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NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
	:	Disciplinary Proceeding
Complainant,	:	No. CAF980002
v.	:	
	:	Hearing Officer - DMF
Respondents.	:	

ORDER REGARDING _____ RESPONDENTS' MOTION TO PRECLUDE DESIGNATION OF _____ TRANSCRIPTS; _____ RESPONDENTS' MOTION FOR A PROTECTIVE ORDER; AND ENFORCEMENT'S MOTION FOR POST-HEARING SUBMISSIONS IN EXCESS OF TWENTY-FIVE PAGES

1. Motion to Preclude

The _____ Respondents (_____ and _____) have filed a motion seeking to preclude the Department of Enforcement from designating additional portions of transcripts of testimony given by _____ in support of Enforcement's post-hearing filings. Prior to the hearing, the Hearing Officer directed the parties not to mark and offer complete transcripts of prior testimony as exhibits if they wished to offer only a portion of the testimony. Enforcement complied with this direction, and submitted as proposed exhibits only portions of various transcripts of _____ prior testimony.

During the hearing, however, both sides indicated a desire to offer additional portions of transcripts of various individuals. Near the close of the hearing, in order to expedite matters, the Hearing Officer advised the parties that, after the hearing was concluded, they would be allowed to designate additional portions of transcripts for the purpose of clarifying or providing context for evidence in the record, in accordance with the so-called "rule of completeness." (Tr. 1864-65.) See

Federal Rules of Evidence, Rule 106 ("When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.").

On January 5, 2000, Enforcement submitted a number of additional excerpts of testimony given by respondent _____ in various forums. The _____ Respondents object that these designations do not comply with the Hearing Officer's "rule of completeness" authorization. The _____ Respondents argue that because they did not designate any portions of the _____ transcripts, there is no basis for Enforcement to offer additional portions of the transcripts for clarification or context. Enforcement responds that the excerpts it now offers are intended clarify and expand upon the portions of the _____ transcripts Enforcement offered at the hearing, as well as to rebut various statements made by _____ during his live testimony at the hearing.

As the above quotation makes clear, the completeness rule is intended to allow an adverse party to offer additional evidence to put a writing or statement offered by an opponent in context for the fact finder. Under a strict application of the rule, a party may not offer additional portions of transcripts simply as additional support for its case.

The Hearing Panel's goal, however, is to obtain a complete picture of the facts, in order to make a well-reasoned decision about the charges in the Complaint, and the Hearing Officer concludes that a strict application of the completeness rule (which is not directly applicable to these proceedings under the Code of Procedure) might undermine that goal. _____ testified in person at the hearing about critical issues in this proceeding; additional portions of his prior testimony that may clarify or complete the testimony he gave at the hearing, or the portions of his testimony already in the record,

could be of great value to the Hearing Panel. The Hearing Officer might nevertheless grant the _____ Respondent's motion if it appeared that Enforcement was attempting to contravene a clear, explicit ruling of the Hearing Officer, but that is not the case. The discussion regarding post-hearing submission of additional portions of transcripts took place orally, during the stress of the hearing. After a review of the relevant portions of the transcript (Tr. 1863-65, 1870-73, 1936-37), the Hearing Officer concludes that the parties' requests and the Hearing Officer's rulings were not crystal clear. Under these circumstances, the Hearing Officer will not strike the additional excerpts offered by Enforcement. Therefore, the _____ Respondents' motion is denied.

2. Motion for Protective Order

The _____ Respondents have also filed a motion requesting a protective order that would excuse them from serving copies of their post-hearing filings on respondents who have been held in default (_____ and ____), as well as the respondents who have settled or as to whom the Complaint has been dismissed (_____ and _____). Enforcement opposes the motion, but no other respondent has opposed it.

The respondents who have settled or as to whom the Complaint has been dismissed are no longer parties, so no party is required to continue to serve them with papers filed in this proceeding. The respondents who have been held in default, however, are still parties. The _____ Respondents argue that serving those respondents "will only provide non-public information to non-participants," but the defaulting respondents are still technically "participants" in this proceeding. Under the Code of Procedure, they are entitled to copies of the post-hearing filings, if they want them.

As noted, however, the defaulting respondents did not oppose the _____ Respondents' motion. Rule 9146(d) provides that a "Party failing to respond [to a motion] shall be deemed to have waived any objection to the granting of the motion." Enforcement did oppose the motion, but the relief sought by the _____ Respondents relates to service of papers on the defaulting respondents, not Enforcement. Enforcement does not have any apparent interest in forcing the _____ Respondents to serve papers on the defaulting respondents if those respondents do not want them.

Accordingly, based on the defaulting respondents' waiver of any objection, the _____ Respondents' motion is granted. They need not serve their post-hearing filings on the defaulting respondents. Similarly, Enforcement is not required to serve its post-hearing papers on the defaulting respondents, but Enforcement may serve the defaulting respondents if it wishes to do so. In that regard, the Hearing Officer notes that, ultimately, Enforcement will have to either move for a default decision against the defaulting respondents, or dismiss the Complaint as to them. If Enforcement does move for a default decision, it may wish to rely on its post-hearing submissions to support such a motion, and that will only be possible if Enforcement serves its post-hearing submissions on the defaulting respondents.

3. Motion for Leave to Exceed Page Limitations

Finally, Enforcement has filed a motion requesting that the Hearing Officer lift the 25-page limitation on post-hearing filings imposed by Rule 9267(d). The _____ Respondents object that Enforcement's request is untimely, and that they will be prejudiced if it is granted because they have prepared their filing based on the 25-page limit.

The schedule calls for the parties to file their initial post-hearing submissions by April 6, 2000 and responses by May 6, 2000. The hearing consumed many days, the exhibits are voluminous, and the issues are complex. The burden of proof rests on Enforcement, as Complainant. Under these

circumstances, the Hearing Officer will grant Enforcement's motion, but will not give Enforcement a blank check. The parties' initial post-hearing submissions shall not exceed 50 pages. The parties' responses shall also not exceed 50 pages, and shall be limited to replying to points raised in the adverse party's initial filing; affirmative new matters of fact or law shall not be raised in a response.

SO ORDERED.

_____

David M. FitzGerald
Hearing Officer

Dated: Washington, DC
March 27, 2000