

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent 1

and

Respondent 2,

Respondents.

Disciplinary Proceeding
No. C9B040020

Hearing Officer – DRP

ORDER DENYING RESPONDENTS' MOTION TO COMPEL DISCOVERY

Respondent 1 is charged with unsuitable mutual fund switching in the accounts of customer JL, in violation of NASD Conduct Rules 2310, 2110 and IM-2310-2. Respondent 1 asserts that every mutual fund trade during the relevant period was made at JL's direction after he warned the customer about additional costs and risks involved. Respondent 2 is charged with failure to supervise during the same period, in violation of NASD Conduct Rules 3010 and 2110. Respondent 2 asserts that his supervision of Respondent 1 with respect to JL's accounts was reasonable and that the customer made the investment decisions in those accounts.

Pursuant to NASD Procedural Rule 9252, Respondents request that Enforcement invoke NASD Procedural Rule 8210 to compel the production of documents and seek to depose JL by videotape in advance of the hearing.¹ Enforcement opposes Respondents' motions on the

¹ Respondent 2 filed a motion to compel production of documents and testimony on May 20, 2004. On May 26, 2004, Respondent 1 filed a motion that was virtually identical. Enforcement filed an opposition to both motions on June 7, 2004. On June 9, 2004, Respondent 2 sought leave to file a reply, which is hereby denied.

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 04-04 (C9B040020).

grounds that the request is excessive in scope and unduly burdensome and the documents are irrelevant and immaterial. Enforcement further asserts that there is no authority under NASD Rules or other law to order the deposition of a customer-witness. For the reasons stated below, Respondents' motions are denied.

With respect to the document request, Respondents are seeking to compel production of new account forms, monthly account statements, correspondence, emails, notices, tape recordings, broker's notes and memoranda related to JL's accounts at four brokerage firms.² Respondents do not know what these documents may (or may not) reveal but hope the materials will provide evidence to support an argument that JL engaged in similar trading in prior accounts or has filed (presumably specious) complaints against other brokers. The Hearing Officer finds Respondents' request to be excessive in scope, unduly burdensome and unreasonable and notes that brokerage firms are only required to maintain books and records for six years. *See* SEC Rule 17a-3. Furthermore, the requested materials are not critical to either Respondent's defense, nor directly relevant to the crucial issues in this disciplinary proceeding, namely, what transpired in

² Respondents are seeking documents related to JL's brokerage accounts at various firms between 1978 and 1998. It is not known exactly when he had accounts at these firms.

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JL's accounts during the relevant period.³ Accordingly, Respondents' request that Enforcement compel production of these documents pursuant to Rule 8210 is denied.

With respect to Respondents' request that Enforcement invoke Rule 8210 to allow them to depose JL, the Hearing Officer notes that Rule 8210 applies only to those over whom NASD has jurisdiction. NASD lacks jurisdiction over customers such as JL. Thus, Enforcement cannot compel his testimony for any purpose.⁴ The Hearing Officer has no authority to order discovery under these circumstances, and Respondents cite no case law to support their request, which must be denied.⁵

Thus, Respondents' motions to compel discovery are denied.

SO ORDERED.

Dana R. Pisanelli
Hearing Officer

Dated: June 10, 2004
Washington, DC

³ The Hearing Officer is not persuaded by Respondents' reliance on Notice to Members 99-90, which requires production of account statements and confirmations for accounts maintained at other firms in a customer-initiated arbitration. The Notice requires production of records for three years prior to the first transaction at issue. Here, the first transaction at issue occurred in 2001, and Respondents have requested documents prior to 1998. Moreover, a customer who pursues arbitration understands that he or she will be required to provide these documents, thereby waiving any right to privacy. A customer who is merely a witness in a disciplinary proceeding is in a far different posture.

⁴ JL could presumably volunteer to be deposed by either party, which might benefit Enforcement if JL were unable to testify at the hearing.

⁵ At the parties' request, the case is scheduled for hearing on October 25-27, 2004. In light of JL's age and health, Enforcement is seeking to advance the hearing to late-August or September. The case administrator assigned to this matter will contact the parties to ascertain if the hearing can be re-scheduled.