

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

RESPONDENT FIRM

and

RESPONDENT 2,

Respondents.

Disciplinary Proceeding
No. 2005000316701

Hearing Officer – AWH

**ORDER RULING ON DEPARTMENT OF ENFORCEMENT'S
(1) OBJECTIONS TO WITNESSES AND DOCUMENTS, (2) MOTION TO
PARTIALLY STRIKE RESPONDENTS' PRE-HEARING BRIEF, (3) MOTION
IN LIMINE, AND (4) MOTION FOR RULING ON THE ADMISSIBILITY OF
DOCUMENTS AND BUSINESS RECORDS**

On February 5, 2007, the Department of Enforcement filed its objections to Respondents' potential witness list and exhibit list. On February 6, 2007, Enforcement filed a motion to partially strike Respondents' pre-hearing brief, and a Motion in Limine seeking to preclude Respondents from introducing testimony and evidence in five subject areas. Finally, on February 12, 2007, Enforcement filed a motion for a ruling on the admissibility of certain "documents and business records produced by [the Firm]." On February 13, 2007, Respondents filed their oppositions to Enforcement's motion in limine, motion to partially strike Respondents' pre-hearing brief, and motion for rulings on admissibility of "purported 'business records' produced by [the Firm]."

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The motions and oppositions overlap to the extent that a single order addressing the matters at issue is appropriate, and the following rulings will apply to the pleadings noted above. The parties should note, however, that, to the extent that documents are not excluded by this Order, they are not in evidence until and unless they are offered and admitted at the hearing.

1. Breakpoint Refunds and Subsequent Modifications of Internal Procedures

Enforcement objects to Respondents' Exhibit 14, which relates to breakpoint refunds to be provided to customers, and Exhibit 57, which relates to modifications to the Firm's internal procedures for delivery of breakpoints. Enforcement cites a previous ruling on November 16, 2006, that precludes the admission of these exhibits. This Hearing Officer will exclude Respondents' Exhibits 14 and 57, based on that previous ruling. However, the previous ruling does not preclude evidence of post-Assessment remedial measures to ensure future errors in data were not made.

2. Earlier Versions of Enforcement's Error Schedules

Enforcement objects to Respondents' Exhibits 58 through 63, earlier versions of its final error schedules, and Exhibit 64, a letter it sent to Respondents relating to an earlier version of its final error schedules. Enforcement again cites the November 16, 2006, ruling. However, while that ruling precluded the admission of earlier versions of the error schedules, the ruling only precluded Enforcement from offering those exhibits for the purpose of proving Respondents' liability for errors in the data they submitted. The ruling did not preclude Respondents from offering them as evidence to demonstrate any difficulty they may have had in determining the appropriate response to the request

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for data. Accordingly, Enforcement's objections to Respondents' Exhibits 58 through 64 are overruled.

3. Issues Relating to Delivery of Proper Breakpoints

Enforcement objects to Respondents' Exhibit 16, which it describes as purporting to demonstrate that properly awarding breakpoint discounts can be difficult.

Enforcement cites a prior ruling that data from other broker-dealers is not "relevant to the charges lodged against Respondents." That ruling still holds. However, Respondents, as noted above, may properly introduce evidence to demonstrate any difficulty they may have had in determining the appropriate response to the request for breakpoint assessment data. Accordingly, Enforcement's objection is overruled, without prejudice to objecting to any parts of Exhibit 16 that are not consistent with this ruling.

4. Unsworn, Hearsay Documents

Enforcement objects to Respondents' Exhibit 36, Respondent 2's July 20, 2005, *Wells* submission, and Exhibit 43, his Form U-4 amendment. Enforcement objects that they are self-serving, unsworn, hearsay statements and arguments of counsel. Both parties are admonished that hearsay has repeatedly been held to be admissible in these disciplinary proceedings. Counsel are free to argue the weight to which the Extended Hearing Panel should give it. Moreover, at this stage of the proceeding, it is not clear that those exhibits are being offered for the truth of the matters asserted in them. In any event, arguments of counsel are not evidence, and the Exhibits are plainly relevant to the issues in this proceeding. The objections are overruled.

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5. Exhibits Relating to the CIBC Conversion

Enforcement objects to Respondents' Exhibits 23 and 24 on the basis that it anticipates that they will be used to support the claim that Respondent 2's senior management was "busy with this conversion and, in effect, too busy to deal with the breakpoint assessment." However, the Hearing Officer will not, at this time, exclude documents that may prove to be relevant for purposes other than those anticipated by Enforcement.

