

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent 1

and

Respondent 2,

Respondents.

Disciplinary Proceeding
No. E1020040926-01

Hearing Officer – SW

**ORDER PRECLUDING THE RESPONDENTS FROM PRESENTING WITNESSES AT
THE HEARING, OTHER THAN RESPONDENT 2**

I. Background

On September 22, 2006, the Department of Enforcement (“Enforcement”) filed a motion seeking Rule 9280 sanctions against the Respondents based on their failure to comply with the Hearing Officer’s Pre-Hearing Order and Scheduling Order, dated June 16, 2006 (the “Scheduling Order”). Specifically, Enforcement requested that the Hearing Officer issue an order precluding the Respondents from introducing testimony of witnesses, other than their own testimony, and from introducing documents at the Hearing because the Respondents failed to comply with the September 15, 2006 filing deadline contained in the Scheduling Order.

On October 3, 2006, a pre-hearing conference was held via telephone, for the purpose of, among other things, affording the Parties the opportunity to present oral arguments on Enforcement’s request.¹ The Respondents failed to appear, either personally or through counsel,

¹ By an order dated September 22, 2006, the Parties were notified of the October 3, 2006 pre-hearing telephone conference, and the subjects that would be discussed at the telephone conference.

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at the October 3, 2006 pre-hearing conference. Accordingly, the Hearing Officer issued an Order to Show Cause on October 3, 2006.

On October 9, 2006, in response to the Hearing Officer's Order to Show Cause, the Respondents filed a motion indicating that they were not aware of the order scheduling the October 3, 2006 pre-hearing conference.

Following an October 16, 2006 pre-hearing conference with the Parties, the Hearing Officer issued an Amended Scheduling Order on October 17, 2006 that: (i) set new Hearing dates, (ii) denied Enforcement's motion to preclude, and (iii) extended the deadline to October 24, 2006, for the Respondents to file their pre-hearing submissions, specifically the Respondents' exhibits, exhibit lists, and witness lists. On October 19, 2006, the Hearing Officer further extended the October 24, 2006 deadline to October 27, 2006.

The Respondents filed their pre-hearing submissions on October 31, 2006, after the deadline, and the Respondents did not serve their pre-hearing submissions on Enforcement until November 1, 2006. The Respondents' pre-hearing submissions did not include a witness list.

Subsequently, the Respondents filed a witness list on November 3, 2006, 49 days after the original September 15, 2006 deadline, 10 days after October 24, 2006, the first extended deadline, and seven days after October 27, 2006, the second extended deadline.

II. Discussion

NASD Procedural Rule 9280(b)(2) authorizes the imposition of sanctions against a Party who fails to comply with any order of the Hearing Officer. The Rule provides, in pertinent part:

[a] Party that without substantial justification fails to disclose information required by the Rule 9240 Series . . . or otherwise required by order of the Hearing Officer . . . shall not, unless such failure is harmless, be permitted to use as evidence at a hearing, in a motion or in any other filing of papers, or in oral argument, any witness or information not so disclosed.

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Under these circumstances, the Hearing Officer finds that an order precluding the Respondents from calling any witnesses, other than themselves, is entirely appropriate to redress their unjustified failure to disclose their witnesses in a timely manner.²

Therefore, it is ORDERED that, pursuant to NASD Code of Procedure Rule 9280(b)(2) the Respondents are hereby precluded from calling any witnesses at the Hearing. Respondent 2 may, however, testify on behalf of himself and Respondent 1.

SO ORDERED.

Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
November 7, 2006

² In any event, the Hearing Officer notes that Mr. Geary Seeley is a witness for Enforcement, and therefore Mr. Seeley will be available for the Respondents to cross examine. The Hearing Officer also notes that Mr. William St. Louis and Mr. Paul Hare are counsel for Enforcement, and except for unusual circumstances, which do not exist in this case, would not be compelled to testify.