This order has been published by the NASDR Office of the Hearing Officers and should be cited as OHO Order 98-5 (C10970141).

NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
Complainant,	:	Disciplinary Proceeding No. C10970141
v.	:	
	:	Hearing Officer - EAE
Respondents.	:	

ORDER DENYING MOTION FOR RECONSIDERATION OF ORDER SETTING DEADLINE FOR FILING MOTION FOR ENTRY OF DEFAULT DECISION

On December 19, 1997, Respondents _____ (hereafter "Movants"), by and through counsel, filed a motion for Reconsideration of Order Setting Deadline for Filing Motion for Entry of Default Decision (hereafter the "Motion"). Specifically, the Motion was addressed to the December 16, 1997 Order which directed the Department of Enforcement to "serve and file a motion for entry of a default decision against Respondents _____ by January 20, 1997."[1] Movants particularly object to that portion of the December 16, 1997 Order which requires the Department of Enforcement to support its Motion for Default Decision with certain specified documents and affidavits. Movants request that the December 16, 1997 Order either be withdrawn or modified to delete the requirement that the Department of Enforcement introduce the evidence specified in that Order on the grounds

[1] By Order dated December 24, 1997, the December 16, 1997 Order was vacated as to Respondent _____ since it was determined that a letter he had sent to the Department of Enforcement and to at least some parties of record, but had not filed with the Office of Hearing Officers, would be treated as an answer to the Complaint. Thus, this Order only will refer to Respondent _____.

that introduction of such evidence at this time would "taint the proceeding, create an appearance of impropriety and a lack of fairness and impartiality, and may well require the recusal or disqualification of the Hearing Officer."[2] Movants further argue that there is no prejudice to the NASD or harm to the public if entry of the default were delayed in order to afford remaining Respondents a fair hearing.[3]

On January 2, 1998, the Department of Enforcement filed a Response to the Motion (hereafter "Response"). Complainant does not oppose deferral of the entry of a default decision as to Respondent _____ until after the hearing in this proceeding has been completed. It requests**,** however, that the Hearing Officer, pursuant to NASD Code of Procedure Rule 9215(f), issue an Order now finding Respondent _____ in default, and deeming the allegations of the Complaint admitted as against him. The Department of Enforcement further requests that the issuance of a default decision (in which factual findings are made) be deferred until after the hearing.[4]

The Hearing Officer has considered the respective positions of the Parties and, for the following reasons, the Motion is denied. Further, the request of the Department of Enforcement to issue an Order of Default, pursuant to Code of Procedure Rule 9215(f), as to Respondent _____ without submission of such evidence necessary to establish a *prima facie* case as set forth in the December 16, 1997 Order also is denied.

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[2] Motion at 2. Movants also raise the possibility of inconsistent factual findings as between the Respondent against whom a default order is entered now and a decision of the Panel with respect to Movants after a disciplinary hearing.

[3] Id.

[4] The Department of Enforcement contends that deferral would obviate the possibility of inconsistent findings of fact, and also "relieve the staff from presenting a direct evidentiary case against a defaulting party." Response at 2.

In support of their Motion for deferral of a default decision as to Respondent _____, Movants argue that the possibility of attendant harm to the NASD and the public is remote.[5] The Hearing Officer is not in a position to make such a determination. What is clear, however, is that the absence of the entry of a default decision at this time would allow Respondent _____ to take unfair procedural advantage of the procedures which govern a disciplinary proceeding. Absent the entry of a default decision, Respondent _____ would continue to be a party of record, entitled to receive copies of all filings and orders and, arguably, to participate in the proceeding at any time, up to and including the disciplinary hearing. This certainly is not what is envisioned by the Code of Procedure. The Code sets forth a procedure for issuance of default decisions in order to bring closure to the ability of a non-answering Respondent to participate in a disciplinary proceeding at his or her whim.

