

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 06-36 (CAF040079).

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Disciplinary Proceeding
No. CAF040079

Hearing Officer – DRP

**ORDER DENYING RESPONDENT'S REQUEST FOR LEAVE
TO FILE MOTION IN LIMINE**

On May 2, 2006, a hearing on the merits was commenced. After Enforcement rested its case on May 16, Respondent sought leave to file a motion for summary disposition of the first two causes of action, pursuant to Procedural Rule 9264(b). On May 25, the Hearing Officer denied Respondent's motion and set additional hearing dates of October 12-13 and 16-20, 2006, for Respondent's case.

On August 14, Respondent sought leave to file a motion in limine to limit the number of witnesses in Respondent's case. On August 25, Enforcement filed its opposition.

In its motion, Respondent notes that Enforcement's theory of liability is based on individual conversations between almost 100 customers and dozens of Respondent's representatives, and argues that the Hearing Panel will be required to make separate determinations regarding each customer. Respondent contends that Enforcement has failed to present a prima facie showing of fraud and/or negligence with respect to any customers, particularly those for which Enforcement relies on hearsay documents rather than live testimony. Respondent thus seeks to file a motion to support its request that the Hearing Panel determine

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whether Enforcement has met its burden with respect to each customer, prior to the start of Respondent's case on October 12. In Respondent's view, this procedure would promote judicial economy, because it might allow Respondent to forego calling dozens of registered representatives to testify at the hearing.

During Enforcement's case, the Hearing Officer admitted in evidence the sworn declarations of 90 customers (CX-8.001, CX-8.003 – 8.091), 15 of whom testified at the hearing. For 3 other customers, she admitted evidence of their correspondence with Respondent (CX-11.001.a – 11.002.b, CX-11.010.a – b). In this case, Respondent's liability may be established under respondeat superior and/or control person liability, if even one representative violated federal securities laws or NASD rules with respect to one of these customers. As noted in the Order denying Respondent's motion seeking leave to file a motion for summary disposition, the Hearing Officer cannot state that Enforcement has been unable to establish that at least one representative violated federal securities laws and/or NASD rules as charged in the Complaint.

Notwithstanding Respondent's desire to pare down its defense, NASD Rules do not provide for the type of relief Respondent seeks leave to request. The Hearing Panel is simply not required to make determinations of this nature in the middle of the hearing. Accordingly, Respondent's motion is denied.

SO ORDERED.

Dana R. Pisanelli
Hearing Officer

Dated: September 8, 2006
Washington, DC