

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 03-06 (C3B020015).

I. Background

The Department filed the Complaint against the Respondents on August 9, 2002, charging the Respondents, in general, with violations of NASD Conduct Rules governing books and records, net capital, and advertising. The Respondents answered the Complaint on September 17, 2002, by letter sent to counsel for the Department. On October 10, 2002, the Hearing Officer conducted an Initial Pre-Hearing Conference, at which the Department objected to the form of Respondents' Answer. The Hearing Officer directed _____ ("DFS") to file an Amended Answer, which it did on November 15, 2002.

II. Discussion

Code of Procedure Rule 9264(e) provides that the Hearing Panel "may grant [a] motion for summary disposition if there is no genuine issue with regard to any material fact and the [p]arty that files the motion is entitled to summary disposition as a matter of law." This is the identical standard as that under Rule 56(c) of the Federal Rules of Civil Procedure governing summary judgments.

It is well established that the moving party bears the initial burden of showing "the absence of a genuine issue of material fact."¹ The substantive law governing the case will identify those facts that are material and "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."²

If the moving party meets that initial burden, the opposing party must "do more than simply show that there is some metaphysical doubt as to the material facts," but

¹ *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

² *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

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must come forward with specific facts “showing that there is a genuine issue for trial.”³

Absent such a showing, summary judgment is appropriate since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.⁴

Here, there is no genuine issue for hearing on the issue of liability under the First and Second Causes of Complaint. In both the Answer and Amended Answer, the Respondents admit that they committed the alleged violations. The First Cause of Complaint alleges that DFS, acting through _____, entered into a stock redemption agreement with two former shareholders to redeem their shares of DFS Preferred Stock, Series A, and that DFS made monthly payments to the former stockholders from its operating account. The Complaint further alleges that DFS failed to record this liability on its books, causing DFS to have inaccurate books and records and inaccurate net capital computations. In the Answer, the Respondents state: “The allegations in this Cause are true. The stock redemption agreement was intended to be a personal agreement between _____ and the shareholders. Through an oversight, the agreement was made between [DFS] and the shareholders. We did not realize our net capital and other records were being affected.” In the Amended Answer, the Respondents more specifically admit to the violations by stating: “_____ agrees that such actions constitute violations of SEC rules 17a-3 and 17a-4 by DFS and violations of NASD Conduct Rules 3110 and 2110.”

The Second Cause of Complaint alleges that DFS, acting through _____ in his capacity as a financial principal, failed to comply with SEC Rule 15c3-1 by conducting

³ *Matsushita Elec. Indus. Corp., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

⁴ *Celotex*, 477 U.S. at 323.

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business when it had inadequate net capital. As to this Cause, the Respondents stated in their Answer: "Again, technically speaking, it is a violation, however, we feel there are mitigating circumstances to both the first and second complaints." In the Amended Answer the Respondents reiterate that DFS failed to maintain adequate net capital, but stress that the violation was unintentional. DFS argues that the violation was caused by the mistake of the firm DFS hired to provide it administrative support, including "correct computations regarding trial balances, net capital and other books and records."

Importantly, in their Opposition, the Respondents do not contest the truth of the allegations in the First and Second Causes of Complaint. Rather, they argue that it would be unfair to use the admissions in their Answers against them because they understood their Answers to be part of settlement negotiations. On that basis, the Respondents urge that the admissions are not admissible. The Respondents cite no authority for the proposition that a party can in this way insulate his answer from consideration, and the Hearing Panel knows of no such principle. The Hearing Panel further notes that at no time did the Respondents seek to amend or "correct" their Answers. Under these circumstances, there is no ground for requesting the Hearing Panel to refuse to take the Respondents' admissions into consideration when determining if there is a genuine issue of fact in dispute as to the Respondents' liability under the First and Second Causes of Complaint.

Moreover, the Hearing Panel notes that the Respondents have not contested the Department's Statement of Undisputed Facts. Accordingly, the unambiguous facts in the

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Department's Statement must be taken as admitted, independently of the admissions in the Respondents' Answers.⁵ The Order Following Initial Pre-Hearing Conference dated October 11, 2002, states: "All material facts set forth in the moving party's statement will be deemed admitted unless controverted by the statement of the opposing party."

The Fourth Cause of Complaint does not present similarly unambiguous facts and admissions. The Third through the Eighth Causes of Complaint all concern the same alleged advertising violations. The Department argues that the Respondents should be deemed to have admitted all of the allegations in the Fourth Cause of Complaint because their Answers did not specifically deny the allegations, as required by Rule 9215(b).⁶ However, in this case, holding *pro se* Respondents to such a rigid standard would, in the opinion of the Hearing Panel, be too severe.⁷ Moreover, many of the allegations in the last six Causes of Complaint are intertwined, and the Respondents have denied a portion of them. Under these circumstances, the Hearing Panel denies the Department's Motion as to the Fourth Cause of Complaint.

III. Conclusion

The Department's Motion is granted as to the First and Second Causes of Complaint, and denied as to the Fourth Cause of Complaint. The Respondents are found liable for the violations alleged in the first two causes. This Order shall not preclude,

⁵ See, *cf.* *Matsushita*, 475 U.S. at 586-87.

⁶ Rule 9215(b) provides, in part, that "[a]ny allegation not denied in whole or in part shall be deemed admitted." (Emphasis added.)

⁷ The Respondents were not represented at the time they filed the Answers.

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however, the Respondents from introducing evidence at the hearing on the issue of sanctions, including evidence to establish relevant mitigating factors.

IT IS SO ORDERED.

Andrew H. Perkins
Hearing Officer
For the Hearing Panel

April 4, 2003