

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

RESPONDENT,

Respondent.

Disciplinary Proceeding
No. 2009017529101

Hearing Officer – RLP

**ORDER DENYING RESPONDENT'S MOTION
TO COMPEL PRODUCTION OF DOCUMENTS
AND A LIST OF WITHHELD DOCUMENTS**

Respondent has moved for an order compelling the Department of Enforcement ("Enforcement") to produce all documents prepared or obtained during the course of an investigation Respondent asserts "relates" to this proceeding. He also seeks an order directing Enforcement to produce a list of withheld documents. As stated in more detail below, because Respondent seeks documents other than those prepared or obtained in connection with the investigation that led to this proceeding, the motion to compel production is denied. Furthermore, Respondent's request for a list of withheld documents is denied because Respondent has failed to establish a reason to believe that Enforcement improperly withheld documents.

I. Background

Enforcement charged Respondent with violating NASD Conduct Rule 2110. Enforcement bases this charge on allegations that, from January 2006 through February 2008, Respondent, then associated with AXA Advisors, LLC, caused an outside business to prepare and send to customers portfolio statements ("summaries") containing a misleading statement.

Specifically, Enforcement alleges that Respondent falsely represented that the information in the summaries was based on "sources which we believe to be reliable." According to Enforcement, however, Respondent lacked a reasonable basis to believe that one source of information, ES, was reliable. ES supplied information concerning one of the investments described in the summaries, the Gemini Fund I, LP. In fact, the Gemini Fund was a Ponzi scheme and, in April 2009, ES, its general partner, pleaded guilty to fraud in connection with the Gemini Fund's operation.

According to Enforcement, an examination that began in 2009 led to the commencement of this proceeding. The investigation concerned Respondent's securities-related conduct while registered through AXA. There is no dispute that Enforcement has already produced to Respondent all documents from the 2009 investigation file and the Declaration of Gary Chodosh ("Chodosh Decl.") so certifies.¹

Contained in the production were some materials from a 2003 NASD Rule 3070 review of ES's activities. That examination pertained to allegations by a customer of ES that, while ES was associated with AXA, he wrongfully withdrew funds from the customer's insurance policy, caused the check to be sent to himself, forged the customer's signature, and deposited the check into the account of one of his outside business activities. In the course of this 2003 review, the examiner obtained documents pertaining to ES's outside business activities, including the Gemini Fund.² Enforcement included such documents in the file compiled during the course of

¹ Chodosh Decl. ¶ 11; see Chodosh Decl. ¶ 9.

² See Chodosh Decl. ¶ 10. The fact that some of the information in the 2003 investigation file pertained to ES's outside business activities does not establish, as Respondent claims, that the 2003 investigation focused both on alleged misapplication of customer funds and on ES's conduct of outside business activities, including his operation of the Gemini Fund. The Chodosh Declaration states that the 2003 investigation pertained "to an allegation by a customer of ES, later retracted, that ES had wrongfully withdrawn cash from the customer's insurance policy." Chodosh Decl. ¶ 10. The Chodosh Declaration makes no mention of ES's outside business activities (including the

the 2009 Respondent investigation, and produced them to Respondent. Respondent contends that, under FINRA Rule 9251(a), Enforcement must now produce the entirety of the 2003 examination file, as well as documents from “any other related examination.”³

II. Enforcement is Obligated to Make Available to Respondent Documents Prepared or Obtained by Interested FINRA Staff in Connection with the Investigation that Led to the Institution of This Proceeding.

FINRA disciplinary proceedings are governed by FINRA's procedural rules. FINRA Rule 9251 governs the scope of “discovery” Enforcement is required to make to a respondent in a FINRA disciplinary proceeding. FINRA Rule 9251(a)(1) provides that Enforcement must make available to the respondent for inspection and copying non-exempt⁴ “[d]ocuments prepared or obtained by Interested FINRA Staff in connection with the investigation that led to the institution of proceedings.”

