

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 04-02 (DFC040005).

NASD OFFICE OF HEARING OFFICERS

NASD TREASURER,	:	
	:	
	:	Rule 9530 Suspension
Complainant,	:	Proceeding
	:	
v.	:	No. DFC040005
	:	
	:	
	:	Hearing Officer - SW
	:	
Respondent.	:	

**ORDER DENYING RESPONDENT'S
MOTION TO DISMISS THE SUSPENSION PROCEEDING**

On March 23, 2004, Respondent moved to dismiss this Rule 9530 suspension proceeding arguing that Respondent was wrongfully named in the underlying arbitration proceeding.

When Respondent became a member of NASD, it agreed to pay dues, assessments, and other charges in the manner and amount fixed pursuant to the NASD By-Laws, Schedules to the NASD By-Laws, and the Rules of NASD.

Under the authority of Article VI, Section 1 of the By-Laws of NASD, Rule 10333 was adopted.¹ Rule 10333 authorizes the NASD to assess member surcharge

¹ Article VI, Section 1 of the By-Laws of NASD, provides that NASD "shall fix and levy the amount of admission fees, dues, assessments, and other charges to be paid by members of the NASD."

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fees,² pre-hearing processing fees,³ and hearing processing fees against each member named as a party in an arbitration proceeding. Rule 10333 states only that the member be named a respondent in an arbitration proceeding.

There is no requirement that the party named be ultimately determined to be liable or even correctly named. In fact, Rule 10333 explicitly states that the process fees are non-refundable.⁴ In Notice to Members 98-1 (January 1998), the NASD explained that if a member concludes its involvement in a case through dismissal or settlement, the process fees that have accrued to the point of the dismissal nevertheless will be assessed.⁵

Accordingly, the Hearing Officer denies Respondent's motion to dismiss this proceeding on the ground that Respondent was wrongfully named in the underlying arbitration proceeding.⁶

² Rule 10333(a) states that "[e]ach member who is named as a party to an arbitration proceeding . . . shall be assessed a surcharge . . . when the Director of Arbitration perfects service of the claim naming the member on any party to the proceeding." Rule 10314(c)(1) provides that service is accomplished on the date of mailing either by first-class postage pre-paid, or by means of overnight mail service or, in the case of other means of service, on the date of delivery. A schedule in Rule 10333(a) lists the surcharge fees to be charged by NASD, which vary depending upon the amount at issue in the arbitration.

³ Rule 10333(b) states, "[e]ach member that is a party to an arbitration proceeding in which more than \$25,000 is in dispute will pay: (A) a non-refundable prehearing process fee of \$750, due at the time the parties are sent arbitrator lists . . .; and (B) a non-refundable hearing process fee, due when the parties are notified of the date and location of the first hearing session."

⁴ Rule 10333(a)(3) provides that the Director of Arbitration will refund the surcharge paid by member in an arbitration filed by a customer if the arbitration panel: (A) dismisses all of the customer's claims against the member or associated person; and (B) allocates all forum fees assessed pursuant to Rule 10332(c) against the customer. The Director may also refund or cancel the member surcharge in extraordinary circumstances.

⁵ See Notice to Members 98-1 (January 1998) at <http://www.nasdr.com/pdf-text/9801ntm.pdf>, 1998 NASD LEXIS 2 (Jan. 1998).

⁶ Respondent's argument that it should be dismissed from the underlying arbitration proceeding should be addressed to the arbitration panel.

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The Department of Enforcement on behalf of NASD Treasurer will have the opportunity to endeavor to prove that that the fees at issue in this proceeding were appropriately assessed in compliance with NASD Rule 10333. The Hearing Officer in determining whether the fees have been assessed in compliance with Rule 10333 will not consider whether Respondent was inappropriately named in the underlying arbitration proceeding.

The Hearing scheduled for April 6, 2004 will proceed.

SO ORDERED.

Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
March 29, 2004