

This order has been published by the NASDR Office of the Hearing Officers and should be cited as OHO Order 98-26 (CAF970011).

For the reasons set forth below, the motion is granted in part and denied in part.

I. Motion To Take Official Notice

Official notice may be taken of any facts which might be judicially noticed by a district court of the United States and any matter that is within the specialized knowledge of the NASD as an expert body.¹ Although broader than the concept of judicial notice in court proceedings, official notice is not without limitation. The facts sought to be established must be relevant, and the parties must have the opportunity to comment on them and establish the contrary.²

Here, Enforcement has requested that the Hearing Panel take official notice of the “disciplinary histories” of _____, _____, and _____, none of whom are parties to this present proceeding. According to Enforcement, their histories are “reflected by” the reported decisions of other adjudicatory bodies. Enforcement did not, however, identify the specific facts that it requests be admitted by official notice or the purposes for which those facts will be offered. Without this information, the Hearing Officer cannot determine which facts Enforcement is requesting be established by official notice and whether they are relevant to the issues in the present proceeding. In addition, unless the facts are identified with particularity, the Respondents do not have a meaningful opportunity to comment.

For the foregoing reasons, Enforcement’s motion to establish the disciplinary histories of _____, _____, and _____ by official notice is

¹ Code of Procedure Rule 9145(b).

² Cf. Conforti v. United States, 74 F.3d 838, 840 (8th Cir. 1996) (construing U.S. Department of Agriculture regulations and Rules of Practice); and Sandra Logay, Exchange Act Release No. APR-525, 63 S.E.C. Docket 508 (November 8, 1996).

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denied. Enforcement is granted leave to supplement the motion by stating precisely the facts it seeks to establish and the purpose for which each fact is offered.

II. Motion To Use Customer Affidavits In Lieu Of Live Testimony

To avoid calling more than 40 additional witnesses to testify, Enforcement has moved for leave to introduce some of their testimony by declarations corroborated by other evidence. Respondents object on the ground that they will not be able to cross-examine the customers. Respondents objection is meritless. The right to cross-examine witnesses is not absolute. Absent a disputed genuine issue of material fact, there is no right to cross-examination.

Enforcement has proffered that the proposed scope of the customers' testimony is limited to establishing that they were not told that _____ bought United Leisure stock from two of the other Respondents at the time the stock was being recommended to them for purchase, as alleged in paragraph 39 of the First Amended Complaint. Three declarations were attached to the motion. In substance they are identical.

Customer affidavits or declarations offered in conjunction with live testimony and other evidence is sufficient evidence to support the findings requested by Enforcement in this proceeding. Indeed, such evidence has been admitted and relied upon under similar circumstances under the more demanding requirements of the Federal Rules of Evidence.³

³ See Federal Trade Commission v. Kitco of Nevada, Inc., 612 F. Supp. 1282 (D. Minn. 1985) (customer affidavits admissible under FRE 803(24) in light of live testimony and documentary evidence with which the affidavits were consistent).

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For the foregoing reasons, Enforcement's motion is granted. In the event that the Respondents present evidence that creates a disputed genuine issue of material fact regarding their testimony, Enforcement shall make the witnesses available, either in person or by telephone, for cross-examination.

III. Motion To Use Affidavits To Establish Prejudgment Interest And Costs

Enforcement likewise seeks to use affidavits of NASD staff to establish the calculation of costs and prejudgment interest if sanctions are assessed against the Respondents. Respondents also objected to the use of these affidavits on the ground that the Respondents would not be able to cross-examine the witnesses who prepared the calculations. But Enforcement's motion specifically stated that its staff witnesses would be available for cross-examination. Accordingly, the motion is granted.

SO ORDERED.

Andrew H. Perkins
Hearing Officer

Dated: August 4, 1998