

This Order has been published by the NASDR Office of Hearing Officers and should be cited as OHO Order 00-23 (C3A990035).

The Department of Enforcement filed a statement in support of the notice of consolidation on July 20, 2000. Respondents filed a joint opposition to the notice of consolidation on August 2, 2000.

A. Nature of the Proceedings

The joint four-count Complaint contains allegations concerning Respondents _____, _____, and _____ participation in the _____, _____ (“____”) securities offering. Counts one and two contain allegations against Respondent _____, and counts three and four contain allegations against Respondents _____ and _____.

During the relevant period from September 1996 through February 1997, Respondent _____ controlled _____, a limited liability company, and was associated with _____ as a registered representative. Respondent _____ was associated with _____ as its owner and president.

Specifically, count one alleges that Respondent _____ violated SEC Rule 10b-9 and Conduct Rule 2110 by representing that the _____ offering was subject to a minimum sales contingency, while failing to conform the conduct of the offering to that representation.

Count two alleges that Respondent _____ violated SEC Rule 10b-5 and Conduct Rule 2120 because the offering materials for the _____ offering were materially misleading, particularly with respect to the use of the proceeds of the offering. The Complaint alleges that _____, through various transactions, dedicated approximately \$470,000 of the \$600,000 in proceeds to the operations of _____; the offering materials, however, did not disclose the possibility that _____ would contribute the proceeds of the offering to _____. Respondent _____ solicited purchases of the _____ securities in his capacity as a controlling person of _____.

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Count three alleges that Respondents _____ and _____ violated Conduct Rules 3010 and 2110 by failing to supervise the activities of Respondent _____. Specifically, the Complaint alleges that Respondent _____'s activities in soliciting purchasers for the _____ securities were within the regular course and scope of his employment with _____ because the _____ securities were offered as part of a planned business arrangement between _____ and _____, and the offering constituted the primary activity of Respondent _____ at _____.¹ Accordingly, count three alleges that _____ and _____ failed to supervise the activities of Respondent _____ in a manner that was reasonably designed to achieve compliance with SEC Rules 10b-9, 10b-5, and Conduct Rules 2120 and 2110.

Count four alleges that Respondents _____ and _____ violated Conduct Rule 2110 by accepting and using the proceeds that had been received from investors in a manner that was inconsistent with the representations that had been made in the _____ offering materials.

B. Legal Standard and Discussion

1. Rule 9214

Code of Procedure Rule 9214 authorizes the Chief Hearing Officer to consolidate two or more disciplinary proceedings “where such consolidation would further the efficiency of the disciplinary process, and where the subject complaints involve common

questions of law or fact”

¹ _____ did not offer the _____ securities, and _____ did not record the transactions on its books and records. Accordingly, the Complaint does not allege that Respondent _____ violated SEC Rules 10b-9, 10b-5 and Conduct Rule 2120.

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Rule 9214 sets forth various factors to be considered in determining whether to consolidate disciplinary proceedings: (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.

2. Respondents' Opposition

In an August 2, 2000 opposition to the notice of consolidation, Respondents argued that consolidation was not appropriate because: (1) different evidence would be offered as to the Respondents, (2) time and resources of the Parties would not be conserved, and (3) unfair prejudice would be suffered by the Respondents.

Respondents argued that Respondent _____'s disciplinary proceeding would evaluate whether Respondent _____ made misrepresentations in the ___ offering. On the other hand, the disciplinary proceeding against Respondents _____ and _____ would evaluate the internal procedures of _____, specifically whether Respondent _____ was properly supervised and whether _____ acted contrary to standards of just and equitable principles of trade when it accepted a post offering subordinated loan from ____.

Accordingly, Respondents argued that the issues of whether Respondent _____ made misrepresentations to the ___ investors or whether he acted consistently with the offering materials were only marginally relevant in the case against Respondents _____ and _____.

3. Reasons Supporting Consolidation

The Chief Hearing Officer finds that there is clearly an overlap of the evidence that will be heard on counts one and two alleged against Respondent _____ and counts three and four alleged against Respondents _____ and _____.

Evidence regarding whether Respondent _____ violated SEC Rules 10b-9 and 10b-5 and Conduct Rules 2110 and 2120 as alleged in count one of the Complaint will be relevant in determining whether Respondents _____ and _____ provided effective supervision of Respondent _____ to assure his compliance with SEC Rules 10b-9 and 10b-5 and Conduct Rules 2110 and 2120 as alleged in count three of the Complaint. Evidence about the information in the ___ offering materials and how the proceeds of the offering were ultimately used is needed both to determine (i) whether Respondent _____ violated SEC Rule 10b-5 and Conduct Rule 2120 because the offering materials were materially misleading, particularly with respect to the use of the proceeds of the offering, as alleged in count two of the Complaint, and (ii) whether Respondents _____ and _____ violated Conduct Rule 2110 by accepting and using the proceeds in a manner inconsistent with the representations made in the ___ offering materials as alleged in count four of the Complaint.

Because of these common issues of fact, the Chief Hearing Officer determines that the time and resources of the Parties would be conserved if the common facts were presented in one proceeding.

In addition, Respondents provided no evidence to support the statement that the Parties would be prejudiced by the consolidation.

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Therefore, the Chief Hearing Officer finds that consolidation (i) would result in a more efficient use of the limited time and resources of all the Parties and the Office of Hearing Officers; (ii) would avoid possible inconsistent rulings on common issues of fact; and (iii) would not result in prejudice to the Parties.

C. Consolidation Order

Accordingly, for the reasons set forth above, the Department of Enforcement v. _____ and _____, Disciplinary Proceeding No. C3A990035, and Department of Enforcement v. _____, Disciplinary Proceeding No. C3A000012, are consolidated under Disciplinary Proceeding No. C3A990035.

Dated: Washington, DC
August 22, 2000

Linda D. Fienberg
Chief Hearing Officer