

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 07-33 (20060042305-01).

FINANCIAL INDUSTRY REGULATORY AUTHORITY¹
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Disciplinary Proceeding
No. 20060042305-01

Hearing Officer – SW

SCHEDULING ORDER

The following schedule and procedural rulings shall govern the conduct of this disciplinary proceeding.

1. Hearing and Final Conference

(a) **Hearing.** A one-day Hearing in this disciplinary proceeding will be held on November 6, 2007, in San Francisco, CA. A notice specifying the exact time and location of the Hearing will be issued on or about October 5, 2007. The Office of Hearing Officers will arrange for a court reporter to be present at the Hearing to swear the witnesses and prepare a transcript.

(b) **Final Pre-Hearing Conference.** A Final Pre-Hearing Conference call in this disciplinary proceeding will be held on Tuesday, October 30, 2007, at 3:00 p.m., Eastern Time (**1:00 p.m., Mountain Time; 12:00 p.m., Pacific Time**). A notice specifying the procedure for participating in the Final Pre-Hearing Conference shall also be issued on or about October 5, 2007.

¹ Effective July 30, 2007, the corporate successor to NASD is the Financial Industry Regulatory Authority (FINRA).

2. Schedule

The following schedule is established for this proceeding:

- 08/15/07 Deadline for the Department of Enforcement to file post-complaint 8210 requests for information, if any, with responses due no later than August 31, 2007;²
- 08/17/07 Deadline for filing motions for summary disposition, if any, in compliance with Rule 9264;
- 08/24/07 Deadline for filing motions in opposition, if any, to the motions for summary disposition;
- 08/27/07 Deadline for any motions, if any, by Respondent pursuant to Code of Procedure Rule 9252 seeking an order requiring FINRA to compel the production of Documents or testimony at the Hearing;
- 08/27/07 Deadline for the Parties to begin discussing proposed witness and exhibit lists and stipulations;
- 08/31/07 Deadline for filing motions, if any, to allow testimony by experts, including identity and credentials, and deadline for filing motions to allow testimony by telephone;³
- 08/31/07 Deadline for any motions by Respondent relating to the discovery provided by the Department of Enforcement;⁴
- 09/10/07 Deadline for the Department of Enforcement's response to any motions filed by Respondent relating to the discovery provided by the Department of Enforcement;

² This deadline does not apply to Rule 8210 requests for testimony to be presented at the Hearing.

³ For the required format for motions for expert testimony and telephone testimony, review paragraph 6 below.

⁴ The Department of Enforcement indicated that it will make its investigative file available to Respondent in compliance with Rule 9251.

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- 09/14/07 Deadline for the Parties to exchange proposed witness and exhibit lists and to discuss the possibility of joint exhibits;
- 09/14/07 Deadline for the Parties to exchange proposed stipulations as to relevant undisputed facts;⁵
- 09/18/07 Deadline for any opposition to any motions relating to the conduct of the Hearing, including motions for testimony by experts and for telephone testimony;
- 09/28/07 Deadline for (i) filing and exchanging Pre-Hearing Submissions,⁶ including Pre-Hearing briefs, witness lists, and exhibits lists, (ii) filing initial Stipulations of the Parties, and (iii) filing any transcript designations;
- 10/12/07 Deadline for filing (i) any motions in limine and/or objections to witnesses or exhibits of another party (objections that are not timely filed will be deemed waived), and (ii) any counter designations to transcripts;
- 10/19/07 Deadline for filing oppositions to motions in limine;
- 10/26/07 Deadline for filing final Stipulations;
- 10/30/07 Final Pre-Hearing Conference; and
- 11/06/07 Hearing.⁷

This schedule will be changed only upon a showing of good cause. Any request for a change shall be filed promptly upon the occurrence of the circumstances requiring a change in the schedule. The Parties may contact the Office of Hearing Officers if they want to schedule a pre-hearing conference before the Final Pre-Hearing Conference provided for in the above Schedule.

⁵ See paragraph 8 below.

⁶ For the required format for pre-hearing submissions, review paragraph 4 below.

⁷ The Hearing Officer adopted the Hearing date agreed upon by the Parties.

3. Motions

Motions and papers in opposition to motions shall be considered timely filed if they are received by the Office of Hearing Officers within the time limits set forth herein. All deadlines will be strictly enforced. After these deadlines, the Parties may not file any such motions or papers in opposition except with leave of the Hearing Officer, which will be granted only upon a showing of good cause.⁸ Any Party requesting a postponement of any deadline shall include in the request alternative dates that, if possible, are agreeable to all Parties.

4. Pre-Hearing Submissions

The Parties must ensure that the original and three copies of their Pre-Hearing Submissions are received by the Office of Hearing Officers on the due date. Each Party's Pre-Hearing Submission shall include the following materials, which shall be prepared as set forth here:

(1) A narrative summary of the Party's case or defense, including a statement or statements by each Party of the issues of fact and law that are undisputed and a statement or statements by each Party of the issues of fact and law that are in dispute;

(2) A summary of the legal theories upon which each Party will rely at the Hearing, which shall include citations to controlling authority and be accompanied by copies of any authorities cited that are not reported;

(3) Exhibit Lists, which shall, with respect to each proposed exhibit, include a description of the exhibit and a brief statement indicating the purpose for which the document will be offered in evidence at the Hearing;

⁸ Examples of Hearing Officers' orders in response to motions are available at "www.finra.org" by following the links to "Regulatory Enforcement," "Adjudication," "Office of Hearing Officers Decisions and Proceedings," and "OHO Disciplinary Orders."

