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Summary Judgment in Self Regulatory Organizations' Disciplinary Proceedings: How the Limitations Imposed by the 1934 Act Have Been Overlooked

By Jason Pickholz[1]

For seventy years, litigants in federal courts have sought to resolve all or part of their respective disputes prior to trial through the use of summary judgment motions. Some States, such as New York, have recognized summary judgment motions for even longer.[2] In England, summary judgment was used extensively for at least 50 years before the United States formally incorporated it into the Federal Rules of Civil Procedure.[3]

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, any party seeking to recover upon a claim, counterclaim, or cross-claim, or to obtain a declaratory judgment, or any party against whom such a claim is made, is entitled to move for a summary judgment in that party's favor.[4] Such a motion may be made 20 days after the commencement of the action or after service of a motion for summary judgment by a party seeking a recovery or declaratory judgment; it may be made at any time by a party against whom such relief is sought.[5] The summary judgment motion may be made with or without supporting affidavits.[6] The motion may request a ruling as to part or all of the ultimate relief sought in the action,[7] and may seek judgment on the issue of liability even though there remains a genuine issue as to the amount of damages.[8]

The two part test that federal courts apply in determining whether to grant or deny a motion for summary judgment is familiar to most federal court litigators:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.[9]

Once the movant has made and supported its motion as provided for in Rule 56, the opposing party "may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."[10] However, if the evidence submitted by the movant does not establish the absence of a genuine issue of material fact, "summary judgment must be denied even if no opposing evidentiary matter is presented."[11] Summary judgment may also be "inappropriate where the party opposing it shows under subdivision (f) that he cannot at the time present facts essential to justify his opposition."[12]

Some Justifications for Summary Judgment in Courtroom Cases

Summary judgment serves many important purposes. Issues of fact are for a jury to determine. Where there is no true issue of fact that could affect the ultimate outcome of the action, there is nothing for the jury to resolve. Nor should the case be submitted to a jury on the assumption, or hope, that they will "get it right". If there is no issue of material fact, and one party is clearly entitled to judgment as a matter of law, submitting the case to trial creates an enhanced risk of confusing a jury and the possibility of its rendering a verdict that runs counter to the uncontroverted evidence. While a federal court can grant a judgment notwithstanding the verdict following trial, it would seem to be a waste of the time and resources of all involved — judge, jury, parties, and their attorneys — to have to endure a full trial in a civil action where there is no issue of material fact and the movant is entitled to judgment as a matter of law.

Where there are no material issues of fact, allowing a court to resolve the legal issues without a trial spares the parties from having to absorb the ever increasing costs, expenses, and legal fees associated with a trial. It also helps to alleviate the overcrowding of the court's docket by allowing the court to resolve some or all of the issues on the motion, thereby freeing blocks of valuable courtroom time for cases involving true factual issues in controversy. In addition, in an era where reforming the system of jury service has become a prominent concern, summary judgment helps to ensure that jurors are not unfairly abused by being asked or compelled to take time off from their work or families to hear cases in which there is no live controversy for them to determine and only one possible outcome after trial.

The Case for Extending Summary Judgment to SRO Disciplinary Proceedings in the Securities Industry

Given the important purposes served by summary judgment in the courts, it would seem similarly logical and practical to extend such procedures to other adjudicative forums, such as to self regulatory organizations ("SROs") in the securities industry.

Where courtroom trials impose burdens on the court's budget and the courthouse staff, in disciplinary proceedings involving their Members and Associated Persons, SROs like the National Association of Securities Dealers ("NASD") and the New York Stock Exchange ("NYSE") have to pay salaries to Hearing Officers to hear the controversy[13] and to staff administrators to administer and coordinate the proceedings. The SROs have to pay for hearing rooms and incur other related costs and expenses, and have to pay salaries to their regulatory and enforcement staff while they conduct full disciplinary hearings. Respondents, too, have to incur legal fees and related costs and expenses to litigate disciplinary hearings that can last for days or even weeks, as do courtroom litigants. Witnesses, be they third party witnesses, experts, or members of the NASD's investigatory staff, have to take time off from work to testify at full evidentiary hearings, as do witnesses in courtroom trials.

