

NASD OFFICE OF HEARING OFFICERS

<hr/>	
DEPARTMENT OF ENFORCEMENT	
	Disciplinary Proceeding
Complainant,	No. C3A040006
v.	Hearing Officer – AWH
Respondent.	
<hr/>	

ORDER DENYING MOTION TO COMPEL TESTIMONY

On June 10, 2004, Respondent requested an order compelling the appearance by telephone and testimony in this proceeding of Mary L. Schapiro, President of the Regulatory Policy and Oversight Division of NASD.¹ The testimony sought to be elicited concerns the contents of a March 15, 2004, NASD press release that quoted remarks by Ms. Schapiro. The heading of the press release announced that NASD had charged three brokers, including Respondent, with suitability violations for recommending investment purchases using mortgage proceeds. The quotation raised a general concern about investment purchases using mortgage proceeds, but did not refer to Respondent or the specific charges in this proceeding.

On June 16, 2004, the Department of Enforcement filed its opposition to the Motion, asserting that the Hearing Officer has no jurisdiction to compel an NASD employee to provide testimony; that the testimony sought to be elicited is irrelevant, immaterial, and cumulative; and that the request is untimely. Because the testimony

¹ By Order dated May 5, 2004, motions seeking an order requiring NASD to compel testimony at the hearing were due by June 4, 2004.

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 04-06 (C3A040006).

sought to be elicited is irrelevant and immaterial to the issue in this proceeding, the Hearing Officer need not address the objections as to timeliness or jurisdiction.

The press release is not evidence of any underlying fact in this proceeding. It purports to describe the Complaint in this proceeding; however, the actual Complaint is already a part of the record. Moreover, the Complaint consists only of allegations, not evidence.

Respondent's Motion does not allege, and there is no reason to believe, that Ms. Schapiro has any personal knowledge of a fact in issue in this proceeding. There is no reason to believe that she has had any involvement in the investigation of this matter, or that she has any role to play in the adjudication of it. Although the Complaint alleges that Respondent's recommendation to the customers involved was unsuitable, Ms. Schapiro's quotation in the press release does not opine on the Respondent's recommendation that is the subject of the Complaint, and therefore, the quoted language has no relevance or materiality to an issue in this case.

The suitability of Respondent's recommendation is a matter for the determination of the Hearing Panel, after it has received all of the evidence and considered all of the arguments made by counsel for the parties. The parties are free to present whatever arguments they wish to make on the legal conclusions to be drawn from the evidence adduced at the hearing. Accordingly, the Motion to compel the testimony of Mary L. Schapiro is *denied*.

SO ORDERED.

Alan W. Heifetz
Hearing Officer

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 04-06 (C3A040006).

Dated: Washington, DC
June 18, 2004