

**NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Disciplinary Proceeding
No. C10010004

Hearing Officer—AHP

**ORDER GRANTING COMPLAINANT’S MOTION TO AMEND THE
COMPLAINT; DENYING COMPLAINANT’S MOTION FOR LEAVE TO FILE A
REPLY TO RESPONDENT’S OPPOSITION TO MOTION TO AMEND; AND
DENYING RESPONDENT’S MOTION TO SEVER**

On March 26, 2001, the Department of Enforcement (“Enforcement”), pursuant to Code of Procedure Rule 9212(b), filed a Motion To Amend The Complaint. Enforcement seeks to add seven respondents and ten causes of action to the original Complaint. The Respondent opposes the motion on the grounds that it was requested in bad faith and that permitting the amendment would be prejudicial. The Respondent also has moved for an order severing him from the case if the motion to amend is granted. For the reasons discussed below, Enforcement’s motion to amend is granted, and the Chief Hearing Officer denies the Respondent’s motion to sever with leave for him to re-file the motion once the added respondents have answered.

This Order has been published by the NASDR Office of Hearing Officers and should be cited as OHO Order 01-08 (C10010004).

I. Background

The Respondent was registered through _____, an NASD member firm, as a General Securities Representative, a General Securities Principal, and a General Securities Sales Supervisor from February 1996 until October 7, 1997. (Compl. ¶ 2.) While at _____, the Respondent served as its Compliance Officer. (Id.) The Respondent is no longer registered with the NASD or associated with an NASD member firm. His registration with the NASD terminated on January 8, 1999. (Id. ¶ 3.)

During the Respondent's tenure at _____, the firm received more than 100 written customer complaints, alleging sales practice violations at the firm. (Id. ¶ 7.) The alleged violations included: (1) the making of material misrepresentations to customers or prospective customers; (2) the failure to disclose material information to customers or prospective customers; and (3) the effecting of unauthorized transactions. (Id.)

On January 5, 2001, Enforcement filed the Complaint in this proceeding against the Respondent. The Complaint alleges that the Respondent failed to implement, maintain, and enforce a supervisory system reasonably designed to achieve compliance with the federal securities laws and the NASD's Conduct Rules. (Id. ¶¶ 10, 15.) According to the Complaint, by reason of the presence of numerous "red flags," the Respondent knew or should have known of the sales practice violations at _____ (Id. ¶¶ 7, 9.)

At the time Enforcement filed the Complaint against the Respondent, it was also investigating _____ and other brokers at the firm, and Enforcement intended also to charge the firm and some of these other individuals with violations of the federal securities laws and the NASD's Conduct Rules. However, because the NASD would lose

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jurisdiction over the Respondent if it did not file a Complaint on or before January 8, 2001, Enforcement filed the present action against only the Respondent. Enforcement represents that it did not have approval to file a complaint against the other targets of its investigation at the time it filed the Complaint against the Respondent. Now, having received such approval, Enforcement seeks to amend the Complaint to add those additional respondents. Three of the proposed additional respondents also are charged with supervisory violations.

II. Discussion

A motion to amend is governed by Code of Procedure Rule 9212, which states that leave to amend “will be freely granted when justice so requires.” Rule 9212(b). This standard is identical to that governing amendments under the Federal Rules of Civil Procedure. Indeed, the NASD recently amended Rule 9212 “to more closely follow the Federal Rules of Civil Procedure.” Notice to Members 00-56, 2000 NASD LEXIS 64 (Aug. 2000). Thus, although not binding on the NASD, the standards enunciated in federal court decisions in applying Fed. R. Civ. P. 15(a) provide guidance on the application of NASD Code of Procedure 9212(b).

Notwithstanding the liberality of the general rule, it is within the sound discretion of the court whether to grant leave to amend. See, e.g., John Hancock Mutual Life Ins. Co. v. Amerford Int’l Corp., 22 F.3d 458, 462 (2d Cir. 1994). In the seminal case addressing the exercise of this discretion, the Supreme Court stated:

In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be “freely given.”

