

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

LANDON L. WILLIAMS  
(CRD No. 1751467),

Respondent.

Disciplinary Proceeding  
No. 2014042524301

Hearing Officer - CC

**ORDER REGARDING RESPONDENT'S INTERROGATORIES, REQUESTS FOR  
PRODUCTION OF DOCUMENTS, AND REQUESTS FOR ADMISSIONS**

**I. Background**

The Department of Enforcement ("Enforcement") filed the Complaint on August 4, 2016, and an Amended Complaint on November 4, 2016. Cause one of the Amended Complaint alleges that Respondent Landon L. Williams ("Williams") fraudulently made materially false and misleading statements and omitted material information in securities-related communications with one customer. Cause two alleges that Williams unethically made materially false and misleading statements and omitted material information in securities-related communications with five customers. Cause three alleges that Williams caused his member firm's books and records to be inaccurate. Cause four alleges that Williams misrepresented facts to his employer. The time period relevant to the Amended Complaint is March 2014 through July 2014. Williams generally denies the allegations of the Amended Complaint.

On March 21, 2017, Williams filed seven documents he identified as "Interrogatories," seven documents he identified as "Requests for Production of Documents," and one document he identified as "Request for Admissions." Williams also requested a one-day extension for filing discovery motions.<sup>1</sup> Instead of filing discovery motions, Williams filed interrogatories and requests for documents and admissions.

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<sup>1</sup> My December 13, 2016 Case Management and Scheduling Order ("Scheduling Order") indicates that March 20, 2017 was the deadline for Respondent to file (A) motions relating to Enforcement's production of documents under Rule 9251; (B) requests pursuant to Rule 9252 for Enforcement to issue Rule 8210 requests for information and documents in connection with this proceeding; and (C) requests under Rule 9253 for Enforcement to produce witness statements.

On April 3, 2017, Enforcement filed an Opposition and Motion to Quash Respondent's Discovery Requests ("Motion to Quash"). Enforcement argues that Williams' discovery requests exceed Enforcement's discovery obligations under FINRA Rule 9251, fail to satisfy the requirements of Rule 9252, and include requests for documents that have already been produced to Williams or are not relevant or material to the issues of this case.

As stated in detail below, I grant Enforcement's Motion to Quash Respondent's discovery requests in their entirety.

## **II. Discussion**

### **A. FINRA's Discovery Rules**

The FINRA Rule 9250 Series includes three rules that establish the parameters for discovery in FINRA disciplinary proceedings. 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."<sup>2</sup> 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."<sup>3</sup> 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 withheld document 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.<sup>4</sup> 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

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<sup>2</sup> OHO Order 15-05 (2012034936005) (Jan. 27, 2015), at 2, [http://www.finra.org/sites/default/files/OHO-Order-15-05-ProceedingNo.2012034936005\\_0\\_0\\_0.pdf](http://www.finra.org/sites/default/files/OHO-Order-15-05-ProceedingNo.2012034936005_0_0_0.pdf) (citing OHO Order 09-04 (2006006259501) (Nov. 24, 2009), at 2, [http://www.finra.org/sites/default/files/OHODecision/p120524\\_0\\_0\\_0.pdf](http://www.finra.org/sites/default/files/OHODecision/p120524_0_0_0.pdf)).

<sup>3</sup> The term "Interested FINRA Staff" is defined in FINRA Rule 9120(t)(1).

<sup>4</sup> See OHO Order 12-04 (2010023367001) (Aug. 30, 2012), at 2-3, [http://www.finra.org/sites/default/files/OHO-Decision/p229424\\_0\\_0\\_0.pdf](http://www.finra.org/sites/default/files/OHO-Decision/p229424_0_0_0.pdf); OHO Order 07-29 (2005001919501) (July 13, 2007), at 7, [http://www.finra.org/sites/default/files/OHODecision/p037091\\_0\\_0\\_0.pdf](http://www.finra.org/sites/default/files/OHODecision/p037091_0_0_0.pdf).

process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”<sup>5</sup>

A respondent bears the burden of establishing a basis for claiming that Enforcement’s withheld documents must be produced.<sup>6</sup> Mere speculation from a respondent that FINRA documents may contain material exculpatory information is not sufficient to warrant production.<sup>7</sup> 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.<sup>8</sup>

The second discovery rule is 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’s jurisdiction. Rule 9252(a) states that the request must describe with specificity the testimony, documents or category or type of documents sought, state why they are material, describe the requesting party’s previous good faith efforts to obtain the documents or testimony through other means, and state whether the custodian of the documents or the person requested to testify is subject to FINRA’s 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.”<sup>9</sup> 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.<sup>10</sup>

The third and final discovery rule in FINRA’s Code of Procedure is FINRA Rule 9253. Rule 9253 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

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<sup>5</sup> *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).

