

**NASD OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent 1

and

Respondent 2,

Respondents.

Expedited Proceeding  
No. ARB060029

Hearing Officer—Andrew H. Perkins

**ORDER DISMISSING DEFENSE AND GRANTING RESPONDENTS LEAVE TO FILE A MOTION FOR LEAVE TO AMEND THEIR REQUEST FOR HEARING**

NASD's arbitration process is designed to provide efficient resolution of disputes involving NASD members, their employees and the public.<sup>1</sup> To ensure compliance with arbitration awards, NASD has promulgated rules to allow for expedited suspension proceedings against members and associated persons for failing to abide by such awards.<sup>2</sup>

A respondent may assert certain limited defenses in an expedited suspension proceeding commenced pursuant to Procedural Rule 9554. These include: (1) the award has been paid in full; (2) the parties have agreed to installment payments of the amount awarded or have otherwise agreed to settle the action; (3) the award has been modified or vacated by a court; (4) a motion to vacate or modify the award is pending in a court; (5) the respondent has a bankruptcy petition pending in U.S. Bankruptcy Court pursuant to

<sup>1</sup> *Eric M. Diehm*, Exchange Act Release No. 33478, 1994 SEC LEXIS 148, at \*4 (Jan. 14, 1994) (internal citation omitted).

<sup>2</sup> NASD By-Laws, Article VI, Section 3; NASD Procedural Rule 9550, *et seq.*

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Title 11, or the award has been discharged by a U.S. Bankruptcy Court.<sup>3</sup> A respondent may also assert a *bona fide* inability to pay the award.<sup>4</sup>

Procedural Rule 9554(e) governs a respondent's right to a hearing. A respondent who receives a notice of suspension, cancellation, or bar under Procedural Rule 9554 must file a written request for a hearing that "set[s] forth with specificity any and all defenses [the respondent has] to the NASD action." A respondent who fails to file a timely request for a hearing that specifies one or more of the permitted defenses waives his right to a hearing.

Here, the Respondents raise a single defense in their request for a hearing filed September 15, 2006.<sup>5</sup> They contend that this Expedited Proceeding should be dismissed because there is a pending motion to vacate the Arbitration Award. However, the motion to vacate does not seek any relief as to the Respondents. Rather, it asks the federal court to determine that the arbitrators erred in finding two others jointly and severally liable for payment of the Arbitration Award. At a pre-hearing conference on October 4, 2006 (the "Conference"), Respondent's counsel confirmed that the Respondents have not asked that the Arbitration Award be modified or vacated as to them.

The Hearing Officer finds that the Respondents' request for a hearing does not meet the requirements of Procedural Rule 9554. The Respondents have not stated a permissible defense. Accordingly, their hearing request is dismissed.

Absent another defense, the suspension notices dated September 7, 2006, would become effective with the entry of this Order. However, at the Conference Respondents'

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<sup>3</sup> NASD By-Laws, Article VI, Section 3; NASD Notice to Members 00-55, 2000 NASD LEXIS 63 (Aug. 2000).

<sup>4</sup> See, e.g., *William J. Gallagher*, Exchange Act Release No. 47501, 2003 SEC LEXIS 599 (Mar. 14, 2003).

<sup>5</sup> The request was filed on behalf of four respondents, two of whom were dismissed on October 4, 2006.

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counsel raised the possibility that the Respondents might have a *bona fide* inability to pay the Arbitration Award, but he was unable to assert that defense without further inquiry.

Accordingly, the Respondents are granted until 5 p.m. on October 9, 2006, to file a motion for leave to amend their request for a hearing to assert their *bona fide* inability to pay the Arbitration Award. Failure to file an amended hearing request by this deadline will be deemed a waiver of the Respondents' right to a hearing. The Respondents' motion shall show that the Respondents have a good-faith basis to assert this defense.

**IT IS SO ORDERED.**

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Andrew H. Perkins  
Hearing Officer

October 4, 2006