

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C1000046
v.	:	
	:	
Respondent.	:	Hearing Officer - EBC
	:	

**ORDER REGARDING RESPONDENT’S MOTION FOR LEAVE
TO FILE A LATE ANSWER**

On July 6, 2000, the Respondent, _____ (“_____” or the “Respondent”), through his counsel, filed a motion for leave to file a late Answer to the Complaint.¹ On July 14, 2000, the Department of Enforcement (Enforcement) filed papers in which it opposed the motion or, in the alternative, proposed that the Hearing Officer conduct an evidentiary hearing on Respondent’s motion. For the reasons set forth below, the Hearing Officer has determined to hold an evidentiary hearing to ascertain the facts and circumstances pertaining to Respondent’s failure to file an Answer in a timely manner, his failure to respond to the Hearing Officer’s May 22, 2000 Order directing Enforcement to file a motion for entry of a default decision against him, and other matters relevant to the disposition of his motion. The hearing will be held on July 28, 2000 at 11:00 a.m., at the Offices of NASD Regulation, Inc., 33 Whitehall Street, New York, New York. The Parties should report to the receptionist on the tenth floor upon their arrival.

¹ In support of the motion, Respondent filed a declaration of his counsel, _____, Esq. (“_____ Decl.”).

Facts

On March 29, 2000, Enforcement filed a five-cause Complaint alleging that _____, while associated with _____, Inc., engaged in abusive sales practices, including unauthorized trading, in handling four, joint customer accounts. The record indicates that, on March 29, 2000, Enforcement served _____, via Airborne Express and conventional first class and certified mail, with a Notice of the Complaint and a copy of the Complaint at three addresses: two residential addresses listed in the Association's Central Registration Depository (the "CRD Addresses") and an address that Enforcement obtained through a LEXIS/NEXIS search (the "LEXIS/NEXIS Address"). (_____ Decl. ¶ 3.) According to the Certificate of Service in the record, Enforcement also sent a copy of the Notice of the Complaint and Complaint, via Airborne Express, to _____, Esq., who purportedly was Respondent's counsel. After _____ failed to answer and his time to do so had expired, on April 27, 2000, Enforcement sent him a Second Notice of Complaint and copy of the Complaint, via conventional first class and certified mail, at the two CRD Addresses and the LEXIS/NEXIS Address. (Id. at ¶ 4.)

When _____ failed to answer or otherwise respond to the Second Notice of Complaint within the period prescribed by the Code of Procedure, on May 22, 2000, the Hearing Officer issued an Order directing Enforcement to file a motion for entry of a default decision against him (the "May 22 Order"). The Office of Hearing Officers sent a copy of the May 22 Order to _____, via first class mail, at the two CRD Addresses and the LEXIS/NEXIS Address, and also sent a copy of the Order to _____, via facsimile transmission and first class mail. According the Office of Hearing Officers'

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records, the Postal Service returned two of the mailings to _____ but did not return the other.² In addition, the Postal Service did not return the mailing to _____, and a facsimile transmission report in the file shows that the May 22 Order was successfully transmitted. On June 19, 2000, Enforcement filed its default motion; the motion is presently pending.

More than six weeks after the Hearing Officer directed Enforcement to file its default motion and more than two weeks after it filed the motion, Respondent moved for leave to file a late Answer to the Complaint. Respondent's counsel asserts, in the declaration he submitted in support of the motion, that _____ denies receiving the notices of complaint. (_____ Decl. ¶¶ 6-7.) In this connection, counsel states that the two CRD Addresses were out of date (_____ Decl. ¶¶ 3-4) and, while apparently conceding that the LEXIS/NEXIS Address was an accurate address for _____, explains Respondent's failure to answer as follows:

Respondent has advised me that at or around the time that the . . . notices [of complaint] were sent, Mr. _____ was traveling and/or was out of the country, and when he attempted to retrieve the notices from the Post Office, they were no longer available, having been returned to sender. Respondent has now returned to the United States, and having recently been hospitalized, received a notice upon his return home.

(_____ Decl. ¶ 8.) Respondent has not submitted a sworn affidavit or any documentary evidence to substantiate the statements of his counsel.

Discussion and Order

Enforcement argues that _____'s motion should be denied on procedural grounds, pointing to fact that the Code of Procedure does not specifically allow a respondent to move for leave to file an Answer where, as here, a motion for entry of a default decision is pending but, by contrast,

² Specifically, the Postal Service returned the mailings sent to _____ at the two CRD Addresses (i.e., _____ and _____), but it did not return the mailing sent to _____ at the LEXIS/NEXIS Address (i.e., _____). (See "Declaration in Support of Motion for Entry of a Default Decision," ¶ 16.)

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does permit a respondent to file a motion with the National Adjudicatory Council (NAC) to set aside a default decision. Enforcement's argument requires but a brief response. There is no explicit prohibition against the motion Respondent has filed; nor is there any implicit prohibition, as Enforcement suggests, since there is nothing in the Code or in the history pertaining to its promulgation to support the conclusion that the NASD intended to specifically provide for every conceivable motion that might be appropriate. Moreover, if a respondent in _____'s posture had no remedy but to await the issuance of a default decision and to then file a motion with the NAC to set aside the decision, final disposition of the disciplinary proceeding would be delayed,³ which would be contrary to both the interests of the investing public and the respondent.

If _____ is not granted leave to file a late Answer, he will be in default and a default decision may be entered against him. There is no question that a hearing on the merits is preferred over defaults and, for this reason, doubts as to the propriety of Respondent's motion should be resolved in his favor.⁴ However, _____'s motion consists of no more than the unsubstantiated statements of his counsel and lacks sufficient evidence for the Hearing Officer to determine whether _____ had good cause for failing to answer the Complaint in a timely manner or, on the other hand, whether his failure to do so was willful. Counsel's declaration also does not address at all whether _____ received the May 22 Order and, if so, why he waited until now to decide that he is interested in participating in and defending this proceeding. Absent answers to these and other questions, the Hearing Officer cannot decide Respondent's motion.

³ This would be true irrespective of whether the NAC denied the motion to set aside the default decision or granted the motion and remanded the proceeding to the Office of Hearing Officers for adjudication.

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Based on the foregoing, the Hearing Officer has determined that it is appropriate to hold an evidentiary hearing to ascertain the facts and circumstances pertaining to _____'s failure to file an Answer in a timely manner, his failure to respond to the May 22 Order, and other matters relevant to the disposition of his present motion. As previously directed, the hearing will be held on July 28, 2000 at 11:00 a.m., at the Offices of NASD Regulation, Inc., 33 Whitehall Street, New York, New York. Respondent should be prepared to testify and to present documentary evidence at the hearing.

SO ORDERED.

Ellen B. Cohn
Hearing Officer

Dated: New York, New York
July 18, 2000

⁴ Thus, federal courts consistently have held that disputes in connection with a motion to vacate a default should be resolved in favor of the movant so as to encourage a decision on the merits. See, e.g., Meehan v. Snow, 652 F.2d 274, 277 (2d Cir. 1981) (citing Klapprott v. United States, 335 U.S. 601 (1949)).