

**NASD OFFICE OF HEARING OFFICERS**

NASD TREASURER,

Complainant,

v.

Respondent.

Rule 9530 Suspension Proceeding  
No. DFC020014

Hearing Officer—Andrew H. Perkins

October 3, 2002

**Member firm failed to pay fees assessed in connection with an NASD arbitration. Respondent's registration suspended, pursuant to Rule 9533, until Respondent pays the fees, arranges for payment, or files a bankruptcy petition.**

**Appearances**

William Brice La Hue, Esq., for the NASD Treasurer.

\_\_\_\_\_, for \_\_\_\_\_, Incorporated.<sup>1</sup>

**DECISION**

**I. Introduction**

By letter dated June 18, 2002, ("Suspension Notice"), the NASD Finance Department ("Finance") notified \_\_\_\_\_, Incorporated (the "Respondent") that, pursuant to Procedural Rule 9531, its membership would be suspended, effective 15 days

<sup>1</sup> \_\_\_\_\_ is the Respondent's President. Accordingly, pursuant to NASD Code of Procedure Rule 9141(b), the Hearing Officer permitted \_\_\_\_\_ to represent the Respondent in this proceeding.

**This Decision has been published by NASD's Office of Hearing Officers and should be cited as OHO Redacted Decision DFC020014.**

after the date of service of the Suspension Notice, unless it paid \$1,348 for past due fees. NASD had assessed the fees against the Respondent pursuant to Code of Arbitration Procedure Rule 10333 in connection with NASD Arbitration Case No. \_\_\_\_\_, which named the Respondent as a party. On June 26, 2002, the Respondent filed a request for a hearing on this matter with the Office of Hearing Officers. The Office of Hearing Officers granted the request and stayed the effective date of the notice pursuant to NASD Procedural Rule 9532(a).

In essence, the Respondent requested a hearing to vacate or modify the fee assessment because the arbitration claimant had withdrawn the claim against the Respondent. The Respondent did not raise any of the permitted defenses enumerated in the Suspension Notice.<sup>2</sup> Accordingly, at a Pre-Hearing Conference held on July 29, 2002, the Hearing Officer requested that the Respondent clarify the basis for its request that the Suspension Notice be set aside. During the Pre-Hearing Conference \_\_\_\_\_ stated that the Respondent was not conducting business and that it did not have the ability to pay the subject fees.<sup>3</sup> The Hearing Officer therefore set the case for hearing to determine the Respondent's ability to pay the disputed fees.

---

<sup>2</sup> The Suspension Notice (CX-7) states that the only available defenses are:

1. You have made full payment of the arbitration fees owed;
2. NASD Finance Department has agreed to installment payments of the arbitration fees owed;
3. A fee award has been modified or vacated by a court, or such action is pending in a court;
4. You have a bankruptcy petition pending in U.S. Bankruptcy Court pursuant to Title 11 of the United States Code (the Federal Bankruptcy Code), or the fee award has been discharged by a U.S. Bankruptcy Court.

<sup>3</sup> Pre-Hearing Transcript at 13-17. The Respondent did not contest that the unpaid fee balance was \$1,348.

**This Decision has been published by NASD's Office of Hearing Officers and should be cited as OHO Redacted Decision DFC020014.**

The Hearing Officer conducted a telephonic hearing on September 17, 2002. Finance offered eight exhibits, which the Hearing Officer admitted without objection. The Respondent testified on his own behalf and offered one exhibit—a financial disclosure statement—which was admitted.<sup>4</sup>

## **II. Findings of Fact**

### **A. Arbitration Fees**

The Respondent has been an NASD member since June 1987.<sup>5</sup> In July 2001, the Respondent was named as one of the respondents in NASD Arbitration Case No. \_\_\_\_\_. Consequently, pursuant to Rule 10333, NASD assessed the Respondent a member surcharge fee on July 29, 2001, and a pre-hearing processing fee on November 8, 2001, before the arbitration claimant withdrew his claim against the Respondent. Those fees totaled \$1,800.<sup>6</sup> On April 19, 2002, NASD deducted \$452 from the Respondent's Central Registration Depository account,<sup>7</sup> leaving a balance due of \$1,348.<sup>8</sup> The Respondent has not paid the balance due.

### **B. Respondent's Financial Condition**

The Respondent claims that it is unable to pay the balance due NASD. Accordingly, the Hearing Officer ordered the Respondent to file, on or before September 6, 2002, a Statement of Financial Condition,<sup>9</sup> and all documents the Respondent intended

---

<sup>4</sup> "CX- \_\_" refers to Finance's exhibits; "RX-1" refers to the Respondent's exhibit; and "Tr." refers to the pages of the hearing transcript.

<sup>5</sup> CX-1, at 2.

<sup>6</sup> CX-7, at 2.

<sup>7</sup> Tr. at 40.

<sup>8</sup> *Id.*

<sup>9</sup> The Hearing Officer ordered the Respondent to complete the standard disclosure used by NASD where a respondent raises an inability to pay defense.

