

**NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. CAF000030
v.	:	
	:	Hearing Officer - EBC
	:	
	:	
	:	
Respondent.	:	

**ORDER GRANTING ENFORCEMENT’S MOTION FOR LEAVE
TO WITHHOLD FROM PRODUCTION CERTAIN DOCUMENTS
AND GRANTING OTHER RELIEF**

I. Introduction

On September 11, 2000, the Department of Enforcement (Enforcement) filed a “Motion for Leave to Withhold Certain Documents and to Modify Complainant’s Obligations Pursuant to Rule 9251(a)(2) of the Code of Procedure”¹ and, on September 21, 2000, the Respondent, _____ (“_____” or the “Respondent”), though his counsel, filed papers in opposition. By Order, dated October 10, 2000, the Hearing Officer granted Enforcement’s motion for leave to file a reply (which was accompanied by Enforcement’s proposed reply papers) in response to _____’s opposition. For the reasons set forth below, the Hearing Officer concludes that Enforcement has demonstrated good cause for withholding certain documents from disclosure and for the other relief requested.

¹ In support of its motion, Enforcement submitted a Declaration of Traci Lin Manuel (“Manuel Decl.”), a Compliance Examiner responsible for the investigation that led to the institution of this proceeding.

II. Discussion

A. **Background**

According to the Complaint, from on or about September 3, 1996 until on or about May 20, 1999, _____ was associated with Lloyd Wade Securities, Inc. (“Lloyd Wade”), an NASD member firm, and was a co-owner of its Office of Supervisory Jurisdiction located in West Paterson, New Jersey (the “Lloyd Wade OSJ”). (Complaint, ¶ 1.) The Complaint alleges that _____ violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110 by failing to produce wire instructions and certain monthly bank statements relating to accounts used by the Lloyd Wade OSJ in its business operations, and by failing to produce other documents in a timely fashion. (See generally, Complaint.) Apparently, _____ did appear for an on-the-record interview (Complaint, ¶ 6), and Enforcement does not allege that _____ failed to cooperate during the interview. Respondent filed an Answer in which he asserted, among other things, that: (1) he substantially complied with Rule 8210 and any violation of Rule 8210 he committed was *de minimis*; (2) this proceeding is moot and frivolous; and (3) Enforcement has engaged in “prosecutorial bias” against him.

B. **The Pending Motion**

Code of Procedure Rule 9251(a)(1) requires Enforcement to “make available for inspection and copying by any Respondent, Documents prepared or obtained by Interested Association Staff in connection with the investigation that led to the institution of proceedings” (emphasis added). Enforcement seeks an order, pursuant to Rule 9251(b)(1)(D), allowing it to withhold from production all documents in the investigative file with the exception of: (1) the transcript of _____’s investigative testimony, which it already has produced to Respondent’s counsel; and (2) all documents relating to _____’s alleged failure to comply or timely comply with the requests for information issued by NASD

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Regulation Inc. (NASDR). Enforcement also seeks to limit the notice obligations, imposed by Rule 9251(a)(2), to those Rule 8210 requests made in connection with this proceeding.²

According to Enforcement, the underlying investigation (ENF-0306) – which is on-going – implicates possible violations of the federal securities laws’ anti-fraud provisions and NASD Rules in connection with Lloyd Wade’s sales of two over-the-counter bulletin board securities, Tolleycraft Yacht Corp. and Netbet, Inc.³ Apparently, the investigative file is voluminous and contains books and records the staff obtained from Lloyd Wade, other firms, transfer agents, and other sources.⁴ Enforcement thus argues that, apart from the documents it already has produced or is willing to produce, the documents in the investigative file have no bearing on the matters at issue in this proceeding and the disclosure of these documents would jeopardize the integrity of the investigation. Enforcement also claims that production of the entire investigative file would be unduly burdensome. In opposition, _____ argues that he is entitled to discovery of the entire investigative file because he believes that its contents will assist him in “proving the bad faith, oppressive nature of this action.”⁵ He further suggests that Enforcement should be required to produce all of the documents in the investigative file because this might “force . . . Enforcement to negotiate in good faith for a reasonable settlement of this matter.”⁶

² Rule 9251(a)(2) provides, in pertinent part:

The Department of Enforcement shall promptly inform the Hearing Officer and each other Party if, after the issuance of a complaint, requests for information under Rule 8210 are issued under the same investigative file number under which the investigation leading to the institution of disciplinary proceedings was conducted.

