

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

FRANK PETER QUATTRONE
(CRD No. 1312126),

Respondent.

Disciplinary Proceeding
No. CAF030007

Hearing Officer – DMF

**ORDER GRANTING COMPLAINANT'S MOTION TO WITHDRAW
THE COMPLAINT, WITH PREJUDICE**

Background

The Department of Enforcement filed this proceeding in March 2003. The Complainant alleges, inter alia, that Respondent, while employed by Credit Suisse First Boston LLC (CSFB), violated NASD Rules 3060 and 2110 by “spinning” initial public offering (IPO) allocations to “strategic” employees of various companies in order to encourage them to place their employers’ investment banking business with Respondent’s CSFB group, or to reward them for having done so. Respondent contested the charges on a variety of grounds and requested a hearing. Following lengthy and contentious discovery and motion practice, the hearing was scheduled to begin in October 2004. The parties identified nearly 100 potential witnesses and more than 1,500 potential exhibits for the hearing.

In August 2004, however, following Respondent’s conviction on two counts of obstruction of justice and one count of witness tampering, Enforcement filed another Complaint against Respondent. This Complaint tracked the criminal charges, alleging that Respondent, while “aware that CSFB was the subject of investigations by NASD, the Securities and Exchange Commission, and a federal grand jury into CSFB’s practices in allocating shares in

initial public offerings,” sent “an email to ... employees strongly encouraging them to clean up their IPO files.” Enforcement contended that Respondent’s conviction would “conclusively establish that Quattrone engaged in conduct that is violative of NASD Rule 2110.”

Respondent requested a stay of the new case pending the outcome of his appeal of his conviction. Enforcement then moved to stay this case as well, also pending the outcome of Respondent’s appeal. Enforcement represented that if Respondent’s conviction was affirmed, it would proceed against Respondent only on the new charges, and would move to dismiss this case, with prejudice. But if Respondent’s conviction was set aside, Enforcement would pursue only this case, and would move to dismiss the other case, with prejudice.

In his response to Enforcement’s motion, Respondent argued, among other things, that delaying the hearing in this case would be prejudicial, pointing out that “with the passage of time witness’ memories will fade, and the NASD will continue to lose jurisdiction over witnesses.” (Footnote omitted.) After confirming that Enforcement understood this risk,¹ the Hearing Officer stayed both proceedings pending the outcome of Respondent’s appeal, concluding that the prejudice issue would be ripe for consideration after the criminal appeal was resolved, if Respondent’s conviction was set aside and Enforcement sought to resume this case.

¹ During the August 25, 2004, pre-hearing conference convened for the purpose of hearing the parties’ arguments regarding the proposed stays, the following colloquy occurred:

[HEARING OFFICER]: I want to be clear on a couple of points with you, Mr. Flynn.

[ENFORCEMENT]: Yes, sir.

[HEARING OFFICER]: First, ... Enforcement understands, that if [this] Case is stayed and the criminal conviction set aside and Enforcement comes back and says we would like to lift the stay and proceed now --

[ENFORCEMENT]: Yes, sir.

[HEARING OFFICER]: --you understand that the Respondent may argue that the delay has been prejudicial.

[ENFORCEMENT]: Understood.

[HEARING OFFICER]: You are willing to take that risk?

[ENFORCEMENT]: Yes, sir.

On March 20, 2006, Respondent's conviction was reversed and the case remanded for retrial. United States v. Quattrone, 441 F.3d 153 (2d Cir. 2006). When that occurred, the stays expired by their own terms. Therefore, the Hearing Officer issued an order directing the parties to file any motions requesting an extension of the stays by April 20, 2006.

On that date, Respondent filed a request that the Hearing Officer extend the time for the parties to respond to the March 31 order regarding the continuation of the stays "until the United States Attorney for the Southern District of New York determines whether to file a petition for certiorari with respect to the Second Circuit's decision, and if not, whether to try the criminal case a third time... While Mr. Quattrone does not seek a stay of [this] matter [it] cannot proceed simultaneously with a retrial of the criminal case. Mr. Quattrone will promptly notify the Hearing Officer when he is informed about these decisions."

Enforcement, on the other hand, filed a motion seeking a stay of this proceeding until the Justice Department decided whether to retry Respondent on the criminal charges, "and if it determines to retry the case, continuing the stay at least through the entry of judgment therein." In response to Enforcement's motion, Respondent made a quick U-Turn, opposing any further stay and urging that this case be set for hearing "by mid-July at the latest."

