

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 07-30 (ARB070023).

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Expedited Proceeding
No. ARB070023

STAR No. 20070089984

Hearing Officer – SW

ORDER DEEMING (1) RESPONDENT'S DEFENSE ABANDONED, (2) THE HEARING WAIVED, AND (3) THE NASD SUSPENSION NOTICE FINAL

On October 25, 2006, an NASD arbitration panel rendered jointly and severally an arbitration award against Respondent, among others. The arbitration award consisted of (1) \$1,899,088.20 in compensatory damages, (2) \$265,248.62 in interest on the foregoing sum, (3) \$74,975 in attorney fees, (4) \$851.98 in costs (the "Award").

Respondent was duly notified of the Award and of his obligation to pay the Award within 30 days.

By a letter dated April 24, 2007 ("Suspension Notice"), NASD's Office of Dispute Resolution notified Respondent that, pursuant to NASD Rule 9554, NASD intended to suspend his registration on May 14, 2007, for failing to comply with the Award. The Suspension Notice advised Respondent that he had the right to request a hearing in writing, setting forth with specificity which of the limited defenses to suspension he claimed.

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 07-30 (ARB070023).

On May 14, 2007, Respondent filed with the Office of Hearing Officers a written request for a hearing, asserting as his defense an inability to pay the Award.¹

On May 17, 2007, the Hearing Officer issued an order convening a telephonic pre-hearing conference on June 1, 2007. The May 17, 2007 Order, among other things, directed Respondent to complete, file, and serve a financial statement together with all required materials in support of his inability to pay defense. The Hearing Officer stated in the Order that "the Hearing Officer may find that Respondent cannot support his inability to pay defense if Respondent fails to complete in a timely manner the financial statement, together with all supporting materials required by the financial statement."² The Hearing Officer also stated that "Respondent's failure . . . to comply with the pre-hearing scheduled may be deemed an abandonment of Respondent's defenses to the notice and a waiver of any opportunity for a hearing, in which case the notice will be deemed to be final NASD action."

During the pre-hearing conference held on June 1, 2007, the Hearing Officer explained that Respondent bears the burden of proving his defense and that at a minimum he must complete NASD's standard financial disclosure form.

During the pre-hearing conference, at the request of Respondent's counsel, the Hearing Officer agreed to reschedule the hearing to July 27, 2007. On June 1, 2007, the Hearing Officer issued a revised order establishing a revised pre-hearing and hearing schedule, which among other things, directed Respondent to exchange a draft exhibit list

¹ Counsel for Respondent also asserted that he had filed a notice of appeal with the 11th Circuit Court of Appeals to a District Court order confirming the Award. At the pre-hearing conference held on June 1, 2007, the Hearing Officer explained that absent a supersedeas bond or an order from the District Court staying enforcement of the Award, the filing of an appeal of a District Court order confirming the Award is not one of the limited defenses to a suspension proceeding.

² The Department of Enforcement mailed Respondent a request for financial disclosure on May 18, 2007.

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 07-30 (ARB070023).

with the Department of Enforcement no later than June 29, 2007, and to file and exchange pre-hearing submissions no later than July 6, 2007.

Respondent failed to submit financial statement or supporting materials, and failed to file and serve pre-hearing submissions by July 6, 2007 as required.

Consequently, in lieu of filing pre-hearing submissions, on July 9, 2007, the Department of Enforcement filed a motion for an order to deem Respondent's request for a hearing abandoned.

NASD Procedural Rule 9559(m) provides that "Failure of any respondent ... to comply with any order of the Hearing Officer ... requiring production of information to support any defense to the notice that the respondent has raised, shall be considered an abandonment of the respondent's defense and waiver of any opportunity for a hearing provided by the Rule 9550 Series."

To date, Respondent has not produced financial information and documents in support of his defense as required by the Hearing Officer's order. Counsel for Respondent orally stated that he had no response to the Department of Enforcement's motion for an order finding that Respondent has abandoned his defense and waived his opportunity for a hearing. Respondent has had ample time and opportunity to provide the documentation and was advised that his failure to comply with the pre-hearing schedule would be considered an abandonment of his defense, waiver of an opportunity for a hearing, and result in his immediate suspension.

Accordingly, the Hearing Officer grants the Department of Enforcement's motion and deems Respondent's asserted defense to be abandoned and his hearing request to be waived.

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 07-30 (ARB070023).

Pursuant to Rule 9559(m), the Suspension Notice is deemed to be final NASD action, the instant proceeding is hereby terminated, and Respondent's registration is terminated effective immediately.

Any questions regarding this proceeding should be directed to Nicholas Laliberté, the Case Administrator assigned to this proceeding. His telephone number is (202) 728-8460.³

SO ORDERED.

Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
July 16, 2007

³ While Mr. Laliberté is on vacation until July 30, 2007, the Parties may contact TJ McPhail at (202) 728-8202.