

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 05-21 (C9B040098).

**NASD OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT

Complainant,

v.

Respondent.

Disciplinary Proceeding  
No. C9B040098

Hearing Officer – AWH

**ORDER GRANTING MOTIONS TO STRIKE AFFIRMATIVE DEFENSES AND FOR LEAVE TO OFFER EXPERT TESTIMONY**

On April 27, 2005, the Department of Enforcement filed a Motion to Strike Affirmative Defenses and a Motion for Leave to Introduce Expert Witness. Both motions are unopposed.

The Complaint alleges that Respondent made unsuitable mutual fund switch recommendations to 12 ML customers, and, in connection with those transactions, made material misrepresentations and omissions of fact. The first motion seeks to strike Respondent's three affirmative defenses which allege that: (1) the Complaint in this case was filed in order to interfere with an arbitration involving Respondent, ML, and others; (2) to allow certain parties to that arbitration to request a stay of the arbitration pending completion of this proceeding; and, (3) to delay the arbitration until this proceeding has been concluded. Those affirmative defenses are not valid defenses to the causes in the Complaint. Accordingly, good cause has been shown for granting the motion to strike the two affirmative defenses contained in Respondent's Answer to the Complaint.

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In its second motion, Enforcement seeks leave to offer the expert testimony of SK on the suitability of the mutual fund switches at issue, and the materiality of the alleged misrepresentations and omissions made in connection with the mutual fund switches. Mr. SK appears to have the background and experience that would qualify him as an expert, and his proposed testimony would assist the hearing panel in its consideration of the issues in this proceeding. Accordingly, good cause has been shown for granting to motion for leave to introduce expert witness testimony and to designate Mr. SK as an expert.

On or before June 17, 2005, Enforcement shall file an original and three copies of Mr. SK's direct testimony in the form of a written report, and will make him available for cross-examination at the hearing.

**SO ORDERED,**

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Alan W. Heifetz  
Hearing Officer

Dated: May 17, 2005