**This Decision has been published by NASD's Office of Hearing Officers and should be cited as OHO Redacted Decision DFC020014.**

to submit at the hearing in its defense.<sup>10</sup> On September 16, 2002, the Respondent filed its Statement of Financial Condition<sup>11</sup> without any supporting documentation, such as tax returns, financial statements, or bank records. At the hearing, \_\_\_\_\_ testified that neither he nor the Respondent had filed tax returns for the past three years due to their poor financial condition.<sup>12</sup>

According to the Statement of Financial Condition, the only asset the Respondent owns is a checking account with a balance of \$5,279.62. \_\_\_\_\_ testified that \$5,000 of that amount had come from a fee the Respondent earned in the last 45 to 75 days.<sup>13</sup> \_\_\_\_\_ testified that the Respondent had to retain these funds in its account to meet its net capital requirement.<sup>14</sup> The Statement of Financial Condition further shows that the Respondent earned \$141,298 in 2000 and \$2,710 in 2001.<sup>15</sup>

The Statement of Financial Condition contains no information regarding the Respondent's income and expenses since January 1, 2002. However, \_\_\_\_\_ testified that the Respondent did have limited income in 2002, most of which he withdrew to pay his personal expenses. For example, \_\_\_\_\_ testified that the Respondent earned a consulting fee in August 2002 for \$1,200, of which \_\_\_\_\_ paid himself \$1,080.<sup>16</sup> All

---

<sup>10</sup> Notice of Hearing and Pre-Hearing Order (Aug. 8, 2002).

<sup>11</sup> R-1.

<sup>12</sup> Tr. at 16.

<sup>13</sup> *Id.* at 21.

<sup>14</sup> *Id.*

<sup>15</sup> R-1, at 4.

<sup>16</sup> Tr. at 23-24.

told, \_\_\_\_\_ testified that he withdrew between \$15,000 and \$20,000 from the Respondent in 2002 to cover his personal living expenses.<sup>17</sup>

### **III. Discussion**

According to Rule 10332 of the NASD Code of Arbitration Procedure, the NASD has the authority to assess forum fees, counterclaim filing fees, and cross-claim filing fees against named parties to an arbitration. Rule 10333 authorizes the NASD to assess member surcharge fees,<sup>18</sup> pre-hearing processing fees,<sup>19</sup> and hearing processing fees against each member named as a party in an arbitration proceeding. Because the arbitration at issue named the Respondent as a party, NASD has authority to assess these arbitration fees against the Respondent in connection with that proceeding. Moreover, Rule 10333 states that the member surcharge fees and the process fees are non-refundable. In Notice to Members 98-1,<sup>20</sup> NASD explained that if a member concludes its involvement in a case through dismissal or settlement, NASD assesses the process fees that have accrued to the point of dismissal.

The Respondent does not contest that NASD correctly calculated the arbitration fees under Rule 10333. Rather, the Respondent contends that it is unable to pay the assessed fees, and it therefore should not be suspended.

---

<sup>17</sup> *Id.* at 37-38

<sup>18</sup> Rule 10333(a) states that “[e]ach member who is named as a party to an arbitration proceeding . . . shall be assessed a non-refundable surcharge . . . .” The 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.

<sup>19</sup> Rule 10333(d) states, “[e]ach member that is a party to an arbitration proceeding will pay a non-refundable process fee as set forth in the schedule below for each stage of a proceeding.” The schedule contained in Rule 10333(d) lists different pre-hearing processing fees and hearing processing fees, depending on the amount in dispute in the arbitration.

<sup>20</sup> 1998 NASD LEXIS 2 (Jan. 1998).

Respondents in Non-Summary Suspension Proceedings for failure to pay arbitration awards may assert certain limited defenses, including that of a *bona fide* inability to pay.<sup>21</sup> In such cases, respondents must bear the burden of establishing their *bona fide* inability to pay an arbitration award.<sup>22</sup> Respondents appropriately bear this burden because their ability to pay is a matter peculiarly within their knowledge.<sup>23</sup> When they raise the defense, NASD is entitled to make a searching inquiry into their assertions.<sup>24</sup>

The burden on a respondent claiming financial inability is heavy. To meet its burden, a respondent must show more than a current lack of funds on hand to pay the arbitration award in full. A respondent also must demonstrate it could not have paid all or a meaningful part of the award by: (1) reducing its expenses; (2) diverting funds from other expenditures; or (3) borrowing the funds.<sup>25</sup> Moreover, the defense may be rejected where the evidence shows that the respondent's lack of financial ability results from the

---

<sup>21</sup> See "Self-Regulatory Organizations; Order Granting Accelerated Approval to Proposed Rule Change," Exchange Act Release No. 40,026, 1998 SEC LEXIS 1154, at \*7, n.14 (May 26, 1998).