Moreover, the procedure suggested by the Department of Enforcement that the Hearing Officer enter an Order of Default against Respondent _____ now, pursuant to Code of Procedure Rule 9215(f), and defer the issuance of a default decision in which factual findings are made until after the disciplinary hearing is not contemplated by the Code of Procedure.[6] Indeed, the type of "bifurcated" default suggested by the Department of Enforcement could result in an

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[5] The Complaint (at ¶5) states that Respondent _____ currently is not registered with the Association or employed with a member firm.

[6] Code of Procedure Rule 9215(f) provides, in pertinent part, that if Respondent does not file an answer within the time required in the Second Notice of Complaint, the allegations of the complaint may be deemed admitted by such Respondent and a default decision may be entered by the Hearing Officer. The Securities and Exchange Commission, however, has made clear that the NASD should maintain its procedure of basing default decisions not only on a failure to answer, but also on a review of the evidence in order to afford the "Commission a basis for discharging its review function under Section 19 of the Securities Exchange Act." In the Matter of James M. Russen, Jr., SEC Exchange Act, Release No. 32895, 54 S.E.C. Docket 2113, 1993 SEC LEXIS 2339, at *7 n.12 (September 14, 1993).

unfair procedural advantage to the non-answering Respondent since he could exercise his rights of appeal with respect to both default orders.[7]

Movants' other argument that the entry of a default decision now will prejudice their case is not compelling.[8] The written submission and documents offered by the Department of Enforcement in support of its Motion for Default Decision as to Respondent _____ will be viewed only in the context of the allegations as to that Respondent. Complainant must make a *prima facie* case as to each Respondent and the Hearing Officer does not at all agree that a finding of liability (or the lack thereof) as to Respondent _____, based on documents and other written submissions, is dispositive of the evidence to be presented against the other Respondents in the context of a disciplinary hearing.[9] For the same reason, the Hearing Officer does not agree that the Hearing Panel will be at all influenced by a separate order of default

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[7] By comparison, the Hearing Officer finds that there is no attendant additional burden to the Department of Enforcement from presenting its evidentiary case against Respondent _____ now since, at some point, it would have to submit such evidence to support a default decision.

[8] The practice of issuing separate orders or decisions as to defaulting parties prior to holding a hearing or issuing a decision as to remaining respondents is well-recognized in the context of other proceedings brought by the Securities and Exchange Commission and the Commodity Futures Trading Commission . In one such case where one respondent failed to answer and, thus, was found in default, it was noted that "this default order may not serve as the basis for establishing further liability." Tirreno International Corp. v. Oppenheimer & Co., CFTC Docket No. 89-R217, 1989 WL 242085 at *1 (C.F.T.C., July 20, 1989). Similarly, in an SEC matter, where certain respondents failed to answer and appear at an administrative hearing and were deemed in default, the Order stated that "[t]he findings herein are not binding on any other respondent named in these proceedings." In the Matter of Ed Pierce a/k/a Eugene Parsons, SEC Exchange Act Release No. 10710, 4 S.E.C. Docket 36, 1974 SEC LEXIS 1557, at * 1 n.1 (April 2, 1974). See also Benoay v. Decker, 517 F. Supp. 490, 496 (E.D. Mich. 1981)[In the context of a private federal securities law action, certain plaintiffs argued that default judgments entered against several primary defendants by the SEC were binding. The Court, citing other precedents, stated "[e]ntry of default as to one party does not determine any rights of the remaining parties."].

[9] For example, in the context of a disciplinary hearing**,** issues concerning the credibility of witnesses may impact the ultimate decision. By comparison, when a case is submitted "on paper", as it is against a non-answering Respondent, credibility determinations typically cannot be made and, thus, do not influence the outcome.

entered by the Hearing Officer based solely on papers submitted by the Department of Enforcement with respect to a non-answering Respondent.[10]

Further, the issue of the possibility of inconsistent factual findings raised both by Movants and the Department of Enforcement is without merit. **Different** factual findings well may be made with respect to each and every Respondent or with respect to Respondent _____. This may occur not only because the case against Respondent _____ will be submitted on paper, but because there may be unique facts attendant to the claims against the other Respondents or their defenses thereto. The possibility, however, of **different** factual findings as to different Respondents does not mean the findings are "inconsistent." They simply are different.

