

**NASD OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Disciplinary Proceeding  
No. C8A050041

Hearing Officer – DRP

**ORDER DENYING RESPONDENT'S MOTION TO SET ASIDE DEFAULT**

By Order dated October 4, 2005, Respondent was held in default pursuant to Rule 9241(f), for failing to appear at two pre-hearing conferences of which he had due notice.<sup>1</sup> Before a Default Decision pursuant to Rule 9269 was issued, Respondent phoned OHO on November 21, 2005 to discuss having missed the disciplinary hearing in this matter.<sup>2</sup> He again requested a hearing. By Order dated November 28, 2005, the Hearing Officer directed Respondent to show cause at a telephonic hearing on December 13, 2005, why his default should be excused.

At the hearing, Respondent again confirmed that his current CRD address is correct. Nevertheless, he claimed to have received notice of only one telephonic pre-hearing conference, which he failed to attend due to "a bad case of the flu." Respondent was unable to provide any date or time frame for his illness, even after consulting his calendar, and failed to supply any

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<sup>1</sup> The Office of Hearing Officers (OHO) notified Respondent of each pre-hearing conference by Orders sent via first class and overnight mail to Respondent's CRD address, which he confirmed was current during the initial pre-hearing conference held on July 28, 2005. In addition, OHO phoned Respondent prior to, and during, the pre-hearing conference held on September 15, 2005. The October 4, 2005 Order Holding Respondent in Default was also sent to Respondent at his CRD address by first class and overnight mail.

<sup>2</sup> Prior to his telephone call on November 21, Respondent had not been in touch with OHO since September 9, 2005.

documentation to support his explanation. He also claimed to have been sick “before, during, and after the date of the scheduled hearing,” but could not say when the hearing was scheduled, nor provide a date or time frame for his alleged illness.

Rule 9269(c) provides that the Hearing Officer may set aside a default upon a showing of “good cause.” The Rule does not define what constitutes “good cause,” but the NAC has indicated that it is appropriate to “consider such factors as: (i) whether the respondent notified ... CRD of any change of address; (ii) the length of time that has passed between the issuance of the default decision and the respondent’s appeal; and (iii) the reasons for the respondent’s failure to participate in the proceeding before the Hearing Officers.”<sup>3</sup>

The Hearing Officer finds Respondent’s explanation for his failure to participate in two pre-hearing conferences unpersuasive. There has been no change of address, and Respondent admitted having received notice of one of the pre-hearing conferences at issue. He provided no reason for his failure to attend the conference other than an unsubstantiated claim of illness. Even if true, he waited approximately two months before contacting OHO about the case.

The Hearing Officer believes that Respondent intentionally avoided pre-hearing proceedings until mid-November in an attempt to postpone the hearing. She notes that during the initial pre-hearing conference, Respondent expressed displeasure about the hearing date, saying it would be “a hardship” to attend a hearing on October 24, without further explanation. Despite having stated a preference that the hearing take place “sooner than later,” Respondent then requested a hearing date of November 1, which the Hearing Officer could not grant due to a

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<sup>3</sup> See *Dep’t of Enforcement v. Hodde*, No. C10010005, 2002 NASD Disc. LEXIS 4, at \*6 (NAC Mar. 27, 2002); Notice to Members 99-77 (Sept. 1999).

scheduling conflict. Thus the hearing was scheduled for October 24, 2005, subject to witness availability.<sup>4</sup>

For the foregoing reasons, Respondent has failed to establish good cause for setting aside his default. Accordingly, his motion is denied.

In addition, on or before January 23, 2005, Enforcement must supplement its November 2 submission by filing documents to support the charges, including, but not limited to, copies of: relevant portions of Respondent's CRD record regarding his address and NASD's jurisdiction over Respondent; written statements from customer MM and the Banc One registered representative referenced in the Complaint; relevant documents from Morgan & Morgan, Inc. checking and brokerage accounts opened on or about January 13, 2004, including evidence of Respondent's position at Morgan & Morgan, his use of an alias, and Respondent's trading in the brokerage account; and the staff's Rule 8210 requests for information sent to Respondent, including evidence of service and any response from Respondent.<sup>5</sup>

**SO ORDERED.**

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Dana R. Pisanelli  
Hearing Officer

Dated: January 9, 2006  
Washington, DC

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<sup>4</sup> Based on Respondent's comments at the initial pre-hearing conference, the Hearing Officer believed that Respondent, who resides in Michigan, was unhappy that the hearing was slated to take place in NASD's Chicago District Office. She convened a pre-hearing conference on September 15 to discuss changing the venue to Detroit. Of course Respondent did not attend that conference, nor the September 27 conference, leading to his default.

<sup>5</sup> All documents submitted shall be individually numbered as Complainant's exhibits and separated by appropriately labeled tabs.