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NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. Respondents.	Disciplinary Proceeding No. CAF000045 Hearing Officer—Andrew H. Perkins

ORDER DENYING COMPLAINANT'S
MOTION TO STRIKE AFFIRMATIVE DEFENSES

The Department of Enforcement ("Enforcement") moved to strike certain of the Respondents' affirmative defenses. For the reasons set forth below, Enforcement's motion is denied.

I. Introduction

On December 27, 2000, Enforcement filed a motion requesting the Hearing Officer to strike two of the Respondents' affirmative defenses contained in their Answers on the grounds that the affirmative defenses are insufficient as a matter of law. The two affirmative defenses are (1) that the

causes of action contained in the Complaint are barred by the statute of limitations in 28 U.S.C. § 2462 and (2) that NASD Conduct Rule 2110 is void for vagueness when not linked to some other specific and substantive violation. In moving to strike these defenses, Enforcement relies on several Office of Hearing Officers' rulings issued before the NASD Code of Procedure was amended in September 2000 to specifically provide that Enforcement may challenge the legal sufficiency of a respondent's defenses through a motion for summary disposition. The Respondents assert that the amendment to the Code precludes Enforcement from using a motion to strike their affirmative defenses.

II. Analysis

A. Pre-Amendment Legal Standard for Motions to Strike Affirmative Defenses

In several cases before the NASD amended the Code in September 2000, the Office of Hearing Officers issued rulings striking affirmative defenses where they appeared from the pleadings to be legally insufficient. *See, e.g.*, *OHO Order 99-10*, No. C8A990015 (OHO June 7, 1999) (H.O. Perkins) <http://www.nasdr.com/pdf-text/99_10oho.txt>. Although the Code did not expressly recognize such motions,[1] in granting them the Office of Hearing Officers relied on the broad authority granted Hearing Officers under Rule 9235 to "do all things necessary and appropriate to discharge his or her duties." Thus, guided by the standard governing motions to strike insufficient defenses under Fed.

[1] Rule 9136(e) does provide for the striking of "scandalous or impertinent" matter from any filing. However, unlike Fed. R. Civ. P. 12(f), Rule 9136(e) does not expressly permit an adjudicator to strike any "insufficient defense."

R. Civ. P. 12(f), the Office of Hearing Officers held that Enforcement could move to strike plainly insufficient affirmative defenses to avoid undue prejudice and delay.[2]

B. The September 2000 Amendment

In December 1999, the NASD proposed a number of changes to the NASD Code of Procedure.[3] Among those was an amendment to clarify any latent ambiguity regarding the Hearing Officer's authority and the procedure for striking insufficient defenses. Principally, the NASD sought to amend Rule 9264, governing motions for summary disposition, which restricted the parties from filing motions to eliminate issues that do not involve entire "causes of actions." The NASD proposed that Rule 9264 be amended to track the language in the Federal Rules of Civil Procedure.

On August 1, 2000, the Securities and Exchange Commission approved the NASD's proposed amendment. The NASD thereafter amended Rule 9264(a) effective September 18, 2000, as follows:

> After a Respondent's answer has been filed and Documents have been made available to that Respondent for inspection and copying pursuant to Rule 9251, the Respondent or the Department of Enforcement . . . may make a motion for summary disposition of . . . <u>any defense raised in a Respondent's answer</u>.

NASD Code of Procedure Rule 9264(a) (emphasis added). Thus, while the Code now recognizes that occasions might arise where an affirmative defense can be resolved as a matter of law before a hearing

[2] The Office of Hearing Officers also recognized, however, that the federal courts disfavor motions to strike affirmative defenses because they are often filed as a dilatory tactic and that it is the federal courts' generally favored policy to treat pleadings liberally so that the parties have the opportunity to be heard on their contentions. *See, e.g., New York v. Almy Brothers, Inc.*, 971 F. Supp. 69, 72 (N.D.N.Y. 1997).

[3] *See* Order Approving a Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Amendments to the Code of Procedure and Other Provisions, Exchange Act Release No. 43,102, 2000 SEC LEXIS 1584 (Aug. 1, 2000).

on the merits, it specifically has not provided for affirmative defenses to be resolved by motions to strike the pleadings. The amendment to the Code precludes Enforcement from using an alternative procedure to challenge respondents' affirmative defenses. Accordingly, to grant Enforcement's motion it must be capable of being treated as a motion for summary disposition.

Rule 9264, however, restricts the timing of motions for summary disposition until after Enforcement has completed its document disclosure under Rule 9251, which Enforcement has not done in this case. Implicitly, the purpose of this limitation is to ensure that the legal sufficiency of a cause of action or defense only be determined after the respondent has had the opportunity to review and analyze the documents Enforcement produced that underlie the proceeding. Thus, Enforcement's motion is premature and cannot be treated as a motion for summary disposition.

For the foregoing reasons, Enforcement's motion to strike is denied. This Order, however, does not preclude Enforcement from renewing its request as a timely summary disposition motion.

SO ORDERED.

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Andrew H. Perkins
Hearing Officer

January 26, 2001