

**NASD OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondents.

Disciplinary Proceeding  
No. EAF0400300001

Hearing Officer-SNB

**ORDER DENYING RESPONDENTS' RULE 9252 MOTION FOR THE  
PRODUCTION OF DATA, DOCUMENTS AND TESTIMONY**

On September 22, 2006, Respondents filed a motion for the issuance of 8210 requests for data and documents. On September 29, 2006, Respondents filed a motion for the issuance of 8210 requests for testimony. Both motions were made pursuant to Rule 9252.

On October 5, 2006, Department of Enforcement ("Enforcement") filed a response opposing most of the motions, but agreeing to issue a Rule 8210 request for testimony to Broker PB, as well as a request that he produce his telephone records for April 2002.<sup>1</sup>

For the reasons discussed below, the Hearing Officer denies the Respondents' motions.

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<sup>1</sup> Unfortunately, Respondents did not confer with Enforcement prior to filing these motions, despite the scheduling order's requirement that they do so. As a result, Respondents have unnecessarily raised issues with the Hearing Officer that could have been resolved without resorting to a motion.

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 06-47 (EAF0400300001).

**A. Standards for Invoking Rule 8210 to Compel Production of Documents and Testimony Pursuant to Rule 9252.**

Rule 9252(a) permits a respondent to request that the Association invoke Rule 8210 to compel the production of documents or testimony at a hearing, provided an appropriate showing is made.<sup>2</sup> Rule 9252(b) provides that such requests shall be granted only upon a showing that: (1) the information sought is relevant, material, and non-cumulative; (2) the requesting Party has previously attempted in good faith to obtain the desired Documents and testimony through other means but has been unsuccessful in such efforts; and (3) each of the persons from whom the Documents and testimony are sought is subject to the Association's jurisdiction. In addition, the Hearing Officer shall consider whether the request is unreasonable, oppressive, excessive in scope, or unduly burdensome, and whether the request should be denied, limited, or modified.

**B. Requests for Data, Documents and Testimony**

Respondents request that Enforcement provide: (1) trading data for block trades in **all NASDAQ securities** with average daily trading volume of 25,000 shares or less; (2) the names of the traders acting on behalf of the seven market makers in [the Firm's] securities; (3) testimony of these traders at the hearing; and (4) telephone records of Broker PB for January through June 2002 (with the exception of the April 2002 telephone records, which Enforcement has already agreed to request).

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<sup>2</sup> The Rule 9252(a) request shall: ... "describe with specificity the Documents, the category or type of Documents, or the testimony sought; state why the Documents, the category or type of Documents, or the testimony are material; describe the requesting Party's previous efforts to obtain the Documents, the category or type of Documents, or the testimony through other means; and state whether the custodian of each Document, or the custodian of the category or type of Documents, or each proposed witness is subject to the Association's jurisdiction."

## 1. Block Trading Data

Respondents argue that block trading data is relevant because it may show that there is generally a discount to the inside market for block sales. Respondents assert that they are unaware of alternative sources of information, and in any event, purchasing the data from an outside vendor would probably be cost prohibitive. Respondents claim that the information is available through NASDAQ, and possibly NASD.

Enforcement argues that Respondents have failed to make the requisite showing of a good faith effort to obtain information from another source, citing to, among other things, Respondents' request to NASDAQ for different data, and NASDAQ's response, that perhaps FACTSET or Thompson might be able to respond to the request.<sup>3</sup>

Enforcement also states that NASD does not have jurisdiction over NASDAQ, nor can NASD be compelled to produce documents. Moreover, Enforcement asserts that NASD should not be made to perform an analysis of trades for thousands of securities. Finally, Enforcement asserts that the request is overbroad, and not relevant to the unique facts of this case, where it is alleged that at the time of the block sale, a higher priced purchase order was pending, and other blocks were executed at market prices.

There are several, independent, reasons for denying Respondents' requests. First, Respondents have not met their burden of showing that they made a good faith effort to obtain the information elsewhere. Among other things, it does not appear that Respondents attempted to contact FACTSET or Thompson, although these sources were suggested by NASDAQ for a related request. Moreover, Respondents' speculation that an outside vendor would be cost prohibitive does not substitute for a good faith inquiry.

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<sup>3</sup> Respondents' counsel is reminded that under Rule 9137, the signature of counsel on a filing constitutes a certification that the filing is well grounded in fact, and is not made for an improper purpose.

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Second, NASD does not have jurisdiction over NASDAQ for purposes of Rule 8210; therefore, the Hearing Officer is unable to compel NASDAQ to provide the requested information.<sup>4</sup> Although contrary to Enforcement's suggestion, the Hearing Officer does have the ability to order NASD to produce documents in an appropriate case; this is not such a case. Respondents do not request the production of documents in NASD's files; they request that NASD conduct an analysis of data from thousands of NASDAQ companies, over a six month time period. There is no authority in the NASD Rules to require NASD to perform an analysis to assist Respondents in their defense.

Moreover, Respondents assert that the requested data is relevant to show that block sales often occur at a discount. While it is unclear that, in a vacuum, there is any opposition to this assertion, Respondents may use their Expert to establish the general proposition that block sales are often executed at a discount. Requiring NASD to conduct a wide ranging survey of data to support this assertion is unreasonable and overly burdensome.

For these reasons, Respondents' motion for an 8210 request for block trading data is hereby denied.

## **2. Market Maker Requests**

Respondents argue that the identity of the Market Makers' traders, and their testimony at hearing, is relevant to establish Respondents were not using "deceptive techniques." Respondents assert that this will be established through the trader's testimony to the "bonafide reasons that [the traders] had for posting bid and ask quotes in [the Firm] during the relevant time period." Respondents also claim that these witnesses

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<sup>4</sup> OHO Order 01-14 (CAF000013) at 4-5.

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will testify, (consistent with Respondents' Expert) that a block trade in a thinly traded stock will have a drastic impact on the stock's price.

Enforcement argues that Respondents failed to establish a good faith effort to obtain the information elsewhere. Moreover, Enforcement asserts that the traders' reasons for posting quotes are irrelevant to the question of whether Respondents used deceptive techniques in their [Firm] trading.

Without reaching the issue of whether Respondents demonstrated that they made good faith efforts to get the information through other means, the Hearing Officer finds that information as to the traders' bonafide reasons for posting quotes in [the Firm] are not relevant or material to the issue of whether Respondents engaged in manipulative practices with respect to trading in [the Firm]. Moreover, Respondents may not use Rule 9252 in an effort to obtain "expert" testimony of these traders as to block trades in thinly traded securities, in disregard of NASD Rules and the scheduling order. Respondents' motion for an 8210 request for testimony and identity of the Market Makers' traders in [the Firm] is denied.

### **3. Broker PB Telephone Records**

As noted above, Enforcement has agreed to issue an 8210 request for the testimony of Mr. \_\_\_'s broker, Broker PB, so this request is no longer at issue. In addition, in response to Respondents' request for Broker PB's phone records for January 2002 through June 2002, Enforcement has agreed to issue an 8210 request for Broker PB's April 2002 phone records.

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Respondents failed to show the relevance of phone records for months other than April 2002, when the order at issue was placed. Accordingly, Respondents' motion for the issuance of an 8210 request for these phone records is denied.

**C. Conclusion**

Respondents' motions for 8210 requests for data, documents, and testimony, are hereby denied.

**SO ORDERED.**

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Sara Nelson Bloom  
Hearing Officer

Dated: October 11, 2006