

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision DFC000003.

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

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|----------------------------|---|----------------------|
| _____                      | : |                      |
| DEPARTMENT OF ENFORCEMENT, | : |                      |
|                            | : |                      |
| Complainant,               | : | Rule 9530 Suspension |
|                            | : | Proceeding           |
|                            | : |                      |
| v.                         | : | No. DFC000003        |
|                            | : |                      |
|                            | : |                      |
|                            | : | <b>DECISION</b>      |
|                            | : |                      |
|                            | : | Hearing Officer - SW |
|                            | : |                      |
| Respondent.                | : | December 26, 2000    |
| _____                      | : |                      |

**Digest**

NASD Regulation, Inc. notified Respondent \_\_\_\_\_. (“Respondent” or the “Firm”) that its membership registration would be suspended, in accordance with Article VI, Section 3 of the NASD By-Laws and Rule 9530 et seq., for failing to pay certain fees. Although acknowledging its non-payment of the fees, the Firm contended that the fees were unfairly assessed against it and requested a hearing.

The Hearing Officer held that the fees levied in connection with several arbitration proceedings were assessed in accordance with the Rules of the Association and that Respondent failed to demonstrate a valid defense for its failure to pay the fees. Accordingly, the Hearing Officer held that the Firm’s membership should be suspended for its failure to pay the duly assessed fees. Pursuant to Rule

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9535, such suspension shall continue until the Firm provides documentary evidence to the Office of Hearing Officers that: (1) the Firm has made full payment of the fees; (2) the NASD Finance Department has agreed to installment payments of the fees owed, or (3) the Firm has filed a bankruptcy petition in a United States Bankruptcy Court or the fees are discharged by a United States Bankruptcy Court.

### **Appearances**

Adam Lipnick, Regional Attorney, New York, New York, for the Department of Enforcement.

\_\_\_\_\_, Esq., New York, New York, Counsel for \_\_\_\_\_.

### **Decision**

#### **Introduction**

The underlying facts are not in dispute.<sup>1</sup> In six letters, each dated August 21, 2000, NASD Regulation, Inc. (“NASDR”) notified Respondent that the Firm’s NASD registration would be suspended, in accordance with Article VI, Section 3 of the NASD By-Laws and Rule 9530 et seq., because of the Firm’s failure to pay certain arbitration fees incurred in connection with six NASD Arbitration Proceedings Nos. 98-01316, 98-02122, 98-02184, 98-02238, 98-02936, and 98-03314.<sup>2</sup> (CX-15 at ¶1). On August 29, 2000, Respondent requested a hearing pursuant to Rule 9532.

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<sup>1</sup> “CX” refers to the Department of Enforcement’s exhibits, with a page number or paragraph number as appropriate.

<sup>2</sup> Initially, there was a seventh letter from the NASDR concerning Respondent’s failure to pay arbitration fees in connection with Arbitration Proceeding No. 98-04174. However, prior to the Hearing, Respondent paid all of the fees assessed in connection with that proceeding. (CX-15 at ¶3).

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The Hearing Officer conducted a hearing via telephone on October 12, 2000.<sup>3</sup> The Department of Enforcement (“Enforcement”) offered 15 exhibits, including a joint stipulation of facts, and called one witness, \_\_\_\_\_, a staff attorney with NASD Dispute Resolution, Inc. (“Dispute Resolution”).<sup>4</sup> (Tr. pp. 11-12). Other than the joint stipulation of facts, Respondent presented no evidence or witnesses. (Tr. p. 36).

After reviewing the evidence and arguments presented, the Hearing Officer finds that the subject fees were assessed in accordance with the Rules of the Association, and that Respondent failed to demonstrate the existence of any valid defense for its failure to pay the fees. Accordingly, Respondent’s registration is hereby suspended until the Firm provides documentary evidence to the Office of Hearing Officers showing the existence of one or more events, as specified in this Decision, that would allow for termination of the suspension as provided in Rule 9535.

### **Facts**

Respondent is registered as a member of the NASD. (CX-15 at ¶1). There is no dispute that Respondent was “named” a party in the initial statements of claim in the six arbitration proceedings.

In Case No. 98-01316, Respondent was assessed a \$1,000 member surcharge fee, a \$600 pre-hearing process fee, and a \$1,500 hearing process fee. (CX-8; CX-15 at ¶7). The arbitration panel dismissed the Firm from the proceeding on September 10, 1999, after notice of the hearing date

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<sup>3</sup> “Tr. p. ” refers to the transcript of the October 12, 2000 Hearing.

