

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

RESPONDENT FIRM,

and

RESPONDENT 2,

Respondents.

Disciplinary Proceeding
No. 2008014621701

Hearing Officer – Rochelle S. Hall

**ORDER DENYING RESPONDENTS' MOTION TO COMPEL
PRODUCTION OF DOCUMENTS AND LIST OF WITHHELD DOCUMENTS**

Respondent Firm, joined by Respondent 2, moved for entry of an order compelling the Department of Enforcement to produce certain documents that Enforcement has withheld from discovery pursuant to Procedural Rule 9251(b)(1). In the alternative, Respondents request a list of the withheld documents. Respondents contend that the withheld documents contain "material exculpatory evidence," as that term is defined by Procedural Rule 9251(b)(2) and the principles enunciated by the Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963), commonly referred to as the Brady Doctrine. Specifically, Respondents believe that Enforcement has withheld notes of interviews that contain *Brady* material.

Rule 9251(a) sets the outside limit of discovery in FINRA disciplinary proceedings, which is substantially less than the scope of discovery permitted in federal court under the Federal Rules of Civil Procedure. The Rule obligates Enforcement to allow respondents to inspect and copy non-privileged "documents prepared or obtained by Interested FINRA Staff in connection with the investigation that led to the institution

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of proceedings.”¹ Notwithstanding its obligations under Rule 9251(a), Enforcement may withhold any document exempted from production by Rule 9251(b)(1), which allows Enforcement to withhold documents subject to attorney-client privilege, internal reports, memoranda, notes, and other writings related to an investigation or examination, and documents that would reveal an enforcement technique or guideline.² FINRA permits such documents to be withheld to ensure that FINRA’s enforcement efforts are not impaired.³

Enforcement’s right to withhold otherwise discoverable documents is limited, however, by Rule 9251(b)(2), which requires Enforcement to produce any document it withheld pursuant to Rule 9251(b)(1) if it contains “material exculpatory evidence.”⁴ FINRA applies Procedural Rule 9251(b)(2) consonant with the principles enunciated by the Supreme Court in *Brady*. In *Brady*, the Supreme Court held “that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”⁵ The Supreme Court later held that the duty encompasses impeachment evidence as well as exculpatory evidence.⁶

In the pre-hearing phase of a FINRA disciplinary proceeding, “material evidence” is evidence relating to liability or sanctions that might be considered favorable to the respondent’s case, which, if suppressed, would deprive the respondent of a fair hearing.⁷ However, mere speculation that FINRA documents might contain material exculpatory

¹ The term “Interested FINRA Staff” is defined in Procedural Rule 9120(t)(1).

² See Procedural Rule 9251(b)(1).

³ See Order Approving Proposed Rule Change, Exchange Act Release No. 38908, 1997 SEC LEXIS 1617, at *134 n.194 (Aug. 7, 1997).

⁴ See Procedural Rule 9251(b)(2).

⁵ 373 U.S. 83 at 87.

⁶ See *United States v. Bagley*, 473 U.S. 667, 676 (1985).

⁷ OHO Redacted Order 01-13, CAF000045, at 11 (May 17, 2001), available at http://www.FINRA.com/RegulatoryEnforcement/Adjudication/OfficeofHearingOfficersDecisionsandProceedings/OHODisciplinaryOrders/2001Orders/FINRAW_007867 (citing *United States v. Bagley*, 473 U.S. 667, 675 (1985)).

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information is not sufficient to warrant their production.⁸ Instead, a respondent must make a “plausible showing” that the requested documents contain information that is both favorable and material to its defense.⁹ In addition, the Brady Doctrine is not violated by failing to disclose information already known to the defense.¹⁰

Another constraint on Enforcement’s right to withhold documents is Rule 9253, which requires Enforcement to produce certain types of “witness statements.” In the context of this case, Rule 9253(a)(1) requires Enforcement to produce any document containing a substantially verbatim transcription of a statement made by a potential witness, where the transcription was made contemporaneously with the making of the statement.

In support of their contention that Enforcement has improperly withheld documents, Respondents assert that Enforcement conducted more than a dozen interviews over the course of its twenty-month investigation, and it is “simply implausible” that the Department does not have a single witness statement or any notes or memos containing material exculpatory information.¹¹ Respondents also contend that Enforcement did not undertake a careful, complete review of its documents prior to making its production. In support of this contention, they point to Enforcement’s production of e-mails between Respondent 2 and his attorney that Respondent 2 claims are privileged. The e-mails were inadvertently produced to FINRA Staff, and Respondent 2 believes that FINRA’s investigator pledged to purge the e-mails from FINRA’s records. Enforcement disputes both that the e-mails are privileged and that the Staff pledged to remove them from FINRA’s records.

