

**NASD OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,  Complainant,  v.  Respondent.	Disciplinary Proceeding No. CAF030008  Hearing Officer—Andrew H. Perkins
---	---

**ORDER DENYING RESPONDENT'S MOTION TO COMPEL PRODUCTION OF INFORMATION REGARDING WITHHELD DOCUMENTS**

The Respondent moved for entry of an order compelling the Department of Enforcement (the "Department") to provide the bates-stamp range of documents that it withheld from production on the ground that they were obtained in the course of another confidential investigation and they would not be used in this proceeding. The Respondent requests this additional information because he "maintain[s] significant concerns about the Department's assessment of whether those documents are exculpatory."<sup>1</sup> The Respondent seeks the information so that it can attempt to obtain copies of the documents from \_\_\_\_\_, the documents' source.

The Department opposes the Motion, arguing that to release this information would defeat the purpose of the Department's request to withhold those documents in the first place. The Department characterizes the Respondent's concern over the

---

<sup>1</sup> Mot. 1.

**This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 03-20 (CAF030008).**

Department's compliance with *Brady v. Maryland*,<sup>2</sup> the doctrine requiring the disclosure of materially exculpatory facts, as "rank speculation."<sup>3</sup>

On its surface, the Respondent's request appears reasonable. In his view, he asks nothing more than the ability to make an independent determination of whether the subject documents contain *Brady* material. However, the Respondent overlooks one of the purposes underlying NASD Procedural Rule 9251(b)(1)(c)—the protection of the confidentiality of unrelated ongoing investigations. Implicit in the Department's argument is the contention that the confidentiality of its unrelated investigation might be compromised by the release of the information the Respondent seeks. Thus, the Respondent's Motion requires the Hearing Officer to weigh the unspecified harm that may result from disclosure against the speculative nature of the Respondent's request.

On balance, the Hearing Officer finds that the policies underlying Rule 9251(b) outweigh the Respondent's concerns. Speculation and doubt about the Department's compliance with *Brady* is insufficient to maintain the Respondent's request.<sup>4</sup> The Respondent has not made a plausible showing that the underlying documents contain facts that are both favorable and material to his defense. Indeed, the Department submitted a sworn declaration of a Department attorney that the subject documents did not contain material exculpatory evidence. Under these circumstances, the Respondent has not made a sufficient showing to justify entry of an order compelling the Department

---

<sup>2</sup> 373 U.S. 83 (1963).

<sup>3</sup> Opp'n 4.

<sup>4</sup> See, e.g., *Orlando Joseph Jett*, 62 SEC 530 (1996).

**This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 03-20 (CAF030008).**

to provide information to enable the Respondent to identify the withheld documents.

Accordingly, the Respondent's Motion is denied.

**IT IS SO ORDERED.**

---

Andrew H. Perkins  
Hearing Officer

October 16, 2003