

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF MARKET
REGULATION,

Complainant,

v.

Respondent 1,

Respondent 2,

and

Respondent 3,

Respondents.

Disciplinary Proceeding
No. 2005000127502

Hearing Officer—Andrew H. Perkins

**ORDER FOLLOWING FINAL PRE-HEARING CONFERENCE MODIFYING
ORDER PRECLUDING RESPONDENTS FROM INTRODUCING EVIDENCE
AT THE HEARING AND DISMISSING THE THIRD CAUSE OF COMPLAINT**

On October 30, 2006, the Hearing Officer conducted a final pre-hearing conference in this case. The Hearing Officer heard argument on the following: (1) the Respondents' Motion to Request Panel to Accept their Evidence; (2) Respondent 2's request for entry of an order directing the Department of Market Regulation to request that two customers produce copies of their account statements for the years 2000 through 2005; and (3) Respondent 3's oral request for the Department of Market Regulation to clarify the remaining charge in the third cause of the Complaint.

I. RESPONDENTS' MOTION TO ACCEPT EVIDENCE

On October 20, 2006, the Hearing Officer entered an Order Precluding Respondents from Introducing Evidence at the Hearing (the "Preclusion Order") because the Respondents had failed to serve and file their pre-hearing submissions by the required

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deadline. At the Final Pre-Hearing Conference, counsel for the Respondents explained that they had provided the Department of Market Regulation with a witness list and exhibit list on or about October 11, 2006, albeit not in compliance with NASD Code of Procedure Rule 9242 and the Order Establishing Pre-Hearing Procedures dated June 15, 2006. The Respondents' witness list did not include the address, occupation, or a summary of the witnesses' expected testimony; and their exhibit list did not include a brief description of each document. The Respondents also failed to provide the Department of Market Regulation with copies of their proposed exhibits or to file the above with the Office of Hearing Officers.

In addition, the Respondents failed to serve and file a timely and complete expert witness designation. On October 10, 2006, at the Respondents' request, the Hearing Officer entered an order extending the deadline for the Respondents to designate any experts they intended to call to testify at the hearing. The expert witness designation was due on October 13, 2006. Nonetheless, the Respondents failed to file a designation that complied with Procedural Rule 9242(a)(5).

On or about October 12, 2006, the Respondents sent an email to the Department of Market Regulation with their expert's curriculum vitae attached. The Respondents did not serve or file a report or other description of the expert's expected testimony, nor did the Respondents serve and file any of the other information required by Procedural Rule 9242(a)(5). Further, the Respondents did not explain their failure to serve and file the expert witness designation.

While the Respondents acknowledged that they had not complied with the Hearing Officer's orders or Procedural Rule 9242, they argued that the sanction of prohibiting them from introducing any evidence at the hearing was too harsh since the Department of Market Regulation had not demonstrated any significant prejudice. The Department of Market Regulation opposed the Respondents' motion.

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The Hearing Officer finds that the Respondents have not shown good cause for their failure to serve and file their pre-hearing submissions. On the other hand, the Hearing Officer finds that the Department of Market Regulation either possessed or received a copy of each of the Respondents exhibits no later than October 12, 2006. Accordingly, the Hearing Officer modifies the Preclusion Order as follows:

- 1) The Respondents will be permitted to testify at the hearing. The remaining three witnesses, including the Respondents' proposed expert, shall not be permitted to testify.
- 2) The Respondents will be permitted to offer their proposed exhibits into evidence at the hearing provided that they serve and file the requisite number of sets of the exhibits in the form required by the Order Establishing Pre-Hearing Procedures no later than the close of business on November 2, 2006. All objections to the documents are preserved until the hearing.

II. MOTION TO OBTAIN CUSTOMER ACCOUNT STATEMENTS

On October 16, 2006, Respondent 2 requested that the Hearing Officer direct the Department of Market Regulation to request that two of its customer witnesses produce their account statements for the years 2000 through 2005. Respondent 2 seeks the documents for use in cross-examining the customers at the hearing. The requested statements, if any exist, would not reflect any of the transactions at issue in this proceeding.

Respondent 2's request is denied. First, NASD lacks jurisdiction over the customers. Accordingly, they cannot be compelled to produce their account statements. Second, and more importantly, the customers are not parties to this proceeding, and they have not waived their right to maintain the confidentiality of their financial records. A respondent in an NASD disciplinary proceeding is not entitled to rummage through a witness's financial records, particularly where, as here, the respondent has not provided a

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reasonable basis for concluding that any of the requested material is relevant to the issues in the present case. In this case, the Respondents are charged with specific fraudulent statements and omissions. General allegations that the witnesses may have bought speculative securities in the past from other brokers at other firms do justify Respondent 2's request.

III. DISMISSAL OF THIRD CAUSE OF COMPLAINT

At the Final Pre-Hearing Conference Respondent 3's counsel asked for clarification of the charge against Respondent 3 in the Third Cause of Complaint in light of the Department of Market Regulation's dismissal of most of the allegations in that cause. Following a discussion of the Department of Market Regulation's remaining allegations, the Department of Market Regulation conceded that the Third Cause of Complaint should be dismissed. Accordingly, without objection, the Hearing Officer dismisses the Third Cause of Complaint.

IT IS SO ORDERED.

Andrew H. Perkins
Hearing Officer

November 1, 2006