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NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. Respondent.	Disciplinary Proceeding No. C01040017 Hearing Officer—Andrew H. Perkins

ORDER GRANTING IN PART THE DEPARTMENT'S MOTION TO PRECLUDE THE RESPONDENT FROM INTRODUCING EVIDENCE AT THE HEARING

According to the pre-hearing schedule, the parties were obligated to file and serve their pre-hearing submissions no later than March 8, 2005. Neither the Department of Enforcement nor the Office of Hearing Officers received any pre-hearing submissions from the Respondent. Consequently, on March 11, 2005, the Department filed a motion to preclude the Respondent from offering any evidence at the hearing. The Respondent did not oppose the Department's motion.

On March 29, 2005, just before the Final Pre-Hearing Conference, the Respondent, through counsel, filed and served by facsimile and first-class mail a pre-hearing memorandum, witness list, and exhibit list. In a cover letter accompanying the filing, Respondent's counsel stated that in the course of preparing for the Final Pre-Hearing Conference he noticed that the Department contended that the Respondent never served his pre-hearing submissions. To the contrary, Respondent's counsel claimed that

he had served and filed them on March 8, 2005, by both facsimile and first-class mail. Respondent's counsel attached a sworn certificate of service reflecting that the pre-hearing submission had been sent on March 8, 2005.

At the Final Pre-Hearing Conference, the Hearing Officer questioned Respondent's counsel regarding the Respondent's pre-hearing submissions. Counsel assured the Hearing Officer that he personally had mailed and faxed the pre-hearing submissions to both the Department and the Office of Hearing Officers on March 8, 2005. He had no explanation for the fact that the material never reached its intended recipients by either means. The Hearing Officer requested counsel to submit any further proof that he had faxed the pre-hearing submissions on March 8, 2005, as counsel claimed.

Later on March 29, 2005, Respondent's counsel submitted a facsimile transaction confirmation reflecting the successful transmission of a 24-page fax to the Department and to the Office of Hearing Officers on March 8, 2005. The Department then filed a report from its facsimile machine reflecting that no such transmission was received on March 8, 2005.

The Hearing Officer finds counsel's neglect in failing to respond to the Department's motion to preclude evidence to be inexcusable. Nonetheless, under the facts and circumstances of this case, and considering the nature of the charges, the Hearing Officer concludes that precluding the Respondent from introducing any evidence at the hearing is too severe a remedy where the Department has not demonstrated undue prejudice. Accordingly, the Hearing Officer denies the Department's motion to preclude the Respondent from introducing evidence at the hearing.

However, the Hearing Officer grants the Department's motion with respect to Respondent's two proposed expert witnesses for the following reasons. First, the Respondent failed to comply with Procedural Rule 9242(a)(5). The Respondent did not provide: (1) a statement of the experts' qualifications; (2) a listing of other proceedings in which the experts' have given expert testimony; and (3) a list of the experts' publications. Although the Respondent's March 29, 2005, filing states that the experts' curricula vitae are attached, they are not.

Second, expert testimony would not be helpful in this case. NASD Procedural Rule 9263(a) gives the Hearing Officer authority to "exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial." This includes the authority to allow or to preclude expert testimony. Expert testimony is often excluded in NASD proceedings because Hearing Panels include individuals who have substantial relevant specialized knowledge themselves.[1]

In this case, the Respondent indicated that he wanted to offer expert testimony on the following subjects: (1) the suitability of the subject investments; (2) the nature of the transactions at issue; (3) the "nature and background" of the Respondent's customers; (4) "concerning selling away"; and (5) the "economic impact of selling away" on the Respondent's customers. Many of these topics are not the subject of expert opinion testimony or are irrelevant to the issues in the case. Moreover, the issues or suitability and selling away do not present issues of such technical complexity as to require expert

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[1] *See Pagel, Inc.*, Exchange Act Release No. 22280, 33 S.E.C. Docket 1003 (Aug. 1, 1985), *aff'd, sub nom. Pagel, Inc. v. SEC*, 803 F.2d 942, 947 (8th Cir. 1986) (affirming SEC Administrative Law Judge's exclusion of expert testimony).

testimony. Accordingly, the Hearing Officer precludes the Respondent from introducing expert testimony at the hearing.

Finally, the Department is granted leave to renew its motion to exclude any of the remaining witnesses on the Respondent's witness list at the hearing on the grounds that his or her testimony is irrelevant, immaterial, unduly prejudicial, or unduly repetitious.

IT IS SO ORDERED.

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Andrew H. Perkins
Hearing Officer

March 30, 2005