

This order has been published by the NASDR Office of the Hearing Officers and should be cited as OHO Order 97-14 (C05970037).

**NASD REGULATION, INC.  
OFFICE OF HEARING OFFICERS**

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DEPARTMENT OF ENFORCEMENT,	:	
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	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C05970037
v.	:	
	:	
	:	Hearing Officer - EBC
	:	
	:	
Respondent.	:	

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DEPARTMENT OF ENFORCEMENT,	:	
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	:	
Complainant,	:	
	:	
v.	:	Disciplinary Proceeding
	:	No. C05970038
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	:	
	:	Hearing Officer - EBC
	:	
	:	
Respondents.	:	

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**ORDER GRANTING MOTION FOR CONSOLIDATION  
OF DISCIPLINARY PROCEEDINGS**

On October 24, 1997, the Department of Enforcement filed a motion, pursuant to Code of Procedure Rule 9214(b), requesting consolidation of the two above-captioned disciplinary proceedings. The Department of Enforcement maintains that consolidation is warranted because both disciplinary proceedings arise out of the same set of operative facts; it expects to offer the same or similar evidence at the hearings in each of these proceedings; the individual

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Respondents, \_\_\_\_\_, would be required to be present at both hearings; and the proposed consolidation would conserve the time and resources of the Parties. The Department of Enforcement also suggests that the Respondents would not suffer any prejudice were these proceedings consolidated.

On November 6, 1997, Respondents \_\_\_\_\_ filed papers objecting to the motion to consolidate. Respondents \_\_\_\_\_ argue, in essence, that because the allegations against \_\_\_\_\_ are far more egregious than the allegations against them, they would be prejudiced by being required to participate in a hearing with \_\_\_\_\_. It appears \_\_\_\_\_ are concerned that the Hearing Panel will be unable to distinguish between the allegations relating to \_\_\_\_\_ and those relating to them, and that they will be “tainted” by any potential findings of wrongdoing against \_\_\_\_\_.<sup>1</sup> While Respondents \_\_\_\_\_ stress the difference in the nature of the violations at issue in the two proceedings, they do not dispute the Department of Enforcement’s contention that the two proceedings raise common questions of fact or that consolidation would enhance the efficiency of the disciplinary process.

Respondent \_\_\_\_\_ has not filed any papers in response to the Department of Enforcement’s motion.<sup>2</sup>

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<sup>1</sup> Respondents \_\_\_\_\_ also assert they would be prejudiced to the extent that evidence regarding \_\_\_\_\_ outside dealings with other brokerage firms is offered at the hearing. The Respondents have provided no explanation as to how they might be prejudiced by the introduction of such evidence.

<sup>2</sup> The decision on the Department of Enforcement’s motion to consolidate was deferred pending clarification of the status of a bankruptcy proceeding that had been instituted by \_\_\_\_\_ and pending resolution of \_\_\_\_\_ motion for a stay of the two subject disciplinary actions.

## THE NATURE OF THE PROCEEDINGS

### *I. The Disciplinary Proceeding Against \_\_\_\_\_*

The Department of Enforcement's Complaint alleges that while \_\_\_\_\_ was associated with \_\_\_\_\_ and employed at its \_\_\_\_\_ office, she misused and converted customer funds for her own use and benefit; effected unsuitable and excessive trades for customers; and effected discretionary securities transactions in the accounts of certain customers without having obtained from the Firm written acceptance to treat those accounts as discretionary. \_\_\_\_\_ is charged with acting in "contravention" of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and violating NASD Conduct Rules 2110, 2120, 2310, 2510(a), 2510(b), and 2330(a).

In her Answer, \_\_\_\_\_ essentially denies all substantive allegations in the Complaint and asserts that she "followed \_\_\_\_\_ policies and procedures" for obtaining written acceptance from the Firm to treat certain customer accounts as discretionary.

### *II. The Disciplinary Proceeding Against \_\_\_\_\_*

The Department of Enforcement's Complaint charges Respondents \_\_\_\_\_ with supervisory deficiencies relating solely to \_\_\_\_\_ conduct. According to the Complaint, during all times relevant, \_\_\_\_\_ was a General Securities Principal and the Financial and Operations Principal at the Firm.

More specifically, the Complaint alleges that the Firm, acting through \_\_\_\_\_, failed to establish, maintain, and enforce supervisory procedures designed to detect and prevent \_\_\_\_\_ misappropriation of customer checks and her excessive trading of customer accounts. The Complaint also alleges that the Respondents failed to establish an adequate supervisory system to

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provide for reasonable supervision of \_\_\_\_\_, and failed to require her and her sales assistant to attend an annual compliance meeting.