³ Motion for Leave to Withhold Certain Documents and to Modify Complainant’s Obligations Pursuant to Rule 9251(a)(2) of the Code of Procedure (“Enforcement’s Motion”), ¶ 1; Manuel Decl. ¶ 2.

⁴ Enforcement’s Motion, ¶ 7; Manuel Decl. ¶¶ 3-4.

⁵ Response to Complainant’s Motion to Withhold Documents, p. 3.

⁶ Id.

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Enforcement's disclosure obligations under Rule 9251(a)(1) are not unqualified. Pursuant to Rule 9251(b)(1)(A)-(C), Enforcement may withhold from disclosure documents that are privileged, constitute attorney work product, or otherwise fall within a protected category. In addition, and of relevance here, pursuant to Rule 9251(b)(1)(D), the Hearing Officer may grant Enforcement leave to withhold a document or category of documents from disclosure "as not relevant to the subject matter of the proceeding, or for other good cause shown."

As a general matter, there is simply no reason to compromise the integrity of an on-going investigation in favor of the disclosure of documents that are plainly irrelevant to the matters involved in a particular disciplinary proceeding – as are the documents that Enforcement seeks to withhold in this proceeding. Indeed, in this case, irrespective of the potential threat to the integrity of the investigation, the Respondent simply has not advanced any plausible theory of relevance to justify granting him unfettered access to the investigative file.⁷ Documents prepared or obtained by NASDR in connection with an investigation involving possible misconduct stemming from Lloyd Wade's sales of OTCBB securities will not assist _____ in proving he substantially complied with NASDR's requests for information or any other of his purported defenses. Further, and needless to say, the Hearing Officer will not require Enforcement to produce plainly irrelevant documents to coerce a settlement of this proceeding.⁸

⁷ _____ suggests that Enforcement's concerns about the integrity of the investigation could be addressed through an appropriate confidentiality order. However, because he has not explained how the documents Enforcement seeks to withhold may be relevant to the issues in this proceeding, there is simply no reason to require Enforcement to produce them and questions as to whether a confidentiality order would satisfy Enforcement's concerns are therefore moot.

⁸ If _____ is interested in settling this proceeding and believes that Enforcement's position on settlement has been unreasonable, there are legitimate methods to raise these issues with the Hearing Officer or Hearing Panel.

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Finally, the Hearing Officer agrees that Enforcement's notification obligations under Rule 9251(a)(2) should be modified to protect the integrity of the on-going, underlying investigation.

III. Order

Accordingly, for good cause shown, Enforcement's motion is GRANTED and it is ORDERED that:

A. Enforcement may withhold from production documents prepared or obtained by Interested Association Staff in connection with the investigation that led to the institution of this proceeding with the exception of: (1) the transcript of _____'s investigative testimony, which it already has produced to Respondent's counsel; and (2) all documents relating to _____'s alleged failure to comply or timely comply with NASDR's requests for information. Enforcement's obligation to produce these documents is, of course, subject to the provisions of Code of Procedure Rules 9251(b)(1)(A)-(C); and

B. Enforcement's notification obligations under Rule 9251(a)(2) are modified such that it is required to notify the Hearing Officer and the Respondent only of those post-complaint Rule 8210 requests that are made in connection with this proceeding; Enforcement otherwise is relieved of its obligation to provide notification of Rule 8210 requests issued in ENF-0306.

SO ORDERED.

Ellen B. Cohn
Hearing Officer

Dated: New York, New York
October 10, 2000