<sup>6</sup> See *Orlando Joseph 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).

<sup>7</sup> *Jett*, 52 S.E.C. at 830.

<sup>8</sup> *Jett*, 52 S.E.C. at 831.

<sup>9</sup> OHO Order 08-12 (2005003188901) (Aug. 27, 2008), at 2, [http://www.finra.org/sites/default/files/OHODecision/p118011\\_0\\_0\\_0.pdf](http://www.finra.org/sites/default/files/OHODecision/p118011_0_0_0.pdf).

<sup>10</sup> OHO Order 15-05 (2012034936005), at 7.

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.<sup>11</sup>

FINRA's Code of Procedure does not provide for the use of interrogatories, requests for the production of documents, requests for admission, or other discovery methods not specifically authorized in the Rule 9250 Series.<sup>12</sup>

## **B. Respondent's Requests and Enforcement's Representations Regarding Discovery**

Williams directed to Enforcement six identical sets of interrogatories, five of which are related to one of the five customers referenced in the Amended Complaint ("Customer Interrogatories") and one of which is related to a Merrill Edge Advisory Center administrative manager ("Manager Interrogatories"), and a seventh set of general interrogatories ("General Interrogatories") that differed from the first six sets of interrogatories. The Customer and Manager Interrogatories include 12 questions each and the General Interrogatories include 25 questions. Williams also directed to Enforcement six identical document production requests, five of which are related to one of the five customers referenced in the Amended Complaint ("Customer Document Production") and one of which is related to a Merrill Edge Advisory Center administrative manager ("Manager Document Production"). Each Document Production requests 13 categories of documents. Williams also requested that Enforcement produce an additional 52 categories of documents in a separate document request ("General Document Production"). Finally, Williams requested that Enforcement admit or deny 42 assertions.

FINRA's rules do not allow for the use of interrogatories, requests for admissions, document production requests, or other discovery outside the parameters established by the FINRA Rule 9250 Series.<sup>13</sup> On this basis alone, I deny Williams' requests, which I find to be excessive in scope and unduly burdensome. In addition, Enforcement counsel of record, Mark J. Fernandez ("Fernandez") declared under penalty of perjury that, on or before November 1, 2016, Enforcement produced to Williams all non-privileged documents that are required to be

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<sup>11</sup> OHO Order 15-05 (2012034936005), at 3.

<sup>12</sup> See OHO Order 12-02 (2011029760201) (Apr. 5, 2012), at 5, [http://www.finra.org/sites/default/files/OHODecision/p126070\\_0\\_0\\_0\\_0.pdf](http://www.finra.org/sites/default/files/OHODecision/p126070_0_0_0_0.pdf) ("FINRA disciplinary proceedings have 'unique characteristics' and are governed by FINRA's own procedural rules, the Rule 9000 Series, not the Federal Rules of Civil Procedure."); OHO Order 07-06 (2005001305701) (Feb. 20, 2007), at 2, [http://www.finra.org/sites/default/files/OHODecision/p018955\\_0\\_0\\_0\\_0.pdf](http://www.finra.org/sites/default/files/OHODecision/p018955_0_0_0_0.pdf) ("Enforcement's discovery obligations are defined and circumscribed by NASD Procedural Rule 9251.").

