

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 03-08 (CAF020023).

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondents.

Disciplinary Proceeding
No. CAF020023

Hearing Officer—Andrew H. Perkins

ORDER GRANTING COMPLAINANT'S MOTION IN LIMINE

On March 20, 2003, the Department of Enforcement (the "Department") filed a "Motion In Limine to Exclude Respondent _____ two New, Untimely, and Irrelevant Asserted Affirmative Defenses" (the "Motion"). Under the Scheduling Order, the Respondent's opposition was due on March 31, 2003, but he did not file one. Accordingly, for the reasons set forth herein, the Motion is granted.

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Discussion

The Motion objects to two affirmative defenses it claims are raised for the first time in Respondent _____ pre-hearing brief. They are estoppel and ratification. The Department objects on the grounds that these defenses were not raised in _____'s Answer, as required by Procedural Rule 9215(b), and that the defenses are barred as a matter of law.

As to the timeliness issue, the Hearing Officer finds that Procedural Rule 9215(b) requires respondents to raise affirmative defenses in their Answers. By so doing, the Department is given adequate notice of the defenses so that it can conduct any needed additional investigation before the hearing on the merits. Here, Respondent _____ failed to raise either of these "defenses" before he filed his pre-hearing submissions on March 18, 2003. Thus, to the extent that the Respondent intended to introduce new affirmative defenses through its pre-hearing submissions, those affirmative defenses are excluded.

In addition, the Hearing Officer finds that neither argument raised by Respondent _____ is a valid defense. As the Department points out in the Motion, NASD is not estopped from proceeding with a disciplinary proceeding against a member or an associated person due to a customer's late complaint about the firm's or individual's misconduct.¹ Likewise, a member firm or an associated person may not escape liability for fraudulent misrepresentations and omissions by arguing that the customers failed to exercise due diligence and that they subsequently ratified the trades in question. The fact that a customer accepts a trade that was tainted by the fraud of the

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registered representative does not preclude NASD from bringing a disciplinary proceeding against the responsible registered representative.²

Accordingly, to the extent that Respondent _____ intended to raise these arguments as new affirmative defenses in his pre-hearing submission, those defenses are precluded.³

IT IS SO ORDERED.

Andrew H. Perkins
Hearing Officer

April 8, 2003

¹ *Cf. Bernard D. Gorniak*, Exchange Act Release No. 35996, 1995 SEC LEXIS 1820, at *4 n.5, 52 S.E.C. 371, 373 n.5 (1995) holding that NASD's power to enforce its rules is independent of a customer's decision not to complain).

² *See, e.g., District Bus. Conduct Comm. V. Hayashi*, No. C3A950047, 1996 NASD Discip. LEXIS 54, at *13 (DBCC Oct. 15, 1996).

³ This Order does not, however, preclude the Respondent from presenting relevant and material evidence on the issue of any sanctions that may be imposed if the Hearing Panel determines that the Respondent committed the alleged violations.