Each SRO has its own regulatory and/or enforcement staff, which of necessity consists of a limited pool of attorneys charged with investigating and bringing disciplinary charges to address potential violations of federal securities laws and the SRO's own rules of conduct. In addition, each SRO maintains its own limited pool of professional disciplinary Hearing Officers. Where there is no issue of material fact, and one of the parties to the disciplinary proceeding is entitled to judgment as a matter of law under the federal securities laws, resolving the dispute through summary judgment in advance of a full hearing on the merits, which can often take days or weeks, allows the SRO's regulatory and/or enforcement staff to turn their efforts to other potential violators, thereby helping to protect even more investors. It also allows the Hearing Officers to move on to other pending disciplinary actions where there may be issues of material fact requiring their attention. In addition, where a Member or Associated Person who has violated the law remains licensed and active in the securities industry, a summary judgment ruling barring the Member or Associated Person from working in the securities industry helps to protect further unwary members of the investing public who might otherwise be injured due to the delay before a full hearing can be had and the disciplinary ruling entered.

From the respondent's perspective, where a Member or Associated Person did nothing wrong, or did do something wrong but the conduct under question had some justification or there were mitigating circumstances, summary judgment may be of benefit to that Member or Associated Person. The mere institution of disciplinary proceedings and the related publicity, especially where it is accompanied by a press release issued by the SRO's regulatory or enforcement division, or where the allegations or proceedings generate third party media coverage or become the subject of discussion or debate on the Internet in chat rooms, blogs, or otherwise, can have a serious detrimental effect on the business and reputation of a regulated Member or Associated Person.

The longer the disciplinary proceeding drags on without resolution, the more customers might transfer their accounts from the Member institution or Associated Person. Potential new customers, faced with a choice of institutions and brokers, out of caution might chose to do business with a competitor.

Reputational damage in some instances could extend beyond the business community to the social and/or personal relationships of the individuals charged. It is not unheard of for persons accused in disciplinary proceedings to find their friends suddenly keeping some distance so as not to be associated with the accused, for charitable or social organizations to decline contributions lest the funds used for those donations be determined to have come from ill-gotten gains, and so forth. All of these things can occur on the mere filing of disciplinary charges, before any evidence or proofs have even been offered let alone tested. Under these circumstances, it might well be in the Member or Associated Person's interest to be able to present its case on a summary disposition motion and obtain a swift dismissal or other favorable ruling, such as a finding that the alleged violation was merely procedural in nature and has already been remedied by the Member or Associated Person such that it is unlikely to occur again.

In light of these concerns and considerations, and others, some SROs have in fact adopted summary judgment procedures in their disciplinary proceedings, and have been utilizing those procedures for many years. For example, the NASD has adopted a "summary disposition" proceeding, which can be found in NASD Rule 9264. As everyone in the securities industry must be registered with the NASD, Rule 9264 and the NASD's summary disposition procedure serves as a good illustration for purposes of this article.

The NASD's Incorporation of Summary Judgment in Rule 9264

For many years, the NASD has relied on its Rule 9264 to justify its use of summary disposition to obtain final determinations in its disciplinary proceedings without necessitating a full hearing on the merits.[14] Rule 9264(e) provides that "The Hearing Panel … may grant the motion for summary disposition if there is no genuine issue with regard to any material fact *and* the Party that files the motion is *entitled* to summary disposition as a matter of law."[15]

Under the NASD's interpretation of its rule, either the complainant or a respondent may move for summary disposition on any or all of the causes of action in the Complaint or any affirmative defenses asserted in the Answer. Most commonly, it is the NASD's Division of Enforcement ("DOE") or Market Regulation Department ("MRD") that moves for a summary disposition ruling suspending or barring a Member or Associated Person from the securities industry. Members and Associated Persons more often desire to have their positions heard by the Hearing Officers during a full hearing on the merits, where they can present documentary evidence and witnesses and cross-examine DOE's or MRD's witnesses live.[16]

