

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 07-22 (2005000191701).

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF MARKET REGULATION,

Complainant,

v.

RESPONDENT FIRM,

RESPONDENT 2,

RESPONDENT 3,

and

RESPONDENT 4,

Respondents.

Disciplinary Proceeding
No. 2005000191701

Hearing Officer – SW

**ORDER DENYING RESPONDENT 3'S
TWO DISCOVERY REQUESTS**

On January 23, 2007, Respondent 3 filed a motion entitled "Demand for Discovery." On February 2, 2007, the Department of Market Regulation ("Market Regulation") filed an opposition to Respondent 3's motion, stating correctly that it was not required to produce its investigative file until 21 days after the last timely answer is filed in the case, and that, at the time that Respondent 3 filed his motion for discovery, two of the Respondents had received extensions until February 28, 2007 to file timely answers.

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Accordingly, the Hearing Officer by this Order denies Respondent 3's January 23, 2007 motion for discovery.¹

On May 15, 2007, Respondent 3 filed a second motion for discovery. The May 15, 2007 motion for discovery was a duplicate of the January 23, 2007 motion, with the following two exceptions, (i) the request for the written report of patient assignments was deleted, and (ii) the requests for customer information and for documents to be relied upon by Market Regulation to prove the allegations of the Complaint were more specific.

The May 15, 2007 motion for discovery included but was not limited to demand for (i) correspondence between Market Regulation and certain customers, (ii) account information regarding three customers, MH, JW, and NY, (iii) designation of the documents in its investigative file, which Market Regulation intends to present at the Hearing, (iv) names, addresses, and summaries of the subject matter of Market Regulation's proposed witnesses, and (v) copies of any notes, memoranda, tape recordings, or any electronic media, or recorded statements taken during Respondent 3's deposition.

On May 25, 2007, Market Regulation filed an opposition to Respondent 3's May 15, 2007 motion on the grounds that the motion was overbroad and included documents that have already been provided to Respondent 3. In reviewing Respondent 3's May 15, 2007 motion, the Hearing Officer first reviewed Market Regulation's discovery obligations as defined and circumscribed by NASD Procedural Rule 9251.

Rule 9251(a)(1) provides that Market Regulation must make available to respondents for inspection and copying documents prepared or obtained by NASD staff

¹ Respondent 3's January 23, 2007 motion for discovery requested that Market Regulation comply with the motion by February 20, 2007.

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in connection with the investigation that led to the institution of this proceeding, including, but not limited to: (i) all requests for information issued pursuant to Rule 8210; (ii) all other written requests directed to persons not employed by NASD to provide documents or to be interviewed; (iii) the documents provided in response to either type of request; (iv) all transcripts and transcript exhibits; and (v) all other documents obtained from persons not employed by NASD.

Rule 9251(b)(1) authorizes Market Regulation to withhold various categories of documents that it would otherwise be required to produce under Rule 9251(a)(1), including: (i) attorney work product; (ii) examination or inspection reports; (iii) **internal memoranda, or other notes or writings prepared by NASD staff that will not be offered in evidence**; and (iv) documents reflecting various types of regulatory information and communications. (Emphasis added).

Even if Market Regulation does not plan to offer particular notes or writings as evidence, Market Regulation may not withhold a document or a portion of a document that contains material exculpatory evidence. Furthermore, pursuant to Rule 9253, the Respondents may move for production of any statement made by any person who Market Regulation will call as a witness at the Hearing, if the statement pertains to the witness' expected direct testimony and is "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, **which is a substantially verbatim recital of an oral statement made by said witness** and recorded contemporaneously with the making of such oral statement," as that phrase is used in 18 U.S.C. §3500(e)(2). (Emphasis added).

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Market Regulation's May 25, 2007 opposition stated that, on April 9, 2007, in compliance with NASD Procedural Rules 9251 and 9253, Market Regulation produced to each Respondent the documents in its investigative file required to be disclosed, in the form of one DVD and five CD-ROMs. For example, copies of correspondence between NASD and certain customers have been produced. Additionally, Market Regulation represented that the account documents related to MH, JW and NY were produced. Further, to the extent that the documents obtained by Market Regulation included information concerning customer's other accounts, names and addresses, the information has also been produced.

To the extent that Respondent 3's request requires a list of the witnesses and documents to be presented at the Hearing, such information is to be filed, consistent with the April 23, 2007 Scheduling Order, no later than October 23, 2007, although preliminary discussions regarding such matters should be held no later than September 17, 2007. Respondent 3 has provided no evidence to indicate to the Hearing Officer that Market Regulation's representations are untrue or incorrect, or that Market Regulation is withholding exculpatory information.

Accordingly, Respondent 3's May 15, 2007 motion is denied in its entirety because the Hearing Officer has determined that the motion is (i) moot as to those requests that Market Regulation has already met, and (ii) overly broad as to the remaining requests.

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If Respondent 3 believes he has not had adequate time to review the disclosure produced by Market Regulation, he may file a written request to extend the June 18, 2007 deadline for filing motions relating to the discovery provided by Market Regulation.

SO ORDERED.

Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
 June 12, 2007