<sup>4</sup> In 1998 and 1999 Dispute Resolution was a part of NASDR and was known as the Office of Dispute Resolution. On September 30, 1999, the Securities and Exchange Commission approved the creation of a separate dispute resolution subsidiary. See Notice to Members 99-100

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had been provided to the parties in June 1999. (Tr. pp. 17-18). The Firm paid the NASD \$2,803 leaving a balance owed of \$297. (CX-7; CX-15 at ¶7).

In Case No. 98-02122, Respondent was assessed a \$2,500 member surcharge fee, a \$600 pre-hearing process fee, and a \$4,500 hearing process fee. (CX-10; CX-15 at ¶8). This case settled on September 15, 1999 after the hearing commenced on September 14, 1999.<sup>5</sup> (CX-15 at ¶8). The Firm made a partial payment to the NASD of \$1,991 leaving a balance of \$5,609 owed. (CX-9; CX-15 at ¶8).

In Case No. 98-02184, Respondent was assessed a \$1,500 member surcharge fee, a \$600 pre-hearing process fee, and a \$2,500 hearing process fee. (CX-2; CX-15 at ¶5). The arbitration panel granted a motion to dismiss the Firm at the commencement of the hearing on September 22, 1999. (CX-15 at ¶5). The Firm has not paid the \$4,600 in fees. (CX-1).

In Case No. 98-02238, Respondent was assessed a \$1,500 member surcharge fee, a \$600 pre-hearing process fee, and a \$2,500 hearing process fee. (CX-5; CX-15 at ¶6). The arbitration panel dismissed the statement of claim in its entirety after a hearing. (CX-15 at ¶6). The Firm has not paid the \$4,600 in fees. (CX-4).

In Case No. 98-02936, Respondent was assessed a \$2,500 member surcharge fee, a \$600 pre-hearing process fee, and a \$4,500 hearing process fee. (CX-12; CX-15 at ¶9). The arbitration panel dismissed the Firm as a party to the arbitration on March 23, 2000 after notice of the hearing date was provided to the parties. (CX-15 at ¶9). The Firm has not paid the \$7,600 in fees. (CX-11).

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In Case No. 98-03314, Respondent was ultimately assessed a \$1,000 member surcharge fee, a \$600 pre-hearing process fee, and a \$1,500 hearing process fee. (CX-15 at ¶10). The case was settled on October 22, 1999 after notice of the hearing date was provided to the parties. (CX-15 at ¶10). The Firm has not paid the \$3,100 in fees. (CX-13).

In each of the proceedings, the Respondent or the entire statement of claim was eventually dismissed or the parties settled. The dismissals or settlements occurred after the arbitration panels were appointed and after notices of the hearing dates were sent to the parties. (Tr. pp. 23-24).

### **Discussion**

Rule 10333 of the NASD Code of Arbitration Procedure<sup>6</sup> provides that when a member is named as a party in an arbitration proceeding, whether in the initial claim, a counter-claim, a cross-claim or a third party claim, a member surcharge fee based upon the dollar amount of the claim is assessed and becomes due and payable.

Rule 10333 also provides for the assessment of certain process fees, including pre-hearing process and hearing process fees. The pre-hearing process fees accrue against a member firm when the firm is provided a slate of names of arbitrators to select or the firm is notified that an arbitration panel has been appointed for the proceeding.<sup>7</sup> A hearing process fee accrues when the parties are notified of

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<sup>5</sup> Respondent was not a party to the settlement. (CX-15 at ¶8).

<sup>6</sup> Article VI, Section 1 of the By-Laws of the Association, provides that “the Association. . . shall fix and levy the amount of admission fees, dues, assessments and other charges to be paid by members of the NASD. . .” Rule 10333 was adopted pursuant to Article VI, Section 1 of the By-Laws of the Association.

<sup>7</sup> Pre-hearing process fees for proceedings with more than \$25,000 in dispute total \$600 and consist of (i) a service of claim fee of \$50, (ii) a case preparation fee of \$150, and (iii) a pre-hearing activities fee of \$400.

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the first scheduled hearing, and, like the member surcharge, the hearing process fee is based upon the dollar amount in dispute.

Rule 10333 states that the member surcharge and the process fees are non-refundable. 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 will be assessed.

Respondent did not argue that the fees were incorrectly assessed pursuant to Rule 10333. (Tr. p. 37). The fees were imposed pursuant to Rule 10333 by Dispute Resolution as the neutral forum, not by the arbitration panels.<sup>8</sup> (Tr. p. 9).

Respondent argued that the Firm was not a proper party to the proceedings, and should not have been named a party in the arbitration proceedings. (Tr. p. 9). Asserting that there was no opportunity to be heard on that issue until after the arbitration panel was appointed and after the arbitrators provided notice of the hearing dates to the parties, Respondent argued that the arbitration system results in an inequitable assessment of fees when a party, such as Respondent, is improperly named in an arbitration proceeding. (Tr. p. 39). Because of the timing of the arbitration system, fees will be assessed against a named party even if being named a party in the proceeding is totally unjustified. (Tr. p. 39). \_\_\_\_\_ testified that the only way a party “can be dismissed, other than the claimant conceding, . . . is by the arbitration panel and that can only happen after they’re appointed.” (Tr. p. 22).