<sup>13</sup> See, e.g., OHO Order 16-30 (2014040476901) (Nov. 14, 2016), at 6, [http://www.finra.org/sites/default/files/OHO\\_Order16-30\\_2014040476901.pdf](http://www.finra.org/sites/default/files/OHO_Order16-30_2014040476901.pdf) (holding that interrogatories are not permitted under FINRA Rule 9252); OHO Order 16-14 (2015044379701) (March 25, 2016), at 6 [http://www.finra.org/sites/default/files/OHO\\_Order16-14\\_2015044379701\\_0\\_0\\_0\\_0.pdf](http://www.finra.org/sites/default/files/OHO_Order16-14_2015044379701_0_0_0_0.pdf) (same); OHO Order 07-06 (2005001305701), at 3 (rejecting interrogatories because Rule 9251 does not explicitly authorize their use).

produced under FINRA Rule 9251.<sup>14</sup> Williams bears the burden of establishing a basis for claiming that Enforcement’s withheld documents must be produced.<sup>15</sup> Williams has made no plausible showing that Enforcement withheld material exculpatory evidence or otherwise failed to comply with Rule 9251. FINRA Rule 9251 does not entitle respondents to conduct a “fishing expedition” in Enforcement’s file.<sup>16</sup> “Nor is the defense entitled to receive every scintilla of evidence that might be beneficial.”<sup>17</sup> I therefore, grant Enforcement’s motion to quash Williams’ discovery requests.

Furthermore, where appropriate, I have analyzed Williams’ requests as if he properly filed them (which he did not) as motions pursuant to FINRA Rules 9251, 9252, and 9253.

### **1. Discovery Requests Related to Witness Identity and Proposed Hearing Exhibits**

The first five questions in the General Interrogatories and the first three questions in the Customer and Manager Interrogatories seek the names and other identifying information about every individual who Enforcement will call to testify or whose testimony Enforcement intends to rely upon in the hearing in this matter. They also ask for every document that Enforcement intends to offer into evidence during the hearing and the relevance that Enforcement attaches to each document. These requests seek information that will be disclosed at a later time in accordance with the Scheduling Order. The Scheduling Order establishes September 20, 2017, as the deadline for the parties to file their pre-hearing submissions, which must include their witness and exhibit lists and copies of the exhibits they intend to offer into evidence.<sup>18</sup> The Scheduling Order requires the parties’ exhibit lists to include all documents that a party expects to use at the hearing, a description of each exhibit, and a brief statement of the purposes for which the exhibit will be offered. The Scheduling Order also requires all parties to include in their witness lists the name, address, telephone number, and current occupation of each prospective witness and a brief summary of the substance and scope of the witnesses’ anticipated testimony.

Under Rule 9253, a respondent may request any written statement that is a substantially verbatim transcription of a statement made by a potential witness, where the transcription was

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<sup>14</sup> April 4, 2017 Declaration of Mark J. Fernandez (“Fernandez Decl.”), at ¶ 3. *See also* Motion to Quash, at 3.

<sup>15</sup> OHO Order 12-04 (2010023367001), at 3.

<sup>16</sup> OHO Order 04-01 (CAF030014) (Mar. 18, 2004), at 9, [http://www.finra.org/sites/default/files/OHODecision/p014459\\_0\\_0.pdf](http://www.finra.org/sites/default/files/OHODecision/p014459_0_0.pdf).

<sup>17</sup> OHO Order 01-14 (CAF000013) (May 21, 2001), at 10, [http://www.finra.org/sites/default/files/OHODecision/p007866\\_0\\_0.pdf](http://www.finra.org/sites/default/files/OHODecision/p007866_0_0.pdf).

<sup>18</sup> FINRA Rule 9242(a) states that, prior to a hearing, the Hearing Officer may order the parties to furnish to each other and the Hearing Panel a list and copies of documents that a party intends to introduce at the hearing and a list of witnesses who shall testify on a party’s behalf, including the witnesses’ names, occupations, addresses, and a brief summary of their expected testimony.

made contemporaneously with the making of the statement. The rule also allows a respondent to request any written statement that is 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. As indicated, Enforcement's list of potential witnesses is not due to be filed until September 20, 2017. At that time, Enforcement should produce to Williams witness statements as described in Rule 9253, if any such statements exist.

