

**NASD REGULATION, INC.  
OFFICE OF HEARING OFFICERS**

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DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C10000122
v.	:	
	:	Hearing Officer - GAC
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	:	
	:	
Respondent.	:	

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**ORDER REGARDING COMPLAINANT’S MOTION FOR  
A PRECLUSION ORDER**

On February 6, 2001, the Department of Enforcement filed a Motion for a Preclusion Order (“Motion”) requesting that Respondent be precluded “from offering any testimony or documents into evidence at the hearing or otherwise relying on or using any information that he has failed to disclose; and striking the Respondent’s pre-hearing submission and witness list.” Respondent filed a Memorandum in Opposition to Motion for Preclusion Order (“Opposition”) on February 9, 2001.

A. Timeline of Events

On September 14, 2000, the Hearing Officer issued an order based on a pre-hearing conference held on September 13, 2000. In that order, the Hearing Officer established a “Schedule of Significant Events” leading up to a hearing, then scheduled for January 29-31, 2001. That schedule called for the Parties to file a witness list, exhibit list and proposed exhibits by December 12, 2000.

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On October 20, 2000, Respondent filed a motion to reschedule the hearing. The basis for the request was that counsel for Respondent was scheduled to appear as counsel in an unrelated arbitration matter that conflicted with the dates set for the hearing. That motion was not opposed by Complainant. On November 3, 2000, the Hearing Officer granted Respondent's motion and rescheduled the hearing to commence on February 21, 2001.

On December 8, 2000, Enforcement filed its witness list, exhibit list, and proposed exhibits, consistent with the Hearing Officer's order of September 14, 2000. Respondent failed to file his witness list, exhibit list, and proposed exhibits by December 12, 2000 as required by the September 14, 2000 order. On December 21, 2000, Respondent filed a Motion to Amend Order but not Adjourn Hearing. In this motion, Respondent sought to adjust the deadlines for significant events leading up to the hearing, but not the date of the hearing. Significantly, Respondent sought to change the date for his submission of a witness list, exhibit list and proposed exhibits from December 12, 2000, to January 26, 2001. The motion was not opposed by Enforcement. Based on representations made in the motion, the Hearing Officer granted the motion on December 26, 2000.

On January 23, 2001, the Parties filed joint stipulations. On January 24, 2001, the Parties participated in a settlement conference. On January 26, 2001, Respondent filed a Motion to Extend Time to File Exhibits Two Days. In that motion, Respondent sought an extension, from January 26, 2001 until January 30, 2001 (two business days) to file his proposed exhibits, exhibit list and witness list. As a basis for the request, Respondent noted that he was still determining whether to accept the terms of a settlement discussed at the

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settlement conference. The Hearing Officer granted that request, extending Respondent's time to serve and file the documents until the close of business on January 30, 2001.

On February 2, 2001, Enforcement filed its Pre-Hearing Brief, consistent with its filing obligation under the revised schedule for significant events, which required both Parties to serve and file the briefs by that day. On February 5, 2001, Respondent filed his Pre-Trial Memorandum of Law with the Office of Hearing Officers, one business day late. On February 5, 2001, Respondent also filed a witness list and list of proposed exhibits. Respondent failed to file the proposed exhibits by the deadline and failed to provide a date by which such documents would be provided. Instead, Respondent merely stated that the "exhibits are in the process of being compiled and will be filed shortly."

In his Opposition, Respondent noted that the reason for submitting the witness list and exhibit list on February 5, 2001 instead of on January 30, 2001, was that Respondent's counsel became ill over the weekend of January 27-28, and missed the next three work days.

Today, February 13, 2001, more than one week after filing that representation, and exactly one week from the commencement of the Hearing, Respondent has still not filed his proposed exhibits or notified the Hearing Panel when the documents will be produced.

**B. Respondent's Pre-Trial Memorandum of Law**

Enforcement moved to strike Respondent's Pre-Trial Memorandum of Law, based principally on the fact that it was filed and served on February 5, 2001 instead of February 2, 2001. Enforcement also argues that the brief is more than ten pages long and therefore does not comply with NASD Procedural Rule 9136(d), since it does not include a table of contents or table of cases, statutes and other authorities.

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The Hearing Officer finds that the delay of one business day in submitting the pre-hearing brief will not significantly prejudice Enforcement. Respondent's failure to include the table of contents and table of authorities likewise is does not prejudice Enforcement to the extent that it would require that the pre-hearing brief be stricken. Therefore, Enforcement's motion to strike Respondent's Pre-Trial Memorandum of Law is denied.

C. Respondent's Witness List

Respondent's witness list was filed and served on February 5, 2001, rather than January 30, 2001. The witness list includes those witnesses included by Enforcement on their list, as well as the Respondent and \_\_\_\_\_, who appears to have been the Compliance Officer at Respondent's firm during the relevant period. Given that the list was only a few days late and contains the name of only one witness beyond the Respondent and those already named by Enforcement, the Hearing Officer finds that the delay in providing the witness list will not unduly prejudice Enforcement. Therefore, Enforcement's motion to strike Respondent's witness list and preclude such witness' testimony is denied.

D. Respondent's Proposed Exhibits

As noted above, Respondent has still not produced his proposed exhibits. Nor has Respondent sought relief from the January 30, 2001 deadline for filing and serving such documents. Finally, Respondent has given no clear date upon which he is prepared to file and serve the proposed exhibits. Respondent has failed to produce the documents despite having several extensions. Beyond having failed to comply with the order of the Hearing Officer setting forth the schedule for the submission of proposed exhibits, Respondent has also failed to comply with NASD Code of Procedure Rule 9261(a), regarding the submission of

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documentary evidence before a hearing. That Rule states: “[n]o later than ten days before the hearing, or at such earlier date as may be specified by the Hearing Officer, each Party shall submit to all other Parties and to the Hearing Officer copies of documentary evidence ... each Party intends to present at the hearing.”

Given Respondent’s repeated failure to comply with the Hearing Officer’s orders to provide the proposed exhibits, the fact that they have not yet been produced and that the hearing is now scheduled to commence in one week, the Hearing Officer finds that Enforcement would be unduly prejudiced if Respondent were permitted now produce proposed exhibits for the hearing. Enforcement has a right, like Respondent of receiving proposed exhibits on a timely basis, so that it can also prepare for the hearing. By reason of the foregoing, Enforcement’s motion to preclude Respondent from offering exhibits at the Hearing is granted.

**SO ORDERED.**

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Gary Carleton  
Hearing Officer

Dated: Washington, DC  
February 13, 2001