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Foman v. Davis, 371 U.S. 178, 192 (1962). This liberality in granting amendments also applies to amending the complaint to add new parties. See, e.g. Koch v. Dwyer, No. 98 Civ. 5519 (RPP), 2001 U.S. Dist. LEXIS 4085, at *19 (S.D.N.Y. Mar. 23, 2001).

A. Prejudice

The Respondent contends that he will be unduly prejudiced in two ways if the amendment is granted. First, he contends that to properly respond to the more detailed Amended Complaint he will be forced to amend his Answer and deny knowledge and information relating to each of the specific sales practice violations. According to the Respondent, in his Answer he admitted knowledge of sales practice violations at _____ as a “tactical decision aimed at foreclosing the need to adduce evidence of specific wrongdoing by specific brokers and whether or not [he] had any role in supervising those brokers.” (Respt’s Opp’n at 3.) By being forced to abandon this tactic, the Respondent contends his credibility will be impeached beyond rehabilitation. (Id. at 4.) Second, the Respondent contends that he will be prejudiced because he will be forced to expend significantly increased resources defending this case if the amendment is permitted. (Id.)

The Respondent’s arguments fail in two respects. First, tactical missteps by the defense are not grounds for denying an otherwise proper amendment to the pleadings. There are innumerable decisions made during the course of litigation that may prove unwise if the pleadings are later altered. But that fact alone does not provide a basis for claiming undue prejudice. If it did, that rule would virtually eliminate the ability to amend a Complaint once the respondent filed an Answer. Here, the Respondent admitted certain facts rather than stipulating to them for the purposes of the proceeding while preserving his position that he denied the facts or had

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insufficient knowledge to admit or deny them. A respondent cannot file a false pleading and then claim prejudice if he has to correct the pleading to assert the truth. Having made the election to admit his knowledge of the sales practice violations at _____, he is bound to the consequences that necessarily flow therefrom. On the other hand, if at the hearing he is questioned about his changed position, he is free to explain the reasons for his earlier tactic.

The Respondent also has not shown undue prejudice as a result of the increased cost of defending the action and the delay in obtaining a resolution of the action. Such burden, standing alone, is not sufficient to warrant denial of a motion to amend a pleading. See, e.g., United States v. Continental Illinois Nat'l Bank & Trust Co., 889 F.2d 1248, 1255 (2d Cir. 1989).

B. Bad Faith

The Respondent's argument that Enforcement is proceeding in bad faith also is without merit. The Respondent contends that Enforcement could have filed the Complaint against him earlier and that Enforcement's professed concern about avoiding multiple proceedings is disingenuous. (Respt's Opp'n at 5.) The Respondent argues that Enforcement's true motive is to present the maximum amount of evidence possible to a single panel to obtain the most severe sanctions possible. However, even if true, the desire to present a full picture of the scope and nature of the problems at _____ in order to assess the Respondent's conduct is not evidence of bad faith. And the Respondent has presented no other evidence of bad faith that would warrant denying the motion to amend.

Accordingly, in light of the lenient standard for amending a complaint and the Respondent's failure to advance any persuasive argument against amendment, Enforcement's motion is granted. Enforcement shall serve and file the Amended Complaint in accordance with

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the NASD Code of Procedure, and the Respondent is granted leave to file an Answer to the Amended Complaint.

It is further ordered by the Chief Hearing Officer that the Respondent's motion to sever is denied. Code of Procedure Rule 9214(e) provides that all parties shall have the opportunity to respond to a motion to sever stating any arguments in favor of or opposition to severance. Accordingly, once the added respondents answer (or their time to do so has expired without them filing an answer) the Respondent may re-file his motion to sever in accordance with Rule 9214(e).

SO ORDERED.

Andrew H. Perkins
Hearing Officer

April 20, 2001