

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 13-01 (2009019108901).

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

RESPONDENT 1

and

RESPONDENT 2,

Respondents.

Disciplinary Proceeding
No. 2009019108901

Hearing Officer – LOM

**ORDER DENYING MOTION BY RESPONDENT 1
FOR AN EXTENSION OF TIME – HEARING**

This is a FINRA disciplinary proceeding.¹ On December 28, 2012, Respondent 1 filed a Motion For An Extension of Time – Hearing. In that Motion, Respondent 1 requested that the hearing in this matter (currently scheduled for four days from January 29, 2013, to February 1, 2013) be rescheduled to begin March 27, 2012 (sixty days later).² On December 31, 2012, Enforcement filed an Opposition to the Motion. For the reasons set forth below, the Motion is

¹ FINRA, the Financial Industry Regulatory Authority, is responsible for regulatory oversight of securities firms and associated persons who do business with the public. It was formed in July 2007 by the consolidation of NASD and the regulatory arm of the New York Stock Exchange. FINRA is developing a new “Consolidated Rulebook” of FINRA Rules in which some NASD Rules have been replaced by new FINRA Rules. Other NASD Rules continue to be in effect. The first phase of the new consolidated Rules became effective on December 15, 2008. *See* FINRA Regulatory Notice 08-57 (Oct. 2008). Because the Complaint in this case was filed after December 15, 2008, FINRA’s procedural Rules apply. The conduct Rules that apply are those that existed at the time of the conduct at issue. FINRA and NASD Rules are available at www.finra.org/Rules (“FINRA Manual On-Line”). References here to FINRA include references to NASD.

² The Motion specified 2012, the wrong year, for both the current hearing dates and the requested extended hearing date. This appears to be a typographical error; but if the year is changed to 2013, then the Motion would have the rescheduled four-day hearing running through Saturday, March 30, 2013. Ordinarily, a hearing is not held on the weekend.

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denied and the hearing will proceed as scheduled, beginning on January 29, 2013, and running, as necessary, for four days through February 1, 2013.

Nature Of The Charges

According to the Complaint, Respondents 1 and 2, along with two other persons, were in the process of attempting to purchase a securities broker dealer, FMC. Respondent 1 and Respondent 2 were employed by and registered with another FINRA member firm, SS, when they began that process. Respondents and the others in their group first obtained \$350,000 for "consulting services" from a company for which SS had acted as placement agent in 2009. They failed to disclose this outside business activity to SS, in violation of NASD Rule 3030 and FINRA Rule 2010.

The Complaint also alleges that the group did not perform any consulting services but rather used the \$350,000 to assist in their planned purchase of FMC. Once Respondent 1 and Respondent 2 were at FMC in February 2010, they began recommending the stock of the same company that had helped fund their planned purchase of FMC. From February to November 2010, Respondents recommended investment in that company to approximately 120 customers. Respondents fraudulently failed to disclose to those customers the payment that they had received from the company they were promoting, in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, and FINRA Rules 2020 and 2010.

Finally, the Complaint alleges that Respondent 1 and Respondent 2 entered into an agreement whereby commissions they earned on sales to FMC customers were improperly attributed to another person and routed to them indirectly rather than directly. This caused the firm's books and records not to accurately reflect the commissions due and paid, in violation of NASD Rule 3110 and FINRA Rule 2010.

Background For The Motion

This matter was on the verge of a hearing in early October 2012. Respondents were originally represented jointly by two lawyers at the firm of SLPC, WU and JC, who filed an Answer on behalf of Respondents at the end of February 2012. WU participated in a March pre-hearing conference in which the Parties agreed to schedule the hearing for October 2, 2012, through October 5, 2012. A May 23, 2012, Case Management Order confirmed the early October hearing dates. The Parties completed their preparations for hearing through the filing of pre-hearing briefs, exhibits, and witness lists on September 12, 2012.

Then, at a pre-hearing conference on September 14, 2012, a little over two weeks before the hearing, Enforcement and Respondents' counsel agreed that Respondents' counsel had a conflict that required them to withdraw from the representation. Consequently, the October hearing was removed from the calendar. Counsel for Respondents represented that they would assist Respondents in finding substitute counsel and were hopeful that such counsel could be found "shortly."

A month passed. Respondents' counsel did not withdraw and no new counsel filed an appearance. On October 12, 2012, Enforcement filed a motion to set a new hearing date. A few days later, on October 16, 2012, new counsel filed an appearance for Respondent 2.³ About a week later, on October 24, 2012, the original lawyers for the two Respondents withdrew.