## **2. Discovery Requests Related to Customer Damages and Customer Reliance**

Questions four, five, seven, and eight in Williams' Customer and Manager Interrogatories, questions six through 11 of his General Interrogatories, admission requests 1, 3, 7, 8, 10, 14, 15, 17, 21, 22, 24, 28, 29, 31, 35, 36, 38, and 42, and Customer and Manager Document Production requests seven, eight and ten relate to the customer damages alleged to have resulted from Williams' misconduct and the customers' reliance on Williams' allegedly fraudulent statements. Documents of this nature are neither relevant nor material to this proceeding. Enforcement has not alleged customer reliance or losses in this case.<sup>19</sup> Furthermore, Enforcement need not prove customer loss or customer reliance to prevail in this matter. "[I]n a FINRA disciplinary action, Enforcement need not show customer reliance to prove fraud."<sup>20</sup> Similarly, proof of customer damages is not needed for Enforcement to prevail.<sup>21</sup>

## **3. Discovery Requests Related to Williams' State of Mind**

Question six in Williams' Customer and Manager Interrogatories and Customer and Manager Document Production request nine asks that Enforcement explain in detail and produce documentation to support its allegation that Williams either knew or should have known of the truth or falsity of any representation he made to each of the five customers listed in the Amended Complaint. FINRA Rule 9251 establishes the parameters of Enforcement's discovery obligations and does not allow for interrogatories such as these. Furthermore, Williams' request is premature in that it seeks information that may be included in Enforcement's pre-hearing brief. The Scheduling Order requires the parties to file pre-hearing briefs that contain "a narrative summary of a party's case or defense, the legal theories on which the party shall rely, and a discussion of

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<sup>19</sup> Motion to Quash, at 5-6.

<sup>20</sup> *Dep't of Enforcement v. Gonchar*, No. CAF040058, 2008 FINRA Discip. LEXIS 31, at \*33 (NAC Aug. 26, 2008), *aff'd*, Exchange Act Release No. 60506, 2009 SEC LEXIS 2797 (Aug. 14, 2009).

<sup>21</sup> See *Edward J. Mawod & Co.*, 46 S.E.C. 865, 871 (1977) (holding that the provisions of the Exchange Act allow for regulatory action without proof of damages because "[t]he evil sought to be remedied is not victimization but deception.").

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sanctions.”<sup>22</sup> The Scheduling Order establishes September 20, 2017, as the deadline for pre-hearing briefs.

With respect to Williams’ request for documents in this category, Enforcement’s only obligation is to comply with Rule 9251. Enforcement represents that, on or before November 1, 2016, it produced to Williams all non-privileged documents that are required to be produced under FINRA Rule 9251.<sup>23</sup>

#### **4. Customer-Focused Discovery Requests Unrelated to Customer Interactions with Williams**

Questions nine through 11 of Williams’ Customer and Manager Interrogatories request the number of years of investment experience, subdivided by category, that each of the five customers had before opening an account with Merrill Lynch and before their contact with Williams. The Customer and Manager Document Production requests 1, 2, 11, and 13 seek copies of every Merrill Lynch client relationship agreement, Merrill Lynch “kdi” client profile, documentation of trade corrections or reversals, dates and an explanation of disposition of every investor complaint, and January 2013 through August 2016 Merrill Lynch account statements for the five customers and the Merrill Lynch administrative manager identified in the Amended Complaint.

FINRA Rule 9251 establishes the outside boundaries of Enforcement’s discovery obligations. Under Rule 9251, Enforcement is required to make available documents prepared or obtained by Interested FINRA Staff in connection with the investigation that led to the institution of proceedings. Enforcement represents that, on or before November 1, 2016, it produced to Williams all non-privileged documents that are required to be produced under FINRA Rule 9251.<sup>24</sup> Williams offers no explanation of how or why information and documents unrelated to the customers’ interactions with Williams and outside the four-month review period would be relevant and material to this action. For instance, Williams seeks information about the customers’ investment experience *before* joining Merrill Lynch without explaining how it would be relevant to allegations that he misrepresented and omitted material facts in conversations that occurred during a four-month period in 2014. Similarly, Williams requests nearly four years of account statements without explaining the relevance to the limited allegations of this case.

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<sup>22</sup> Scheduling Order, at 7. FINRA Rule 9242(a) states that, prior to a hearing, the Hearing Officer may order the parties to file an outline or narrative summary of a party’s case or defense and the legal theories upon which a party shall rely.

<sup>23</sup> Motion to Quash, at 3; Fernandez Decl., at ¶ 3.

