

This Order has been published by the NASDR Office of Hearing Officers and should be cited as OHO Order 99-06 (CAF980002).

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. CAF980002
v.	:	
	:	
	:	Hearing Officer - DMF
	:	
Respondents.	:	
	:	

**ORDER GRANTING RESPONDENTS' MOTION TO COMPEL PRODUCTION OF
RULE 8210 REQUEST, AND DENYING RESPONDENTS' MOTION TO COMPEL
PRODUCTION OF PERSONNEL FILE AND TO PRECLUDE ENFORCEMENT'S
EXHIBITS**

Respondents _____ have filed motions seeking (1) to compel production of a Rule 8210 request issued by the Department of Enforcement after the commencement of this proceeding to obtain documents from _____ for use in this proceeding; (2) to compel production of the "personal" file of a former NASD employee; and (3) to preclude Enforcement from offering any exhibits at the hearing or from objecting to any of the _____ Respondents' exhibits. For the reasons set forth below, the first motion is granted and the others are denied.

1. Rule 8210 Request

On January 7, 1999, in accordance with Rule 9251(a)(2), Enforcement filed a notice informing the Hearing Officer and the parties that it had issued a request for information to _____, pursuant to Rule 8210. Enforcement subsequently provided to the _____ Respondents two boxes of documents it received from _____ in response to the Rule 8210 request. Enforcement advised the _____ Respondents that those documents were _____ entire

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response to the Rule 8210 request, but Enforcement refused to give the _____ Respondents a copy of the request itself. The _____ Respondents have now moved for an order compelling Enforcement to do so.

In support of their motion, the _____ Respondents offer a very pragmatic argument: “These boxes contained over three feet of pages of material which appear to be predominantly hand written ledgers. There is no identification on these materials of what they are or the significance of these ledgers to the instant matter. The only reason why the Respondents have any idea of what these materials are is a cover letter from [counsel for Enforcement] identifying these materials as documents which he has received from _____ in response to an 8210 request for information However, [he] offers no explanation of what these documents are.”

Enforcement opposes this motion. Enforcement does not take issue with the _____ Respondents’ characterizations of the volume or nature of the documents, but argues that Rule 9251(a)(2) does not explicitly require Enforcement to give respondents copies of post-Complaint Rule 8210 requests.

Rule 9251(a)(2) requires Enforcement to notify the Hearing Officer and the respondents of any post-Complaint Rule 8210 request “issued under the same investigative file number under which the investigation leading to the institution of disciplinary proceeding was conducted,” and also requires Enforcement to make available to the respondents any documents received in response to such a request that are material and relevant to the disciplinary proceeding. As Enforcement notes, it does not expressly require Enforcement to disclose the Rule 8210 request itself.

There is no general policy against disclosing Rule 8210 requests to respondents. On the contrary, Rule 9251(a)(1) (A) specifically requires Enforcement to disclose all pre-Complaint

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Rule 8210 requests issued “in connection with the investigation that led to the institution of proceedings.” It is not surprising, however, that Rule 9251(a)(2) does not have similar language requiring the disclosure of post-Complaint Rule 8210 requests. The Rule applies to any request issued “under the same investigative file number,” which means it may encompass requests in ongoing investigations that are unrelated to the pending disciplinary proceedings, and which do not elicit responses that are relevant to those proceedings. In this case, however, Enforcement concedes that it employed the Rule 8210 request to _____ to obtain documents for this proceeding, and that, pursuant to Rule 9251(a)(2), it has made available to the _____ Respondents _____ entire response to the request. Furthermore, Enforcement has not challenged the _____ Respondents’ contention that without the request it is impossible for them to interpret the _____ documents or to understand their relevance to this proceeding. Under such circumstances, the _____ Respondents are entitled to the _____ request. To hold otherwise would make Enforcement’s obligation to disclose _____ response to the request meaningless. Therefore, Enforcement is ordered to make available to the _____ Respondents the Rule 8210 request sent to _____.

