

**NASD OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Disciplinary Proceeding  
No. E9B2003033501

Hearing Officer—Andrew H. Perkins

**ORDER DENYING IN PART AND GRANTING IN PART  
RESPONDENT'S MOTION TO COMPEL DISCOVERY**

Respondent is charged with excessive and unsuitable trading activity JD's and GP's securities accounts at Continental Broker-Dealer Corp. ("Continental"), in violation of NASD Conduct Rules 2120, 2110, NASD IM-2310-2, Section 10(b) of the Securities Exchange Act of 1934, and Exchange Act Rule 10b-5. Respondent denies each charge.

Pursuant to NASD Procedural Rule 9251, on or about October 7, 2005, Enforcement produced Respondent with a copy of NASD staff's investigative file; excluding documents Enforcement claimed fell within the scope of Procedural Rule 9251(b).<sup>1</sup> After reviewing Enforcement's file materials, on November 17, 2005, Respondent sent Enforcement a request for

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<sup>1</sup> Rule 9251(b) permits Enforcement to withhold specific categories of documents. These include documents falling within traditional definitions of privilege, such as documents subject to attorney-client privilege, as well as: (1) internal reports and memoranda that Enforcement will not offer in evidence; (2) documents that would disclose an examination, investigatory or enforcement technique or guideline; (3) documents that would reveal the identity of a source, including a federal, state, or foreign regulatory authority or a self-regulatory organization that furnished information or was furnished information on a confidential basis regarding an investigation, an examination, an enforcement proceeding, or any other type of civil or criminal enforcement action; (4) documents that would reveal an examination, an investigation, an enforcement proceeding, or any other type of civil or criminal enforcement action under consideration by, or initiated by, NASD, a federal, state, or foreign regulatory authority, or other self-regulatory organization; and (5) documents that the Hearing Officer permits Enforcement to withhold as not relevant to the subject matter of the proceeding, or for other good cause shown.

**This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 06-07 (E9B2003033501).**

production of documents and information. On December 5, 2005, Enforcement replied by letter, stating in summary that it had complied with NASD Procedural Rule 9251 and that it had not withheld any exculpatory evidence. Enforcement also informed Respondent that it would not provide a withheld document list.<sup>2</sup>

Pursuant to NASD Procedural Rule 9252, Respondent now moves for entry of an order compelling Enforcement to respond separately and fully to each document request. With respect to his request for witness statements, if none are available, Respondent alternatively moves that Enforcement be compelled to conduct on-the-record interviews of customers JD and GP. In addition, Respondent requests that Enforcement be compelled to produce a list of documents that it withheld under NASD Procedural Rule 9251(b)(1).

Enforcement opposes Respondent's motion on the grounds that the request is overly broad, excessive, and unduly burdensome, and that it seeks the production of irrelevant and immaterial information. As to Respondent's request for a privilege log, Enforcement asserts that the request does not comply with Procedural Rule 9251(c). Enforcement contends that the motion does not show that Respondent has a reason to believe that documents are being withheld in violation of Rule 9251.<sup>3</sup> Finally, Enforcement further opposes Respondent's request that it depose JD and GP because NASD lacks jurisdiction to compel their testimony. Neither customer is registered with NASD or associated with an NASD member firm.

On January 10, 2006, Respondent filed a reply brief in support of his motion. Respondent argues that he has sufficient reason to believe Enforcement may be withholding exculpatory evidence improperly because—after stating that it had complied with Rule 9251—Enforcement produced an interview statement created by NASD staff during an interview of customer JD. Respondent contends that JD's interview statement contains exculpatory evidence. Based on

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<sup>2</sup> Respondent's Mot. to Compel Discovery, Exh. B.

<sup>3</sup> Rule 9251(c) requires that in order to compel a withheld document list a respondent must show "some reason to believe that a Document is being withheld in violation of the Code."

this, Respondent argues that a privilege log is needed so that the Hearing Officer can verify Enforcement's compliance with NASD Procedural Rule 9251.

## **Discussion**

### **I. Document Requests**

Respondent seeks production of a broad range of information concerning customers JD and GP, including their tax returns, financial statements, any account documents from all firms at which they maintained securities accounts, and personal notes pertaining to their investments. Respondent further requests production of copies of all correspondence, emails, notices, tape recordings, brokers' notes and memoranda, diaries, and calendars related to JD's and GP's accounts at Continental.

Respondent's requests are excessive and unreasonable. First, the Hearing Officer notes that Enforcement has certified that it produced all non-privileged documents relating to the underlying investigation. Thus, Respondent received the documents in NASD's possession that relate to the accounts at issue in this proceeding. As to Respondent's request for documents relating to any other accounts, these materials are not critical to Respondent's defense, nor are they directly relevant to the crucial issues in this disciplinary proceeding, namely, what transpired in JD's and GP's Continental accounts during the relevant period. Accordingly, Respondent's request that Enforcement compel production of the foregoing categories of documents is denied.

With respect to Respondent's request that Enforcement invoke Procedural Rule 8210 to allow them to depose JD and GP, the Hearing Officer notes that Rule 8210 applies only to those over whom NASD has jurisdiction, and NASD lacks jurisdiction over these two customers. Thus, Enforcement cannot compel their testimony for any purpose. The Hearing Officer has no authority to order discovery under these circumstances, and Respondent cites no case law to support his request. Accordingly, Respondent's request that Enforcement be compelled to obtain additional information from these two customers is denied.

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## **II. Customer Statements and Request for Privilege Log**

With respect to Respondent's request for witness statements as defined by Procedural Rule 9253, the Hearing Officer is concerned that Enforcement may not have conducted a thorough review of the notes and statements it withheld under Rule 9251(b)(1). Enforcement's unexplained late production of the notes pertaining to the JD interview gives Respondent "some reason" to believe that Enforcement may not have produced all non-privileged witness statements. Accordingly, the Hearing Officer orders Enforcement to produce a privilege log of the witness notes and statements it withheld. The log shall include a brief description of each withheld document, and identify the author, date of creation, and privilege claimed. Enforcement shall file the privilege log on or before February 1, 2006.

**IT IS SO ORDERED.**

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Andrew H. Perkins  
Hearing Officer

January 11, 2006