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NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. Respondents.	Disciplinary Proceeding No. CAF970011 Hearing Officer—AHP

ORDER DENYING MOTIONS FOR INTERLOCUTORY APPEAL AND TO RECONSIDER DENIAL OF MOTION TO STAY THE PROCEEDING

At the pre-hearing conference on June 25, 1998, the Respondents moved orally for entry of an order under Code of Procedure Rule 9148 to allow them to appeal the denial of their motion to stay this proceeding. The Department of Enforcement opposed the motion and requested leave to file a written opposition. The Hearing Officer then granted the Parties the right to file memoranda in support of and in opposition to the motion. The Department of Enforcement filed its opposition on July 1, 1998, and the

Respondents filed their reply memorandum on July 8, 1998. The Respondents also included a Motion to Reconsider Denial of Stay with their reply memorandum. The Department of Enforcement filed an opposition to that motion on July 15, 1998.

For the reasons set forth below, Respondents' motions are denied.

I. Motion for Interlocutory Appeal

Interlocutory appeals are not favored under Code of Procedure Rule 9148. They are limited to extraordinary circumstances and may be pursued only if the Hearing Officer grants review. Except for appeal of an order excluding an attorney or party-representative from a disciplinary hearing for contumacious conduct under Code of Procedure Rule 9280, interlocutory appeals may not be taken as a matter of right.

In the absence of any decisions defining a standard for deciding motions for interlocutory appeal, the Respondents urge application of the collateral-order doctrine to interlocutory appeals under Rule 9148. But because the Respondents have not satisfied the test they advocate, it is unnecessary to decide whether the principles of the collateral-order doctrine should apply to NASD disciplinary proceedings.

The collateral-order doctrine is a judicially created exception to the "final-judgment rule." The final-judgment rule arises from the requirement of 28 U.S.C. § 1291 that only "final decisions" of federal district courts are subject to appeal by right. As a general rule, a federal district court's decision is appealable under 28 U.S.C. § 1291 only when the decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[1]

[1] Catlin v. United States, 324 U.S. 229, 233 (1945).

In Cohen v. Beneficial Industrial Loan Corp. the Supreme Court recognized a "small class" of decisions that are appealable under 28 U.S.C. § 1291 even though they do not terminate the underlying litigation. [2] This ruling, which came to be known as the collateral-order doctrine, stated that a district court's decision is appealable if it "finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[3]

As developed by the Supreme Court after Cohen, the collateral-order doctrine involves a multi-pronged test to determine whether an order that does not finally resolve a litigation is nonetheless appealable.[4] First, the order must conclusively determine the disputed question. Second, the order must resolve an important issue completely separate from the merits of the action. Third, the order must be effectively unreviewable on appeal from the final judgment. Some courts have also added a fourth requirement that the appeal involve a serious and unsettled issue of law, not merely a question of the proper exercise of discretion.[5]

Assuming the application of the principles of the collateral-order doctrine, the refusal to grant a motion to stay the proceeding fails the initial requirement. The refusal to

[2] 337 U.S. 541, 546 (1949).

[3] Id.

[4] See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 276 (1988).

[5] United States v. Billmyer, 57 F.3d 31, 35 (1995), cert. denied, 117 S.Ct. 959 (1997).

grant a stay of a proceeding is not a conclusive determination of the disputed question.[6] Such procedural pre-trial rulings are open to further review as the proceeding progresses.[7]

Respondents' motion also fails the fourth requirement of the collateral-order doctrine. There is no unsettled issue of law raised by the denial of Respondents' motion for a stay. Both the National Adjudicatory Council of the NASD and the Securities and Exchange Commission have rejected the argument that a stay of an NASD disciplinary proceeding must be granted to protect a respondent's Fifth Amendment right against self-incrimination when the respondent is also subject to related criminal prosecution.[8]

The Respondents have not established that: (1) the ruling they wish to appeal involves an important question of law or policy concerning which there is a substantial grounds for difference of opinion; and (2) an immediate review of the ruling may materially advance the completion of the proceeding. Accordingly, interlocutory appeal of the ruling denying Respondents' request for a stay is not warranted.

II. Motion to Reconsider

Respondents also move for reconsideration of the order denying their request for a stay of the proceeding. Their motion, however, does not advance any new grounds in support of their request. Accordingly, the motion is denied. Motions for reconsideration

[6] Gulfstream, 485 U.S. at 278 (refusal to grant stay "does not necessarily contemplate that the decision will close the matter for all time").

[7] Id.

[8] Dan Adlai Druz., Exchange Act Release No. 36306, 60 S.E.C. Docket 911, 1995 SEC LEXIS 2572, at *34 (Sept. 29, 1995).

are not to be used for the losing party to rehash arguments previously considered and rejected.[9]

SO ORDERED.

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Andrew H. Perkins
Hearing Officer

Dated: July 20, 1998

[9] Cf. Voelkel v. GMC, 846 F. Supp. 1482, 1483 (D. Kan.), aff'd, 43 F.3d 1484 (10th Cir. 1994).