). In addition, the Hearing Officer must consider whether the request is “unreasonable, oppressive, excessive in scope, or unduly burdensome”

⁸ See *Order Approving Proposed Rule Change*, SEC Release No. 38908, 1997 SEC LEXIS 1617 (Aug. 7, 1997).

⁹ *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1128-1132 (9th Cir. 2005).

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thus quashed, and pursuant to Rule 9235(a), Respondents are hereby ordered to withdraw all "subpoenas."

SO ORDERED.

Dana R. Pisanelli
Hearing Officer

Dated: November 17, 2005
Washington, DC