

**STATE OF NEW HAMPSHIRE  
BUREAU OF SECURITIES REGULATION  
DEPARTMENT OF STATE  
CONCORD, NEW HAMPSHIRE**

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**IN THE MATTER OF:** ) )  
) )  
**ING Life Insurance and Annuity Company)** ) )  
) )  
**and** ) )  
) )  
**ING Financial Advisors, LLC** ) **No. INV. 04-016**  
) )  
**Respondents** ) )  
\_\_\_\_\_) )

**STATE’S MOTION TO COMPEL**

NOW COMES the State of New Hampshire, by and through the Secretary of State, Bureau of Securities Regulation (“the Bureau”), and hereby requests that the hearing examiner compel the production of certain email communications of the Respondents as well as the Respondent’s internal review of market timing, and as grounds therefore says:

1. That on June 8, 2006, the Bureau filed a Staff Petition For Relief (“the Petition”) against the Respondents alleging various violations of New Hampshire RSA 421-B, the Uniform Securities Act. The Petition addresses issues of market timing, failures to disclose material information, and failure to retain records. In the spring of 2004, the Bureau launched an investigation into these matters, and on April 19<sup>th</sup>, 2004, the Bureau issued a Subpoena Decus Tecum in which the Bureau demanded that the Respondent produce its internal review document. The Respondent refused to produce the internal review document citing the attorney-client privilege and the attorney work product doctrine. In the summer of 2005, the Bureau expanded its investigation, and on September 2<sup>nd</sup>, 2005, the Bureau demanded production of any and all email communication of the Respondent which relates to revenue sharing, directed brokerage, the Plan, or its Strategic

Partner program. Despite the Bureau's request for a privilege log for any e-mails withheld, the Respondents did not produce one until November 16<sup>th</sup>, 2005. Upon receipt of the log, it was revealed that the Respondents were claiming privilege over some four thousand email communications. In January 2006, the Bureau renewed its demand for the internal review document arguing that the Respondent waived any privilege over the document when it used portions of the review to bolster claims that it had uncovered the market timing, that it was minimal, and that it did not affect the Plan. Again, the Respondents refused to comply.

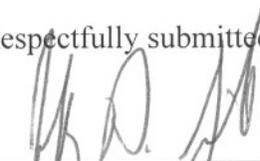
2. That the Respondent's claim of privilege and work product is subject to question and inquiry by the Examiner in camera with an opportunity to review in a non-redacted fashion the claimed privileged information to determine if the Respondent is entitled to withhold this information from the Bureau. The claim of privilege is evidentiary, meaning that the Examiner must rule on whether this information can be legitimately withheld from the Bureau and kept out of the hearing process.
3. That several factors support the need for Examiner intervention. The Respondent claimed privilege regarding emails that were sent from one non-attorney to another non-attorney. The Respondent claimed privilege over emails that were sent to non-attorneys and then, later, were bundled and sent to one or more attorneys. Respondent also claimed privilege without making a proper log which explained adequately why the privilege applied. The Respondent, on several occasions, both orally and in writing, revealed parts of its internal review when it outlined for regulators and the public certain of its findings and made claims based on its review in an attempt to mitigate the impact of its wrong doing.
4. That the attorney-client privilege does not protect communications made for purposes other than for the purpose of legal representation and advice. Generally, communications between non-attorneys are not subject to a claim of attorney-client privilege. See Upjohn Co. v. United States, 449 U.S. 383 (1981). A communication cannot be clothed with the privilege merely by sending it to an attorney. Communication of a privileged document to someone not privileged to receive it breaks the privilege. Riddle Spring Realty Co. v. State, 107 N.H. 271, 274 (1966). The Respondent cannot make "use of the substance of the document as a sword while at the same time invoking the privilege as a shield." In re Kidder Peabody Securities Litigation, 168 F.R.D. 459, 472 (S.D.N.Y. 1996). "[W]here a corporation has disseminated information to the public that reveals parts of privileged communications or relies on part of the privileged reports, courts have found the privilege waived." In re Grand Jury Proceedings, 219 F.3d 175, 184 (2d Cir. 2000). Additionally, "a client may waive privilege by conduct which reasonably implies waiver of the privilege or a consent to disclosure." United States v. Dakota, 197 F.3d 821, 825 (citing, In re Von Bulow, 828 F.2d 94, 104 (2d Cir. 1987).

WHEREFORE, the State of New Hampshire, by and through the Secretary of State, Bureau of Securities Regulation, hereby respectfully requests that the hearing examiner:

- 1) Order the Respondent, pursuant to RSA 421-B:22 and 421-B:26-a, to produce in a non-redacted format the withheld email communications, and a copy of the internal review, for an in camera review to determine the scope and validity of the Respondent's claimed privilege.
- 2) Order the Respondent to produce to the Bureau any such documentation determined by the hearing examiner not to be privileged and subject to the work product doctrine.
- 3) Grant such other and further relief as deemed just and proper.

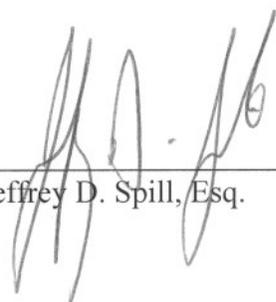
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Dated

Respectfully submitted,

  
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Jeffrey D. Spill, Esq.  
Deputy Director  
Securities Regulation  
State House Room 204  
Concord, New Hampshire 03301

I hereby certify that a copy of the foregoing motion has been forwarded via 1<sup>st</sup> class mail this day of June, 8 2006 to Attorneys Brian Quirk and Peter Anderson of the Respondent.

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Dated

  
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Jeffrey D. Spill, Esq.