On October 25, 2012, another pre-hearing conference was held. Respondent 2's new counsel, DK, participated but no one representing Respondent 1 was on the conference call.⁴ Respondent 2's new counsel indicated that another attorney, identified as TB, had been contacted

³ Enforcement represents in its Opposition that Respondent 2 had retained new counsel in late September, even though counsel did not file an appearance until mid-October.

⁴ Respondent 1 was notified in advance of the pre-hearing conference by mail and email and given instructions on how to participate.

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and expected to be retained by Respondent 1. The Parties discussed potential new hearing dates, taking into account TB's schedule as communicated by Respondent 2's new counsel. The participants on the call tentatively agreed to a hearing beginning on January 29, 2013, and running through February 1, 2013, subject to confirming TB's availability. Enforcement represented in its Opposition to the Motion that it spoke with Respondent 1's prospective counsel, TB, after the pre-hearing conference. TB indicated that he would be available on the proposed hearing dates and that he expected to be retained within a few days. However, TB never filed an appearance in the matter.

On November 8, 2012, two weeks after the last pre-hearing conference regarding the schedule, the Fourth Case Management Order was issued. That Order noted that Enforcement had confirmed its availability for the late January hearing dates and no Respondent had indicated an inability to participate on those proposed dates. Accordingly, the Order set the hearing for January 29 through February 1, 2013. Since at that point Respondent 1 was unrepresented, he was himself served with the Fourth Case Management Order.

For nearly six weeks after the Fourth Case Management Order, and almost two months after the Parties tentatively agreed to the late January hearing dates, no counsel for Respondent 1 entered an appearance. Then, on December 19, [2012], JA filed an appearance for Respondent 1. He did not at that time file any Motion regarding the schedule.

On Friday, December 28, 2012, nine days after he filed his appearance, JA filed the Motion to extend the trial date. This was almost two months after the Fourth Case Management Order was issued setting the hearing to begin in late January. It also was well into the holiday season when many people might be out of their offices and less able to respond to such a Motion.

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Nevertheless, Enforcement did file an Opposition the next business day, Monday, December 31, 2012. Among other things, Enforcement notes in its Opposition that Respondent 1's new counsel, JA, was employed as a law clerk from November 2011 to at least September 2012 by Respondent 2's old law firm, SLPC, prior to starting his own firm in October 2012.⁵

Rule Regarding Extensions Of Time

FINRA Rule 9222 governs extensions of time in FINRA disciplinary proceedings. Rule 9222(b) provides that a hearing "shall begin" at the time ordered unless the Hearing Officer postpones its commencement "for good cause shown." Rule 9222(b)(1) sets forth five factors that the Hearing Officer "shall consider" in determining whether to postpone a hearing: (i) the length of the proceeding to date; (ii) the number of postponements or extensions already granted; (iii) the stage of the proceedings at the time of the request; (iv) potential harm to the investing public if an extension of time is granted; and (v) such other matters as justice may require.

Parties' Arguments

In support of the Motion, Respondent 1's new counsel states that he needs time to review the discovery file (which he says he did not have as of the filing of the Motion), consult with counsel for the other Respondent in the matter on trial strategy, and to prepare the defense. He asserts that the extra time is necessary to "ensure a fair trial."

In its Opposition, Enforcement argues that the five factors specified in Rule 9222(b)(1) for consideration in determining whether to grant a motion for the continuance of a hearing all favor denial of the Motion. *First*, Enforcement notes that the matter has been pending for a substantial period of time. The Complaint was filed on January 31, 2012, nearly a year to the

⁵ Enforcement reports in its Opposition that it obtained this information from a LinkedIn profile for JA, which Enforcement reviewed on December 27, 2012. Enforcement further reports that it discussed that profile with JA because the profile indicated that JA was still associated with SLPC in December 2012. After that conversation, the profile was modified.

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date before the currently scheduled beginning of the hearing. *Second*, Enforcement notes that the hearing has already been rescheduled once before from October 2 through 5, 2012, to late January 2013. *Third*, Enforcement points out that the case was very far along when it was rescheduled the first time. Through their joint counsel, Respondents filed an Answer in February 2012, and by early September 2012 the Parties had filed their pre-hearing briefs, exhibits, and witness lists. The Third Case Management Order issued on September 14, 2012, in connection with rescheduling the original October hearing dates, "caution[ed] the Parties ... that this matter was on the brink of Hearing and that undue delay will not be permitted." *Fourth*, Enforcement stresses that Respondents have been charged with serious misconduct involving fraud in the sale of securities and yet Respondents remain registered as General Securities Representatives, are currently associated with a FINRA member firm, and continue to solicit securities transactions with the general public. In such situations there is potential harm to the investing public from any further delay. *Fifth*, Enforcement maintains that other matters also militate against further delay. Among these matters is the fact that Respondent 1 has had months to retain new counsel. Moreover, in October Respondent 1 appeared to be about to retain TB. Enforcement reports that Respondent 1 did separately retain other counsel to represent him at testimony in December 2012, asserting that this demonstrates that Respondent 1 was able to retain counsel before now and did not use his best efforts to do so.

