

**NASD OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,  Complainant,  v.  Respondent 1  and  Respondent 2,  Respondents.	Disciplinary Proceeding No. CAF030055  Hearing Officer – DRP
--	---

**ORDER DENYING ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION**

On June 7, 2004, the Department of Enforcement filed a motion for summary disposition of the third cause of action, which alleges that Respondents engaged in a series of wash sales in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, as well as NASD Conduct Rules 2120 and 2110.<sup>1</sup> Respondents filed their opposition to the motion on June 21, 2004.

In support of the motion, Enforcement submitted a statement of undisputed facts and several exhibits to show that between April 5, 2001 and June 20, 2001, Respondents engaged in a series of transactions with its clearing firm, in which Respondents traded shares of \_\_\_\_\_ (\_\_\_\_) stock, with no resulting change in beneficial ownership. Enforcement alleges the trades had no *bona fide* purpose and that Respondents engaged in this activity to stabilize the price of \_\_\_\_\_ stock when it was dropping precipitously.

---

<sup>1</sup> Wash sales are transactions involving no change in beneficial ownership. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 205 n.25 (1976).

**This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 04-08 (CAF030055).**

In so doing, Enforcement contends that Respondents manipulated the market in \_\_\_\_ and that summary disposition of the third cause of action is warranted.

Respondents do not contest Enforcement's description of the trades as wash sales but oppose summary disposition.<sup>2</sup> Among other arguments, Respondents assert the trades were made without "malicious or mysterious intention" and were reported only to comply with NASD rules.

NASD Procedural Rule 9264(d) provides that a motion for summary disposition may be granted when "there is no genuine issue with regard to any material fact and the party that files the motion is entitled to summary disposition as a matter of law."<sup>3</sup> As the moving party, Enforcement bears the initial burden of showing that no genuine issue of material fact exists.<sup>4</sup>

The Hearing Officer cannot conclude from the papers that there are no genuine issues of material fact, particularly with respect to scienter.<sup>5</sup> These issues must be resolved at a hearing. Accordingly, Enforcement's motion for summary disposition is denied.

**SO ORDERED.**

---

Dana R. Pisanelli  
Hearing Officer

Dated: June 24, 2004

---

<sup>2</sup> Respondents previously denied all allegations related to the third cause of action. *See* Answer ¶¶ 39-47, 93-95.

<sup>3</sup> *See also Dep't of Enforcement v. Skelly*, No. CAF000013, 2003 NASD Discip. LEXIS 40, at \*27 (NAC Nov. 14, 2003).

<sup>4</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

<sup>5</sup> Wash sales are manipulative when an illicit purpose is established. *Ernst & Ernst*, 425 U.S. at 205-206, citing *J.A. Latimer & Co.*, Exchange Act Release No. 5849, 1958 SEC LEXIS 324 (1958); *Thornton & Co.*, Exchange Act Release No. 4115, 1948 SEC LEXIS 432 (1948). *See also* Section 9(a)(1) of the Exchange Act, which proscribes wash sales when effectuated "for the purpose of creating a false or misleading appearance of active trading in any security...or a false or misleading appearance with respect to the market for any such security" (emphasis added).