Consistent with the proper construction of Rule 9251, only documents prepared or obtained in the course of investigations directly and proximately leading to the institution of particular proceedings must be produced. In determining whether an investigation led to the institution of a particular proceeding, consideration is given to, among other things, the investigation's temporal relationship to the proceeding and the degree of identity between the subject matter of the investigation and the allegations of the complaint. Thus, while Enforcement may have the obligation to search for and produce non-exempt documents in the possession of any FINRA employee who directly participated in the “case at issue” or in a “related” investigation, irrespective of whether the documents are maintained in the formal

Gemini Fund) as a focus of investigation. Respondent has provided nothing to cause the Hearing Officer to question the declarant's characterization of the investigation.

³ Given that Respondent has not provided a reason to believe that other related examinations exist, this order addresses only his contention that the 2003 investigation file must be produced.

⁴ Rule 9251(b) lists certain categories of documents Enforcement may withhold from production. Respondent's motion does not concern any claim of exemption.

investigatory file,⁵ the related investigation must be one that necessarily led to the institution of the proceeding at issue.⁶

III. The 2003 Investigation Did Not Lead to the Institution of This Proceeding and, Therefore, Enforcement Need Not Produce the 2003 Investigation File to Respondent.

The 2003 investigation of ES's conduct did not lead to the institution of this proceeding and therefore is not sufficiently "related" to this proceeding to require that Enforcement produce the entire 2003 investigation file. A nine-year-old investigation into a complaint by ES's customer that ES had wrongfully withdrawn funds from the customer's insurance policy is unrelated, both in time and focus, to the 2012 institution of this proceeding against Respondent for his 2006-2008 misrepresentations concerning his belief about ES's reliability. Insofar as production of documents from the 2003 ES investigation file is concerned, Enforcement met its obligation under Rule 9251 when it provided Respondent with the documents it obtained from the 2003 investigation file in the course of the 2009 investigation that directly led to the institution of this disciplinary proceeding.

Accordingly, the 2003 investigation file need not be produced simply because the 2003 investigation may have involved ES (and, to a limited extent, the Gemini Fund) or because the complaint in this case is "based on Respondent's understanding of ES's 2003 and earlier conduct" as Respondent asserts. While it is true that the complaint refers to warning signs about ES's veracity that allegedly were brought to Respondent's attention between 1997 and 2003, not one of those red flags concerned the customer complaint that was the subject of the 2003 ES

⁵ See OHO Order 07-36 (E112005002003) (Aug. 16, 2007); OHO Order 01-13 (CAF000045) (May 17, 2001).

⁶ See *Department of Enforcement v. Reichman*, No. 200801201960, 2011 FINRA Discip. LEXIS 18, at *33 (NAC July 21, 2011) (ruling that documents obtained and prepared in connection with a broad investigation into misconduct practiced by a firm and its employees need not be produced in a proceeding under Rule 8210 against one of the employees for failing to cooperate with the overall investigation because the broad investigation "did not necessarily lead to the institution" of the 8210 proceeding and the documents were irrelevant).

investigation. Respondent thus points to nothing that supports his assertion that “the allegations in the complaint are related to ES’s 2003 and earlier conduct, which was investigated by the NASD.”⁷

IV. Enforcement Need Not Produce a Withheld Document List.

Respondent seeks an order directing Enforcement to submit to the Hearing Officer a list of withheld documents. Respondent grounds this request on his assertion that because Enforcement has advised Respondent and stated in its response to Respondent’s motion that Enforcement has conducted a search of other examination files for exculpatory materials, Enforcement is obliged to produce a withheld document list for each of the other files it reviewed. That Enforcement searched what the Chodosh Declaration describes as “non-discoverable examination files that were not part of [the] file or investigation leading up to the complaint against Respondent”⁸ does not provide any reason to believe that Enforcement is improperly withholding documents.

Respondent’s motion is **DENIED**.

SO ORDERED.

Rada Lynn Potts
Hearing Officer

Dated: May 2, 2013

⁷ Reply ¶ 8.

⁸ Chodosh Decl. ¶ 12.