

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 06-09 (E8A2003080701).

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Disciplinary Proceeding
No. E8A2003080701

Hearing Officer – DRP

ORDER DENYING RESPONDENT'S MOTION FOR DISCOVERY

Respondent is charged with violating NASD Conduct Rule 2110 for selling 4,672.897 shares of an adjustable rate Class B mutual fund for customer MH, who had only authorized Respondent to sell 3,738.318 shares. At the initial pre-hearing conference, Respondent asserted that he was entitled to sell additional mutual fund shares to cover MH's purchase of another security for which she failed to pay. To support his contention, Respondent pointed to the customer agreement between MH and Ferris Baker, which allows the firm to "sell out a position" under these circumstances. Respondent also argued that Enforcement filed these charges as retaliation for his having sent a letter of complaint about improper practices at Prudential Financial to the SEC in June 2003, rather than submitting the complaint to NASD.

On December 22, 2005, Respondent moved for an order requiring Enforcement to provide "complete access to all [NASD] files" related to the complaint he filed with the SEC on behalf of customers of Prudential Financial, which was forwarded to NASD in August 2003. Respondent contends that these files and "his contacts with ... Enforcement" from August 2003 to date are relevant to this proceeding.

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In his motion, Respondent also requests a list of all clients of Ferris Baker that Enforcement may have contacted by letter as part of an investigation of the firm's sales practices. Respondent claims the inquiry letters "falsely presented" that NASD was investigating the firm, when it was investigating Respondent.

On December 30, 2005, Enforcement opposed Respondent's motion and disputed his claim that the charges are retaliatory. Enforcement asserts that the investigation that led to the filing of this Complaint was prompted by a Form U-5 filed in October 2003 by Ferris Baker after the firm terminated Respondent's registration for executing unauthorized transactions in two customers' accounts. MH was one of the two customers. Furthermore, Enforcement represents that it has given Respondent an opportunity to review all documents related to this case, pursuant to Procedural Rule 9251(a)(1),¹ and argues that he is not entitled to review the requested documents. The Hearing Officer concurs.

Respondent has conceded that he sold more shares of a security than authorized by the customer, as charged in the Complaint. Though he questions whether his conduct constitutes a violation of NASD Rules, Respondent has failed to show that the requested documents are relevant to any of the issues in this proceeding. Furthermore, to the extent the requested documents were not obtained in connection with the investigation that led to the filing of the Complaint, they are outside the scope of Enforcement's obligation under Procedural Rule 9251.²

¹ Enforcement states it has withheld documents obtained during the course of this investigation that fall within the definition of Procedural Rule 9251(b), which include those that are privileged or constitute attorney work product. The staff represents that none of the withheld documents contain material exculpatory evidence.

² Under NASD Rules, Enforcement is required to produce documents "prepared or obtained by ... [the] staff in connection with the investigation that led to the institution of proceedings." Such documents shall include requests for information pursuant to Rule 8210 and documents provided in response to those requests.

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Accordingly, Respondent's motion for discovery is denied in its entirety.

SO ORDERED.

Dana R. Pisanelli
Hearing Officer

Dated: January 12, 2006
Washington, DC