

**FINANCIAL INDUSTRY REGULATORY AUTHORITY  
OFFICE OF HEARING OFFICERS**

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DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

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Disciplinary Proceeding  
No. 2005001798201

Hearing Officer – SW

**ORDER DENYING RESPONDENT'S  
MOTION FOR SUMMARY DISPOSITION**

On April 28, 2008, Respondent filed a motion for partial summary disposition (“Motion”) as to count one of the three-count Complaint, arguing that under the undisputed facts of this case, the promissory notes issued by Respondent do not qualify as securities under the *Reves* test as defined by the Supreme Court in *Reves v. Ernst & Young*, 494 U.S. 56 (1990). Respondent provided customer affidavits, which state that the customers intended to make personal loans to Respondent and were not persuaded or influenced to make the loans because of the conversion rights contained in the promissory notes.<sup>1</sup>

On May 19, 2008, the Department of Enforcement (“Enforcement”) filed an opposition to Respondent’s Motion. Enforcement provided evidence that at least one of the customers exercised the conversion right on the promissory notes and, accordingly, a reasonable person would have viewed the conversion feature as important. Enforcement also presented evidence that one of the promissory notes describes itself as a “convertible security.”

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<sup>1</sup> The promissory notes referenced a right to convert the note into interests in [], LLC, a Michigan limited liability company, which interests were labeled “member shares,” “membership units,” “founder shares” or “units.”

**This Order has been published by FINRA’s Office of Hearing Officers and should be cited as OHO Order 08-10 (2005001798201).**

On June 9, 2008, the Parties supplemented the Motion and the opposition thereto with oral argument to the Hearing Panel via a telephone conference call.

Code of Procedure Rule 9264(d) provides that the Hearing Panel “may grant [a] motion for summary disposition if there is no genuine issue with regard to any material fact and the Party that files the motion is entitled to summary disposition as a matter of law.”<sup>2</sup> Under the analogous federal court summary judgment procedure, it is clear that the moving party bears the initial burden of showing “the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

If the moving party meets its initial burden, the opposing party must come forward with specific facts “showing that there is a genuine issue for trial.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

At the same time, however, at the summary judgment stage, it is incumbent on the court to resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party. *Patrick v. LeFevre*, 745 F.2d 153, 160 (2d Cir. 1984).<sup>3</sup> A motion for summary judgment will not be granted if the trier of fact could resolve an outcome-determinative issue in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Respondent requested summary disposition and therefore bears the burden of demonstrating the absence of a genuine issue of material fact or law.<sup>4</sup>

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<sup>2</sup> See also *Dep’t of Enforcement v. Usher*, Complaint No. C3A980069, 2000 NASD Discip. LEXIS 5, at n.3 (NAC Apr. 18, 2000) (reiterating summary disposition standard).

<sup>3</sup> See also, e.g. *American Cas. Co. v. Nordic Leasing, Inc.*, 42 F.3d 725, 728 (2d Cir. 1994) (in determining whether summary judgment is appropriate, the court “must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor”) (quoting *Consarc Corp. v. Marine Midland Bank, N.A.*, 996 F.2d 568, 572 (2d Cir. 1993)).

<sup>4</sup> FINRA patterned Rule 9264 after Fed. R. Civ. P. 56; thus, it is appropriate to consider federal case law on this issue. *Dep’t of Enforcement v. U.S. Rica Financial, Inc.*, Complaint No. C01000003, 2003 NASD Discip. LEXIS 24, at \*12 & n.3 (NAC Sept. 9, 2003).

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The Hearing Panel has reviewed the pleadings, including the supporting declarations and exhibits, and concludes that Respondent has not met his burden of demonstrating the absence of genuine issues of material fact. There are genuine issues of material fact, which can only be resolved at a full evidentiary hearing. Accordingly, the moving party has not demonstrated that it is entitled to summary disposition as a matter of law as required under Rule 9264(e).

Respondent's Motion is therefore denied.

**SO ORDERED.**

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Sharon Witherspoon  
Hearing Officer

Dated: Washington, DC  
June 12, 2008