

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

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DEPARTMENT OF ENFORCEMENT,	:	
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Complainant,	:	Disciplinary Proceeding
	:	No. C01000003
v.	:	
	:	
Respondents.	:	Hearing Officer - EBC

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**ORDER DENYING RESPONDENTS' REQUEST FOR A  
SECOND CONTINUANCE OF THE HEARING**

On July 19, 2000, the Hearing Officer, over the objection of the Department of Enforcement (Enforcement), granted Respondents' eleventh-hour request for a continuance of the hearing in this proceeding, and the hearing, which was initially scheduled for July 20, was continued until August 10, 2000. On July 28, 2000, Respondents, through their counsel, filed a letter submission requesting that the hearing be continued for another three weeks, i.e., until August 31, 2000, and on July 31, 2000, Enforcement filed opposition papers. For the reasons set forth below, Respondents' request for a second continuance of the hearing is denied.<sup>1</sup>

**Background**

**A. The Nature and Procedural Posture of the Proceeding**

On February 2, 2000, Enforcement filed a twelve-cause Amended Complaint against \_\_\_\_\_ (the "Firm"), an NASD member firm, and \_\_\_\_\_, the Firm's chief executive officer and sole general securities principal, alleging that they engaged in false advertising on the Firm's

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web site, securities fraud, and false trade confirmation disclosure. More specifically, the Amended Complaint alleges that the Respondents misrepresented the Firm's commission rates and, in some instances represented that trades would be effected for free, when, in fact, they effected customer trades on a riskless principal basis through the Firm's proprietary account and charged their customers undisclosed mark-ups and mark-downs as well as commissions. According to the Amended Complaint, by charging undisclosed mark-ups and mark-downs, the Respondents made "secret profits" on 316 specific customer trades and, with respect to these trades, falsely confirmed that the Firm was acting as an agent and charging commissions in accordance with its published commission schedule. The Amended Complaint alleges that the Respondents engaged in false advertising during three discrete periods (i.e., from December 29, 1998 through January 21, 1999, and on February 17 and December 23, 1999) and engaged securities fraud and issued false trade confirmations during these periods and as recently as January 5, 2000. Based on the foregoing, Respondents are charged with violating Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), SEC Rules 10b-5 and 10b-10(a)(ii)(A), and NASD Conduct Rules 2110, 2120, 2210(d)(1)(A) and (B), and 2230. The Amended Complaint also alleges that Respondents failed to make appropriate memoranda of brokerage orders and thereby violated Section 17(a) of the Exchange Act, SEC Rule 17(a)(3), and NASD Conduct Rules 3110 and 2110.

On March 20, 2000, the Hearing Officer held an Initial Pre-Hearing Conference in this proceeding. At that conference, with the agreement of counsel for Enforcement and counsel for Respondents, \_\_\_\_\_, Esq., the Hearing Officer established a schedule for the completion of

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<sup>1</sup> Counsel for the Parties were informed orally of the Hearing Officer's decision to deny the requested continuance, on August 1, 2000 at approximately 9:00 a.m. PDT, through a telephone call placed by the Hearing Officer's legal assistant.

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pre-hearing activities in this proceeding and scheduled the hearing for July 20, 2000. On March 23, 2000, the Hearing Officer issued an Initial Pre-Hearing Order setting forth the agreed-upon dates and, on July 5, 2000, she issued a Notice reminding the Parties of the July 20 hearing date.

On May 5, 2000, Enforcement filed a motion for summary disposition as to liability. In response, Respondents admitted the factual allegations against them and conceded they engaged in conduct violative of NASD and SEC Rules. At a Pre-Hearing Conference on June 8, 2000, counsel clarified that Respondents admit that they violated the specific SEC and NASD provisions set forth in the Complaint and agreed that the hearing would be limited to the issue of sanctions.<sup>2</sup> Accordingly, by Order, dated July 12, 2000, the Hearing Panel granted Enforcement's summary disposition motion and stated, "the hearing will proceed as scheduled for the sole purpose of receiving evidence and hearing argument bearing on the issue of sanctions, including any mitigating or aggravating factors that the Parties wish to bring to the Hearing Panel's attention."

