

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

RESPONDENT 1,

RESPONDENT 2,

RESPONDENT 3,

RESPONDENT 4,

and

RESPONDENT 5,

Respondents.

Disciplinary Proceeding
No. 2010024522103

Hearing Officer - DRS

ORDER DENYING RESPONDENTS' MOTION PURSUANT TO RULE 9251

A. Introduction

On January 30, 2015, Respondents moved for an order directing the Department of Enforcement to produce:

documents, notes, recordings, transcripts, etc. sufficient to identify the substance:
1) all statements made by and documents produced by non-FINRA persons to FINRA staff members relating to the matters at issue in the proceeding; 2) all statements made by and documents produced by persons who have entered into settlements with FINRA including but not limited to Acceptance, Wavier [sic] and Consents and Offers of Settlement; and 3) a document withheld list.¹

¹ Motion at 4.

On February 13, 2015, Enforcement opposed the motion, representing that it has complied with its discovery obligations under FINRA's Code of Procedure by producing all documents which Respondents are entitled to receive and withholding only those documents that the Code permits it to withhold. After reviewing the motion and opposition, the Hearing Officer finds that Respondents have not established that Enforcement is improperly withholding, or has otherwise failed to produce, any documents that Enforcement is required to produce to them. Nor have Respondents shown that they are entitled to a withheld documents list. Accordingly, as explained below, the motion is denied.

B. Discussion

Under Rule 9251(a), Enforcement is required to make available for inspection and copying to a respondent the documents that were "prepared or obtained by Interested FINRA Staff in connection with the investigation that led to the institution of proceedings," including all documents "obtained from persons not employed by FINRA."² Enforcement, however, may withhold certain documents from production, including, privileged documents, documents which constitute attorney work product,³ internal memoranda or other notes or writings prepared by FINRA employees that shall not be offered into evidence,⁴ and documents that would reveal an enforcement technique or guideline.⁵ Nevertheless, if any exempt documents contain material exculpatory evidence⁶ or which constitute witness statements (as defined in the Code of Procedure),⁷ Enforcement must produce them.

Respondents argue that the requested documents fall within Enforcement's discovery obligations under Rule 9251. Further, Respondents assert that these documents are relevant and material to this proceeding because any statements made by customers to FINRA regarding Metals, Milling and Mining LLC relate to the charge that Respondents made misrepresentations concerning that entity.

Respondents' relevancy and materiality argument misses the point, as Rule 9251(a) does not contain a relevance or materiality requirement. Documents within the scope of the Rule must be produced regardless of whether they are relevant or material,⁸ unless the Rule authorizes Enforcement to withhold them. Therefore, the determinative issues are whether Respondents have shown that Enforcement: has withheld, or otherwise failed to produce, the requested

² Rule 9251(a)(E).

³ Rule 9251(b)(1)(A).

⁴ Rule 9251(b)(1)(B).

⁵ Rule 9251(b)(1)(C).

⁶ Rule 9251(b)(3).

⁷ Rule 9253.

⁸ If Enforcement seeks to withhold documents on the grounds that they are irrelevant "or for other good cause," it must obtain leave to do so under Rule 9251(b)(1)(D).

documents and, if so, was Enforcement required to produce them under Rule 9251. In addressing these issues, the Hearing Officer notes, as a threshold matter, that the document request is ambiguous. It is not clear whether Respondents request only those documents “sufficient to identify the substance” of certain statements and other documents, or whether it also seeks the actual “statements” and “other documents” themselves. In this order, the Hearing Officer interprets the request broadly, encompassing both categories of documents.

Even reading the request broadly, Respondents have not demonstrated that Enforcement has withheld, or otherwise failed to produce, any documents that Enforcement must provide to them under Rule 9251. Although Respondents state that they “believe that Enforcement has withheld documents,”⁹ they did not support this assertion, noting only that when they reviewed the documents produced by Enforcement, they did not locate documents disclosing the substance of communications between certain customers and FINRA.¹⁰ Finally, other than asserting generally that they “are entitled to full and fair disclosure of all records which are relevant and material to the defense of this proceeding,”¹¹ Respondents did not explain why they are entitled to receive all the requested documents (to the extent the documents exist and have not been produced).

