

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent 1

and

Respondent 2,

Respondents.

Disciplinary Proceeding

No. C9B040036

Hearing Officer – SNB

ORDER GRANTING RESPONDENTS' RULE 9261(c) REQUEST

On September 29, 2004, Respondent served Respondent's proposed Exhibit 44 and identified PW as a witness who may testify at the hearing concerning Exhibit 44 and the NASD's Mutual Fund Analysis contained in Complainant's proposed Exhibit 25. During the September 29, 2004 Final Pre-Hearing Conference, the parties raised the issue of proposed Exhibit 44 and PW's testimony. While the Hearing Officer had not yet received Respondent's filing, she heard oral argument on it.

On October 1, 2004, Complainant filed an Opposition to "Respondent's Expert Witness and Analysis." In it, Complainant asserts that Respondent has failed to provide any information to demonstrate that the witness is qualified to be an expert witness. The Hearing Officer agrees. However, based upon Respondent's oral argument during the September 29, 2004 Pre-Hearing Conference, PW is offered as a fact witness, in the same manner that Complainant offers AM. Moreover, Complainant's proposed Exhibit 44 does not appear to offer expert opinion.

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 04-22 (C9B040036).

With respect to Complainant's allegation of untimeliness, the proposed witness and exhibit are offered in response to the information contained in Complainant's proposed Exhibit 25, which was served on Respondent on September 9, 2004. Prior to that date, Respondent did not have notice that Complainant would assert that the Alliance Funds would be the benchmark used with respect to Complainant's breakpoint allegations. While it would have been preferable to receive Respondent's submission before September 29, 2004, this alone is insufficient to justify exclusion of evidence that may be of assistance to the Panel in their evaluation of the case.

Under these circumstances, and after consideration of the argument of the parties, the Hearing Officer finds good cause, pursuant to Rule 9261(c),¹ to permit Respondent to submit the additional evidence set forth in Respondent's letter filing dated September 28, 2004 and received by the Office of Hearing Officers on September 29, 2004. In order to address Complainant's concern as to the ability to fully and adequately review the analysis and critique it, the Hearing Officer will entertain a motion from the Complainant at the conclusion of the hearing to leave the record open for post-hearing submissions concerning the Respondent's late submitted evidence, should the Complainant deem this desirable.

SO ORDERED.

Sara Nelson Bloom
Hearing Officer

Dated: October 4, 2004

¹ Code of Procedure Rule 9261(a) requires that each party submit copies of documentary evidence and the names of witnesses intended to be called no later than ten days before the hearing. Rule 9261(c) allows additional evidence to be submitted after this deadline at the discretion of the Hearing Officer.