Pursuant to the schedule established in the Initial Pre-Hearing Order, on July 6, 2000, the Parties filed their joint stipulations in which Respondents stipulated to all of the facts and violations alleged in the Complaint. On July 6, 2000, Enforcement filed seven proposed exhibits, its witness list indicating that it intended to call only one witness (the supervisor of the examination that led to the institution of this proceeding) and to cross-examine \_\_\_\_\_, and a memorandum pertaining to the sanctions it is seeking in this proceeding. Respondents also filed their witness list, which identified \_\_\_\_\_ as their sole witness, and in their pre-hearing submission indicated that they did not intend to offer any exhibits and stated that "there were no legal issues to be resolved" in this proceeding.

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<sup>2</sup> See Transcript of June 8, 2000 Pre-Hearing Conference.

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There are no outstanding pre-hearing activities to be completed. On July 13, 2000, the Hearing Officer held a Final Pre-Conference during which she overruled Respondents' only objection pertaining to Enforcement's proposed exhibits; established time limits for opening and closing arguments; and directed Respondents to file a memorandum setting forth their position on sanctions, which they did on July 17, 2000.

**B. Respondents' First Request for a Continuance of the Hearing**

Although the hearing date was established four months in advance of the hearing (and the Parties twice received written notification of that date) approximately 36 hours before the hearing was scheduled to commence, Respondents counsel, \_\_\_\_\_, notified the Hearing Officer that he no longer was representing the Respondents and that they had decided to retain new counsel. In his notice, \_\_\_\_\_ also indicated that Respondents would need time to locate substitute counsel and that they would "have to request a continuance of the Thursday hearing."

Because \_\_\_\_\_ offered no reason for his last-minute withdrawal and the Respondents, in fact, had not made any request for a continuance, on July 19, 2000, the Hearing Officer held a telephone conference call to obtain clarification on these issues. At that conference, \_\_\_\_\_ explained that the previous evening, while he and \_\_\_\_\_ were preparing for the hearing, \_\_\_\_\_ expressed displeasure with \_\_\_\_\_'s advice, and both he and \_\_\_\_\_ concluded Respondents would be better served by retaining other counsel. \_\_\_\_\_ explained that he had been dissatisfied with Mr. \_\_\_\_\_'s representation for quite some time and, at the July 19 Conference, requested a continuance of the hearing to allow him to obtain new counsel. When asked why he waited until the last minute before the hearing to dismiss \_\_\_\_\_, \_\_\_\_\_ indicated that he did not

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realize he could dismiss counsel until his meeting with \_\_\_\_\_ on the evening of July 18.<sup>3</sup>

Enforcement objected to Respondents' request for a continuance.

The Hearing Officer, with some reservation about \_\_\_\_\_'s explanation for his eleventh-hour decision to dismiss counsel (who had been representing Respondents throughout this proceeding) and over Enforcement's objection, decided to continue the hearing for three weeks, until August 10, 2000. At the July 19 Conference, the Hearing Officer informed the Parties that she would not grant Respondents any further continuances, and \_\_\_\_\_ acknowledged that he understood this to be the case. In addition, on July 21, 2000, the Hearing Officer issued an Order in which she stated:

The Respondents are reminded that the Hearing Officer will not grant them any further continuances. Thus, irrespective of whether Respondents are successful in obtaining substitute counsel by August 10, 2000, they will be required to proceed with the hearing on that date.

In the Order, the Hearing Officer noted that since the hearing will relate solely to the issue of sanctions, the three-week continuance would provide ample preparation time for any new counsel; the Hearing Officer also directed Respondents to provide a copy of the Order to any new counsel they retained.

### **Discussion**

Notwithstanding the Hearing Officer's prior admonitions, on July 28, 2000, Respondents, through their new counsel, \_\_\_\_\_, Esq., filed a letter submission requesting yet an additional three-week continuance of the hearing.<sup>4</sup> In his letter, \_\_\_\_\_ acknowledges that he received a copy of the July 21 Order but claims that he has "a number of prior commitments in the next two weeks," and a continuance is necessary to allow for adequate hearing preparation. In connection with the requested

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<sup>3</sup> Following the July 19 Conference, \_\_\_\_\_ sent a letter to the Office of Hearing Officers, by facsimile transmission, confirming that \_\_\_\_\_ no longer represents Respondents and reiterating his request for a continuance of the hearing to enable Respondents to obtain new counsel.

<sup>4</sup> \_\_\_\_\_ also filed a Notice of Appearance on that date.

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continuance, counsel also asserts that Respondents have taken steps to ameliorate their past misconduct (i.e., they are now disclosing on their web site that they may engage in principal trades, sending customers trade confirmations reflecting principal trades when they occur, and are in the process of retaining a compliance consultant), which “obviate the necessity for immediate relief.” Finally, Respondents’ counsel claims that, although he understands some settlement discussions previously occurred, he would like a further opportunity to explore settlement.

