

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 07-27 (E102003025201).

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant v. RESPONDENT 1, RESPONDENT 2, RESPONDENT 3, RESPONDENT 4, and RESPONDENT 5, Respondents.	Disciplinary Proceeding No. E102003025201 Hearing Officer – SW
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PROCEDURAL PRE-HEARING ORDER

At the Final Pre-Hearing Conference held on June 28, 2007 (“Final Conference”), a number of issues were raised. The following Order addresses certain of those issues.

I. Motion to Amend Pre-Hearing Submissions Granted

On June 27, 2007, the Department of Enforcement (“Enforcement”) filed a motion for leave to amend its pre-hearing submissions to substitute proposed exhibits C-508A through C-527A for exhibits C-508 through C-527, consisting of various charts. The exhibits have been amended to provide cross-references to the stop/restriction letters referred to in the charts, and to correct certain typographical errors. The other data in the charts have not been amended.

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The Hearing Officer hereby grants Enforcement's motion. Enforcement's proposed exhibits C-508A through C-527A, filed on June 27, 2007, will replace exhibits C-508 through C-527, filed on May 1, 2007.

II. Joint Stipulations

The Hearing Officer hereby accepts the joint stipulations of the Parties filed on June 27, 2007.

III. Respondents 1 and 2 Directed to File Final Witness List

In a June 6, 2007 Order, the Hearing Officer extended the deadline to June 14, 2007, for Respondents 1, 2 and 3 to file and serve their pre-hearing submissions on the Office of Hearing Officers and the Parties.

On June 14, 2007, Respondents 1 and 2 filed pre-hearing submissions, which included a witness list that did not comply with the Hearing Officer's Order that a witness list include a summary of the proposed witnesses' testimony.

On June 18, 2007, Enforcement filed objections to certain of the witnesses listed by Respondents 1 and 2. On June 19, 2007, Respondents 1 and 2 amended their witness list. At a pre-hearing conference held on June 19, 2007, counsel for Respondents 1 and 2 indicated that he had not spoken with the proposed witnesses. The Hearing Officer advised counsel to Respondents 1 and 2 to contact the witnesses to confirm their willingness to testify.

The witnesses listed by Respondents 1 and 2 on their June 14, 2007 list may testify at the Hearing. However, the Hearing Officer will not compel any of the witnesses listed to testify.

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In addition, no later than Friday, June 29, 2007, Respondents 1 and 2 must file with the Office of Hearing Officers, and serve on the Parties, by no later than 4:00 p.m., Eastern Time, their final witness list, listing those individuals who have agreed to testify at the Hearing. No further extensions will be granted.

IV. Format of the Hearing ¹

The initial Hearing day will begin promptly at 9:30 a.m. The Hearing Officer will determine the time to begin the other Hearing days and the time to end the Hearing days, as well as the times for breaks, including lunch.

At the Hearing, the procedures set forth below shall be followed:

a. First, the Hearing Officer will read her opening statement. At the end of the opening statement, the Parties will have an opportunity to ask any questions regarding procedures to be followed at the Hearing, i.e., housekeeping matters.

b. Second, counsel for Enforcement will make an opening statement. The opening statement should set forth the theory of Enforcement's case and briefly summarize the evidence that Enforcement intends to introduce in its direct case. The opening statement shall be limited to 15 minutes.

¹ "Respondent's Guide to the Disciplinary Hearing Process" may be found at www.nasd.com, then follow the links to "Regulatory Enforcement," "Adjudication," "Office of Hearing Officers Hearings and Proceedings," and "Respondent's Guide to the Disciplinary Hearing Process."