⁸ *See In re Jett*, 52 S.E.C. 830, 1996 SEC LEXIS 1683, at *1-2 (1996) (vacating an SEC order for the Division of Enforcement to produce memoranda for in camera review, finding that defendant’s proposal amounted to a “fishing expedition” through confidential documents, in the hope of finding something useful to his case).

⁹ *Id.* at 2.

¹⁰ *United States v. Morris*, 80 F.3d 1151, 1170 (7th Cir. 1996).

¹¹ Respondents’ Motion at 3.

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Enforcement opposed the Respondents' motion, and attached to its opposition the sworn Declaration of Daniel D. McClain, an Enforcement Director and counsel of record in this proceeding. Mr. McClain stated, under penalty of perjury, that he oversaw Enforcement's compliance with its discovery obligations under Rules 9251 and 9253, including Rule 9251(b)(2), which directs Enforcement to produce "material exculpatory evidence." Mr. McClain stated that he reviewed all documents prepared or obtained by Interested FINRA Staff (as that term is defined by the Code of Procedure) in connection with the investigation that led to the institution of this proceeding, except for certain e-mails sent only among FINRA employees, not to any outside parties, and personal notes made by Enforcement senior managers.

Mr. McClain stated that from those documents, he removed certain documents that were subject to withholding under Rule 9251(b)(1). Of those documents, Mr. McClain personally reviewed all materials, with one exception, for material exculpatory evidence, and substantially verbatim statements of potential witnesses recorded contemporaneously with the making of the statement. Mr. McClain stated that among the materials he reviewed, he did not find any documents that were required to be produced under Rules 9251(b)(2) or 9253.

Mr. McClain further stated that, under his direction and supervision, other Interested FINRA Staff reviewed their own e-mails for material exculpatory evidence and substantially verbatim witness statements. Mr. McClain personally reviewed the e-mails of one person who had left FINRA before the complaint was filed. Mr. McClain stated that the documents reviewed included notes of interviews with customers and other potential witnesses, but the notes reflected the Staff's mental impressions, analysis and summary of conversations, and did not contain transcriptions of statements made by potential witnesses. Mr. McClain stated that he and the other Staff found no documents that were required to be produced under Rules 9251(b)(2) or 9253.

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With respect to the e-mails that Respondent 2 claims are privileged and were improperly produced to both Respondents in Enforcement's production, Enforcement submitted the Declaration of Joshua R. Doolittle, an Enforcement Case Manager. Mr. Doolittle declared, under penalty of perjury, that Enforcement notified Respondent 2's attorney that it had received the e-mails among other documents that had been produced to Enforcement on a CD by a third party. As a courtesy, Enforcement told Respondent 2's attorney that, although it took no position on whether the e-mails were in fact protected by the attorney-client privilege, it would not review or consider the e-mails in its investigation. Mr. Doolittle then arranged for the e-mails to be removed from Enforcement's database so that Enforcement's investigative team would not review the e-mails. Mr. Doolittle explained that the e-mails would not be deleted from the CD because to do so could be viewed as tampering with the investigative file.

It appears that, contrary to Respondents' contention, Enforcement's production of the e-mails on the CD was not negligent, but was instead required by FINRA's rules requiring Enforcement to produce to Respondents all documents it obtained in connection with its investigation. Respondents' bald assertion that Enforcement's production of arguably privileged e-mails indicates that it did not conduct a proper document review is insufficient to overcome Mr. Doolittle's Declaration.

The Respondents have failed to make a plausible showing that Enforcement is withholding material exculpatory evidence. The Respondents merely state that it is "simply implausible" that the Department does not have a single witness statement or any notes or memos containing material exculpatory information. Although Enforcement admits that it has documents relating to its interviews of certain witnesses, it declares, under penalty of perjury, that the documents do not contain verbatim witness statements or *Brady* material. Respondents have not provided any evidence sufficient to overcome

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Enforcement's sworn declaration that it has complied with its disclosure obligations under Procedural Rules 9253 and 9251(b)(2) and the Brady Doctrine.

For the reasons discussed above, Respondents' motion for production of documents or a list of the documents that Enforcement withheld pursuant to Procedural Rule 9251(b)(1) is DENIED.

SO ORDERED.

Rochelle S. Hall
Hearing Officer

Dated: October 8, 2010