

NASD OFFICE OF HEARING OFFICERS

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| DEPARTMENT OF ENFORCEMENT, | |
| Complainant | |
| v. | Disciplinary Proceeding No. C3A040045 |
| Respondent. | Hearing Officer – DMF |

**ORDER DENYING RESPONDENT'S MOTION FOR
SUMMARY DISPOSITION ON THE ISSUE OF RESTITUTION**

On July 1, 2005, Respondent filed a motion for partial summary disposition seeking a determination that restitution may not be ordered as a sanction in this proceeding. The Department of Enforcement filed its opposition on July 11.

The Complaint in this matter charges that Respondent made unsuitable recommendations to certain customers, in violation of Rules 2310 and 2110. The Complaint indicates that if Respondent is found to have committed the violations charged, Enforcement may urge the Hearing Panel to impose, in addition to other sanctions, an "order requiring Respondent to disgorge fully any and all ill-gotten gains and/or make full and complete restitution, together with interest."

Respondent contends (and Enforcement does not contest) that all of the customers identified in the Complaint have settled their private disputes with Respondent and have formally released all claims against him. Respondent argues that in light of the settlements and releases, requiring restitution in this proceeding would be inappropriate as a matter of law and of public policy, even if Respondent is found to have violated NASD's rules, as charged.

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In that regard, Respondent points to the portion of the NASD Sanction Guidelines discussing restitution, noting a footnote recognizing: "Other avenues, such as arbitration, are available to injured customers as a means to redress grievances." NASD Sanction Guidelines at 4 n. 3 (2005 ed.). And he cites a Hearing Panel decision in which the Panel "decline[d] to issue such an order because [the] customers have pending arbitrations against" the Respondent, noting the possibility of inconsistent results in the two proceedings. DOE v. Katsock, No. C9A020018, 2003 NASD Discip. LEXIS 39 (O.H.O. Sept. 4, 2003).

Respondent also argues that ordering restitution under these circumstances would be contrary to the well-established public policy favoring settlement of disputes. He contends that parties who enter into settlements do so on the understanding and with the belief that the settlement will finally resolve the controversy between them. He urges that if NASD can order restitution in a disciplinary proceeding notwithstanding the parties' settlements and the customers' releases, it will provide a disincentive for respondents to settle arbitration claims with customers.

In opposition, Enforcement argues that NASD Hearing Panels are empowered to order any fitting sanction when they find that a respondent has violated the securities laws or regulations or NASD rules. And they assert that the customers' pursuit of their private rights through arbitration does not limit NASD's authority in that regard, citing NASD's Code of Arbitration Procedure, as well as several Hearing Panel decisions ordering restitution to customers, but giving the respondent credit for amounts previously paid pursuant to arbitration awards or settlements.

To obtain summary disposition pursuant to Rule 9264, the moving party must establish not only the absence of any genuine issue of material fact, but that the party "is entitled to

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summary disposition as a matter of law.” The Sanction Guidelines instruct that sanctions are intended

to remediate misconduct by preventing the recurrence of misconduct, improving overall standards in the industry, and protecting the investing public. Toward this end, Adjudicators should design sanctions that are significant enough to prevent and deter future misconduct by a respondent, to deter others from engaging in similar misconduct, and to modify and improve business practices.

A Hearing Panel may order restitution “where necessary to remediate misconduct,” not in order to resolve private disputes between respondents and their customers. It is premature to determine whether restitution will be necessary to remediate any misconduct by Respondent, but Respondent has failed to establish that if the Panel should determine that such a sanction is necessary to accomplish NASD’s remedial goals in this case, it would be precluded from ordering it as a matter of law. Rather, this appears to be an issue that is committed to the sound discretion of the Panel, which, if and when the issue crystallizes, may or may not be persuaded by Respondent’s policy arguments against restitution.

The motion, therefore, is denied.

SO ORDERED.

David M. FitzGerald
Hearing Officer

Dated: August 5, 2005