

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. CMS960174
v.	:	
	:	
Respondent.	:	Hearing Officer - EBC
	:	

**ORDER DENYING RESPONDENT’S MOTION
TO SEVER AND PRECLUDE**

Introduction

The Respondent, _____, has filed a “Motion to Sever and Preclude,” in order to prevent the members of the Hearing Panel, in particular the two “industry” panelists, from reviewing allegations in the Complaint that are unrelated to the charges against him. Respondent argues that these “non-party” allegations are not only irrelevant but highly prejudicial and, absent the relief requested, the Hearing Panel may be confused and allow the allegations of misconduct pertaining to other Respondents to “taint” its consideration of the charges against him.¹ The Department of Enforcement (Enforcement) has opposed the motion or, in the alternative, proposed that certain additional paragraphs or portions of

¹ In particular, Respondent requests that the Hearing Panel be precluded from reviewing any portion of the Complaint with the exception of certain paragraphs (*i.e.*, paragraphs 7, 8, 15, the first three sentences of paragraph 24, and those paragraphs comprising Cause Ten of the Complaint) and that the remaining portions of the Complaint be “severed” from this case.

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paragraphs be presented to the Hearing Panel for its review.² For the reasons set forth below,

Respondent's motion is denied.

Discussion

A. Background

On September 18, 1996, the Market Regulation Committee (the "MRC") initiated this proceeding against _____, a former general securities representative and principal associated with _____ ("_____" or the "Firm"), and 15 other Respondents, including _____ and some of the Firm's senior managers. The Complaint alleges that _____ engaged in fraudulent sales practices in dealing with three customers and effected an unauthorized transaction in one of those customer's accounts, and thereby violated Section 10(b) of the Securities Exchange Act of 1934, SEC Rule 10b-5, and NASD Conduct Rules 2110 and 2120. _____ filed an Answer in which he denied the substantive allegations against him.

On April 2, 1997, an MRC Hearing Panel³ began a hearing on the charges against _____ and some of the other Respondents.⁴ The hearing concluded on June 5, 1998 and, on March 22, 1999, the MRC issued its decision finding, among other things, that _____ had engaged in fraud. The MRC barred _____, ordered him to pay disgorgement of \$161,623.75, and fined him \$100,000.

_____ appealed from the MRC's decision and, on April 14, 2000, the National Adjudicatory

² Enforcement proposed that paragraphs 2, 10, the first three sentences of paragraph 16, the first sentence of paragraph 18, and paragraph 22 also should be presented to the Hearing Panel for its review.

³ The hearing began before the SEC approved the amendments to the NASD Code of Procedure authorizing the establishment of the Office of Hearing Officers and the use of professional hearing officers to preside over NASD disciplinary proceedings.

⁴ Pursuant to an order issued by a United States District Judge for the Southern District of New York, NASD Regulation, Inc. was enjoined from proceeding against certain Respondents.

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Council (NAC) issued a decision concluding that there were certain procedural errors in the proceeding before the MRC and remanding the matter to the Office of Hearing Officers “to conduct a new hearing, ab initio.”⁵ The remand order pertains only to _____.

B. Motion and Ruling

_____ contends that only an expurgated version of the Complaint should be provided to the members of the Hearing Panel because their consideration of the charges against him may be tainted if they are allowed to review the entire Complaint, which includes allegations that some of the other Respondents engaged in more egregious misconduct than he. _____ also asserts that the members of the Hearing Panel may be confused about the nature of the charges against him if they are permitted to review the entire Complaint.

The Hearing Officer believes that all members of the Hearing Panel presumptively are entitled to review the entire formal charging document in a proceeding. _____ has not advanced any argument to overcome this presumption and, moreover, his concerns are unfounded. Typically, questions of prejudice and confusion arise when a case will be decided by a lay jury, which will not be the situation here. The members of the Hearing Panel who will adjudicate this proceeding, by virtue of their training and sophistication, have a greater understanding of legal matters than the typical lay jury and are undoubtedly capable of distinguishing between the allegations against _____ and those against other Respondents. They also understand that the allegations in the Complaint (whether they pertain to _____ or others) are not evidence.

There is no doubt, as Respondent notes, that a trial court has broad discretion to order separate trials to avoid evidence pertaining to the alleged misconduct of one defendant from tainting the trial of

⁵ The procedural errors were not related to the issues _____ raised in his present motion.

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other defendants. However, in this case the hearing will relate only to the charges against _____ and, therefore, there are no justifiable concerns of prejudice and possible taint resulting from the introduction of evidence on the charges against other Respondents.

Based on the foregoing, Respondent's motion is denied.

SO ORDERED.

Ellen B. Cohn
Hearing Officer

Dated: New York, New York
July 31, 2000