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FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. MICHAEL VENTURINO (CRD No. 5872439), Respondent.	Disciplinary Proceeding No. 2021070337501 Hearing Officer–MC

ORDER DENYING RESPONDENT'S MOTION IN LIMINE

I. Introduction

The three causes of action in the Complaint the Department of Enforcement filed against Respondent Michael Venturino focus on his trading activity in twelve customer accounts from July 2014 to June 2017. The first cause of action charges churning, in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. The second alleges quantitatively unsuitable excessive trading, in violation of FINRA Rules 2111 and 2010. The third charges unauthorized trading in violation of FINRA Rule 2010.

Respondent has filed a Motion in Limine ("Motion"). He seeks an order making pre-hearing "rulings" to establish that:

1. The charges of churning and excessive trading are indistinguishable, so the violations charged in the first and second causes of action are redundant, and one should be dismissed;

2. Scienter and control are essential elements required to prove churning;

3. FINRA Rule 2111, revised as of June 30, 2022, does not apply to the violations in this case, which allegedly occurred between July 2014 and June 2017; and

4. Enforcement should be precluded from offering evidence relating to any customer who does not appear and testify in person at the hearing.[1]

[1] Motion 1, 12–13.

Enforcement has filed an Opposition to Respondent's Motion in Limine ("Opposition"). In it, Enforcement argues that the rulings Respondent seeks lack factual and legal foundation. Enforcement also objects that the Motion inappropriately seeks to preclude probative admissible evidence.

II. Discussion

Respondent's arguments and citations to authorities in support of the Motion are unpersuasive.

First, Respondent's primary assertion—that "the elements to prove churning, excessive trading or quantitative suitability are the same"[2]—is, as Enforcement points out, "directly contrary to controlling law."[3] The Securities and Exchange Commission issued a decision just last month stating that excessive trading "occurs when a registered representative controls the trading in an account, and the level of that trading is inconsistent with the customer's objectives and financial situation." [4] Churning, however, is "excessive trading committed *with scienter,*" an essential additional element.[5] As stated succinctly in another precedent, "Churning is commonly said to have three elements: (1) control of the customer's account by the broker, either explicit or de facto; (2) excessive trading in light of the customer's investment objectives; and (3) scienter—the required state of mind for liability under Section 10(b) and Rule 10b-5."[6] Respondent cites no authorities that reach differing conclusions. The first and second causes of action are not redundant, and neither will be dismissed.

Second, as the cases cited above state, scienter and control are essential elements of churning. Thus, there is no need to issue an order containing a "ruling" to this effect.

Third, there is also no need for an order "declaring" that current FINRA Rule 2111 is inapplicable to the violations charged here. Respondent claims that in the Complaint, Enforcement "is seeking to apply" the current version of Rule 2111, which was changed in a revision that took effect after the relevant period and eliminated the need to prove a respondent controlled trading in customer accounts to establish violations of that rule.[7] But the Complaint—at paragraph 139 in the second cause of action containing the Rule 2111 allegations—specifically incorporates the language of Supplementary Material 2111.05(c) which was in effect

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[2] *Id.* at 1.

[3] Opposition 1.

[4] *Edward Beyn*, Exchange Act Release 97325, 2023 SEC LEXIS 980, at *7 (Apr. 19, 2023) (emphasis added), cited by Enforcement at Opposition 8–9.

[5] *Id.* at 7–8.

[6] *Ralph Calabro*, Exchange Act Release No. 75076, 2015 SEC LEXIS 2175, at *3 (May 29, 2015) (quoting *Rizek v. SEC*, 215 F.3d 157, 162 (1st Cir. 2000)).

[7] Motion 9.

at the relevant time. This language explicitly requires the element of "actual or de facto control over a customer account." Consequently, the Complaint applies the correct version of Rule 2111.

Finally, Respondent argues that customer testimony is essential for Enforcement to prove (1) Respondent executed unauthorized trades in customer accounts and (2) Respondent made unsuitable trades for customers and exercised de facto control over customer accounts.

Respondent claims that to establish unauthorized trading requires proof of deception which, in turn, requires customer testimony.[8] For authority, Respondent cites several federal decisions. But they are civil suits for damages and allege unauthorized trading in violation of the anti-fraud provisions of Exchange Act Section 10(b) and Rule 10b-5.[9] The Complaint, however, charges unauthorized trading in violation of FINRA Rule 2010. As Enforcement correctly counters, the provisions of Section 10(b) and Rule 10b-5 "require proof of scienter that Rule 2010 does not."[10] The alleged violations of Rule 2010 do not require proof of deception. The cases Respondent relies on are inapposite. Further, they do not hold that customer testimony is required to prove unauthorized trading.

Similarly, Respondent's arguments that customer testimony is required to prove Respondent engaged in churning and unsuitable trading in customer accounts, and exercised de facto control over customer accounts, are without foundation. Respondent cites and quotes from numerous cases holding that scienter and de facto control are essential elements of churning.[11] He then asserts that those cases "indicate" that Enforcement "cannot prove" those elements "without customer testimony" and Enforcement "should not be permitted to offer any evidence regarding churning . . . including but not limited to data demonstrating annual turnover, cost-to-equity, and average equity for any customer that does not appear for testimony."[12]

But the cases Respondent cites do not address the need for customer testimony. And there is abundant authority supporting the relevance of evidence of turnover rates, cost-to-equity ratios and customer profiles to determine whether charges of churning and excessive trading are proven.[13] Indeed, the SEC recently stated expressly that it "considered the cost-to-equity ratio, turnover rate, customer's age, retirement status, and financial condition and objectives" to determine whether a broker's level of trading was suitable for a customer.[14] That case involved

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[8] *Id.*

[9] Motion 3–4 (discussing *Caiola v. Citibank, N.A.*, 295 F.3d 312 (2d Cir. 2002), *Pross v. Baird, Patrick & Co.,* 585 F. Supp. 1456 (SDNY 1985), and *E.F. Hutton & Co. v. Penham*, 547 F. Supp. 1286 (SDNY 1982)).

[10] Opposition 4–5.

[11] Motion 4–9.

[12] Motion 9.

[13] *See, e.g.*, *Calabro*, 2015 SEC LEXIS 2175, at *18–19, reciting factors, including cost-to-equity ratios and turnover rates, relevant to determining whether excessive trading occurred, and reviewing precedents involving analyses of cost-to-equity ratios.

[14] *Beyn,* 2023 SEC LEXIS 980, at *7.

charges of churning and trading excessively in the accounts of six customers. Four customers testified at the hearing but two did not.[15] Evidence relating to all six customers was offered, admitted, and weighed by the hearing panel, which found that the respondent churned and traded excessively in all the accounts at issue, including the two belonging to customers who did not testify. The SEC affirmed the hearing panel's decision.[16]

III. Conclusion

FINRA Rule 9263 requires that hearing officers "shall receive relevant evidence." After careful review and consideration of the parties' filings and the arguments and legal authorities offered, Respondent's Motion is **DENIED** for the reasons discussed above**.**

SO ORDERED.

Matthew Campbell
Hearing Officer

Dated: June 2, 2023

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[15] *Id.* at *8–11.

[16] *Id.* at *12–13.