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NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
Complainant,	:	Disciplinary Proceeding No. C10990121
v.	:	
	:	Hearing Officer - EBC
Respondent.	:	

ORDER DENYING ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION

The Department of Enforcement's Complaint alleges that the Respondent, _____ ("_____" or "Respondent"), violated NASD Conduct Rule 2110 by failing to disclose on a Uniform Application for Securities Industry Registration or Transfer (Form U-4) that he was convicted on charges of importing heroin, which is a felony. The Department of Enforcement (Enforcement) moved for summary disposition, pursuant to Rule 9264, requesting that the Hearing Panel: (1) find that _____ violated Rule 2110, as alleged in the Complaint; and (2) fine _____ $5,000 and bar him from association with any member firm in any capacity.[1] _____ opposed the motion.[2]

Code of Procedure Rule 9264(d) provides that the Hearing Panel "may grant [a] motion for summary disposition if there is no genuine issue with regard to any material fact and the Party

[1] In support of its motion, Enforcement filed a Statement of Undisputed Facts, a Memorandum of Points and Authorities, and seven exhibits (CX A-CX G).

[2] Respondent, who is appearing *pro se*, filed a "Statement of Facts & A Request For Immediate Dismissal Of Case For Want of Evidence" ("Respondent's Opposition") on December 13, 1999. The Hearing Panel has considered Respondent's submission only to the extent that it may be construed as a response to Enforcement's summary disposition motion. To the extent that Respondent's submission may be construed as a cross-motion for summary disposition, the Hearing Panel has determined to reject it on the grounds that it is untimely: pursuant to the

that files the motion is entitled to summary disposition as a matter of law." The Rule further requires that, in considering such a motion, "the facts alleged in the pleadings of the Party against whom the motion is made shall be taken as true." It also is clear, based on the case law under the analogous federal court summary judgment procedure, that the moving party (in this case, Enforcement) bears the initial burden of showing "the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The substantive law governing the case will identify those facts that are material and "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The following facts are not in dispute. On or about September 27, 1989, the United States Drug Enforcement Agency arrested _____ on a charge of importation of heroin, which is a felony. (CX A.) On or about November 8, 1990, _____ was convicted on this charge in United States District Court for the _____ (_____) and sentenced to six months imprisonment. (Id.) During all times relevant, _____ understood that he had been convicted of a felony. (CX B, p. 9.)

In or about November 1996, _____ was hired by _____ ("_____") and, on March 26, 1997 took the Series 7 Examination for the first time. (CX E.) Sometime prior to March 26, 1997, a Form U-4 was filed with the National Association of Securities Dealers, Inc. (NASD) on _____ behalf. (CX D.) Question 22A(3) on a Form U-4 requires an applicant to answer "yes" or "no" to the following:

September 16 Initial Pre-Hearing Order, all pre-hearing motions for summary disposition were required to be served and filed by October 19, 1999.

> 22A. Have you been convicted of or plead guilty or nolo contendere ("no contest") in a domestic or foreign court to:
>
> (3) any . . . felony?

The Form U-4 that was filed with the NASD for _____ did not include any disclosure of his felony conviction (CX D) and, on or about June 24, 1997, Respondent became registered as a general securities representative through _____. (CX E.) Approximately two months later, on or about August 29, 1997, _____ filed a Uniform Termination Notice for Securities Industry Registration (Form U-5) discharging _____ because he had failed to disclose on the Form U-4 "his arrest [and] subsequent incarceration . . . for the importation of heroin." (CX F.)

_____, in his papers in opposition to Enforcement's summary disposition motion, in essence claims that he did not complete the Form U-4, and also seems to claim that he did not authorize any person or entity to file a Form U-4 on his behalf. (See Respondent's Opposition, p. 1.) Previously, during the investigation that led to this disciplinary proceeding and at the Initial Pre-Hearing Conference, _____ claimed that he: (a) did not have his eyeglasses when he completed the Form U-4 and, consequently, did not read the form properly; and (b) failed to understand that the Form U-4 required disclosure of any type of felony, irrespective of whether it was investment-related. (CX B, pp. 8-12, CX G, pp. 43-46.) Similarly, in his Answer, Respondent claimed that he "did not willfully file any false application with an intent to deceive any one . . . ."

The Hearing Panel is troubled by Respondent's recent revision of his defense in this proceeding.[3] However, in considering a motion for summary judgment, it is inappropriate to

[3] The Panel also recognizes that the defenses _____ initially raised may not have been sufficient to defeat summary disposition on the issue of liability, since a violation of Rule 2110 may be predicated on the filing of false

weigh or assess the credibility of the evidence presented. See, e.g., Agosto v. INS, 436 U.S. 748, 756 (1978) ("a district court generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented"); Vital v. Interfaith Med. Ctr., 168 F.3d 615, 622 (2d Cir. 1999) ("Assessments of credibility and choices between conflicting versions of the events are matters for the jury, not for the court on summary judgment."). And, while _____ has not submitted any independent evidence in support of the statements he has made in opposition to the motion, given that he is appearing *pro se*, the Hearing Panel is inclined to grant him greater latitude than otherwise might be warranted.

Based on the foregoing, the Panel has determined that there is sufficient dispute as to the material facts to warrant a hearing in this matter. Therefore, pursuant to Rule 9264(d), Enforcement's Motion for Summary Disposition is denied.

HEARING PANEL

_____

By: Ellen B. Cohn
Hearing Officer

Dated: New York, New York
January 4, 2000

Form U-4, irrespective of a respondent's willfulness or intent. See, e.g., In re Robert E. Kauffman, Exchange Act Release No. 33219 (Nov. 18, 1993), aff'd, 40 F.3d 1240 (3d Cir. 1994) (table).