On May 5, 2006, the Hearing Office issued an order denying Enforcement's request for a continuation of the stay.² The Hearing Officer concluded that, although it was not reasonable to begin as soon as July, in the interests of the investing public, and as a matter of fairness to Respondent, the hearing in this case should take place as soon as possible. Accordingly, the Hearing Officer ordered the parties to begin a series of steps to assess the feasibility of holding the hearing prior to any retrial of Respondent's criminal case. As one such step, the Hearing

² In accordance with the commitment Enforcement made to obtain the stays in 2004, the Hearing Officer also dismissed the other case, with prejudice.

Officer ordered Enforcement to “begin promptly to determine and implement the steps necessary for it to proceed to a hearing as quickly as reasonably possible, and [to] file a report with the Office of Hearing Officers by June 5, 2006, detailing its efforts and conclusions in that regard.”

On May 26, 2006, Enforcement filed a motion to withdraw the Complaint in this proceeding, with prejudice. In its motion, Enforcement explained:

The Department has reviewed those matters referenced in the Order. Before a stay was imposed, the Department identified more than 60 witnesses for hearing. ... In 2004, the majority of the named witnesses for the Department were registered individuals over whom the NASD had jurisdiction – the Department could compel their sworn testimony at hearing. Many of those individuals were CSFB employees (or former employees). Based upon its experience with many of these witnesses, the Department did not and does not believe that many of the named witnesses would voluntarily appear at the disciplinary hearing.

Since the issuance of the May 5, 2006 Order, the Department has examined Central Registration Depository records for its witnesses. It is clear that during the 20-month stay, NASD ha[s] lost jurisdiction over many of its potential witnesses, including several of its key witnesses. That loss of jurisdiction significantly undermines the Department’s ability to introduce key testimonial and documentary evidence and establish material facts (hampering its ability to present its case at hearing).

In light of these developments, Enforcement requests leave to withdraw the Complaint, pursuant to Rule 9212(c). That rule provides that if the Complaint is withdrawn before the Hearing Panel’s ruling on a motion for summary disposition, or the start of the hearing on the merits, the withdrawal is without prejudice – that is, Enforcement “shall be permitted to refile a case based on allegations concerning the same facts and circumstances that are set forth in the withdrawn complaint.” In spite of this provision of the rule, in its motion Enforcement requests that the withdrawal of the Complaint in this case be with prejudice.

On May 31, 2006, Respondent filed a response to Enforcement’s motion in which he states that he does not oppose the withdrawal with prejudice. On the same date, Respondent also filed two motions for summary disposition, pursuant to Rule 9264. In one motion, Respondent

argues that this proceeding should be dismissed because Respondent has been prejudiced by the delay attributable to the 2004 stay, stating that NASD has lost jurisdiction over five named individuals whose testimony he would have sought to compel for his defense, and urging that even those witnesses who would testify voluntarily will “suffer from faded memories.” In his second motion, Respondent argues that certain legal developments since the 2004 stay lend further support to his long-standing contention that the charges against him should be dismissed because NASD failed to provide fair notice that its rules prohibited the conduct charged. Respondent recognizes, however, that it will be unnecessary for the Hearing Panel to consider and resolve these issues if Enforcement’s motion is granted.

Discussion

Under Rule 9212(c), Enforcement may only withdraw a Complaint with leave of the Hearing Officer. The Complaint in this case raises very serious and important issues that will not be resolved on their merits if the Complaint is withdrawn. But Enforcement represents that it cannot proceed, because, due to the passage of time, it can no longer compel its witnesses to testify, and Respondent, too, claims prejudice from the delay. As Respondent points out, this was foreseeable (and in fact expressly discussed) in 2004, when Enforcement requested a stay. Nevertheless, it is impossible to turn back the clock, and it would make no sense to move ahead with this case under current circumstances. Thus, it is clear that this proceeding should be dismissed, as Enforcement requests. Moreover, because the dismissal is attributable to the loss of evidence resulting from the stay sought by Enforcement, it must be with prejudice, as a matter of fairness, regardless of the provisions of Rule 9212(c).

Enforcement's motion to withdraw the Complaint is granted, and this proceeding is dismissed, with prejudice. Respondent's motions for summary disposition, and all other pending motions that were left in abeyance when the stay was granted in 2004 are denied as moot.

SO ORDERED.



David M. FitzGerald
Hearing Officer

Dated: May 31, 2006

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