

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF MARKET
REGULATION

Complainant,

v.

Respondent 1

and

Respondent 2

Respondents.

Disciplinary Proceeding
No. CLG050021

Hearing Officer – Andrew H. Perkins

ORDER DENYING COMPLAINANT'S MOTION TO CONTINUE HEARING

In March 2005, the Department of Market Regulation (the "Department") filed a Complaint that charged Respondents 1 and 2 with violations of NASD Conduct Rules 2110 and 3010 for failing to detect and prevent an alleged fraudulent scheme that was being conducted by a trader on [Firm]'s institutional desk. When the Department filed the Complaint, the Securities and Exchange Commission ("SEC") was investigating the same alleged fraudulent conduct at the Firm.

In August 2005, the SEC filed a federal civil action, *SEC v. [Respondent 2], et al.*, Civil Number _____, in which the SEC charged Respondent 2 and Respondent 1 with violations of the antifraud provisions of the federal securities laws, Section 17(a) of the Securities Act of 1933, Sections 10(b) and 15(c)(1) of the Securities Exchange Act of 1934, and Rules 10b-5 and 17a-3. The Department notes that the allegations in the SEC's civil complaint "encompass and surpass in scope and

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severity the disciplinary charges brought by NASD.”¹

Six months later, on February 28, 2006, the Department requested a continuance of the hearing in this case pending the outcome of the SEC action against Respondent 1 and Respondent 2. In its motion, the Department argues that a continuance is appropriate because the SEC action involves the same facts and overlapping charges. The Department theorizes that the SEC case might obviate the need to proceed with this case, thereby resulting in a substantial savings of resources. The Department further contends that a continuance would serve the public interest by avoiding duplicative proceedings and the potential for conflicting rulings and judgments.² The Department requests that its case be delayed until after the trial of the SEC action concludes. Currently, the SEC action is scheduled for trial beginning on October 15, 2007. Accordingly, if the Department's motion is granted, the hearing in this proceeding would not commence until 2008, at the earliest.

Both Respondents oppose the Department's motion. The Respondents point out that this case has been pending for more than one year and that the underlying investigation commenced approximately four years ago. Furthermore, the charges relate to conduct that dates back to over seven years ago. The Respondents argue that it would be unfair to postpone the hearing for another two years. In short, the Respondents state they are ready to proceed to hearing under the current schedule.

For the reasons discussed below, the Department's motion for a continuance of the hearing is denied.

¹ Department's Mot. to continue Hr'g at 2.

² There is no indication in the Department's motion papers that the SEC requested NASD to defer proceeding with the hearing in this matter.

Discussion

NASD Code of Procedure Rule 9222(b) authorizes Hearing Officers to postpone the commencement of a hearing “for a reasonable period of time” for “good cause shown.” If a postponement is to exceed 28 days, Procedural Rule 9222(b)(2) provides that the Hearing Officer shall state the reasons for the longer delay. Procedural Rule 9222(b)(1) sets forth the following five factors that the Hearing Officer must consider in deciding if a continuance should be granted: (1) the length of the proceeding to date; (2) the number of postponements already granted; (3) the stage of the proceedings at the time of the request; (4) the potential harm to the investing public if a postponement is granted; and (5) such other matters as justice may require.

The Hearing Officer considered each of the foregoing factors and concluded that the Department had not shown good cause for the lengthy delay it requests. The case has been pending for a year, and the Department has known of the SEC action for six months. Nonetheless, the Department offered no explanation for its tardy request for a continuance. Moreover, the underlying facts involve hundreds of trades. Indeed, the Department has represented that the spreadsheets reflecting the trades at issue contain thousands of sheets. Thus, if a lengthy continuance is granted at this stage of the proceeding, a substantial amount of pre-trial effort will have to be redone in two years when the Department is ready to proceed with the hearing.³ These factors weigh against granting a two-year continuance.

In addition, the Hearing Officer finds that the Department failed to show that public policy or efficiency considerations warrant the delay the Department requests. Although the Department obliquely argues that a continuance should be granted to avoid interference with the SEC action, the Hearing Officer notes that the SEC has not

³ The Hearing Officer notes that the Parties' pre-hearing submissions are due to be filed on March 27, 2006.

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requested the continuance. Nor did the Department demonstrate how this proceeding will interfere with the SEC action. Although the Department argues that the "extensive, ongoing discovery that is being conducted by Respondent 2 and Respondent 1 in the SEC case will almost certainly prolong the NASD's proceedings and significantly delay any final resolution" of this case, there is no support for this speculation. While it is evident from the discovery schedule in the SEC action that the parties have agreed to an exhaustive discovery regime, neither Respondent 2 nor Respondent 1 have requested an accommodation in this case to facilitate that schedule. The Hearing Officer must conclude that the Respondents took this case into consideration in setting the schedule in the SEC case.

The Department also raises concerns that the Respondents might seek to introduce new evidence obtained from discovery in the SEC action. This argument is speculative at best. The Respondents have not taken this position, and at this point there is no reason to conclude that the issue will arise. However, should this happen, any motions to supplement or reopen the record in these proceedings will be addressed applying well-established rules governing NASD disciplinary proceedings.

Further, the Hearing Officer finds no merit in the Department's argument that, if this case goes forward as scheduled, the Respondents will gain an unfair advantage in the SEC action by previewing the evidence against them. Under the Federal Rules of Civil Procedure, the Respondents are entitled to complete discovery of the SEC's case. In fact, the Department points out that the federal court has entered an order that provides for more than a year of intensive discovery in that case. Under these circumstances, the Hearing Officer cannot identify any unfair advantage or prejudice that will accrue if this case proceeds as scheduled.

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Finally, most of the Department's arguments regarding efficiency and avoiding duplicative efforts are equally applicable if NASD proceeds under the current schedule. Thus, the Hearing Officer denies the Department's motion to continue the hearing.

IT IS SO ORDERED

Andrew H. Perkins
Hearing Officer

March 16, 2006