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c. Third, counsel for Respondent 4, followed by Respondent 5, counsel for Respondents 1 and 2, and Respondent 3² will have an opportunity to make opening statements. The opening statements of the Respondents shall each be limited to 15 minutes. The opening statements should consist of a broad outline of what the Respondents intend the Hearing Panel to understand at the conclusion of their evidence.

d. Opening statements are not considered evidence. Objections to opening statements are not permitted. Concerns about any inaccuracies in another Party's opening statement may be addressed in the closing statements or through questioning of witnesses.

e. Fourth, Enforcement will present evidence in support of the allegations of the Amended Complaint. At the conclusion of Enforcement's presentation of each witness, the Respondents will have an opportunity to cross-examine that witness.

f. Questions on cross-examination are limited to those issues relevant and material to the allegations in the Amended Complaint.³

g. Fifth, once Enforcement has completed its case, the Respondents will have an opportunity to present evidence relating to their case.

h. At the conclusion of the presentation of each of the Respondent's witnesses, Enforcement and the other Respondents will have an opportunity to cross-examine the witnesses.

² Respondent 3 may participate in the Hearing if (i) no later than June 29, 2007, he files an explanation with the Office of Hearing Officers for his failure to appear at the Final Conference, and (ii) the Hearing Officer determines not to hold him in default based on his explanation. The explanation must also be served on the Parties in compliance with the NASD Procedural Rules 9133 through 9138.

³ For witnesses listed by both Enforcement and the Respondents, the cross examination is not limited because the examination is a combination of direct and cross.

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i. Hearing Panel members may question any witness at any time while the witness is on the witness stand, or recall any witness for additional questions.

j. Questions may only be addressed to the witness on the stand or to the Hearing Officer.

k. Parties objecting to particular questions must address the objection to the Hearing Officer and should state the reason for the objection. The Party asking the question will then have an opportunity to rephrase the question or describe to the Hearing Officer why the objection should be overruled, the Hearing Officer will then either sustain or overrule the original objection. Parties are not permitted to object to answers to questions. If they believe incorrect information has been provided they may ask additional questions of the witness or address the inaccuracy in their closing statement or their testimony.

l. The Hearing Officer may exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial.

m. For the exhibits officially offered by Enforcement, the Respondents will have an opportunity to object to the particular exhibit, stating the reasons for the objection. The Hearing Officer will then rule on which of Enforcement's exhibits will be accepted. The Respondents will then offer their exhibits, and Enforcement will have an opportunity to object to Respondents' exhibits, stating the reasons for the objection. The Hearing Officer will then rule on which exhibits of the Respondents will be accepted.

n. Once all Parties have completed the presentation of their evidence, Enforcement will have the opportunity to make a closing argument, followed by the closing arguments of the

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Respondents, also limited as determined by the Hearing Officer.⁴ The closing arguments should summarize the evidence that has been presented supporting a finding of liability or supporting a finding of not liable. The closing arguments should also present the Parties' suggestions for sanctions. Enforcement should list any aggravating and mitigating factors that it considered in reaching their proposed sanctions.⁵ The Respondents should be prepared to argue any evidence of mitigating factors.⁶ The Parties may request that certain post-hearing briefs or exhibits be permitted.

- o. At the conclusion of the Hearing, the Hearing Officer will read a closing statement.

Any questions regarding this Order or this proceeding should be directed to Nicholas Laliberté, the Case Administrator assigned. His telephone number is (202) 728-8460.

SO ORDERED.

Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
June 28, 2007

⁴ Enforcement may reserve part of its time from its closing argument to rebut the Respondents' closing arguments.

⁵ Aggravating and mitigating factors are listed in the NASD Sanction Guidelines at www.nasd.com, then follow the link to "Regulatory Enforcement" and to "NASD Sanction Guidelines."

⁶ For example, to establish selective enforcement, a respondent must show that he was singled out for enforcement while others who were similarly situated were not and that his prosecution was motivated by arbitrary or unjust considerations, such as race, religion, or the desire to prevent a constitutionally-protected right. District Bus. Conduct Comm. v. Roach, No. C02960031, 1998 NASD Discip. LEXIS 11, at *19 n.13 (N.B.C.C. Jan. 20, 1998) (rejecting a claim of selective enforcement where NASD knew of more serious violations by respondent's firm and other employees, but chose only to file a complaint against respondent) (citing George H. Rather, Exchange Act Release No. 36,688, 1996 SEC LEXIS 85, at *6 (Jan. 5, 1996).