Rule 9264 summary "disposition" resembles summary judgment in the federal courts in many respects. In fact, the NASD often analogizes its summary disposition proceedings to motions for summary judgment in federal court, and professes to have "downloaded" Rule 56 of the Federal Rules of Civil Procedure into its proceedings and interpretations of the NASD Code.[17]

There are certain key differences between summary disposition in an NASD disciplinary proceeding and summary judgment in federal court, though. As noted above, in federal courts, summary judgment motions are typically made after full discovery, and may be denied where the opposing party is unable at that time to present facts essential to justify its opposition.[18] By contrast, in NASD disciplinary proceedings the respondent typically receives little meaningful document discovery from the NASD in advance of a full hearing on the merits. Not infrequently, DOE or MRD submit as "evidence" in support of their summary disposition motions summary charts created by their legal staff or examiners. Motions for the underlying data, so as to enable a respondent to test the summaries and their underlying assumptions, are routinely denied by NASD disciplinary Hearing Officers.[19] Moreover, unlike in federal court, in NASD disciplinary proceedings, the respondent is rarely if ever permitted to take depositions of either the NASD staff, its examiners who create the

summaries and swear to them in affidavits, or third party witnesses who allegedly provided the underlying data to DOE or MRD.[20]

Another difference between summary disposition in NASD disciplinary proceedings and summary judgment in federal court cases is in the appellate review process. In federal court, a party may appeal the grant of summary judgment to a Court of Appeals, and from there may petition the United States Supreme Court for certiorari if it so desired. The District Court's summary judgment ruling becomes effective upon its issuance, though, unless a motion for a stay of the ruling is made and granted.

The respondent in an NASD disciplinary proceeding has the right to appeal the summary disposition order to the NASD's National Adjudicatory Council ("NAC"), in which case the summary disposition order is automatically stayed until the NAC rules on the appeal. If the NAC affirms the ruling of the Hearing Panel, the suspension or bar, or such other summary disposition order as the NASD's Office of Hearing Officers ("OHO") issued, becomes effective and permanent. The respondent does have the right to appeal the NAC's ruling to the United States Securities and Exchange Commission ("SEC"), and if necessary to appeal the SEC's ruling to a United States Court of Appeals. However, the summary disposition ruling will remain in full force and effect unless and until the respondent obtains a reversal from either the SEC or the Court of Appeals — a difficult task to say the least, as can be confirmed by anyone who has attempted it.

Part of the difficulty in obtaining reversals of such grants of summary disposition stems from the NASD's repeated claim that it is a private Delaware corporation and not a governmental or quasi-governmental agency, and therefore its disciplinary rulings are not subject to the same Constitutional standards or standards of review as are the summary judgment rulings of federal courts. It is also difficult to convince the SEC or a federal Court of Appeals to overturn *on the merits* a ruling based on the often meager facts that a respondent can place in the Record during the summary disposition hearing given the circumscribed nature of discovery in NASD disciplinary hearings.

The NASD's Use of Summary Disposition to Obtain Rulings In Disciplinary Proceedings Under Rule 8210

At this point, an example of the NASD's use of summary disposition would be beneficial. One of the most common types of disciplinary proceedings in which DOE or MRD seek, and often obtain, summary disposition rulings are those brought under NASD Procedural Rule 8210.

Securities litigators representing corporate and individual clients before the NASD tend to be familiar with the flow of a common disciplinary proceeding. Early on, either at the initial step or after engaging in some preliminary informal fact gathering, NASD staff working in its DOE, MRD, or some other department begin serving requests on NASD Member institutions or their Associated Persons for responses to written questions, production of documents, and/or for investigative testimony sworn to before a notary public pursuant to NASD Procedural Rule 8210.