Discussion

New counsel for Respondent 1 has failed to show "good cause" for postponing the hearing. He merely asserts that the discovery file for this matter is voluminous, that he does not yet have it in hand, and that he needs time to consult co-counsel and to prepare for the hearing. At the time JA filed his appearance he had six weeks to prepare for the hearing at the end of January. Given that pre-hearing briefs, exhibits, and witness lists had already been submitted by

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the Parties, the case was already developed and focused. JA did not need to start over, and six weeks was ample time to prepare for the hearing.⁶ If new counsel did not think that time adequate, he should not have taken on the representation.⁷

The record suggests that Respondent 1's new counsel either has not been diligent or has engaged in gamesmanship. There is no explanation why he delayed nine days after the filing of his appearance to file the Motion for more time. The delay is particularly suspect given the filing of the Motion on a Friday during the holiday season. Nor is there any explanation why counsel did not yet have the relevant files at the end of December. Since JA had previously worked at the same law firm that originally represented Respondent 1, there seems less reason than in most cases for the transfer of relevant files to be difficult.

The record also suggests that Respondent 1 is engaged in delaying tactics. He has had since mid-September to retain new counsel. In October it appeared that TB was about to be retained and that he would be able to participate in the late-January hearing. There is no explanation why this plan fell through. A respondent in a FINRA disciplinary proceeding cannot indefinitely delay a hearing by his failure to retain counsel.⁸

Furthermore, Enforcement is correct that the five factors specified in FINRA Rule 9222(b)(1) weigh in favor of denying the Motion. *First*, this case has been pending nearly a year. *Second*, the hearing has already been rescheduled once. *Third*, the Parties completed their

⁶ Indeed, the Hearing Officer finds that the three weeks that remain before the hearing are still ample time to prepare. The defense has already been developed and the pre-hearing submissions have been made.

⁷ OHO Order 06-01 at p. 3 n.2 (CLI050004) (AHP), citing *Falcon Trading Group, LTD v. SEC*, 102 F.3d 579, 581 (D.C. Cir. 1996) (holding that new counsel should not have undertaken representation of the respondent where his schedule would not permit him to present an adequate defense or attending the scheduled hearing).

⁸ OHO Order 10-02 at p. 2 (2008013503101) (AHP) ("It is incumbent upon a respondent who desires to retain counsel to do so promptly, taking into consideration the hearing date and pre-hearing schedule. A respondent cannot delay his search and then use that as the basis for a postponement of the hearing.").

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pre-hearing submissions in mid-September and were on the verge of a hearing in early October. They have been cautioned that undue delay will not be tolerated. *Fourth*, and most importantly, Respondents have been charged with fraud but continue to be involved in securities business with the public. Any delay in resolving the charges carries with it the potential for harm to public investors. *Fifth*, the unexplained months of delay in retaining counsel, accompanied by the suspect timing of the Motion, suggest that Respondent 1 is engaged in calculated delaying tactics. This is an abuse of the process and cannot stand in the way of resolving the charges against Respondents.

As another Hearing Officer has stated, FINRA Rule 9222 is primarily “intended to ensure prompt resolution of [FINRA’s] disciplinary proceedings, which is necessary to enable [FINRA] to carry out its regulatory mandate and fulfill its responsibilities in protecting the public interest.”⁹ A Hearing Officer has broad discretion to grant or deny an extension of time, taking into account the particular facts and circumstances.¹⁰ In this case, the facts and circumstances counsel against further delay of the hearing.

Accordingly, the hearing scheduled to commence on January 29, 2013, will go forward as scheduled. The Motion for an extension of time is denied.

SO ORDERED.

Lucinda O. McConathy
Hearing Officer

Dated: January 2, 2013

⁹ OHO Order 06-28 (CLI050007) (AHP).

¹⁰ OHO Order 00-22 at p. 6 and n.5 (C01000003) (EBC) (“It is well established that in [FINRA] 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.”). That discretion will be overturned only where the denial of an extension of time is unreasonable and arbitrary in the face of a justifiable request for delay. *Id.* (quotations and citations omitted). No such justifiable request has been presented here.