

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 06-40 (ARB060029).

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent 1,

Respondent 2,

Respondent 3,

And

Respondent 4

Respondents.

Expedited Proceeding
No. ARB060029

Hearing Officer—Andrew H. Perkins

ORDER CLARIFYING AGENDA FOR PRE-HEARING CONFERENCE

On September 18, 2006, the Office of Hearing Officers issued a scheduling order for this proceeding. Later the same day, the Office of Hearing Officers received a letter from counsel for the Respondents that questioned whether the Hearing Officer was in possession of all of the correspondence exchanged with the Office of Hearing Officers the prior week concerning the Respondents right to a hearing under NASD Procedural Rule 9554. Respondents' counsel enclosed copies of the subject correspondence for the Hearing Officer's convenience.

In light of counsel's inquiry, the Hearing Officer issues this order to clarify the agenda for the pre-hearing conference on October 4, 2006.

Background

This Expedited Proceeding arises from the Respondents' failure to pay an arbitration award entered in favor of Claimant on July 25, 2006, in NASD Dispute Resolution Arbitration No. 04-08270. According to the papers filed by the Respondents, the arbitration award held that all four Respondents were jointly and severally liable for the Arbitration Award.

On or about August 9, 2006, the assignee for the benefit of the creditors of Claimant filed a petition to confirm the Arbitration Award in the United States District Court, District of New Jersey, Civil Action No. 3:06-CV-3653-MLC-TJB. On or about September 5, 2006, the Respondents filed a Reply to the Amended Petition to Conform Arbitration Award, and Respondents 3 and 4 filed a Cross-Petition to vacate the Arbitration Award as to them.¹ Respondents 3 and 4 asserted that the arbitrators erred in finding them jointly and severally liable. According to Respondents 3 and 4, the arbitrators disregarded the unambiguous terms of the agreements governing their liability for the obligations and liabilities of their branch office. The Cross-Petition seeks no relief as to the other two Respondents.

On September 15, 2006, the Respondents filed a request for hearing pursuant to NASD Procedural Rule 9554. They jointly asserted the defense that the Cross-Petition to Partially Vacate the Arbitration Award filed by Respondents 3 and 4 was pending in the United States District Court, District of New Jersey. The Respondents did not contest the amount of the Arbitration Award or NASD's allegation that the full amount is unpaid.

¹ The papers filed by the Respondents do not provide any details regarding modifications made to the original filing by the Amended Petition to Confirm Arbitration Award. In any event, the allegations in the petitions to confirm the Arbitration Award are not relevant to this proceeding.

Discussion

NASD's arbitration process is designed to provide efficient resolution of disputes involving NASD members, their employees and the public.² 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.³

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 Title 11, or the award has been discharged by a U.S. Bankruptcy Court.⁴ A respondent may also assert a *bona fide* inability to pay the award.⁵

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.

² *Eric M. Diehm*, Exchange Act Release No. 33478, 1994 SEC LEXIS 148, at *4 (Jan. 14, 1994) (internal citation omitted).

³ NASD By-Laws, Article VI, Section 3; NASD Procedural Rule 9550, *et seq.*

⁴ NASD By-Laws, Article VI, Section 3; NASD Notice to Members 00-55, 2000 NASD LEXIS 63 (Aug. 2000).

⁵ *See, e.g., William J. Gallagher*, Exchange Act Release No. 47501, 2003 SEC LEXIS 599 (Mar. 14, 2003).

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Here, the Respondents present a single defense. They contend that this Expedited Proceeding should be dismissed because there is a pending motion to vacate the Arbitration Award against Respondents 3 and 4.

The Hearing Officer scheduled a pre-hearing conference for October 4, 2006, to hear argument on whether the proceedings against Respondents 3 and 4 should be dismissed because they filed a petition to vacate the Arbitration Award. Accordingly, the Department of Enforcement is ordered to verify the status of this petition before the pre-hearing conference.

In addition, the Hearing Officer will hear argument on whether Respondents 1 and 2 (the "Non-Moving Respondents") have asserted a permitted defense. Although the four actions have been consolidated for hearing, each Respondent's defense must be evaluated independently. The Hearing Officer notes that the Respondents' papers fail to show that the Non-Moving Respondents' liability could be affected in any way by the court's ultimate ruling on the Cross-Petition to Vacate the Arbitration Award. Accordingly, the Parties should be prepared to address why the hearing requests filed by the Non-Moving Respondents should not be dismissed for failure to specify a permitted defense pursuant to Procedural Rule 9554(e).

IT IS SO ORDERED.

Andrew H. Perkins
Hearing Officer

September 20, 2006