<sup>24</sup> Motion to Quash, at 3; Fernandez Decl., at ¶ 3. Enforcement specifically represents that the documents it produced to Williams included the relevant customers’ Merrill Lynch account application forms, Merrill Lynch Customer Profile System information for the relevant customers, and the customers’ account statements for the period at issue. Fernandez Decl., at ¶¶ 4(b), 4(c); Motion to Quash, at 9.

Williams’ requests also fail under Rule 9252. “Rule 9252 does not...permit a respondent to use Rule 8210 to issue requests for information in the form of interrogatories.”<sup>25</sup> Rule 9252(a) allows a respondent to request that Enforcement issue a Rule 8210 request for information or documents. If Williams’ discovery requests are analyzed as a Rule 9252 motion for Enforcement to issue a Rule 8210 request to Merrill Lynch, Williams has not met his burden under Rule 9252 of demonstrating that this information is relevant and material, describing his previous good faith efforts to obtain the information himself, and demonstrating that the recipient is subject to FINRA’s jurisdiction. Additionally, given that the allegations against Williams are confined to a definite period of time, his requests are unreasonable and excessive in scope.

### **5. Discovery Requests Related to Williams’ Financial Remuneration**

Question 12 of Williams’ Customer and Manager Interrogatories, Customer and Manager Document Production request 12, and admission requests 2, 9, 16, 23, 30, and 37 seek information and documentation related to all commissions, bonuses, or other type of remuneration received by Williams in connection with each of the five customers identified in the Amended Complaint. As stated above, Williams bears the burden of establishing a basis for claiming that Enforcement possesses responsive documents in its investigative file and has improperly withheld them.<sup>26</sup> Williams has made no such showing sufficient to overcome Fernandez’s declaration that Enforcement has complied with its disclosure obligations under Procedural Rule 9251.

Williams’ requests also fail under Rule 9252. If Williams’ discovery requests are analyzed as a Rule 9252 motion for Enforcement to issue a Rule 8210 request to Merrill Lynch, Williams has not met his burden under Rule 9252 of demonstrating that this information is relevant and material, describing his previous good faith efforts to obtain the information himself, and demonstrating that the recipient is subject to FINRA’s jurisdiction. Additionally, given the nature of the allegations against Williams, his requests for information and documentation of all remuneration he ever received related to these customers are unreasonable and excessive in scope.

### **6. Discovery Requests Related to Other FINRA Disciplinary Proceedings**

Questions 12 through 17 of the General Interrogatories request the disciplinary proceeding numbers for every disciplinary proceeding in which Merrill Lynch, a Merrill Lynch employee, Merrill Edge Advisory Center, a Merrill Edge Advisory Center employee, Bank of America Corporation, or a Bank of America employee was a respondent from 1996 through 2016. Under Rule 9251(a)(1), Enforcement’s discovery obligations are narrowly focused on evidence that is directly relevant to the *particular disciplinary proceeding* against the

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<sup>25</sup> OHO Order 16-14 (2015044379701), at 6.

<sup>26</sup> OHO Order 12-04 (2010023367001), at 3.



respondent.<sup>27</sup> “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.”<sup>28</sup> Enforcement represents that it has complied with Rule 9251 and produced all required documents. Williams has presented nothing to suggest that Enforcement has not met its obligations in this regard.

## 7. Discovery Requests Related to Merrill Lynch Siebel Notes

Williams' Customer and Manager Document Production request three asks for copies of “all Merrill Lynch ‘Siebel notes’<sup>29</sup> or any other Merrill Lynch client contact documentation evidencing all current and previous conversation Merrill Lynch and/or a Merrill Lynch representative had with [a customer identified in the Amended Complaint] beginning with the Merrill Lynch investment representative's notes taken at the time [the customer] opened his Merrill Lynch account or accounts.” Enforcement represents that, on November 1, 2016, it produced to Williams copies of all Siebel notes that pertain to the telephone conversations that are the subject of the Amended Complaint.<sup>30</sup> Enforcement also represents that it has fully complied with the requirements of Rule 9251. Williams has made no plausible representation that Enforcement has not complied sufficient to overcome Fernandez's declaration.