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(4) Witness Lists, which shall include the names and addresses of all prospective witnesses, their occupations, and a brief summary of the substance of their anticipated testimony; and

(5) Copies of the proposed exhibits pre-marked for identification. Each exhibit must be consecutively numbered. A letter identifying the Party proposing the exhibit shall precede the exhibit number, using "CX" to identify the Department of Enforcement and "RX" to identify Respondent. Each page of each exhibit shall be marked with the appropriate Party identifier and the exhibit number, followed by the page number of the exhibit and the total number of pages in the exhibit. By way of illustration, if the Department of Enforcement's first exhibit were a ten-page document, it would be marked: CX-1, Page 1 of 10; CX-1, Page 2 of 10, etc. Similarly, if Respondent's first exhibit were a five-page document, it would be marked RX-1, Page 1 of 5; RX-1, Page 2 of 5, etc.

Prior to the exchange and filing of proposed exhibits, the Parties shall confer to determine whether there is substantial duplication in the exhibits they intend to offer that warrant a joint submission of exhibits and a joint exhibit list. The Department of Enforcement shall be responsible for pre-marking all joint exhibits and filing a Joint Exhibit List. Joint exhibits shall be prefaced with the letter "JX" to indicate that they are offered jointly.

At the Hearing, the Parties must have available to submit to the court reporter additional copies of the exhibits, which will become part of the official record of the Hearing. The Parties must ensure that each page of each exhibit is legible. Any Party offering copies of poor quality must note on the proposed exhibit that it is the "best available copy," and must include as an exhibit an affidavit that the copies of the exhibits provided are the best copies available.

5. Transcripts of Prior Testimony

(1) If any Party intends to offer the prior testimony of a witness, other than for impeachment or rebuttal purposes, the prior testimony should be included as a proposed exhibit on the Party's Exhibit List. Only in unusual circumstances will a Party be permitted to offer an entire transcript of prior testimony as an exhibit. Instead, the exhibit should include only the portions of the transcript that the Party intends to offer as evidence, together with the portions setting forth the caption of the proceeding, the date on which the testimony was given, the identity of the witness, and the court reporter's certification.

(2) Any other Party may include as an exhibit on its Exhibit List any other relevant portions of the transcript that that Party intends to offer. Where possible, however, all portions of the prior testimony of a single witness to be offered by any Party should be incorporated in a single joint exhibit.

6. Use of Expert Testimony and Telephone Testimony at the Hearing

Expert testimony and testimony by telephone will not be permitted without the permission of the Hearing Officer. Each motion seeking leave to offer the testimony of an expert shall describe the subject matter and substance of the expected expert testimony and explain why such testimony would be helpful to the Hearing Panel, a majority of whom will be industry members. The motion must also include a statement of the expert's qualifications, a listing of other proceedings in which the expert has given expert testimony, a list of the expert's publications, and copies of those publications that are not readily available to the other Parties and the Hearing Panel.

Each motion seeking leave to offer testimony by telephone shall, at a minimum, address the following points: (1) the location of the witness; (2) the nature of the witness's expected

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testimony; (3) the efforts made by the sponsoring Party to secure the witness's attendance at the Hearing; (4) whether the witness is subject to the jurisdiction of FINRA; and (5) the reason the witness is unable to appear in person.

7. Preclusion

Absent a showing of good cause, the Hearing Officer may preclude evidence and witnesses that have not been identified timely or have not been identified in accordance with the requirements pertaining to the preparation of Exhibit Lists and Witness Lists; the designation of prior testimony; and the submission of information with respect to expert witnesses.

8. Stipulations

The Parties are expected to stipulate to those matters that reasonably cannot be contested and to the authenticity of documents that are expected to be offered in evidence, absent a good-faith basis to question the genuineness of the documents. It shall be the duty of the Department of Enforcement to initiate the meeting and the duty of the other Party to fully cooperate and assist in reaching stipulations to fulfill the substance and spirit of this Order.

9. Presentation of Evidence Relevant to Liability and Sanctions

All evidence bearing on both liability and sanctions must be presented at the Hearing. Based on the evidence presented at the Hearing, the Hearing Panel will determine whether Respondent committed the violations alleged in the Complaint, and if so, what, if any, sanctions should be imposed. There will not be a subsequent hearing addressing the question of sanctions.

Accordingly, the Department of Enforcement should be prepared to present, at the Hearing, any evidence it wishes the Hearing Panel to consider in connection with the possible imposition of sanctions. Likewise, Respondent should be prepared to present, at the Hearing,

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any evidence of mitigating factors to be considered by the Hearing Panel, as well as evidence in support of any claim of financial hardship that would prevent the payment of sanctions.

Any questions regarding this Order may be initially addressed to Nick Laliberté at (202) 728-8460.

SO ORDERED.

Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
 August 7, 2007