2. Personnel File

The _____ Respondents have also filed a motion seeking production of “the NASD’s personal file” – the Hearing Officer assumes that they mean “personnel” file – for a former employee. In support of this motion, the _____ Respondents allege, without any supporting evidence, that the former employee “was actively involved in the NASD’s investigation of _____”; that, “upon information and belief, [she] provided confidential NASD information to people associated with _____ and that she was fired because of her actions”; and that they “suspect that [her] file will contain an accounting of [her] actions during the relevant time

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period.” The _____ Respondents also contend that “the information contained in her personnel file is directly relevant to the affirmative defenses which Respondents have raised including, but not limited to, the NASD’s failure to properly regulate _____ and the conduct of _____ principals.” The _____ Respondents ask the Hearing Officer to “conduct an in camera inspection to determine if the material contains relevant evidence regarding the instant matter.” Enforcement also opposes this motion, arguing that no provision of the Code of Procedure authorizes the relief that the _____ Respondents seek; that production of the personnel file would constitute an invasion of the former employee’s privacy; and that the _____ Respondents have not offered any evidence to support the factual allegations and suspicions set forth in the motion.

The motion will be denied. There is no need for the Hearing Officer to conduct an in camera review. Assuming, for the sake of argument, that the Hearing Officer would have authority to require production of such documents upon a proper showing, the _____ Respondents have made no such showing in this case. They have offered no evidence to support their “belief” and “suspicion” that the former employee engaged in any sort of misconduct whatsoever, and, in any event, the misconduct they “suspect” does not relate to the charges in this proceeding. This case is not about the conduct of the NASD investigation of _____, or the NASD’s regulation of that firm or individuals associated with it. This case concerns the merits of certain charges that have been lodged against the respondents. In accordance with Rule 9263(a), at the hearing the Hearing Officer will receive evidence relevant to those charges, but will exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial. The personnel records sought by the _____ Respondents fall squarely within that class of evidence that the Hearing Officer will exclude.

3. Enforcement's Exhibits

The _____ Respondents' third motion seeks an order that would preclude Enforcement from offering any exhibits at the hearing, or from objecting to any of the _____ Respondents' exhibits. The _____ Respondents also ask the Hearing Officer to give "a formal warning to [Enforcement] that if [Enforcement] continues to deal with Respondents in bad faith [Enforcement] will be sanctioned."

This motion arises out of a process that the Hearing Officer established, based upon the agreement of the parties during a pre-hearing conference, in the hope that it might facilitate a cooperative effort of the parties to agree upon the authenticity and admissibility of proposed exhibits. See Order Regarding Objections to Exhibits (Mar. 2, 1999). The process required the parties to exchange exhibit lists, indicating whether they would or would not object to the authenticity or admissibility of the exhibits, on a prescribed schedule. The Hearing Officer imposed this formal process after attempts to encourage the parties to work together cooperatively on an informal basis failed.

In their original motion papers, the _____ Respondents argued that Enforcement exhibited bad faith by failing to make its exchange of the exhibit lists, with objections noted, in a timely manner. In response, Enforcement stated that it mailed its list in a timely manner. Enforcement also pointed out that the _____ Respondents had not contacted counsel for Enforcement before filing the motion, as required under the Standing Order issued in this proceeding. In reply, the _____ Respondents acknowledged that Enforcement did mail the materials on the date set for the exchange, but complain that an exchange, not mere mailing, was required, noting that they faxed their corresponding materials to Enforcement on the date set for the exchange. The _____ Respondents also argue that Enforcement exhibited bad faith by

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raising unjustified objections and refusing to stipulate to the admissibility of the _____ Respondents' exhibits. Finally, the _____ Respondents admit that they did not contact Enforcement before filing the motion.

The motion will be denied. Denial could be premised on the _____ Respondents' failure to contact Enforcement before filing the motion, but that failure, like the actions of Enforcement about which the _____ Respondents complain, is simply further evidence of the inability of the parties to cooperate in a reasonable manner in the pre-hearing process, a problem that has persisted since the outset of this proceeding. This does not appear to reflect bad faith on either side, but rather over-zealousness on the part of all. Sanctioning one side or both, or threatening to do so, however, will not accomplish the goal of resolving this proceeding in a fair and expeditious manner. Instead, to achieve those goals, the Hearing Officer will establish a hearing and pre-hearing schedule and procedures, in an order issued simultaneously with this order, in order to bring this proceeding to a resolution without the cooperative effort of the parties.

Therefore, (1) the _____ Respondents' motion for an order compelling Enforcement to produce the Rule 8210 request to _____ is granted; (2) the _____ Respondents' motion for an order compelling production of the personnel file of a former NASD employee is denied; and (3) the _____ Respondents' motion for an order precluding Enforcement from offering any evidence at the hearing or from objecting to any of the _____ Respondents' exhibits, is denied.

SO ORDERED

David M. FitzGerald
Hearing Officer

Dated: Washington, DC
April 14, 1999