Williams' request also fails under Rule 9252. If Williams' discovery requests are analyzed as a Rule 9252 motion for Enforcement to issue a Rule 8210 request to Merrill Lynch, Williams has not met his burden under Rule 9252 of demonstrating that this information is relevant and material, describing his previous good faith efforts to obtain the information himself, and demonstrating that the recipient is subject to FINRA's jurisdiction. Additionally, Williams' requests are overbroad as they are unlimited in time and potentially encompass communications between numerous individuals who have no relevance to this proceeding.

## 8. Discovery Requests Related to FINRA Staff

Questions 18 through 25 of the General Interrogatories request information regarding the relationship between Bank of America Corporation, Merrill Lynch, Merrill Edge Advisory

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<sup>27</sup> See *Dep't of Enforcement v. Reichman*, No. 200801201960, 2011 FINRA Discip. LEXIS 18 (NAC July 21, 2011) (upholding discovery denial where respondent sought information related to a larger investigation related but not relevant to the narrow issues involved in her case); *Dep't of Enforcement v. Sturm*, No. CAF000033, 2002 NASD Discip. LEXIS 2, at \*19 n. 14 (NAC Mar. 21, 2002) (affirming Hearing Officer's denial of discovery request for documents relating to broader investigation of respondent but not relevant to the matters at issue in the present proceeding); OHO Order 12-02 (2011029760201) (Apr. 5, 2012), at 6, [http://www.finra.org/sites/default/files/OHODecision/p126070\\_0\\_0\\_0\\_0.pdf](http://www.finra.org/sites/default/files/OHODecision/p126070_0_0_0_0.pdf) (stating that document production in a FINRA Disciplinary proceeding is narrowly focused on evidence that is directly relevant to the particular proceeding against respondent).

<sup>28</sup> 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>.

<sup>29</sup> The Amended Complaint describes “Siebel” as a customer relationship management software application. Amended Complaint, at ¶ 8.

<sup>30</sup> Fernandez Decl., at ¶ 4(d).

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Center, and U.S. Trust and eight members of FINRA staff (including the undersigned Hearing Officer). These requests fall outside the discovery parameters of FINRA Rule 9251. The requests are unreasonable, overbroad and inappropriate, and Williams has not demonstrated the materiality or relevance of this information.

To the extent Williams' requests relate to the undersigned Hearing Officer, FINRA's rules require Hearing Officers to avoid conflicts of interest. Rule 9233 governs the recusal and disqualification of Hearing Officers and directs that a Hearing Officer who determines that he or she has a conflict of interest or bias or circumstances otherwise exist where his or her fairness might reasonably be questioned must withdraw from the matter.

### **9. Discovery Requests Related to Allegedly Falsified Records**

Williams' requests for admissions 4, 5, 6, 11, 12, 13, 18, 19, 20, 25, 26, 27, 32, 33, 34, 39, 40, and 41 seek admissions that Merrill Lynch, Bank of America Corporation, and FINRA staff falsified Merrill Lynch's business records, particularly those related to Williams' investment conversations with the five customers and one investment manager identified in the Amended Complaint. This set of requests is improper on its face in that it falls far outside the scope of Rule 9251. For this reason alone, I reject Williams' requests. Additionally, Williams has offered no basis whatsoever to support the suggestion that Merrill Lynch's records have been falsified.

### **10. Discovery Requests Related to Merrill Lynch, Merrill Edge, and Bank of America Manuals**

The first 42 categories in Williams' General Document Production request the following 2013 and 2014 Merrill Lynch, Merrill Edge Advisory Center, and Bank of America manuals, including addendums, appendices, and supplements:

- Employee manuals;
- Procedures manuals used by managers;
- Procedures manuals used by employees;
- Disciplinary procedures manuals used by managers;
- Disciplinary procedures manuals used by employees;
- Financial Solutions advisor training manuals used by managers; and
- Financial Solutions advisor training manuals used by Financial Solutions Advisors.