Finally, Movants argue that if the Hearing Officer receives, reviews, and bases a decision on an "ex parte communication, a unilateral offering of evidence * * *, the mere possibility of a perception of partiality and prejudgment would require the Hearing Officer's recusal or disqualification."[11] Not only has this proposition, albeit in another context, been rejected both

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[10] In an analogous situation, respondents claimed on appeal that a disciplinary proceeding had been flawed because a member of the hearing panel had been exposed to an Offer of Settlement ("Offer") which later was withdrawn. Respondents contended "that the DBCC panel member's knowledge of the Offer 'may have created a situation where, from the outset, she looked unfavorably on the respondents.'" District Business Conduct Committee for District 10 v. Rimson & Co., Complaint Nos. C10940071 and C10950014, 1996 NASD Discip. LEXIS 26, at *24 (NBCC January 29, 1996). As here, respondents argued that "even the appearance of impropriety is sufficient to warrant a new hearing" and that "knowledge of the proposed settlement's terms could 'indicate to the panel that respondents did violate the rules of fair practice.'" Id. at * 24-25. The NBCC specifically rejected respondents' argument based on potential bias of the DBCC panel member noting that the "SEC recently held that a DBCC panel was not disqualified by reason of the fact that it had considered a settlement offer that the respondent withdrew prior to the DBCC hearing." Id. at *33 (citing In the Matter of DeSanto, SEC Exchange Act Release 35860, 59 S.E.C. Docket 1429, 1995 SEC LEXIS 1500 at *15-16 (June 19, 1995) and Withrow v. Larkin, 421 U.S. 35, 55 (1975) ["'The mere exposure to evidence presented in nonadversary * * * procedures is insufficient in itself to impugn the fairness of [panel] members at a later adversary proceeding.'"]). Here, of course, the possibility of prejudice is even more attenuated than in the cases cited since in the context of the default as to Respondent _____, the Hearing Officer will not be considering any evidence as to the Movants.

[11] Motion at 4.

by the NBCC and the SEC,[12] but whether or not the default decision is based on "a unilateral offering of evidence" is not within the discretion and control of the Hearing Officer. It is for this very reason that the Department of Enforcement is ordered to file a motion with necessary supporting documentation. The non-answering Respondent still has the opportunity to participate in the proceeding and to oppose the motion and the evidence offered by the Department of Enforcement. If he chooses not to do so, the Hearing Officer must base his or her decision solely on the evidence submitted by Complainant and determine whether a *prima facie* case based on the evidence submitted has been established. This result is no different than that faced by any judge or adjudicator when required to decide a preliminary motion against a non-answering party.[13] Moreover, any subsequent Motion for Disqualification of a Hearing Officer must be based on more than a supposition of partiality and prejudgment of issues. The fact that a Hearing Officer simply fulfills his or her responsibilities under the Code of Procedure by deciding a Motion for Default Decision against a non-answering Respondent, standing alone, certainly would not support a colorable claim for disqualification.

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[12] See n.10 and cases cited therein.

[13] In a somewhat analogous context, the United States Supreme Court noted, "a judge is [not] disqualified from presiding over an injunction proceeding because he has initially assessed the facts in issuing or denying a temporary restraining order or preliminary injunction. It also is very typical for members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings." Withrow 421 U.S. at 56.

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Accordingly, for the foregoing reasons, the Motion for Reconsideration of Order Setting Deadline for Filing Motion for Entry of Default Decision is denied and the Department of Enforcement is instructed to file its Motion on or before January 20, 1998, as set forth in the Order of December 16, 1997.

SO ORDERED

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Ellen A. Efros
Hearing Officer

Dated: Washington, DC
January 13, 1998