

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C3A000056
v.	:	
	:	Hearing Officer - DMF
	:	
	:	
	:	
Respondent.	:	

**ORDER DENYING MOTION TO DISMISS, IN PART,
DEFERRING DECISION ON MOTION, IN PART, AND
DIRECTING ENFORCEMENT TO SUPPLEMENT ITS OPPOSITION**

On January 4, 2001, the Department of Enforcement filed a Complaint against respondent _____ and another respondent. The proceedings were subsequently severed, pursuant to Rule 9214, and this proceeding continued as to _____ only. On March 20, 2001, Enforcement filed an Amended Complaint, which included only the charges against _____. The Amended Complaint charges that _____ participated in two private securities transactions in violation of Rules 3040 and 2110, and, without notifying the NASD member with which he was associated, opened securities accounts at another firm in violation of Rules 3050 and 2110.

On March 30, 2001, _____ filed a motion to dismiss the Complaint, arguing, first, that both charges are barred by the five year limitations period set forth in 28 U.S.C. §2462 and, second, that the NASD's delay in filing the Complaint makes this proceeding "inherently unfair," under the analysis

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applied by the SEC in Jeffrey Ainley Hayden, Exchange Act. Rel. No. 42772, 2000 SEC LEXIS 946 (May 11, 2000).

On April 12, 2001, Enforcement filed an opposition to the motion. Enforcement explained that its charges are based on private securities transactions in August 1994 and June 1995, and on securities accounts opened in November 1993 and August 1995. Enforcement did not explain the delay between those activities and the filing of the Complaint in January 2001. Instead, Enforcement argued, first, that the statute of limitations that _____ relies upon does not apply to NASD proceedings, and, second, that _____ has failed to establish a sufficient factual basis to support dismissal under Hayden. On April 16, 2001, _____ filed a reply memorandum in which he argued that Enforcement's delay in filing charges in this case is similar to the delay that led the SEC to dismiss Hayden, and that if Enforcement knows of facts that would explain the delay, it should be required to come forward with them.¹

Discussion

As Enforcement points out, the Code of Procedure does not expressly permit a "motion to dismiss"; therefore, the Hearing Officer will consider _____'s motion under Rule 9264, which authorizes motions for summary disposition. A summary disposition motion may be granted "if there is no genuine issue with regard to any material fact and the Party filing the motion is entitled to summary disposition as a matter of law." The Hearing Officer has authority to deny or defer decision on any summary disposition motion. The Hearing Officer may grant a motion "with respect to questions of jurisdiction," but only the Hearing Panel may grant summary disposition on other issues.

¹ Enforcement filed a motion to strike _____'s reply on the ground that he did not obtain permission to file it, as required by Rule 9146(h). _____ correctly responded, however, that the Hearing Officer gave _____ permission to file a reply during a pre-hearing conference on April 5. Therefore, Enforcement's motion to strike is denied.

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_____’s motion is denied insofar as he relies on the limitations period in 28 U.S.C. §2462.

That five year limitation period applies to “an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise” The proceedings covered by the limitation are more specifically defined in 28 U.S.C. §2461 as involving “a civil fine, penalty or pecuniary forfeiture ... prescribed for the violation of an Act of Congress” It is well established that the NASD is not an agency of the government; that NASD disciplinary proceedings do not involve penalties “prescribed for the violation of an Act of Congress”; and, accordingly, that the limitations period in 28 U.S.C. §2462 does not apply to NASD proceedings. See William D. Hirsh, Exchange Act Rel. No. 43691, 2000 SEC LEXIS 2703 at *19-20 n.11 (Dec. 8, 2000) (citing cases).

_____’s Hayden argument is difficult to resolve on the present record. In Hayden, the misconduct occurred from 1982 to 1990. The New York Stock Exchange “was informed about significant misconduct by Hayden through a referral in 1991 to its Division of Enforcement of a ‘voluminous’ sales practice examination report,” but the NYSE did not begin its investigation until 1993 and did not bring charges against Hayden until 1996, “approximately fourteen years after the first act of misconduct and over six years after the last incident.” Citing these time periods, the SEC ordered the proceedings dismissed because “the delay in the underlying proceedings was inherently unfair.” The SEC did not explain, however, the relative weight it gave to the various time periods in reaching its ultimate conclusion that the delay was unfair.

Subsequently, the SEC considered a Hayden argument in Hirsh. The misconduct in Hirsh occurred from 1989 through December 1990, but the NYSE did not file charges until November 1998, nearly eight years after the misconduct ended. In refusing to dismiss the charges, in spite of this delay, the SEC noted that in Hayden the charges were brought 14 years after the misconduct began, six years

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after it ended, and five years after the NYSE was informed about significant misconduct by Hayden.

The SEC concluded, “We do not believe that the factors discussed in Hayden necessarily require the dismissal of the charges [against Hirsh]. Once the Exchange was notified of [an] arbitration award [against Hirsh] only 20 months elapsed before the charges were filed.” 2000 SEC LEXIS 2703 at *6-14, 18-20.

In this case, there appears to be no dispute that the alleged misconduct took place in November 1993, August 1994, June 1995 and August 1995. The Complaint was filed in January 2001, a bit more than seven years after the first alleged misconduct and approximately five and a half years after the last. These periods are somewhat shorter than those in Hayden and Hirsh, but it is unclear from the SEC’s decisions whether this difference is determinative. There is no evidence in the record, at present, concerning when the NASD first learned of _____’s alleged misconduct, a fact that may be crucial in light of Hirsh. Indeed, Enforcement suggests: “There are many more facts critical to a Hayden analysis that have not been established, including, but not limited to, information pertaining to the timing of notice to NASD Regulation that ‘substantial misconduct’ may have occurred, the timing of various events that took place during the investigation and the scope and nature of the investigation.” But Enforcement offers none of these “critical” facts, even though, as _____ points out, they are known only to Enforcement.

The party seeking summary disposition has the initial burden of demonstrating the absence of any genuine issue of material fact, but once the moving party satisfies that burden, the opposing party may not simply rely on its pleadings, or on unsubstantiated contentions, but rather must come forward with “concrete evidence” showing the existence of a genuine, material factual dispute. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). In this case, there is no dispute that the underlying

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alleged misconduct took place between November 1993 and August 1995, but the Complaint was not filed until 2001. These facts, standing alone, may raise a colorable, though hardly compelling case under Hayden. The problem is that Enforcement has described categories of additional facts, known only to it, that Enforcement contends are critical under Hayden. In these unusual circumstances, the Hearing Officer concludes that Enforcement may not simply tantalize us with these categories of undisclosed facts, but must articulate specific facts, supported by concrete evidence.

Therefore, Enforcement shall supplement its opposition to the motion with evidence sufficient to establish the existence of genuine issues of material fact relevant to a Hayden analysis in this proceeding, including when the NASD had notice that _____ might have engaged in the misconduct charged and any other circumstances that Enforcement contends are relevant under Hayden. Enforcement shall file and serve its supplemental materials by May 10, 2001. _____ may file a supplemental memorandum in support of his motion by May 18, and Enforcement may file a response by May 25. A ruling on the Hayden portion of the motion is deferred pending those filings; the motion is denied insofar as _____ relies on 28 U.S.C. §2462.

SO ORDERED

David M. FitzGerald
Hearing Officer

Dated: Washington, DC
 April 20, 2001