6. Job Descriptions

Enforcement objects to the job descriptions contained in Exhibits 24, 25, 26, and 53, asserting that none may reasonably be read to encompass responsibility for completing the Firm's breakpoint assessment, and are, therefore, irrelevant. However, counsel for Respondents may argue otherwise, and the Hearing Officer will not exclude those exhibits at this time.

7. All Papers Filed with The Office of Hearing Officers in This Matter

As Enforcement points out in its objections, the November 16, 2006, Order denied Respondents' request to file a compilation of all motions, briefs, and rulings. Consistent with that Order, Enforcement's objection to the admission of such papers is sustained.

8. NASD's On-Site Reviews

Enforcement objects to any testimony by any witness during Respondents' case-in-chief regarding NASD's on-site examination of the Firm in 2004 and 2005, arguing that such evidence is irrelevant, and that Enforcement does not intend to rely on the results of on-site examinations to prove its case. However, in its witness list,

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Enforcement states that Mark A. Fowler and Christopher B. Moraitis are expected to testify, inter alia, about their on-site review of selected transactions in the Firm's November 2003 breakpoint assessment. At this stage of the proceeding, the Hearing Officer will defer any ruling on the admissibility of such evidence until it is offered at the hearing. At a minimum, without the benefit of hearing testimony from Fowler and Moraitis, the relevance of the evidence to which Enforcement objects cannot be determined.

9. Privileged Conversations of a Former NASD Examiner

In its Motion in Limine, Enforcement seeks to preclude "conversations between Mark Fowler, a former NASD examiner, and NASD attorneys, and other NASD employees, as well as work he performed in conjunction with NASD attorneys as an NASD employee." During the hearing, the Hearing Officer will sustain proper objections to privileged matters. However, the broad language in the Motion in Limine seeks to preclude matters that may not be privileged. Accordingly, the Motion in Limine is denied, without prejudice to Enforcement's raising objections at the hearing to testimony that seeks information that is privileged.

10. Representative of NASD with the Most Knowledge of "bugs," Viruses or 'other failures' in the Operation and Design of the Computer Programs, Systems and Website Used in the Self-Assessment

In its objections to Respondents' potential witness list, Enforcement objects to, and moves to strike, the above designation, asserting that it is an improper discovery request and erroneously assumes the existence, and Enforcement's awareness of the knowledge sought in the designation. The objection is overruled and the motion to strike

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is denied. The designation can only refer to one of three witnesses who appear on Enforcement's witness list: two who are NASD employees, and one who is not. This Order does not grant any discovery, nor does it assume facts that are not yet offered and admitted into evidence.

11. Ruling on Documents Produced by the Firm

Enforcement seeks a ruling in advance of the hearing that certain exhibits it wishes to offer are admissible, notwithstanding Respondents' objection to them on the basis of hearsay and authenticity. As noted above, an objection on grounds of hearsay will not be sustained in this proceeding. If the authenticity of a document is in issue, authenticity will have to be demonstrated at the hearing, unless a document is self-authenticating. Enforcement argues that Exhibits CX-1 and CX-2 are Assessments made, prepared, and submitted by the Firm and are authenticated as business records. However, those exhibits are printouts of data submitted to NASD by the Firm and are not records kept in the Firm's regular course of business. Accordingly, they are not self-authenticating. CX-50 contains spreadsheets and cover letters sent by Firm employees to certain mutual funds. The spreadsheets contain handwritten notations that cannot be considered to be "business records," as that term is used in the Federal Rules of Evidence. Accordingly, CX-50 cannot be self-authenticated in its entirety.

12. Motion to Partially Strike Respondents' Pre-Hearing Brief

Enforcement's motion seeks to strike a paragraph in Respondents' pre-hearing brief that refers to post-Assessment measures taken by Respondents. The paragraph, beginning at the bottom of page 8 and continuing onto page 9, contains references that are consistent with the rulings made above in this Order, and others that are inconsistent

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with those rulings. Under the circumstances, the entire paragraph cannot be stricken, and, in this Order, will not be parsed. The motion is denied.

SO ORDERED.

David M. FitzGerald
Deputy Chief Hearing Officer¹

Dated: February 15, 2007

¹ The Deputy Chief Hearing Officer issues this Order in the absence of the Hearing Officer, pursuant to Rule 9235(b).