It is well established that in NASD proceedings, as in judicial proceedings, the adjudicator has broad discretion in determining whether a request for a continuance should be granted, based upon the particular facts and circumstances presented. See, e.g., In re Falcon Trading Group, Ltd., 52 S.E.C. 554, 1995 SEC LEXIS 3454, at \*18 (Dec. 21, 1995), petition for review denied, 102 F.3d 579 (D.C. Cir. 1996).<sup>5</sup> Thus, in reviewing the denial of a request for a continuance, the inquiry of an appellate body is limited to determining whether the denial constituted “an unreasoning and arbitrary ‘insistence upon expeditiousness in the face of a justifiable request for delay.’” In re Richard W. Sutter, 47 S.E.C. 951, 963 (1983) (quoting Morris v. Slappy, 461 U.S. 1, 11 (1983)).

In this case, Respondents’ counsel has not advanced a justifiable reason for further delaying the hearing in this matter, which has been pending for more than six months. His vague assertions of prior commitments provide an insufficient basis for delay, especially since counsel had prior notice that the August 10 hearing date was a firm date and given the facts attendant to Respondents’ first request for a

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<sup>5</sup> See also, e.g., Morris v. Slappy, 461 U.S. 1, 11 (1983) (“broad discretion must be granted trial courts on matters of continuances”); In re Whiteside & Co., Inc., 49 S.E.C. 963, 967 (1988) (“The NASD has broad discretion as to whether or not a continuance should be granted.”), aff’d 883 F.2d 7 (5<sup>th</sup> Cir. 1989); District Business Conduct Committee No. 10 v. McNeil, Complaint No. C3B960026, 1999 NASD Discip. LEXIS 3, at \*15-16 (National Adjudicatory Council Jan. 21, 1999) (same); District Business Conduct Committee No. 2 v. Koppel-Heath, Complaint No. C02950044, 1998 NASD Discip. LEXIS 2, at \*25 (National Business Conduct Committee Jan. 6, 1998) (same).

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continuance. Further, since the hearing in this matter will be limited to the issue of sanctions and there will be only two testifying witnesses, including \_\_\_\_\_, counsel – even if faced with other, prior commitments – will have had more than ample time to prepare for the hearing.<sup>6</sup> Notably, counsel does not claim he is unavailable to participate in a hearing on August 10 and, even if that were the case, it would not necessarily justify a continuance. See, e.g., In re Perkins, 51 S.E.C. 380, 386 (1993) (no error in refusing continuance where counsel for respondents discovered a conflict of interest approximately one month before an NASD hearing and new counsel, who was hired the day before the hearing, requested a continuance based on his unavailability on the hearing date and his need for time to prepare).

Nor does the fact that Respondents may have taken steps or intend to take steps, which in their view ameliorate their past misconduct, obviate the need to proceed with the hearing as scheduled. As a matter of law, the absence of exigent circumstances mandating an immediate hearing does not mean that a continuance should be granted. See, e.g., In re Falcon Trading Group, Ltd., 52 S.E.C. 554, 1995 SEC LEXIS 3454, at \*18, n.32. Further, whatever corrective action Respondents may have undertaken does not eliminate the need for the Hearing Panel to make an independent determination, based on the evidence and argument that will be presented at the hearing, as to the appropriate sanctions, if any. In this case, Enforcement has requested that the Firm be expelled and \_\_\_\_\_ barred in all capacities, an order requiring Respondents to return the so-called “secret profits” to investors, and the imposition of a \$245,000 fine. Responsible investor protection mandates that the

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<sup>6</sup> The Hearing Officer also notes that \_\_\_\_\_ is not a solo practitioner. Indeed, his firm’s letterhead indicates that there are no less than 34 other attorneys employed at the firm.

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hearing proceed as scheduled to determine whether Respondents should be allowed to continue doing business in the securities industry.<sup>7</sup>

Finally, Respondents' desire to explore the possibility of settlement is simply not a basis to grant a continuance of the hearing. They may do so irrespective of the scheduled hearing.

**SO ORDERED.**

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Ellen B. Cohn  
Hearing Officer

Dated: New York, New York  
August 3, 2000

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<sup>7</sup> The Parties should not construe the Hearing Officer's statements to imply that she has formed any view as to the sanctions, if any, that should be imposed.