<sup>22</sup> See *Bruce M. Zipper*, Exchange Act Release No. 33,376, 51 S.E.C. 928, 1993 SEC LEXIS 3525, at \*8 (Dec. 23, 1993) ("Because the scope of his assets is peculiarly within Zipper's knowledge, we think Zipper should properly bear the burden of adducing evidence with respect to those assets.").

<sup>23</sup> *Id.*

<sup>24</sup> *Daniel Joseph Avant*, Exchange Act Release No. 36,423, 52 S.E.C. 442, 1995 SEC LEXIS 2816, at \*11 (Oct. 26, 1995); *Zipper*, 1993 SEC LEXIS 3525, at \*8.

<sup>25</sup> See *District Bus. Conduct Comm. v. Escalator Securities, Inc.*, No. C07930034, 1998 NASD Discip. LEXIS 21, at \*3 (NBCC Feb. 19, 1998) ("[T]he Firm must be required to demonstrate that the fine or award is so large in relation to its actual capital that it is unable to obtain the additional capital to pay the fine or award by, among other things, reducing expenses and salaries, raising capital, and/or borrowing money."); *District Bus. Conduct Comm. v. Miguel Angel Cruz*, No. C8A930048, 1997 NASD Discip. LEXIS 62, at \*106 (NBCC Oct. 31, 1997) (holding that Cruz could not rely on the inability to pay defense because he could have diverted funds from other unnecessary expenses, such as charitable contributions and a car lease, to pay the fine).

**This Decision has been published by NASD's Office of Hearing Officers and should be cited as OHO Redacted Decision DFC020014.**

respondent's voluntary asset allocation choices.<sup>26</sup> For example, NASD has held that a respondent who chose to pay debts to relatives rather than to the arbitration creditor failed to show a good faith inability to pay the award.<sup>27</sup> Similarly, a respondent who was not paying the award despite having a net worth over \$120,000 and who "had not shown that he is incapable of cutting expenses or raising additional capital" similarly failed to establish a good faith inability; his situation was more attributable to "his own asset-allocation choices than a genuine inability to pay."<sup>28</sup>

The Hearing Officer finds that these same principles apply where a respondent raises the defense of inability to pay in a Rule 9530 Suspension Proceeding for failure to pay arbitration fees assessed under Rule 10333. Applying these standards, the Hearing Officer finds that the Respondent failed to satisfy its burden of proof.

\_\_\_\_\_ testified that he withdrew between \$15,000 and \$20,000 from the Respondent in the year 2002 alone to pay his living expenses. While there is no question that \_\_\_\_\_'s personal financial condition is grave,<sup>29</sup> his personal expenses are not the Respondent's legitimate operating expenses. Rather, \_\_\_\_\_ has used his control status to divert corporate funds for his personal use. In other words, the Respondent elected to

---

<sup>26</sup> See *Department of Enforcement v. Michael A. Bronzino*, 1998 NASD Discip. LEXIS 54 (Hearing Panel, June 29, 1998); *Department of Enforcement v. Milton R. Barnes*, 1998 NASD Discip. LEXIS 55 (June 26, 1998) (NASD Board).

<sup>27</sup> *Bronzino*, 1998 NASD Discip. LEXIS 54.

<sup>28</sup> *Barnes*, 1998 NASD Discip. LEXIS 55, at \*13.

<sup>29</sup> \_\_\_\_\_ testified that over the last few years he had to sell his house and liquidate his other assets to pay his bills. (Tr. at 32-33.) He also testified that he had borrowed heavily. He claimed he owed \$150,000 to family members and friends, and that he had substantial bank loans and credit card debts. (*Id.*) \_\_\_\_\_ claimed that he had no income other than what little amounts he could pull out of the Respondent, and that he had less than \$1,000 to his name. (Tr. at 15-16.)

**This Decision has been published by NASD's Office of Hearing Officers and should be cited as OHO Redacted Decision DFC020014.**

pay \_\_\_\_\_ instead of satisfying the debt due NASD.<sup>30</sup> Accordingly, the Hearing Officer finds that the Respondent has failed to carry the burden of proving a *bona fide* inability to pay the arbitration fees due NASD.

#### **IV. Order**

It is hereby ordered, pursuant to Article VI, Section 3 of the NASD By-Laws and Rule 9530 *et seq.*, that Respondent's registration shall be suspended effective as of the date of the issuance of this Decision and that such suspension shall continue until the Respondent provides documentary evidence to the Office of Hearing Officers showing: (1) the Respondent has paid the fees in full; (2) the NASD Finance Department has agreed to an installment payment plan; or (3) the Respondent has filed a bankruptcy petition in a United States Bankruptcy Court (which petition has not been dismissed) or that the fees have been discharged by a United States Bankruptcy Court.<sup>31</sup>

**IT IS SO ORDERED.**

---

Andrew H. Perkins  
Hearing Officer

---

<sup>30</sup> \_\_\_\_\_ testified that the Respondent is a wholly owned subsidiary of \_\_\_\_\_, a holding company, and that he is its sole stockholder. (Tr. at 19, 29.)

<sup>31</sup> The Hearing Officer has considered all of the arguments of the parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.