

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 05-12 (CAF040002).

**NASD OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent 1

Respondent 2

and

Respondent 3

Respondents.

Disciplinary Proceeding  
No. CAF040002

Hearing Officer—Andrew H. Perkins

**ORDER DENYING IN PART THE DEPARTMENT'S  
MOTION FOR LEAVE TO OFFER TESTIMONY BY TELEPHONE  
AND DENYING THE RESPONDENTS' MOTION PURSUANT TO RULE 9252**

On March 11, 2005, the Department of Enforcement moved for leave to present the testimony of 38 witnesses by telephone, 25 customer witnesses<sup>1</sup> and 13 former employees of Respondent 1. All of Respondent 1's former employees are subject to NASD's jurisdiction.

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<sup>1</sup> The Department stated that it expects seven customer witnesses and seven former employees to appear in person at the hearing. Because "arrangements may not work out," however, the Department included these individuals in its motion.

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The Respondents opposed the Department's motion and moved, pursuant to Procedural Rule 9252, to compel the attendance of Respondent 1's former employees at the hearing. As to the customer witnesses, the Respondents propose that the parties take the customers' depositions *de bene esse*. The Respondents offer to pay the cost of the court reporter and the videographer.

### **I. The Former Respondent 1 Employees**

Other than generalized claims of inconvenience and cost, for all but one of the former employees, the Department offers no reason for not having them testify in person. On the other hand, because of the nature of this Extended Proceeding, there are compelling considerations in favor of their personal appearance. Among other factors, their credibility will be critical to resolving some of the contested issues. In addition, the document-intensive nature of the case weighs against permitting the Department to offer their testimony by telephone. Accordingly, except for DG, the Hearing Officer denies the Department's motion to permit the former employees listed in its motion to testify by telephone. Because the Department represents that Mr. G suffers from a fear of flying and lives in Pennsylvania, he will be permitted to testify by telephone if his testimony is needed and relevant.

In addition, the Hearing Officer denies the Respondents' Rule 9252 motion. The Respondents did not satisfy the requirements of Rule 9252(b). Particularly, the Respondents did not demonstrate their efforts to secure the former employees' testimony by other means.

### **II. The Customer Witnesses**

The Department did not address the serious and difficult issues presented by its request to have 25 customers testify by telephone in a case of this nature, nor did the Department identify

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the customers it intended to present in person at the hearing. The Department also did not provide specific reasons why each remaining customer could not appear in person or could not appear for his or her videotaped deposition.<sup>2</sup> In addition, the Hearing Officer concludes that under the facts and circumstances of this case, it would be desirable to present this testimony in a manner that would allow the Extended Hearing Panel to observe the witnesses demeanor while testifying. Accordingly, the Hearing Officer denies the Department's motion to have all 25 customers testify by telephone.

The Hearing Officer further notes that the motion failed to address at all the need to have these particular customers testify by telephone. This case involves more than 6000 customers, yet the Department focused on just 29 without explanation. The Department made no effort to demonstrate the unique importance of these witnesses, nor did the Department address whether other customers might be willing to testify at the hearing. In sum, the Department's motion lacked a sufficient factual foundation.

Given the motion's shortcomings, the late stage of the proceeding, the unprecedented nature of the Department's proposal, and the document-intensive nature of this case, the Hearing Officer concludes that the Department should make every reasonable effort to obtain the customer's testimony by videotaped deposition.<sup>3</sup> Accordingly, before the Department can renew its motion, the Department is ordered to request each individual to testify at a videotaped

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<sup>2</sup> The Hearing Officer finds the cost and burden of securing the customers' testimony to be outweighed by the Department's assessment of its significance. Furthermore, most of the projected difficulty of obtaining the customers' depositions at this time is a direct result of the Department's delay in not addressing this issue earlier.

<sup>3</sup> The Department also should consider whether there are other equally-qualified customers who could testify at the hearing.

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deposition *de bene esse* at a location convenient to the customer and to make himself or herself available by telephone during the hearing to answer questions from the Extended Hearing Panelists. The Department shall coordinate the time and place of such depositions with Respondents' counsel. The Respondents shall pay all of the fees and costs charged by the court reporter and the videographer. The Department shall not file a copy of each customer's transcript and videotape with the Office of Hearing Officers until the Department offers them into evidence at the hearing.

Once the Department determines if there are individuals who are unwilling or are unable to testify at a deposition *de bene esse* before the hearing begins, the Department may renew its motion as to those customers.

**IT IS SO ORDERED.**

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Andrew H. Perkins  
Hearing Officer

March 31, 2005