Enforcement represents that, in connection with its production of documents to Williams under Rule 9251, it produced the following Merrill Lynch Manuals:

- Wealth Management Branch Office Compliance Manual (Sections 6.1 and 20.1);
- Edge Advisory Center Procedures Manual (Sections 2.1.4, 2.3.8, 9.2, and 11.1);
- Edge Self-Directed Investing Procedures Manual (Section 7.8);
- Edge Advisory Center Supervisors Policy Manual (Sections 12.2, 100.4, and 100.6);

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- Edge Advisory Center Compliance Policy Manual (Sections 6.1, 6.8, 12.3, 15.2, 17.1, 17.16, 17.18, and 100.6);
- Edge Solutions Advisor New Hire Training Manual (Sections on mutual fund switches and investment oversight procedures for large trades); and
- All manual sections that Interested FINRA Staff obtained in connection with the investigation that led to the institution of this proceeding.<sup>31</sup>

Enforcement also represents that it has fully complied with its obligations under Rule 9251. Williams has not demonstrated nor even alleged that Enforcement has not complied. Additionally, if Williams' discovery requests are analyzed as a Rule 9252 motion for Enforcement to issue a Rule 8210 request to Merrill Lynch, Williams has not met his burden under Rule 9252 of showing that this information is relevant and material, describing his previous good faith efforts to obtain the information himself, and demonstrating that the Rule 8210 recipient is within FINRA's jurisdiction. Williams' requests are also overbroad.

#### **11. Discovery Requests Related to Merrill Lynch's Warnings to Williams**

Categories 43 and 44 of Williams' General Document Production request documents evidencing written or verbal warnings issued by Merrill Lynch management and responses from Williams. Enforcement represents that it has fully complied with its obligations under Rule 9251, and Williams has not demonstrated nor even alleged that Enforcement has not complied. Additionally, if Williams' discovery requests are analyzed as a Rule 9252 motion for Enforcement to issue a Rule 8210 request to Merrill Lynch, Williams has not met his burden under Rule 9252 of showing that this information is relevant and material, describing his previous good faith efforts to obtain the information himself, and demonstrating that the Rule 8210 recipient is within FINRA's jurisdiction. Williams' requests are also overbroad.

#### **12. Discovery Request Related to Communications between FINRA and Merrill Lynch**

Category 45 of Williams' General Document Production requests copies of all correspondence or other communications between Merrill Lynch and FINRA relating to FINRA's investigation of Williams. Enforcement represents that it has fully complied with its obligations under Rule 9251, and Williams has not demonstrated nor even alleged that Enforcement has not complied. Enforcement represents that the items it produced to Williams in accordance with Rule 9251 included copies of correspondence between Merrill Lynch and FINRA investigative staff relating to the investigation in this matter.<sup>32</sup>

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<sup>31</sup> Fernandez Decl., at ¶¶ 4(e), 4(f), 4(g), 4(h), 4(i), 4(j), 6.

<sup>32</sup> Motion to Quash, at 9.

**13. Discovery of Merrill Lynch Materials Not Related to the Investigation in this Matter**

Categories 46 and 49 of Williams' General Document Production seek a variety of unrelated Merrill Lynch recordings and surveillance to which Williams is a party and written manager approval requests that are not related to the subject of the Amended Complaint. Rule 9251 specifies that only documents prepared or obtained in the course of investigations "directly and proximately leading to the institution of particular proceedings must be produced."<sup>33</sup> In these requests, Williams seeks documents that are not related to this proceeding. These requests fall outside the bounds of Rule 9251. The requests also fail under Rule 9252. If Williams' discovery requests are analyzed as a Rule 9252 motion for Enforcement to issue a Rule 8210 request to Merrill Lynch, Williams has not met his burden under Rule 9252 of showing that this information is relevant and material, describing his previous good faith efforts to obtain the information himself, and demonstrating that the Rule 8210 recipient is within FINRA's jurisdiction. Furthermore, the requests, which are unlimited in time, are unreasonable, oppressive, and excessive in scope.

**14. Discovery Requests Related to Williams' Merrill Lynch Emails**

Categories 47 and 48 of Williams' General Document Production requests every email sent or received by Williams using Merrill Lynch's email system during the entire term of his employment. Enforcement represents that it has fully complied with its obligations under Rule 9251, and Williams has not demonstrated nor even alleged that Enforcement has not complied. Enforcement also represents that the items it produced to Williams included all electronic communications that Williams sent or received between March 1, 2014, and August 6, 2014 (the relevant period).<sup>34</sup> These requests thus fall outside the scope of Rule 9251. The requests also fail under Rule 9252. If Williams' discovery requests are analyzed as a Rule 9252 motion for Enforcement to issue a Rule 8210 request to Merrill Lynch, Williams has not met his burden under Rule 9252 of showing that this information is relevant and material, describing his previous good faith efforts to obtain the information himself, and demonstrating that the Rule 8210 recipient is within FINRA's jurisdiction. Furthermore, Williams' requests are unreasonable, oppressive, and excessive in scope.

