

**NASD OFFICE OF HEARING OFFICERS**

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DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent Firm

and

Respondent 2,

Respondents.

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Disciplinary Proceeding  
No. 2005002392101

Hearing Officer—DMF

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DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent Firm

Respondent 3

Respondent 4

and

Respondent 5,

Respondents.

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Disciplinary Proceeding  
No. E072004006101

Hearing Officer—AHP

## **ORDER DENYING RESPONDENT FIRM'S MOTIONS TO CONSOLIDATE**

On August 29, 2006, the Respondent Firm filed motions to consolidate the two above-captioned proceedings and to sever the respondents in Disciplinary Proceeding No.

2005002392101 (the "CRD Complaint"). On September 8, 2006, the Department of Enforcement (the "Department") filed its oppositions to the Respondent Firm's motions. For the reasons set forth below, the motions are denied.

### **Background**

The CRD Complaint contains two causes of action. In the first, the Department alleges that Respondent 2, the Respondent Firm's former General Counsel, violated NASD Conduct Rule 2110 by conducting 205 searches on Web CRD for improper purposes. The Complaint further alleges that the Respondent Firm, acting through Respondent 2, violated NASD Conduct Rule 2110 by failing to obtain written consent to conduct the Web CRD searches and by falsely certifying that it had obtained written consent for the searches. The second cause of action alleges that the Respondent Firm violated NASD Conduct Rules 3010 and 2110 by failing to establish and maintain adequate written procedures governing the use of Web CRD and by failing to ensure that all Web CRD searches were conducted only for authorized purposes.

The Complaint in the second case, Disciplinary Proceeding E072004006101 (referred to by the Parties as the "Omnibus Complaint") alleges that the Respondent Firm experienced a general breakdown of its supervisory system. The Omnibus Complaint contains six causes of action. The first cause of action alleges that the Respondent Firm failed to establish, maintain, and enforce written supervisory procedures reasonably designed to provide a system of supervision for registered representatives with histories of repeated customer complaints, disciplinary actions, and arbitrations, as required by NASD Conduct Rule 3010(a). The Second

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cause of action alleges that the Respondent Firm, Respondent 3, its Chief Compliance Officer, and Respondent 5 failed to supervise trading in customer accounts at one of the Respondent Firm's branch offices in a manner reasonably designed to detect and prevent unauthorized trading by the firm's brokers. The third, fourth, and fifth causes of action allege that the Respondent Firm and Respondent 4, a principal in the Respondent Firm's compliance department, failed to exercise reasonable supervision designed to assure (1) compliance with NASD's continuing education requirement; (2) reporting of customer complaints; and (3) filing of updates to Forms U-4 and U-5 to reflect customer complaints and arbitrations. The final cause of action alleges that the Respondent Firm and Respondent 3 failed to enforce the Respondent Firm's written supervisory procedures governing cold calling.

The Respondent Firm argues that both Complaints essentially involve supervisory violations, and, therefore, consolidation of the two Complaints is appropriate. In addition, with regard to the CRD Complaint, the Respondent Firm seeks to sever the cause of action against the Respondent Firm because it views the Respondent Firm's potential liability as secondary. The Respondent Firm argues that it can only be found liable of inadequate supervision if the Hearing Panel concludes that Respondent 2 conducted improper Web CRD searches. In effect, the Respondent Firm casts the cause of action against it as nothing more than a supervisory charge.

The Department disagrees with the Respondent Firm's characterization of the Complaints. The Department argues that the CRD Complaint involves distinct charges and that three of the Respondents in the Omnibus Complaint are not named in the CRD Complaint. In addition, the Department argues that the Respondent Firm misconstrues the CRD Complaint when it contends that the Respondent Firm's liability rests on supervisory failures. Rather, the Department notes that the CRD Complaint alleges that the Respondent Firm —acting through

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Respondent 2—is primarily liable for the inappropriate Web CRD searches. Thus, if the claims against the Respondent Firm and Respondent 2 are severed, the Department will have to present the same evidence twice.

### **Discussion**

Rule 9214(b) provides that a party may move for consolidation of two or more disciplinary proceedings “if such consolidation would further the efficiency of the disciplinary process, if the subject complaints involve common questions of law or fact, or if one or more of the factors favoring consolidation set forth in [Rule 9214(a)] is present.” The factors set forth in Rule 9214(a) are: “(1) whether the same or similar evidence reasonably would be expected to be offered at each of the hearings; (2) whether the proposed consolidation would conserve the time and resources of the Parties; and (3) whether any unfair prejudice would be suffered by one or more Parties as a result of the consolidation.”

Here, the two cases do not share common questions of fact or law. The two cases will not require proof of the same facts. Based on the pleadings, the Department correctly notes in its Opposition that the cases involve different issues and parties. The second case centers on “a general breakdown of ... [the Respondent Firm]’s supervisory system, for which Respondent [3] was primarily responsible.”<sup>1</sup> On the other hand, Respondent 3 is not named as a respondent in the CRD Complaint, which centers on the much more discreet issue of the alleged improper use of Web CRD and the false certification that the Respondent Firm and Respondent 2 had obtained the required consents before conducting the searches. From the pleadings, there appears to be

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<sup>1</sup> Omnibus Complaint ¶ 5.

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little likelihood that the same evidence would be presented at both hearings. Thus, consolidation of the two cases would likely not lead to a significant conservation of time and resources.

Likewise, severance of the claims against the Respondent Firm and Respondent 2 in the CRD Complaint will not result in a conservation of time and resources. Indeed, the opposite is more likely. Under the pleadings, the Department alleges that the Respondent Firm is primarily liable for the alleged violations. Accordingly, if the claims are severed, the Department would be required to present the same evidence in each hearing. Accordingly, severance of the Respondents would not conserve resources.

For the foregoing reasons, the Respondent Firm's motions for consolidation and severance are denied.

**IT IS SO ORDERED.**

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Linda D. Fienberg  
Chief Hearing Officer

September 14, 2006