

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 06-18 (CAF040058).

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent 1

and

Respondent 2,

Respondents.

Disciplinary Proceeding
No. CAF040058

Hearing Officer – DRP

**ORDER DENYING RESPONDENTS' MOTION TO INVOKE
PROCEDURAL RULE 8210**

On January 26, 2006, Respondents asked that NASD invoke Procedural Rule 8210 to compel the testimony of nine individuals at the disciplinary hearing scheduled to commence on February 13, 2006. Respondents assert that these potential witnesses will offer testimony that is “material to [their] defense ... in that they will address, inter alia, their role, *if any*, in the supervision of the Respondents ... and the supervisory and compliance structures in place at [Respondents' former firm] ... when the trades at issue took place.” (emphasis added) According to Respondents, one of the potential witnesses will also testify about the firm's investigation of Respondents.

During the pre-hearing conference held on January 27, 2006, Enforcement objected to Respondents' request, contending that it was not timely and did not meet other requirements of Procedural Rule 9252. The Hearing Officer concurred and directed Respondents to file a supplemental request that complied with the requirements of Rule 9252.

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On January 31, Respondents filed “an enhanced discussion of the materiality of witness testimony and the non-cumulative nature thereof, as a supplement” to their January 26 request. On February 1, Enforcement filed its opposition to Respondents’ motion. Enforcement again noted that Respondents’ request failed to address the requirements of Rule 9252.

For the reasons stated below, Respondents’ request is denied.

Under NASD Procedural Rule 9252, respondents may ask NASD to invoke Procedural Rule 8210 “to compel the production of [d]ocuments or testimony at a hearing.”¹ Such request shall: “be submitted to the Hearing Officer no later than 21 days before the scheduled hearing date; describe with specificity ... the testimony sought; state why ... the testimony [is] material; describe the requesting [p]arty’s previous efforts to obtain ... the testimony through other means; and state whether ... each proposed witness is subject to [NASD’s] jurisdiction.”²

A Hearing Officer may grant such a request if the information sought is relevant, material and non-cumulative; the requesting party has made a good faith, but unsuccessful, effort to obtain the desired documents and/or testimony; and each person “from whom documents and testimony are sought” is subject to NASD’s jurisdiction.³ In addition, the Hearing Officer must consider whether the request is “unreasonable, oppressive, excessive in scope, or unduly burdensome”⁴

¹ Rule 9252(a).

² *Id.* The Hearing Officer notes that Enforcement provided the CRD record of one of the proposed witnesses, Witness 1, which demonstrates that she has not been associated with a member firm since May 2003. She is thus no longer subject to NASD’s jurisdiction and cannot be compelled to appear and testify pursuant to Rule 8210. *See* NASD By-Laws Article V, Section 4.

³ Rule 9252(b).

⁴ *Id.*

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Respondents offer no reasonable explanation for their untimely request that NASD invoke Rule 8210 to compel the appearance and testimony at the hearing of these individuals.⁵ Respondents identified these individuals as potential witnesses in their pre-hearing submissions, filed on December 16, 2005, and thus have no excuse for failing to meet the statutorily-imposed deadline for such requests.

Furthermore, Respondents failed to demonstrate any effort to secure the testimony by means other than compulsory process. Respondents assert that their pending arbitration claim against their former firm prevents them from contacting these proposed witnesses directly. Other than phoning the firm's counsel two or three times in an apparent attempt to discuss this issue, Respondents offer no evidence of any effort to secure the testimony of these individuals, such as submitting a written request to counsel.

Moreover, compelling at least some of the proposed witnesses to appear and give testimony on very short notice would be unduly burdensome. Witness 2, one of the proposed witnesses, will be on vacation for at least the first half of the hearing and will be starting a new job thereafter, according to Enforcement. Witness 3, another of the proposed witnesses, works (and presumably resides) in South Florida, according to Respondents' papers. Under these circumstances, Respondents' belated request that Witness 3 and Witness 2 be required to appear is unreasonable and unduly burdensome, particularly when the individuals face possible disciplinary action for failing to comply with a Rule 8210 request.

Furthermore, the Hearing Officer is not convinced that the testimony of the proposed witnesses is relevant, material and non-cumulative, with the possible exception of Witness 4. Despite Respondents' failure to comply with the requirements of Rule 9252, in the interests of

⁵ Respondents' request should have been filed no later than January 23, 2006.

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justice, the Hearing Officer is directing the parties to discuss whether they can stipulate to Witness 4's testimony or to the admission of excerpts of his on-the-record interview, which have been marked as CX-5 by Enforcement and RX-7 by Respondents. If the parties are unable to reach such an agreement, they are directed to contact Witness 4's counsel to determine Witness 4's availability to appear and testify at the hearing. If he is available, Respondents may renew the request to invoke Rule 8210 at the commencement of the hearing.

SO ORDERED.

Dana R. Pisanelli
Hearing Officer

Dated: February 8, 2006
Washington, DC