In their Answer, Respondents \_\_\_\_\_ deny the failure to supervise charges, and assert, among other things, that the Firm's compliance staff had communications with \_\_\_\_\_ customers concerning the activity in their accounts; the Firm was aware of her past conduct in the securities industry; and the Firm regularly conducted compliance reviews of its \_\_\_\_\_ office.

### **LEGAL STANDARD AND DISCUSSION**

Code of Procedure Rule 9214 authorizes the Chief Hearing Officer to consolidate two or more disciplinary proceedings "where such consolidation would further the efficiency of the disciplinary process, and where the subject complaints involve common questions of law or fact. . . ." The Rule sets forth various factors to be considered in determining whether to consolidate disciplinary proceedings: (1) whether the same or similar evidence reasonably would be expected to be offered at each of the hearings; (2) whether the proposed consolidation would conserve the time and resources of the Parties; and (3) whether any unfair prejudice would be suffered by one or more Parties as a result of the consolidation.

In this case the propriety of and benefits from consolidation are evident and far outweigh any potential prejudice to the Respondents. As pled, the Department of Enforcement's allegations of supervisory deficiencies are derivative in nature and are inevitably related to the alleged misconduct committed by \_\_\_\_\_.<sup>3</sup> Because the allegations against \_\_\_\_\_ and the allegations against \_\_\_\_\_ involve substantially common questions of fact, it is apparent

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<sup>3</sup> See, e.g., District Business Conduct Committee No. 10 v. Zandford, Complaint No. WA-530, 1989 NASD Discip. LEXIS 39, at \*22 (Bd. of Governors June 7, 1989) (because of the dismissal of charges that a

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that there will be significant overlap in the documentary evidence and testimony offered at each of the hearings. In particular, both cases will involve the presentation of evidence relating to \_\_\_\_\_ alleged misconduct, and at least some of the documentary evidence that the Department of Enforcement may offer to prove its case against \_\_\_\_\_ may be offered for the Hearing Panel's consideration as to whether there were "red flags" sufficient to alert \_\_\_\_\_ as to \_\_\_\_\_ alleged misconduct. Further, the Department of Enforcement has indicated that the individual Respondents, \_\_\_\_\_, are likely to be witnesses at both hearings.

Consolidation of the two subject disciplinary actions will promote efficiency in the disciplinary process, by eliminating duplicative effort, the need for witnesses to attend two proceedings, and the costs that would be attendant to litigating two separate proceedings.

The concerns of prejudice raised by Respondents \_\_\_\_\_ do not warrant denial of the motion to consolidate. The NASD frequently institutes a single disciplinary proceeding against multiple respondents, alleging various types of misconduct or degrees of culpability. While Hearing Panels must be mindful of the "facts and circumstances that differentiate one man's case from another's,"<sup>4</sup> as the SEC has recognized this does not mean that each respondent is entitled to a wholly separate hearing where common questions of fact or law are present that warrant consolidation. In re Richard C. Spangler, 46 S.E.C. 238, 252 n.62, 1976 SEC LEXIS 2418, n.62, at \*35 (1976) (denying respondents' claims of prejudice as a result of consolidation of administrative proceedings). Indeed, the SEC has explicitly rejected claims of prejudice, similar to those made by the Respondents here, arising out the consolidation of

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registered representative effected excessive and unsuitable transactions, the DBCC and Board of Governors dismissed the related failure to supervise charges.

<sup>4</sup> In re Robert F. Lynch, Exchange Act Rel. No. 11737, n.17, 8 S.E.C. Docket 75, 1975 SEC LEXIS 599, n.17, at \*12 (Oct. 15, 1975).

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NASD disciplinary proceedings. In In re Kirk A. Knapp, 50 S.E.C. 858, 1992 SEC LEXIS 430, at \*12-13 (1992), where an action against a supervisor was consolidated with the action against the primary wrongdoer, the SEC rejected the supervisor's claim that he was prejudiced by being joined in a proceeding with an individual who had a prior disciplinary record of serious infractions. Finally, while a lay jury may have difficulty distinguishing between various respondents' conduct and may tend to impute the wrongdoing of one respondent to another, such considerations are not present here. These proceedings will be heard by a Hearing Panel comprised of two experienced and professional industry members and a Hearing Officer, who is an attorney, and all potential Hearing Panel members have been trained to be impartial adjudicators.

Accordingly, for the reasons set forth above, the Department of Enforcement's motion to consolidate the two disciplinary proceedings, Department of Enforcement v. \_\_\_\_\_, Disciplinary Proceeding No. C05970037, and Department of Enforcement v. \_\_\_\_\_, Disciplinary Proceeding No. C05970038, is granted.

**SO ORDERED.**

\_\_\_\_\_  
Linda D. Fienberg  
Chief Hearing Officer

Dated: December 18, 1997  
Washington, DC