

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 RESPONDENTS' MOTIONS TO STRIKE
DEPARTMENT OF ENFORCEMENT'S EXHIBITS**

On February 5, 2007, Respondents filed motions to strike certain exhibits proposed to be offered by the Department of Enforcement.¹ On February 14, 2007, Enforcement filed its Opposition to the motions. This Order will resolve both motions and separate the objections by category.

1. The Respondent Firm moves to strike CX-16, a summary of facts purportedly admitted by Respondent 2 in sworn testimony that has been offered in full in CX-84. Respondent 2 also moves to strike CX-22 through CX-29, summaries of errors Enforcement alleges are in the breakpoint Assessments. The summaries are in the nature of demonstrative exhibits that are annotated to describe source material. Enforcement asserts that the errors alleged in the summaries are identical to those contained in the source documents. If that assertion is incorrect, at the hearing, Respondents may demonstrate that parts or all of the summaries may not be relied upon to make findings of

¹ Respondent 2 joins in the Respondent Firm's motion to strike, in addition to his own requests.

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fact. Moreover, Respondents may demonstrate any discrepancy between CX-16 and CX-84. At this point in the proceeding, Respondents have not shown a basis for precluding Enforcement from offering those exhibits.

2. Respondents move to strike CX-63, and CX-65 through CX-76, which pertain to Respondents' alleged disciplinary histories.² However, as Enforcement notes in its Opposition to the motions, NASD Sanctions Guidelines specifically require consideration of a respondent's disciplinary history, and settled matters that specifically provide for their use in future actions by NASD or any other regulator are appropriately put into evidence in actions brought against the respondent which arise after the settled matter. Finally, because NASD disciplinary proceedings are not bifurcated, the Code of Procedure does not contemplate or provide for withholding exhibits until the Hearing Panel undertakes a sanctions analysis after determining liability.

3. Respondents move to strike CX-77, CX-78, and CX-80 through CX-88, which are transcripts of on-the-record interviews ("OTR"), on grounds that the witnesses have not been shown to be unavailable for the hearing, and Respondents' counsel did not have a similar motive to cross-examine the witness at the time of the OTR. The motions are premature. The exhibits, at this stage of the proceeding, are only proposed, and the question of unavailability of any witness will have to be determined at the hearing. To the extent that any OTR is admitted into evidence, counsel may argue that any statement in the OTR is ambiguous, out of context, or otherwise unreliable.

4. Respondent 2 moves to strike CX-18 through CX-20, NASD's Breakpoint Assessment Computer Program and hard-copy screen prints from that program.

² On the same basis, Respondents also seek to strike or redact their own exhibit, RX-38. Respondents are under no compulsion to offer that exhibit in its present form. Should they elect to offer the exhibit in a redacted form, any objection to the exhibit will be resolved at the time it is offered.

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Respondent avers that the Program was not produced to him in a form that protects Respondents' work product, nor has Enforcement produced information related to the Program, its mechanics or revisions. Enforcement responds that it has undertaken efforts to ensure the confidentiality of Respondents' analysis and work-product relating to the Program, and that it will take further steps, after the hearing, to delete and destroy records of Respondents' use of the Program for hearing preparation, at the request of Respondents. The use of the Program at the hearing was the subject of an extensive pre-hearing conference. Issues regarding the Program and its development and maintenance are in flux. Accordingly, should those issues be resolved prior to the hearing, the exhibits will be admissible. To the extent that they are not, the Hearing Officer will hear further argument at the time they are offered.

5. Respondent 2 moves to strike CX-56, the Declaration of JC, on grounds that it is hearsay and because there is no indication that JC will be unavailable to testify at the hearing. As noted in a previous Order, hearsay is not a basis for excluding evidence in this proceeding. Moreover, Enforcement represents that it will offer the Declaration only in the event that JC does not appear to testify. Accordingly, the motion to strike CX-56 is denied.

SO ORDERED.

David M. FitzGerald
Deputy Chief Hearing Officer³

Dated: February 16, 2007

³ The Deputy Chief Hearing Officer issues this Order in the absence of the Hearing Officer, pursuant to Rule 9235(b).