

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent 1

and

Respondent 2

Respondents.

Disciplinary Proceeding
No. C07050029

Hearing Officer—Andrew H. Perkins

ORDER DENYING COMPLAINANT'S MOTION TO PRECLUDE THE RESPONDENT FROM OFFERING EVIDENCE, REVISING THE PRE-HEARING SCHEDULE, AND DENYING RESPONDENT'S MOTION TO RECONSIDER DENIAL OF MOTION TO COMPEL DISCOVERY

Respondent 1 is charged with making misrepresentations and omitting material facts in connection with his recommendations to four customers to purchase shares of Sequiam Corp. stock, in violation of NASD Conduct Rules 2120 and 2110, Section 10(b) of the Securities Exchange Act of 1934, and Exchange Act Rule 10b-5. At the time, Respondent 1 was associated with Clark Street Capital, Inc. Respondent 1 denies the charges and affirmatively claims that he made suitable recommendations to his customers.

On December 12, 2005, Department of Enforcement ("Enforcement") moved for entry of an order precluding Respondent 1 from offering any evidence at the hearing because he failed to file and serve his pre-hearing submissions in accordance with the deadline set in the Scheduling Order dated July 5, 2005. After Enforcement filed this motion, Respondent 1 filed an unopposed motion to continue the hearing for approximately two months and to extend the deadline for Respondent 1 to respond to Enforcement's preclusion motion. The Hearing Officer granted both

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requests, and Respondent 1 filed his opposition to Enforcement's preclusion motion on January 4, 2006.

At the same time, pursuant to Procedural Rule 9252, Respondent 1 moved for entry of an order directing Enforcement to issue Rule 8210 requests to obtain documents reflecting the customers' investment experiences at other firms before they opened their accounts at Clark Street Capital. Respondent 1 argues that these documents are central to his defense. Enforcement opposes this motion because: (1) Respondent 1 filed the motion after the applicable deadline in the Scheduling Order; (2) the Hearing Officer has denied nearly identical requests twice before; and (3) Respondent 1 has not complied with Procedural Rule 9252. In addition, Enforcement continues to assert that it has fully met its disclosure obligations under NASD Procedural Rule 9251 and that Respondent 1 is not entitled to further discovery.

For the reasons discussed below, the Hearing Officer denies both Enforcement's motion to preclude Respondent 1 from offering any evidence at the hearing and Respondent 1's motion to compel Enforcement to issue Rule 8210 requests for information.

Discussion

I. Enforcement's Motion to Preclude Evidence

The Hearing Officer denies Enforcement's motion to preclude Respondent 1 from introducing evidence at the hearing. The deadline for filing pre-hearing submissions was set to accommodate the original hearing date of January 4, 2006. However, due to no fault of Respondent 1, the hearing has been continued to March 14, 2006, and Enforcement points to no real prejudice if the pre-hearing schedule is adjusted to correspond to the new hearing date. The fact that Respondent 1 received Enforcement's pre-hearing submissions at an earlier date does not constitute such prejudice that would warrant the extreme sanction Enforcement seeks by its motion to preclude the Respondent from introducing any evidence in his defense. Accordingly, Enforcement's motion is denied, and the pre-hearing schedule is modified as set forth below.

II. Respondent 1's Motion for Rule 8210 Requests

On December 9, 2005, Respondent 1 moved for entry of an order compelling Enforcement to issue Rule 8210 requests for documents relating to the four complaining customers and their investments. In summary, Respondent 1 seeks production of every document touching on the customers' investments since 1998, including correspondence, account statements, new account forms, confirmations, margin agreements, investment contracts, partnership documents, trust documents, tax shelter documents, financial statements, loan documents, income tax returns, litigation and arbitration documents, and documents relating to any regulatory complaints they made.¹ Respondent 1 contends that these documents are necessary to permit him to challenge the customers' allegations and veracity and to show the customers' investment experience and sophistication.

On December 12, 2005, Enforcement filed its opposition to Respondent 1's motion. Enforcement argued that the document requests were vague, overbroad, and excessive in scope. In addition, Enforcement argued that Respondent 1 had failed to comply with the requirements of Procedural Rule 9252, which governs respondents' requests that NASD invoke Procedural Rule 8210 to compel the production of documents or testimony at the hearing.

On December 14, 2005, the Hearing Officer denied Respondent 1's motion. Respondent 1 now asks the Hearing Officer to reconsider this ruling.

The Hearing Officer finds Respondent 1's request to be excessive in scope, unduly burdensome, and unreasonable. Respondents are not entitled to employ NASD's power under Procedural Rule 8210 to go on a fishing expedition regarding complaining customers' personal finances. Furthermore, the requested materials are neither critical to Respondent 1's defense nor directly relevant to the crucial issues in this disciplinary proceeding, namely, the nature of the representations Respondent 1 made in connection with the sales of Sequiam stock. A registered representative cannot avoid liability for misrepresentations of material fact by showing that the

¹ Respondent 1's document request contains 30 detailed requests for information and documents.

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customer is a sophisticated investor. Accordingly, the Hearing Officer denies Respondent 1's motion.

III. Modification of Pre-Hearing Schedule

The Pre-Hearing Schedule is modified as follows:

Deadline for filing pre-hearing submissions, which shall include the following: <ul style="list-style-type: none">• witness lists• exhibit lists• copies of all exhibits pre-marked for identification• pre-hearing briefs.	February 2, 2006
Deadline for filing motions in limine.	February 9, 2005
Deadline for Respondent 1 to file motion under Rule 9252 to compel attendance of witnesses at the Hearing.	February 14, 2006
Deadline for filing oppositions to motions in limine.	February 16, 2006

IT IS SO ORDERED.

Andrew H. Perkins
Hearing Officer

January 12, 2006