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<sup>8</sup> The Rule 10333 fees, unlike the forum fees and costs of Rule 10332, are not within the discretion of the arbitration panels.

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In the six arbitration proceedings, fearing that they might not be able to collect from a former NASD member, \_\_\_\_\_, the claimants also sought recovery from Respondent based on Respondent having purchased some of \_\_\_\_\_ assets. (Tr. p. 9). In each of the six cases, Respondent was named as a party on a faulty theory of transferee liability. (Tr. p. 9).

Respondent acknowledged that, in a any single arbitration case, it would be difficult for Dispute Resolution as the neutral forum to determine whether a particular party was a proper party to a proceeding before assessing fees. (Tr. p. 10). However, Respondent argued that the six arbitration proceedings were before Dispute Resolution virtually at the same time. (Tr. p. 10). Respondent argued that, before Dispute Resolution attempted to collect the fees, it knew or should have known that the theory of transferee liability was faulty and that Respondent was not a proper party to the arbitration proceedings. (Tr. p. 10). Respondent argued that it is appropriate for the Hearing Officer to determine that because Respondent was named a party in the arbitration proceedings on a discredited theory of transferee liability, the application of Rule 10333 in these cases results in an inequitable amount of fees being assessed on Respondent.<sup>9</sup> (Tr. p. 10).

In contrast, Enforcement argued that Rule 10333 imposes a “bright line” test. (Tr. p. 37). According to the Rule, the member surcharge and process fees were non-refundable and were assessed on all parties named in arbitration proceedings when certain events occurred. Whether correctly named

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<sup>9</sup> In each of the arbitration proceedings, the arbitration panels or the parties agreed by settlement that Respondent was not a proper party in the proceedings.

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in the case or not, Respondent by becoming a member of the Association agreed to abide by all the NASD Rules, and there was no exception for Rule 10333. (Tr. p. 37).

The Hearing Officer agrees with Enforcement's analysis. Rule 10333 is clear-cut. The NASD prescribed Rule 10333 to help fund a neutral and an independent forum for the arbitration of controversies between members and between members and customers or others. No exceptions were made in the Rule for respondents who were ultimately judged not liable for whatever reason. The Securities and Exchange Commission approved Rule 10333 pursuant to Section 19(b) of the Securities Exchange Act of 1934 and Rule 19b-4 thereunder.

After a fee is imposed, timely payment of the fee is very important to the NASD. The NASD has established two procedures to assure timely payment of fees. First, as with other fees, any overdue, unpaid arbitration process fees may be deducted from member funds maintained in the member's Central Registration Depository account.<sup>10</sup> Second, there is the 15-day notice suspension proceeding for failure to pay dues, assessments, and charges in a timely manner.

Respondent agreed to pay the dues, assessments, and other charges assessed in the arbitration forum in accordance with the Rules of the Association upon agreeing to become a member of the Association.<sup>11</sup> Respondent, as a member of the Association, had the advantage of having the theory of transferee liability decided in its favor in the neutral arbitration forum and must also bear the

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<sup>10</sup> See Notice Members 97-71 (October 1997).

<sup>11</sup> Article IV, Section 1 of the NASD By-laws provides that an application for membership in the NASD shall contain an agreement to pay such dues, assessment, and other charges, in the manner and amount as from time shall be fixed pursuant to the NASD By-Laws, Schedules to the NASD By-Laws, and the Rules of the Association.

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responsibility of paying its share of the fees for the forum. Accordingly, Respondent is responsible for the \$25,806 in member surcharge and process fees imposed in compliance with the requirements of Rule 10333.

That application of Rule 10333 may be viewed as leading to an inequitable amount of fees, because of the number of cases involved, cannot justify disregarding a Rule that the NASD has plainly and intentionally provided.<sup>12</sup>

### **Conclusion**

Accordingly, 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 Firm provides documentary evidence to the Office of Hearing Officers showing: (1) the Firm has made full payment of the fees; (2) the NASD Finance Department has agreed to installment payments of the arbitration fees owed; or (3)

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<sup>12</sup> The Hearing Officer does not address whether the President of Dispute Resolution has the discretion to waive or reduce Rule 10333 fees.

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the Firm has filed a bankruptcy petition in a United States Bankruptcy Court or that the fees have been discharged by a United States Bankruptcy Court.

**SO ORDERED**

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Sharon Witherspoon  
Hearing Officer

Dated: Washington, DC  
December 26, 2000