

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT	:	
	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C9A030006
v.	:	
	:	
	:	Hearing Officer – DMF
	:	
Respondent 1	:	
	:	
and	:	
	:	
Respondent 2	:	
	:	
	:	
	:	
Respondents.	:	

ORDER DENYING MOTION FOR SUMMARY DISPOSITION

Respondents have filed a motion for summary disposition, which the Department of Enforcement opposes. Pursuant to Rule 9264, such a motion may be granted “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.”

1. Respondents’ Motion

The Complaint alleges that, in connection with the termination of one of Respondent 1’s registered representatives, “Respondent 1, acting through Respondent 2, willfully misrepresented a material fact on the Form U-5 it submitted to NASD. Specifically, Respondent 1 falsely stated that [the representative’s] termination from the firm had been ‘voluntary,’ when, in fact, he had initially been fired and then permitted to resign from the firm.” The Complaint charges that respondents thereby violated NASD Rule 2110 and IM-1000-1.

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 03-15 (C9A030006).

In their motion, respondents argue that this charge should be dismissed because the SEC conducted an investigation of respondents "involving, *inter alia*, the precise same issue," which led to the SEC issuing an Order Instituting Public Administrative and Cease-And-Desist Proceedings, followed by an Amended Order Instituting Public Administrative and Cease-And-Desist Proceedings that incorporated a settlement agreed to by the SEC and respondents. Respondents urge that, in light of the SEC's action, this proceeding is unfair, amounting to "double jeopardy."

2. The SEC Proceeding

The SEC's initial Order included charges against Respondent 1, Respondent 2 and the representative. It charged that the representative "engaged in a scheme to defraud investors by recommending and executing an unsuitable, aggressive trading strategy in four customer accounts at Respondent 1 in contradiction of the customers' conservative investment objectives. He also misrepresented or omitted to disclose to them the risks inherent in this strategy." The SEC alleged that he also churned the customers' accounts.

The SEC charged that Respondent 1 and Respondent 2 failed reasonably to supervise the representative, in violation of Section 15(b)(4)(E) of the Securities Exchange Act of 1934, and that Respondent 1 failed to "have any written procedures concerning the retention of correspondence and information pertinent to customer accounts," in violation of Section 17(a) of the Exchange Act and SEC Exchange Act Rule 17a-4. Among other things, the SEC alleged that Respondent 2 "failed to respond meaningfully to indications of questionable activity by [the representative]." In that context, the SEC alleged that after Respondent 2 delivered a letter of termination to the representative, Respondent 2 nevertheless agreed to accept a letter of resignation, and that on the Form U-5 Respondent 1 filed with the NASD concerning the

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 03-15 (C9A030006).

representative's termination, Respondent 1 "misstate[d] that [it] was voluntary." The Order did not, however, assert any identifiable separate charges against respondents based on the Form U-5.

Respondent 1, Exch. Act Rel. No. xxxxx, xxxx SEC LEXIS xxx.

The SEC subsequently issued an Amended Order as to Respondent 1 and Respondent 2 incorporating the agreed-upon settlement terms. The Amended Order included a finding that the representative "was permitted to resign from Respondent 1," but did not otherwise refer to the Form U-5. The Amended Order imposed sanctions on Respondent 2 and Respondent 1 for failing reasonably to supervise the representative, in violation of Section 15(b)(4)(E) of the Exchange Act, and on Respondent 1 for failing to have adequate procedures concerning the retention of correspondence, in violation of Section 17(a) of the Exchange Act and Rule 17a-4, but nothing in the Amended Order suggests that either Respondent 2 or Respondent 1 was sanctioned for submitting an inaccurate Form U-5 to NASD. Respondent 1, Exch. Act Rel. No. xxxxx, xxxx SEC LEXIS xxx.

3. Discussion

Arguments similar to those made by respondents were raised and rejected in Jones v. SEC, 115 F.3d 1173 (4th Cir. 1997), cert. denied, 523 U.S. 1072 (1998), where the SEC imposed sanctions on Jones based on the same conduct for which he had been disciplined by NASD. The court rejected Jones' contention that the SEC's action was barred by the Double Jeopardy Clause of the Fifth Amendment, concluding that the Double Jeopardy Clause was "not applicable (1) because the NASD is a private party and not a governmental agent and (2) because the SEC's sanctions are remedial rather than penal." Id. at 1183. The court also rejected Jones' argument that the SEC's proceeding was barred under principles of res judicata, stating that it had "found no statutory, regulatory, or historical reference to support Jones' argument that NASD discipline

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 03-15 (C9A030006).

of its members was intended to preclude this disciplinary action by the SEC itself against a securities professional.” Id. at 1179.

Although this case involves the reverse of Jones – here NASD's proceedings follow, rather than precede the SEC's action – the court's reasoning is applicable. As the Jones court explained: “While the NASD and the SEC both aim at providing efficient markets with fair disclosure, protecting investors, and preserving the integrity of markets, their respective roles, while coordinated, vary in more than degree. They represent distinct interests. Congress' decision to give both the NASD and the SEC overlapping disciplinary authority reflects a considered decision to bring two separate vantage points to enforcement efforts – one from the industry itself and the other from the regulator.” Id. at 1180.

In this case, the SEC acted first, sanctioning respondents for failure to supervise and for failure to maintain books and records – violations of the securities laws and regulations that the SEC enforces. But the SEC did not sanction respondents for submitting an inaccurate Form U-5 to NASD, which the Complaint charges was a violation of Rule 2110's requirement that NASD members and associated persons “observe high standards of commercial honor and just and equitable principles of trade” – a standard that only NASD, not the SEC, applies. Further, the Rule 2110 charge reflects NASD's distinct and critical interest in receiving complete and accurate information from NASD members on U-5 Forms, which NASD relies upon to identify circumstances that may warrant an investigation to protect the investing public and member firms – an interest that the SEC's action did not attempt to vindicate.

Whether the information on the U-5 at issue in this case was inaccurate, as Enforcement alleges, remains an open issue, to be determined by the Hearing Panel after hearing all the evidence, but NASD's important, independent interest in resolving that issue is undeniable. The

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 03-15 (C9A030006).

fact that the SEC may have considered the same underlying events in the process of addressing issues that were of concern to the SEC does not, under either "double jeopardy" or general fairness principles, foreclose NASD from addressing its own distinct concerns arising from those events in this proceeding.

In accordance with Rule 9264(e), therefore, the Hearing Officer will deny respondents' motion, having determined that they have failed to establish that they are entitled to summary disposition dismissing the charge against them as a matter of law. Nothing in this order, however, will preclude the Hearing Panel from considering the SEC's action as a possible factor bearing upon appropriate sanctions, if the Panel determines that respondents violated Rule 2110 as charged.

SO ORDERED

David M. FitzGerald
Hearing Officer

Dated: June 4, 2003