**15. Discovery Request Related to All of Williams' Trades at Merrill Lynch**

Category 50 of Williams' General Document Production requests copies of documentation evidencing every trade of any kind that Williams executed during the entire term of his tenure at Merrill Lynch. Enforcement represents that it has fully complied with its obligations under Rule 9251, and Williams has not demonstrated nor even alleged that Enforcement has not complied. Enforcement also represents that the items it produced to

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<sup>33</sup> OHO Order 15-05 (2012034936005), at 5 (citations omitted).

<sup>34</sup> Fernandez Decl., at ¶ 4(a).

Williams included all Merrill Lynch account statements for the customers identified in the Amended Complaint during the relevant period. As such, Enforcement has provided Williams with documentation related to the trades he executed that are relevant to the Amended Complaint. Williams' request for additional items falls outside the bounds of Rule 9251. The requests also fail under Rule 9252 in that Williams has made no showing of relevance and materiality and has not described his previous good faith efforts to obtain the information from Merrill Lynch. Furthermore, the requests are unreasonable, oppressive, and excessive in scope.

**16. Discovery Requests Related to Merrill Lynch Sales Scripts, Sales Aids, and Other Fact Sheets**

Categories 51 and 52 of Williams' request for the production of documents seek copies of every sales script, sales aid, or other type of fact sheet used by Merrill Edge financial advisors in 2013 and 2014. Enforcement represents that it has fully complied with its obligations under Rule 9251, and Williams has not demonstrated nor even alleged that Enforcement has not complied. Furthermore, Williams' request is denied under Rule 9252 because he has not demonstrated relevance and materiality, described his previous good faith efforts to obtain the information himself, and demonstrated that the proposed Rule 8210 recipient is within FINRA's jurisdiction.

**C. Respondent's Failure to Comply with Hearing Officer Orders**

The Scheduling Order states that all motions must include "a certification that the moving party has made a reasonable, good faith effort to meet and confer with all other parties to resolve each issue in the motion informally."<sup>35</sup> It also states that motions that do not contain this certification may be rejected. Enforcement represents that Williams did not confer with Enforcement prior to filing his discovery requests on March 21, 2017.<sup>36</sup> Williams' failure to confer with Enforcement before filing the discovery requests was a violation of the Scheduling Order.

On September 26, 2016, I issued an order directing Williams to file a supplement to the Answer in which he responds directly to each individual allegation contained in every paragraph of the Amended Complaint. I ordered that each such response be numbered to correspond to the paragraph in which the allegation is included, and required that Williams admit, deny or state that he does not have and is unable to obtain sufficient information to admit or deny each allegation. I ordered Williams to supplement his Answer on or before October 12, 2016. I later granted Williams' request to extend the due date to October 19, 2016. To date, Williams has not complied with my order to supplement the Answer.

I remind Williams that his failure to comply with my orders could result in an order to show cause why he should not be held in contempt. FINRA Rule 9280 states in part that, if a party engages in conduct in violation of an order of a Hearing Officer or other contemptuous

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<sup>35</sup> Scheduling Order, at 5.

<sup>36</sup> Fernandez Decl., at ¶ 9.

**This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 17-10 (2014042524301).**

conduct, the Hearing Officer may subject the party to sanctions as set for in paragraph (b) of Rule 9280.

### **III. Conclusion**

For the reasons outlined in this Order, I grant Enforcement's Motion to Quash Respondent's Discovery Requests. Additionally, I order Williams to comply with all outstanding orders in this disciplinary proceeding. I further order Enforcement, when it files its pre-hearing submission, to produce to Williams witness statements as described in FINRA Rule 9253, if any such statements exist.

**SO ORDERED.**

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Carla Carloni  
Hearing Officer

Dated: April 11, 2017