Enforcement responds that the requested documents have either been produced, do not exist, or are properly withheld. Enforcement supported its opposition with a declaration, executed under penalty of perjury, from Senior Regional Counsel Frank Weber, one of Enforcement’s attorneys of record in this proceeding. In his declaration, Weber describes the steps Enforcement took to ensure that it complied with its discovery obligations. Weber states that he oversaw a “reasonable search for all documents encompassed by” Rule 9251(a), including documents that “may not have been kept as part of the investigatory file.”¹² He also “directed relevant FINRA staff to search for documents.”¹³ Weber goes on to say that after those documents were located, he “oversaw the reasonable steps taken for removal of certain documents” that may be withheld under the Code.¹⁴ He “also oversaw the reasonable steps taken to review documents subject to protection from disclosure to determine whether any contained ‘material exculpatory evidence’” and “communicated with relevant FINRA staff regarding the existence of” material exculpatory evidence.¹⁵ Finally, Weber declares that Enforcement took all reasonable steps to ensure the production of documents encompassed by the Code, including any material exculpatory evidence.¹⁶

⁹ Motion at 3.

¹⁰ Motion at 2.

¹¹ Motion at 3.

¹² Decl. ¶ 3.

¹³ Decl. ¶ 3.

¹⁴ Decl. ¶ 4.

¹⁵ Decl. ¶ 4.

¹⁶ Decl. ¶ 5.

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Enforcement's opposition also identified various categories of documents produced to Respondents, including documents relating to the customers and the individuals who settled with FINRA. Among its representations, Enforcement states that, subject to the limitations under Rule 9251, it produced: (1) all documents that Respondents' customers provided to FINRA during the investigation underlying this disciplinary proceeding; (2) all of FINRA's written communications with these customers made prior to the filing of the Complaint; and (3) all documents relating to these customers that FINRA received from Respondents' prior employer. Enforcement also represented that "these customers did not submit any statements to FINRA and there are no verbatim transcripts of any oral communications between those customers and FINRA." Regarding persons who entered into settlements with FINRA, Enforcement states that these individuals were represented by counsel and none made Wells statements or produced any documents. According to Enforcement, Respondents' prior employer provided documents to FINRA from these individuals' files, and Enforcement produced those documents, as well as transcripts of all on-the-record testimony taken in this matter, including the transcripts of the settling individuals.

In its opposition, Enforcement also addressed the issue of internal documents relating to its communications with the customers or with any individuals who settled with FINRA. Enforcement correctly points out that it is not required to produce non-materially exculpatory work product, internal memoranda or other notes or writings prepared by FINRA employees that shall not be offered into evidence. Therefore, any such notes or memoranda or writings that FINRA staff prepared relating to discussions with customers or other prospective witnesses are exempt from production.

In sum, Respondents have not demonstrated that Enforcement withheld, or has otherwise failed to produce, any documents which Enforcement must produce under Rule 9251. Their unsupported assertions do not overcome Enforcement's detailed statements, including those under penalty of perjury, that it complied with its discovery obligations.¹⁷ Accordingly, the Hearing Officer declines to direct Enforcement to produce the documents that are the subject of the motion.

Finally, Respondents have not shown that they are entitled to a withheld documents list. Rule 9251(c) authorizes the Hearing Officer to require Enforcement to submit to the Hearing Officer a list of documents withheld under Rule 9251(c). But a motion seeking a withheld documents list "shall be based upon some reason to believe that" Enforcement is withholding a document it is required to produce under the Code. Here, Respondents have not provided any

¹⁷ Cf. OHO Order 12-04 (2010023367001) at 4 (denying motion to compel documents, finding that respondent's statement that it is "substantially likely" that Enforcement was withholding exculpatory evidence was insufficient "to overcome Enforcement's declaration that it complied with its discovery obligations"); OHO Order 10-06 (2008014621701) at 5-6 (denying motion to compel documents and withheld document list, finding that respondents did not provide "any evidence sufficient to overcome Enforcement's sworn declaration that it has complied with its disclosure obligations"); OHO Order 09-04 (2006006259501) at 4 (denying motion to compel withheld documents list, finding that "respondent failed to make a plausible showing that Enforcement is withholding material exculpatory evidence sufficient to overcome Enforcement's sworn declaration that it has complied with its disclosure obligations").

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reason for the Hearing Officer to conclude that Enforcement is improperly withholding any documents.

C. Order

Because Respondents have not demonstrated that Enforcement withheld, or has otherwise failed to produce, any documents which it is obligated to produce to them under Rule 9251, and because they have not provided some reason to believe that Enforcement is withholding documents it is required to produce under the Code, the motion is **DENIED**.

SO ORDERED.

David R. Sonnenberg
Hearing Officer

Date: February 23, 2015