

**NASD OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT

Complainant,

v.

Respondent.

Disciplinary Proceeding  
No. C07040084

Hearing Officer – SNB

**ORDER GRANTING COMPLAINANT'S MOTION FOR TELEPHONE TESTIMONY**

On April 13, 2005, Enforcement filed a motion for telephone testimony, which was opposed by Respondent during a pre-hearing conference on April 15, 2005.

Enforcement intends to call seven of Respondent's customers to testify regarding alleged unauthorized trading in their account. Enforcement's motion identifies three of these customers who it proposes to call by telephone. Enforcement's motion indicates that the customers are scattered throughout the United States, well outside Boca Raton, Florida, where the hearing will be held, and that for various reasons the customers are unable or unwilling to travel to testify at the hearing, but are willing to testify by telephone.<sup>1</sup> Enforcement's motion also indicates that the testimony of these three customers will be very limited in duration and scope. Each witness is expected to offer ten minutes of direct testimony about the one or two trades at issue in their accounts.

Telephone testimony is a familiar aspect of NASD disciplinary hearings. Because NASD has no subpoena power, it relies on the voluntary cooperation of customers and others who are

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<sup>1</sup> Enforcement is still trying to determine if one of these three customers will attend the hearing, but seeks leave to offer the witness via telephone if needed.

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not subject to NASD jurisdiction. The use of telephone testimony as an accommodation to obtain this cooperation is well accepted, and has been upheld by the Securities and Exchange Commission. See, e.g., Robert Gibbs, 51 S.E.C. 482, 484 n. 3 (1993), aff'd, 25 F.3d 1056 (10th Cir. 1994) (table).

Respondents argue that this case may turn on issues of credibility and that it will not be possible for the Hearing Panel to assess the credibility of the customers if they testify by telephone. Although in-person testimony is generally preferable when possible, experience shows that Hearing Panels can adequately evaluate the credibility of witnesses who testify by telephone. Respondents also suggest that the lack of subpoena power not work to the disadvantage of Respondent. Conversely, the lack of subpoena should not advantage Respondent by disallowing the testimony of customers who cannot attend the hearing. The Hearing Officer notes that Enforcement's motion indicates that there will be four customers testifying at the Hearing who comprise the bulk of the trades at issue in this case, so Respondent will have ample opportunity to explore the credibility of the customers.

Therefore, Enforcement's motion is granted, subject to the following conditions:

1. Enforcement shall either have a notary public available at each witness' location to swear the witness or offer, at the time the witness is called, a statement by the witness attesting that the testimony he or she will give at the hearing will be truthful.
2. Enforcement shall ensure that each witness has, at the time of testifying, copies of all exhibits that relate to that witness' direct testimony, as well as any exhibits that the Respondents may provide to Enforcement, no later than May 5, 2005, for possible use on cross-examination of the witness.

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3. Enforcement shall ensure that each witness will be available by telephone during a block of time when it is reasonable to expect that the witness will be called to testify at the hearing, so that the hearing is not unduly disrupted if the testimony of prior witnesses is longer or shorter than expected.

**SO ORDERED.**

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Sara Nelson Bloom  
Hearing Officer

Dated: April 25, 2005