

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Disciplinary Proceeding
No. E0220030845-01

Hearing Officer – DRP

ORDER POSTPONING HEARING

I. Background

On March 9, 2006, the Department of Enforcement filed a three-count Complaint against Respondent. The Complaint alleges that Respondent defrauded customer CC of approximately \$500,000, in violation of NASD Conduct Rules 2120 and 2110 and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10-5 thereunder; engaged in private securities transactions without providing prior written notice to his member firm, in violation of NASD Conduct Rules 3040 and 2110; and failed to respond to requests for information, in violation of NASD Procedural Rule 8210 and Conduct Rule 2110. Respondent failed to file an Answer or otherwise respond to the Complaint, Amended Notice of Complaint, and Second Notice of Complaint. On June 9 - the same day Enforcement filed a motion for entry of default decision - Respondent filed an Answer.

On June 22, the Hearing Officer held an initial pre-hearing conference by telephone conference call with counsel for Enforcement and Respondent, who appeared *pro se*. With the parties' consent, the hearing in this matter was scheduled for August 30-31, 2006, in Los Angeles. On June 23, the Hearing Officer issued an order memorializing the hearing date and

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setting forth the schedule and procedures governing the conduct of this disciplinary proceeding.

On July 27, the Hearing Officer issued a formal Notice of Hearing, pursuant to NASD Rule 9221(d), advising the parties that the hearing will be held on August 30-31, 2006, beginning at 9:30 a.m. in NASD's Los Angeles District Office.

On August 4, the Hearing Officer held a telephonic pre-hearing conference to discuss Respondent's request for additional discovery. During the conference, counsel for Enforcement stated that he believed Respondent intended to retain counsel and would be requesting a postponement of the hearing. Respondent was equivocal about his intention to retain counsel but confirmed that he was seeking a postponement of the hearing, because he had been "essentially summoned out of the country" from August 16-31. In response to the Hearing Officer's questioning, he admitted that he was traveling in order to pursue "a business opportunity."

The Hearing Officer pointed out that Respondent had agreed to the hearing date; thus, his scheduling a business trip to conflict with the date would not constitute good cause to postpone the hearing. Respondent contended that, based on his conversations with counsel for Enforcement, he agreed to hold the hearing in August because he believed he had no choice. Despite the fact that the Hearing Officer asked Respondent for his preferred hearing dates during the initial pre-hearing conference, Respondent claimed he did not know that the Hearing Officer ultimately determined the schedule.

The Hearing Officer offered to entertain Respondent's application to postpone the hearing in writing and told the parties that if Respondent retained counsel, she would convene a pre-hearing conference to discuss postponing the hearing. The Hearing Officer instructed the parties that the scheduling order of June 23 remained in effect and noted that all pre-hearing submissions were due on August 11.

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On August 11, Enforcement filed its pre-hearing submissions. Instead of filing pre-hearing submissions on that date, newly-retained counsel for Respondent submitted a letter seeking an extension of the deadline for pre-hearing submissions and a continuance of the hearing until November 30, 2006, to allow for discovery and hearing preparation. Counsel also noted that the trial in a related civil lawsuit is currently scheduled for November 15, 2006. In support of the application, counsel also noted that Respondent planned to be in Dubai from August 16-30, then asked the Hearing Officer "to confirm the granting of this request [for continuance] in writing forthwith."

On August 14, Enforcement filed its opposition to Respondent's request for a continuance. On August 15, the Case Administrator phoned the parties to arrange an immediate telephonic pre-hearing conference with the Hearing Officer, but counsel for Respondent was not available until August 17. Accordingly, the Hearing Officer issued an order convening a telephonic pre-hearing conference on that date.

During the August 17 conference, the Hearing Officer learned that Respondent had left the country and did not plan to return until after the scheduled hearing date. After taking argument from the parties, the Hearing Officer took the matter under advisement.

II. Discussion

NASD Procedural Rule 9222 governs extensions of time, postponements and adjournments in disciplinary proceedings. Under the Rule, a Hearing Officer may, for good cause shown, postpone the commencement of a hearing for a "reasonable period of time." When determining whether to grant a motion to postpone the hearing, the Hearing Officer must consider the following factors: (1) the length of the proceeding to date; (2) the number of postponements, adjournments, or extensions already granted; (3) the stage of the proceedings at

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the time of the request; (4) potential harm to the investing public if an extension of time, adjournment, or postponement is granted; and (5) such other matters as justice may require. Pursuant to Rule 9222(b)(2), postponements "shall not exceed 28 days," unless the Hearing Officer explains why a longer period is necessary.

After considering the aforementioned factors, as well as the parties' submissions and arguments, the Hearing Officer finds that a 90-day continuance is not warranted or reasonable. Respondent's conduct, namely scheduling a trip that conflicts with the hearing date; failing to bring the scheduling conflict to the Hearing Officer's attention; and departing for Dubai while his motion to postpone the hearing was pending, do not constitute good cause for a continuance.

However, Respondent's departure has placed counsel in an untenable position. Though Respondent's belated decision to retain counsel would not ordinarily establish good cause for a continuance, particularly in a straightforward and uncomplicated case such as this, under the circumstances presented, justice requires a short postponement of the hearing.

The Hearing Officer notes that Respondent has not made a previous request to postpone the hearing. Furthermore, despite Respondent's tardiness in filing an Answer and minor delays due to extensions he sought and received, the case has proceeded expeditiously since the initial pre-hearing conference held in late June. A short postponement of the hearing will still ensure the prompt resolution of this proceeding and enable Enforcement to fulfill its responsibility to protect the investing public,¹ while also affording Respondent's counsel ample opportunity to provide meaningful representation of his client.

¹ See OHO Order 06-01, No. CLI050004 (Jan. 6, 2006) (prompt resolution of disciplinary proceedings to protect investing public is primary purpose of Rule 9222).

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Accordingly, the Hearing Officer will postpone the hearing until September 28-29, 2006.²

Finally, the Hearing Officer declines to adjust the pre-hearing schedule with respect to discovery and motion practice, because Respondent has availed himself of the opportunity to inspect and copy Enforcement's files pursuant to Rule 9251, and filed a discovery motion, which was denied. Furthermore, it was Respondent's choice to wait until after the relevant deadlines had passed to retain counsel.

Though Respondent ignored the August 11 deadline for filing pre-hearing submissions pursuant to Rule 9242, counsel submitted a request for extension on that date. The Hearing Officer will thus extend the deadline to August 25. The deadline for filing objections to proposed witnesses and exhibits is extended to September 8. The final pre-hearing conference will be held by telephone conference call on September 20 at 2:00 p.m. Eastern Time. A subsequent Notice will be issued regarding the exact location of the hearing, which will commence at 9:30 a.m. on September 28, 2006.

SO ORDERED.

Dana R. Pisanelli
Hearing Officer

Dated: August 18, 2006
Washington, DC

² During the August 17 conference, the Hearing Officer discussed the possibility of commencing the hearing on September 27, thereby postponing the case for 28 days, but counsel for Respondent was not available on that date. He was available, however, on September 28 and 29. According to Enforcement, the sole customer witness will make himself available to appear and testify at any time. Enforcement's other witnesses should also be available on September 28 and 29, as one is subject to NASD jurisdiction, and the other is an NASD employee. The Hearing Officer notes that Respondent is due to return before the new hearing date, and that his counsel is currently able to contact him via electronic mail.