

**NASD OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,	
Complainant,	
v.	Disciplinary Proceeding No. C05050005
Respondent.	Hearing Officer – SNB

**ORDER DENYING RESPONDENT'S MOTION UNDER RULE 9253**

On August 1, 2005, Respondent filed a motion for witness statements under Rule 9253. Respondent asserts that the Department of Enforcement has “at least one contemporaneously written statement made by an Interested Association Staff member about the substance of oral statements made by [an investor] and possibly others.” On November 17, 2005, the Department of Enforcement filed its response, asserting that it had produced all information covered under Rule 9253, but acknowledging that it had withheld staff notes of interviews with potential witnesses.<sup>1</sup> These notes were withheld on the grounds that they did not constitute “substantially verbatim” records, and therefore, they were not covered by the Rule. On November 17, 2005, Respondent filed a reply, which echoed her earlier argument, and added a new argument that if the materials are not required to be produced under Rule 9253, then they should be produced as a matter of fairness.<sup>2</sup>

<sup>1</sup> Enforcement's response was delayed due to Hurricane Katrina.

<sup>2</sup> Respondent's motion for leave to file this reply is hereby granted. While a reply including new arguments not prompted by the response is generally not permissible, in the interest of efficiency and given that Enforcement is not prejudiced, the Hearing Officer has determined to permit the reply.

**This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 05-43 (C05050005).**

Rule 9253(a)(1) is the NASD analogue to the Jencks Act, 18 U.S.C. 3500(e)(2), and requires production of a “substantially verbatim recital of an oral statement made by” the witness. The Department represents that it has produced all written statements of witnesses, including the declaration of the investor highlighted in Respondent’s motion. The Department acknowledges that it has withheld notes of conversations with witnesses, which it asserts, “contain the interviewers’ general outline of what was said, and none contain substantially verbatim quotations of potential testimony.” Because these notes are not “substantially verbatim recitals,” Enforcement is not required to produce them. *See, Palermo v. United States*, 360 U.S. 343, 350 (1959).

Rule 9253(a)(2) requires the production of a contemporaneous writing made by NASD personnel about the statements made by non-NASD personnel during “a routine examination or inspection.” Contrary to Respondent’s suggestion that Enforcement can call an investigation whatever it likes, there is a clear, objective, distinction between routine examinations to which all firms are subject on a standardized cycle, as compared with cause examinations, which may be initiated based upon investor complaints or referrals from other regulators, among other reasons. In this case, because the notes were not taken during a routine examination or inspection, Rule 9253(a)(2) does not apply.<sup>3</sup>

Finally, Respondent argues that the notes should be produced as a matter of fairness, even if not called for under the Rule 9253. In support of her argument, Respondent cites to the Exchange Act. However, the U.S. Securities and Exchange Commission (“Commission”) made a finding that Rule 9253 was consistent with the Exchange Act when it issued its order approving the rule. *See, Exchange Act Release No. 34-43102, SR-NASD 99-76; 65 Fed Reg. 152 (August 7,*

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<sup>3</sup> Of course, as Enforcement is well aware, if these notes contain “material exculpatory evidence,” they must be produced pursuant to Rule 9251(b)(2).

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2000). Indeed, consistent application of the carefully considered rules that were subject to public comment and Commission approval would seem to be the best way to ensure fairness.

Based on the foregoing, Respondent's motion is denied.

**SO ORDERED.**

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Sara Nelson Bloom  
Hearing Officer

Dated: December 15, 2005