

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

RESPONDENT FIRM,

RESPONDENT 2,

RESPONDENT 3,

RESPONDENT 4,

Respondents.

Disciplinary Proceeding
No. C10040052

Hearing Officer – SNB

ORDER DENYING RESPONDENTS' MOTION FOR PARTIAL SUMMARY DISPOSITION

On December 20, 2006, Respondents filed a motion for partial summary disposition in this matter. For purposes of their motion, Respondents do not dispute the allegations in the Complaint. Rather, Respondents assert that the postponement of the hearing, resulting from a stay pending a parallel criminal investigation, has caused Respondents great prejudice, and it would be inherently unfair to proceed as to the counts specified. On January 26, 2007, the Department of Enforcement ("Enforcement") filed an opposition.¹

For the reasons set forth below, Respondents' motion is denied.

I. Background

In May 2004, Enforcement filed a 14 cause Complaint in this matter. Counts three, four and ten are the subject of Respondents' motion for partial summary disposition. Count three alleges that the Respondent Firm and Respondent 2 engaged in general solicitations of investors in connection with three offerings. Count four, a derivative claim of count three, alleges that if

¹ On February 2, 2007, Respondents filed a motion for permission to reply to Enforcement's Opposition. This motion is denied.

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 07-11 (C10040052).

there had been an improper general solicitation as alleged, the Respondent Firm and Respondent 2 received excessive underwriting compensation. Count ten alleges that all Respondents violated NASD Rules requiring Respondent 3 to register with NASD. In August 2004, following an initial pre-hearing conference, the Hearing Officer issued an order setting the matter for hearing beginning May 23, 2005.

In March 2005, the Manhattan District Attorney's Office (the "Manhattan DA") requested that Enforcement seek a stay of the NASD proceedings pending the outcome of its parallel criminal investigation. In response, on March 22, 2005, Enforcement requested a stay of this proceeding. Respondents did not oppose this request.

On April 1, 2005, the Hearing Officer issued an order staying the proceedings. The Hearing Officer also directed Enforcement to provide periodic status reports. Enforcement filed three status reports, each indicating that Enforcement had confirmed with the Manhattan DA that the criminal proceeding was ongoing. In each case, Respondents agreed with Enforcement that the stay should continue.

On October 3, 2006, the Manhattan DA informed Enforcement that the stay was no longer necessary. On the same day, Enforcement filed a motion to lift the stay, which the Hearing Officer granted. On October 17, 2006, the parties filed an agreed pre-hearing schedule proposing an initial hearing date of June 18, 2007. The Hearing Officer issued an order generally adopting the schedule that the parties proposed.

II. Discussion

Respondents assert that the postponement of the hearing has caused Respondents great prejudice. In particular, Respondents claim that they have been severely prejudiced by "the loss of jurisdiction over numerous key witnesses, the faded memories of witnesses who would testify, and two additional years of burden, uncertainty and reputational damage."

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While the passage of time may result in the loss of NASD jurisdiction over witnesses and faded memories, given the circumstances in this case, this alone is insufficient to justify granting Respondents' motion for partial summary disposition. Here, the delay was caused by a stay pending a parallel criminal investigation, and was not the result of any neglect or tactical maneuvers on the part of Enforcement. Moreover, Respondents did not oppose the stay, nor did they raise any concern regarding the availability of witnesses or the potential for any other prejudice from a delay of the proceedings. Similarly, Respondents agreed that the stay should continue each time Enforcement provided status reports regarding the stay. Even when the stay was lifted, Respondents argued for a hearing date eight months out. Given Respondents' concurrence in the stay and failure to raise the issue at a time when it might have been addressed, it is too late to now claim that dismissal is the only remedy. See, generally, Dept. of Enforcement v. Morgan Stanley Dean Witter, Inc. No. CAF000045, 2002 NASD Discip. Lexis 11, at **30-32 (July 29, 2002).

Respondents' motion is denied.

SO ORDERED.

Sara Nelson Bloom
Hearing Officer

Dated: March 22, 2007