NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant v. Respondent.	Disciplinary Proceeding No. C9B050022 Hearing Officer – DMF

ORDER DENYING RESPONDENT'S MOTION FOR DISCOVERY

Respondent filed a motion to compel discovery, which the Department of Enforcement

opposes. Respondent requests discovery of "the entire investigatory file" relating to this

proceeding; all notes taken by NASD staff relating to the investigation; all staff notes of informal

interviews conducted during the investigation; all depositions, interviews or meetings that were

reported by a court reporter or recorded; all document requests and "subpoenas" issued in

connection with the investigation and all responses; all witness statements; all communications

with the New Jersey Bureau of Securities or any other regulator or agency concerning the

investigation; all documents reflecting or memorializing communications with customers; all

documents reflecting or memorializing communications with any current or former employees of

Financial Consultant Group, Inc, or Financial Consultant Group, LLC; all exculpatory evidence

and witness statements; all documents that Enforcement intends to or may use at the hearing; and

all audio or visual recordings relating to the investigation. In addition, Respondent requests that

Enforcement be ordered to produce a privilege log of all materials withheld from production.

Enforcement's discovery obligations are defined and circumscribed by Rule 9251. Rule

9251(a)(1) provides that Enforcement must make available to the Respondent for inspection and

copying documents prepared or obtained by Interested Association Staff in connection with the investigation that led to the institution of this proceeding, including but not limited to all requests for information issued pursuant to Rule 8210; all other written requests directed to persons not employed by NASD to provide documents or to be interviewed; the documents provided in response to either type of request; all transcripts and transcript exhibits; and all other documents obtained from persons not employed by NASD.

Rule 9251(b)(1) authorizes Enforcement to withhold various categories of documents that it would otherwise be required to produce under Rule 9251(a)(1), including attorney work product; examination or inspection reports, internal memoranda, or other notes or writings prepared by NASD staff that will not be offered in evidence; and documents reflecting various types of regulatory information and communications. Enforcement may not, however, withhold a document or a portion of a document that contains material exculpatory evidence. Furthermore, pursuant to Rule 9253, a Respondent may move for production of any statement made by any person who Enforcement 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) (the Jencks Act).

Applying these standards to the case at hand, it is apparent that Respondent's motion must be denied. He is entitled to inspect and copy the documents described in Rule 9251(a)(1), subject to Enforcement's right to withhold documents identified in Rule 9251(b)(1). Enforcement represents that it has made available all of the documents it is required to produce. Respondent complains that Enforcement did not produce staff interview notes, but Enforcement

was entitled to withhold staff notes, except that, upon motion, it was required to produce any notes constituting witness statements under Rule 9253. Enforcement represents that after Respondent filed the instant motion, it produced all witness statements to which Respondent is entitled under Rule 9253, and Respondent has not shown any reason to believe that Enforcement's representation is untrue or incorrect, or that any notes are being withheld improperly. Respondent further complains that Enforcement did not produce any documents that may have been obtained by the New Jersey Bureau of Securities, but has shown no reason to believe that Enforcement received any such documents, or if it did, that it is improperly withholding them.[1]

Respondent also seeks any withheld documents containing material exculpatory evidence. Enforcement represents that it has reviewed all of the withheld materials for material exculpatory evidence and has found none, and Respondent has not shown any reason to believe that any material exculpatory evidence is being improperly withheld.

Respondent also seeks an index of all withheld documents. Rule 9251(c) provides that a motion to require Enforcement to produce a list of withheld documents shall be based upon some reason to believe that a document is being withheld in violation of NASD's rules, and Respondent has failed to make such a showing.

Accordingly, there is no basis for ordering Enforcement to produce additional materials, or for requiring Enforcement to produce an index of withheld documents. Respondent's motion is therefore denied.

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[1] Respondent cites Rule 9251(a)(3), which gives the Hearing Officer discretion to order the production of "any other document," as well as Rule 9235, which grants the Hearing Officer authority "to do all things necessary and appropriate to discharge his or her duties." These rules allow a Hearing Officer to deal with circumstances not otherwise addressed by the Code of Procedure, but do not authorize a Hearing Officer to simply override the express discovery provisions of the Code, as Respondent requests. In any event, even assuming that the Hearing

SO ORDERED.

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David M. FitzGerald
Hearing Officer

Dated: October 11, 2005

Officer has discretion to order the production requested by Respondent, the Hearing Officer is not persuaded that Respondent has shown a basis for exercising that discretion in this case.