

**NASD OFFICE OF HEARING OFFICERS**

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DEPARTMENT OF ENFORCEMENT,

Complainant

v.

RESPONDENT 1,

RESPONDENT 2,

RESPONDENT 3,

RESPONDENT 4,

and

RESPONDENT 5,

Respondents.

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Disciplinary Proceeding  
No. E102003025201

Hearing Officer – SW

**ORDER REGARDING PRE-HEARING MOTIONS**

**I. Motion to Amend Pre-Hearing Submissions Granted**

On June 14, 2007, the Department of Enforcement (“Enforcement”) filed a motion for leave to amend its pre-hearing submissions to add one witness and 17 additional proposed exhibits, consisting of (i) metadata, i.e., embedded email internet headers, for the 16 emails that were previously provided,<sup>1</sup> and (ii) two W-2 Forms for Respondent 4. The new witness and the metadata will address Respondent 4’s argument that the time stamps on the emails are unreliable indicators of the times that the emails were sent and/or received because of the problems with the computers of Respondent 1 (or the “Respondent Firm”), the receiver of the emails. Enforcement is providing the

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<sup>1</sup> Metadata is data about data and can describe all aspects surrounding the data including the: (i) data, activities, people and organizations involved; (ii) locations of data; (iii) access methods; (iv) limitations; and (iv) timing.

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witness and the metadata to demonstrate that the times displayed on the emails in question are from the computers of the senders of the emails rather than the Respondent Firm. The two W-2 Forms were recently received by Enforcement from Respondent 4 as evidence of the amount that Respondent 4 earned from his business with his four hedge fund customers.

The Hearing Officer hereby grants Enforcement's motion. Enforcement will be permitted to present the testimony of either Patrick Hendry or Mark Susens, two staff members of NASD's Technology Group, regarding the emails. Enforcement's pre-hearing submissions are supplemented to include (i) the metadata presented in exhibits C-348-1, and C-351-1 through 365-1, and (ii) the W-2 Forms presented in exhibit C-451.

## **II. Motion for Telephone Testimony of SR Granted**

On June 25, 2007, Enforcement filed an unopposed motion to offer the testimony of SR by telephone. SR is a former employee of Respondent 1's clearing firm. SR, who resides in the Dallas, Texas area and is no longer employed in the securities industry, recently informed Enforcement that traveling to New York would be extremely burdensome.

For good cause shown, Enforcement's motion to offer the testimony of SR by telephone is granted, subject to the following conditions:

- a) Enforcement shall have a notary public available at the witness' location to swear the witness, or, alternatively, shall offer, at the time the witness is called, a sworn statement by the witness attesting that the testimony she will give at the Hearing will be truthful.

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- b) Enforcement shall ensure that the witness has, at the time of testifying, copies of all exhibits that relate to her direct testimony, as well as any Enforcement exhibits that the Respondents may designate, no later than July 2, 2007, at 4:00 p.m., Eastern Time, for possible use on cross-examination.<sup>2</sup>
- c) Enforcement shall ensure that the witness will be available by telephone during a block of time when it is reasonable to expect that the witness will be called to testify at the Hearing, so that the Hearing is not unduly disrupted if the testimony of prior witnesses is longer or shorter than expected.

**III. Enforcement's Objections to the Proposed Exhibits of Respondents 1 and 2 Overruled, in Part, and Sustained, in Part**

On June 14, 2007, Respondents 1 and 2 filed an exhibit list and copies of proposed exhibits that they intend to introduce at the Hearing.<sup>3</sup> The list included the following documents:

- (1) Spread Sheet showing the net revenues earned by Respondent 1 and \_\_\_\_\_ from mutual fund trades;
- (2) Original Complaint filed by Enforcement to show the total number of mutual fund trades executed as 11,337;
- (3) Documents related to the two prior NASD exams at Respondent 1 and \_\_\_\_\_;

<sup>2</sup> The Respondents are responsible for providing SR with any of the Respondents' exhibits that they would like SR to address. No later than July 2, 2007, each of the Respondents must identify for each of the Parties the exhibits they have or intend to send to SR.

<sup>3</sup> Respondent 3 adopted the pre-hearing submissions of Respondents 1 and 2. Accordingly, the Hearing Officer's rulings with regard to the pre-hearing submissions of Respondents 1 and 2 equally apply to Respondent 3.

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(4) 1994 NASD Mutual Fund Examination Module; and

(5) the Respondent Firm's Supervisory Procedures Manual.<sup>4</sup>

On June 18, 2007, Enforcement raised a number of objections to the five listed exhibits. On June 21, 2007, Respondents 1 and 2 filed amended proposed exhibits labeled exhibits one and five, which addressed Enforcement's objections.

Accordingly, the Hearing Officer overrules Enforcement's objections to the proposed amended exhibits of Respondents 1 and 2 that are labeled exhibits one and five.

Enforcement objected to proposed exhibit two because pleadings are not the proper subject of exhibits. Enforcement objected to proposed exhibit three on the grounds that the exhibit does not appear to have any bearing on whether the Respondents engaged in the conduct alleged in the Amended Complaint. Enforcement objected to proposed exhibit four on the ground that because it was created ten years prior to the conduct in this case it was irrelevant.

The Hearing Officer sustains Enforcement's relevancy objections to proposed exhibits two and four of Respondents 1 and 2. However, the Hearing Officer overrules Enforcement's objection to proposed exhibit three of Respondents 1 and 2's exhibits.<sup>5</sup>

**SO ORDERED.**

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Sharon Witherspoon  
Hearing Officer

Dated: Washington, DC  
June 27, 2007

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<sup>4</sup> The manual was not included in the June 14, 2007 pre-hearing submission.

<sup>5</sup> As stated in the Hearing Officer's June 11, 2007 Order, the Parties should note that documents are not in evidence until and unless they are offered and admitted at the Hearing. Pursuant to NASD Procedural Rule 9263, the Hearing Officer retains the authority to reject the proposed exhibits of any of the Parties at the Hearing.