This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 04-03 (C8A030100).

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. Respondent 1 and Respondent 2, Respondents.	Disciplinary Proceeding No. C8A030100 Hearing Officer – DMF

ORDER DENYING MOTION FOR LEAVE TO FILE AMENDED ANSWER

Respondents have filed a motion for leave to file an Amended Answer to the Complaint, which the Department of Enforcement opposes. The proposed Amended Answer, which is attached to the motion, is 36 pages long. The first 28 pages are devoted to argument, rather than responses to the allegations of the Complaint. The proposed Amended Answer then sets forth responses to each of the numbered paragraphs of the Complaint that do not appear materially different from the responses set forth in Respondents' Answer. Finally, the proposed Amended Answer sets out 19 purported "Affirmative Defenses," which appear to include some revisions to the 10 Affirmative Defenses set forth in the Answer, as well as nine additional Affirmative Defenses. Thus, it appears that the only substantive effect of the proposed Amended Answer would be to revise and add Affirmative Defenses.

Rule 9215 provides that "the Hearing Officer may, after considering good cause shown by the Respondent and any unfair prejudice which may result to any other Party, permit an answer to be amended." In their motion, Respondents assert that they have good cause for the proposed Amended Answer, but do not explain why they were unable to include the proposed Affirmative Defenses in their original 30 page Answer.

The Complaint was filed on December 29, 2003. After receiving a two-week extension, Respondents filed their Answer on February 2, 2004. Respondents did not file their motion for leave to file an Amended Answer until April 19, 2004. On their face, the revised and additional Affirmative Defenses in the proposed Amended Answer do not rest on newly discovered evidence or other circumstances that would explain and justify Respondents' failure to include them in the Answer. See Freedom Int'l Trucks, Inc. v. Eagle Enterprises, Inc., 182 F.R.D. 172, 175 (E.D. Pa. 1998) ("The party seeking leave to amend bears the burden of explaining the reasons for the delay.")

Further, Enforcement would suffer prejudice if Respondents were allowed to file an Amended Answer at this late date. After Respondents filed their original Answer, Enforcement promptly issued several requests for additional information regarding Respondents' Affirmative Defenses. The pre-hearing schedule in this case required that any motions for summary disposition be filed by April 12, 2004. On April 8, 2004, Respondents requested an extension of that deadline to April 19, 2004. On April 19, Enforcement and Respondents both filed motions for summary disposition. Enforcement's motion necessarily addressed the issues as they had been defined in the Complaint and Respondents' Answer, including the Affirmative Defenses set forth there. As noted above, Respondents did not file their motion for leave to amend their Answer

until April 19, so Enforcement was unable to request information regarding the revised and additional Affirmative Defenses prior to filing its motion or to address those Defenses in its motion. Therefore, Enforcement would suffer prejudice if Respondents were allowed to add additional Affirmative Defenses now. See Lockheed Martin Corp. v. Network Solutions, Inc., 175 F.R.D. 640, 644-45 (C.D. Cal. 1997).

Finally, the Hearing Officer has reviewed Respondents' proposed revisions and additions to their Affirmative Defenses to determine whether, as a matter of fairness, they should be allowed to file the Amended Answer. Respondents propose to revise their seventh Affirmative Defense to allege, in substance, that "no public customer has been proven to have suffered any damages. On the other hand, Respondents have suffered damages." Respondents then argue that the Hearing Panel should not order them to pay legal fees to the arbitration claimants. Assuming that Enforcement seeks such relief, however, Enforcement will have the burden of establishing that it is appropriate. Thus, Respondents' argument is not an affirmative defense. See Compania Mgmt. Co. v. Rooks, Pitts & Poust, 290 F.3d 843, 850 (7th Cir. 2002) ("Thus, the so-called 'affirmative defense' raised in Compania's amended answer was properly rejected as superfluous.").

Respondents also propose to revise their ninth Affirmative Defense to incorporate a contention that NASD is precluded from pursuing this disciplinary proceeding because it allegedly did not participate in state court proceedings as amicus curiae. As a matter of law, this defense would fail. Respondents' proposed new eleventh Affirmative Defense contends, in substance, that NASD is precluded from pursuing this disciplinary proceeding because of the alleged misconduct of the arbitration claimants. Again, this defense would fail as a matter of law. See Freedom Int'l Trucks, 182 F.R.D. at 175 ("a

court may justify the denial of a motion to amend on the grounds that the amendment would be futile").

Proposed Affirmative Defenses twelve through sixteen all assert that, for a variety of reasons, NASD Rule 2110 cannot be applied to Respondents' conduct. These amount to legal arguments in opposition to the charges, not affirmative defenses. See Compania, 290 F.3d at 850 ("A court may determine that a proposed amendment is futile if it sets forth facts or legal theories that are redundant, immaterial, or unresponsive to the allegations in the complaint.").

Respondents' proposed seventeenth Affirmative Defense is that "NASD cannot establish in this case any risk of future violation, whether it be a very great risk or some risk." This amounts to an argument in opposition to the imposition of sanctions, not an affirmative defense. Respondents' proposed eighteenth Affirmative Defense is that NASD "has 'unclean hands' because it has failed to follow its normal practices" with regard to the disclosure of information obtained by Enforcement from the arbitration claimants. This is not an affirmative defense, but rather appears to relate to Enforcement's disclosure obligations under Rule 9251(a)(1). The Hearing Officer notes that Respondents have previously filed motions relating to Enforcement's disclosure obligations, which were denied. Respondents' proposed nineteenth Affirmative Defense is that "NASD has failed to afford Respondents due process in its role as an essential arm of a federal regulatory organization, *i.e.*, the SEC …." As a matter of law, this would fail as an Affirmative Defense.

Considering all of the above factors, Hearing Officer finds that Respondents have failed to demonstrate good cause for the proposed Amended Answer. Therefore, the motion is denied.

SO ORDERED.

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David M. FitzGerald
Hearing Officer

Dated: June 1, 2004