

**NASD OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Disciplinary Proceeding  
No. CAF030058

Hearing Officer – DRP

**ORDER DENYING RESPONDENT'S MOTION TO DEEM ADMITTED STATEMENT OF UNDISPUTED FACTS SUPPORTING MOTION FOR SUMMARY DISPOSITION**

On November 23, 2004, Respondent's motion for summary disposition was denied.

On February 28, 2005, Respondent filed the instant motion, which seeks an order determining that all facts set forth in the Statement of Undisputed Facts (Statement) supporting his motion for summary disposition be deemed admitted for purposes of the hearing in this matter. In support of this motion, Respondent cites the March 18, 2004 Order (Order) establishing pre-hearing procedures, which was issued by the Hearing Officer who previously presided over this disciplinary proceeding. In the Order, the Hearing Officer required the party moving for summary disposition to include a statement of undisputed facts and the opposing party to respond to each paragraph in the moving party's statement. The Order further stated that "all material facts set forth in the moving party's statement will be deemed admitted unless controverted by the statement of the opposing party."

Respondent argues that Enforcement's failure to file a direct response to Respondent's Statement (submitting instead a memorandum of law and declaration of counsel with exhibits) violated the Order. According to Respondent, these undisputed facts should be deemed admitted

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and claims he will suffer "substantial prejudice" if required to present evidence to support many of the facts in the Statement, necessitating a longer and more complicated hearing.

On March 14, 2005, Enforcement filed its opposition to this motion. Enforcement contends that the purpose of the Order was to assist the Hearing Officer in deciding the motion for summary disposition. Enforcement further argues that in its opposition to the motion for summary disposition, it disputed several of the facts in the Statement and that many of the matters included in the Statement are irrelevant to the charges. Finally, Enforcement contends there is no prejudice to Respondent and that the parties have attempted to narrow the issues via stipulations to uncontested facts.

The Hearing Officer finds that the intended purpose of the Order was to aid the Hearing Officer or Hearing Panel in determining the motion for summary disposition. The Order places the burden on the parties and their counsel to frame the issues so that any motion for summary disposition may be decided efficiently and effectively. *Cf. Jackson v. Finnegan, et al.*, 101 F.3d 145, 151 (D.C. Cir. 1996). While Enforcement may not have complied with the Order by responding directly to each paragraph in the Statement, the staff supplied sufficient facts to support its opposition by controverting *material* facts set forth in the Statement. Accordingly, the Hearing Officer found there are genuine issues with regard to material facts and denied Respondent's motion for summary disposition. The facts contained in the Statement have no legal significance once the motion has been decided.

The cases Respondent cites further support the Hearing Officer's ruling. For example, in *SEC v. Banner Fund Int'l*, 211 F.3d 602, 616 (D.C. Cir. 2000), the district court was "fully justified in treating as admitted the SEC's statement of material facts" when respondent failed to comply with a local court rule that requires an opposition to a motion for summary judgment to

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be accompanied by a separate concise statement of genuine issues setting forth material facts. Under those circumstances, the local rule permitted the court to "assume that facts identified by the moving party in its statement of material facts are admitted," and summary judgment was properly granted. *Banner* and the other cases cited by Respondent hold that a court may deem as admitted -- *for the purposes of summary judgment* -- facts in the moving party's statement when the opposing party failed to file a proper response. Respondent cites no authority to support its argument that facts contained in the moving party's statement in support of a motion for summary judgment (or summary disposition) should be deemed admitted at trial (or at a disciplinary proceeding).

Finally, the Hearing Officer finds there is no prejudice to Respondent. The issues in this proceeding are not complicated, and there remains a strong possibility that Enforcement will stipulate to some of the facts outlined in the Statement. If not, Respondent should be able to establish many of the facts through his own testimony or by questioning Enforcement's witnesses.

For the reasons stated above, Respondent's motion is hereby denied.

**SO ORDERED.**

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Dana R. Pisanelli  
Hearing Officer

Dated: March 21, 2005  
Washington, DC