

This order has been published by the NASDR Office of the Hearing Officers and should be cited as OHO Order 97-17 (CAF970001).

**NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,	:	
	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. CAF 970001
v.	:	
	:	
	:	Hearing Officer - SW
	:	
	:	
Respondent.	:	

**ORDER REGARDING MOTION
FOR JUDGMENT ON THE PLEADINGS**

On December 10, 1997, Respondent filed a Motion for Judgment on the Pleadings.¹ On December 19, 1997, the Department of Enforcement (“Enforcement”) filed an Opposition to the Motion for Judgment on the Pleadings. The Motion for Judgment on the Pleadings is a motion for summary disposition under Code of Procedure Rule 9264. Pursuant to Code of Procedure Rule 9264(d), it is the Hearing Panel, not the Hearing Officer, that must act on a motion for summary disposition.

The Hearing Panel has carefully reviewed the Motion for Judgment on the Pleadings and Enforcement’s Opposition to the Motion for Judgment on the Pleadings with the attached memorandum. Respondent’s argument is based on 28 U.S.C. § 2462 (“§ 2462”), a federal five-year statute of limitations applicable to judicial and administrative governmental proceedings brought for the enforcement of any civil fine, penalty, or forfeiture. In 3M Co. v. Browner, 17 F.3d 1453 (D.C. Cir. 1994), the United States Court of Appeals for the District of Columbia Circuit reversed the holding of an Administrative Law Judge for the Environmental Protection

¹ On December 10, 1997, the Respondent also filed an Opposition to Enforcement’s Motion to Strike the Respondent’s Affirmative Defenses, on which the Hearing Officer issued a separate order.

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Agency (“EPA”) that §2462 was inapplicable to an EPA proceeding on the ground that §2462 only applied to judicial proceedings. The court in the 3M case held that an agency adjudication of civil penalties was a proceeding within the definition of §2462.

Respondent specifically relies on Johnson v. SEC, 87 F.3d 484 (D.C. Cir. 1996), where the United States Court of Appeals for the District of Columbia Circuit, applying its reasoning in 3M, held that the five year statute of limitations of §2462 applied to administrative enforcement proceedings of the Securities and Exchange Commission (“SEC”). The Respondent takes the position that an NASD Regulation disciplinary proceeding, which is modeled in part on the Administrative Procedure Act,² is substantially identical to an SEC proceeding, and, therefore, should be included within the meaning of proceeding for purposes of §2462.

Subsequent to the 1996 Johnson decision, the SEC considered the applicability of §2462 to disciplinary proceedings initiated by self-regulatory organizations. The SEC unequivocally held that the five year limitation period of §2462 does not apply to disciplinary proceedings initiated by self-regulatory organizations, such as the NASD. The SEC, among other things, observed that applying a statute of limitations to a self-regulatory organization would impair the organization’s statutory obligation and duty to protect the public and discipline its members. See In re the Application of Henry James Faragalli, Jr., Securities Exchange Act Release No. 37991, 63 SEC Docket 651, 1996 SEC LEXIS 3263, at *36 (Nov. 26, 1996) and In re Larry Ira Klein, Securities Exchange Act Release No. 37835, 1996 SEC LEXIS 2922 (Oct. 17, 1996). In Respondent’s Motion for Judgment on the Pleadings, the Respondent failed to cite or acknowledge the Faragalli or Klein cases.

² See Exchange Act Release No. 38545, 1997 SEC LEXIS 959, at *20 (April 24, 1997).

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The Office of Hearing Officers is subject to the precedents of the National Business Conduct Committee, the SEC, and the federal courts. Since the SEC has ruled definitively on this issue, the Hearing Panel denies Respondent's motion for summary disposition.

SO ORDERED.

Hearing Panel

By: _____
Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
December 26, 1997