NASD Rule 8210(c) states in absolute terms that "No member or person shall fail to provide information or testimony or to permit an inspection and copying of books, records, or accounts pursuant to this Rule." As most securities litigators who interact with the NASD know, a Rule 8210 demand is not so much a request as it is an order to Members or Associated Persons who are registered with the NASD. The NASD Code does not even use the word "request", but rather grants to NASD staff the "right" to "require" full compliance with Rule 8210 demands.[21]

Compliance is compelled by virtue of the fact that a violation of Rule 8210 can be punished by the imposition of a permanent lifetime bar from the securities industry for individuals, or severe sanctions up to and including expulsion of the broker-dealer Member.[22] Such penalties are theoretically available even where the Member or Associated Person refuses to answer just a single question posed by the NASD staff. It does not matter whether that single refusal is in an initial letter response to a written Rule 8210 demand from the NASD or in response to a particular question posed during investigative testimony. In fact, the NASD has consistently taken the position that an Associated Person is not permitted to avail him or herself of basic constitutional rights and may not invoke the Fifth Amendment right not to bear witness against oneself in its disciplinary proceedings. Doing so, in the NASD's eyes, is akin to refusing to answer the Rule 8210 request, exposing the Associated Person to a potential lifetime bar from the securities industry.

It might seem relatively simple for DOE or MRD to prove a violation of Rule 8210, at least under certain circumstances. For instance, where DOE or MRD send a letter requesting information under Rule 8210, and the Member or Associated Person either fails to respond or submits a letter, either directly or through counsel, stating either that it refuses to respond or that the individual asserts his or her Fifth Amendment or other Constitutional rights, the proofs would seem to be straightforward and no material issue of fact would seem to exist as to the noncompliance with the Rule 8210 request. Given the NASD's interpretation of Rule 8210 as

requiring absolute compliance, in many situations any explanation the respondent offers would most likely go to mitigation for purposes of punishment (*i.e.*, damages, but not liability, were it analogized to the summary judgment standards of Rule 56 in federal courts).

Moreover, the possibility of a respondent being able to offer "evidence" sufficient to raise a material issue of fact would seem to be remote in many cases, given the dearth of available discovery under the NASD Code, as explained above. In reality, lifetime bars from the securities industry for individuals have become virtually automatic for alleged violations of Rule 8210,[23] absent extenuating circumstances such as the respondent's commitment to fully answer the questions posed at some future time, after the conclusion of an ongoing criminal trial, [24] and even then such exemptions from temporarily responding are infrequently granted.

Of course, the respondent who is so barred can appeal the summary disposition ruling according to the procedure outlined above. On appeal, attempting to convince the SEC or Court of Appeals that the OHO's grant, or the NAC's affirmance, of summary disposition to DOE or MRD was improper based on the merits of the dispute may seem to some to be the most obvious, or the only, way to obtain a reversal, and a remote one at that. Or so the common thinking goes.

Under Section 15A(h)(3) of the Securities Exchange Act of 1934, the NASD is Only Entitled to Summary Disposition in Two Specific Instances

As noted above, the use of summary disposition in NASD disciplinary procedures may seem to make sense. But despite the logic and convenience of employing a summary disposition procedure, and the frequency with which it has been used, is the NASD actually authorized to impose discipline on its Members and Associated Persons through summary procedures, or must it afford its Members and Associated Persons an opportunity to be heard on the merits at a full and fair evidentiary hearing?

The NASD is a creature of statute, 15 U.S.C. §78o-3, and its power to discipline Members and Associated persons flows from that statute, the rules promulgated thereunder, and the prior approval by the SEC of the NASD's own rules, which *must* be consistent with the Securities Exchange Act of 1934.[25] The source of the NASD's power to discipline Members and Associated Persons is 15 U.S.C. §78o-3(h) (Section 15A(h)), which mandates a full hearing, brought on notice of specifically identified charges, with a full and fair opportunity to defend against such

charges on the record. As the statute makes clear, there are only two statutory exceptions to this requirement of a full evidentiary hearing, enumerated in 15 U.S.C. §78o-3(h)(3), which provides, in relevant part:

> (h) Discipline of registered securities association members and persons associated with members; summary proceedings.
>
> * * * *
>
> (3) A registered securities association may summarily (A) suspend a member or person associated with a member who has been and is expelled or suspended from any self-regulatory organization or barred or suspended from being associated with a member of any self-regulatory organization, (B) suspend a member who is in such financial or operating difficulty that the association determines and so notifies the Commission that the member cannot be permitted to continue to do business as a member with safety to investors, creditors, other members, or the association, or (C) limit or prohibit any person with respect to access to services offered by the association if subparagraph (A) or (B) of this paragraph is applicable to such person or, in the case of a person who is not a member, if the association determines that such person does not meet the qualification requirements or other prerequisites for such access and such person cannot be permitted to continue to have such access with safety to investors, creditors, members, or the association.[26]

Thus, under the Securities Exchange Act of 1934, the NASD is not entitled to summary disposition except under two very clearly delineated circumstances specifically set forth in the statute, both of which pertain to the character of the respondent and not to the violation alleged. Nowhere does the statute authorize a motion for summary disposition under Rule 9264 with regard to any other condition of which the NASD may complain, including but not limited to Procedural Rule 8210. Although the availability of such a procedure may have seemed convenient to the NASD in prior cases, and even sanctioned by the SEC in its affirmances of NASD "summary dispositions", Congress has plainly delimited the circumstances in which such a procedure may be used.

The NASD may not, by reference to a series of its own precedents, however uniformly adopted they may be, create thereby an implied shortcut to sanctions if Congress has explicitly stated by statute only two very specific types of SRO proceedings that may be conducted as

"summary proceedings". As the United States Supreme Court observed in rejecting an implied private cause of action for "aiding and abetting" a violation of the federal securities laws, despite the uniform approval of such a cause of action by every United States Court of Appeals for decades, "When Congress wished to provide a … remedy, it knew how to do so and did so expressly".[27]

The NASD Cannot Make Rules that are Inconsistent with the 1934 Act

The NASD is without authority to make any rule that is inconsistent with or unauthorized by the 1934 Act or any rule promulgated thereunder.[28] By statute, SRO rules are explicitly made subject to prior SEC review to ensure that they do not exceed the scope of the SRO's delegated authority.[29] Facially, NASD Rule 9264 might not seem to violate the 1934 Act. But the NASD purports to rely on its own Rule 9264 to justify using its summary disposition procedure in a wide range of disciplinary proceedings, including but not limited to those brought for alleged violations of Procedural Rule 8210.

The application of the NASD's Rule 9264 to circumstances beyond the two clearly and unambiguously set forth in the 1934 Act, even if approved of by the SEC, would therefore seem to be unsupported by statute or prevailing law. Rule 9264(e) is an NASD Rule, and as such it cannot trump an Act of the United States Congress. In turn, the SEC would not have the power to approve or amend such a rule, or to adopt an alternative rule of its own, if such rule exceeded the bounds of the 1934 Act.[30]

Moreover, NASD rules are not law,[31] and they cannot, absent statutory authority, serve as a basis for a download of Rule 56(c) of the Federal Rules of Civil Procedure into an NASD proceeding. Nor do vague references to Congress's legislative intent, such as an intent generally to protect investors, which are often advanced by the NASD to sustain its extension of Rule 9264, suffice absent clear textual support in the 1934 Act.[32]

Conclusion

The only circumstances in which an SRO in the securities industry, like the NASD, is "entitled to summary disposition as a matter of law",[33] are the two instances specifically set forth by Congress in the 1934 Act, 15 U.S.C. §78o-3(h)(3). Alleged violations of other SRO rules, including NASD Rule 8210, do not appear to be among those specifically enumer-

ated instances. Nor is any violation of any substantive securities law, rule, regulation, or any other SRO rule or code provision.

Therefore, for any alleged violation of procedural rules like the NASD's Rule 8210, or any alleged substantive violation, SRO Member institutions and their Associated Persons are entitled, as a matter of federal law, to procedurally fair hearings, on the record, where they can cross-examine witnesses and call their own witnesses. To the extent that SROs in the securities industry seek to rely upon their own internal rules or code provisions for the purpose of depriving Member institutions and their Associated Persons of such hearings, the proposed use of those rules or provisions would seem to exceed their statutory basis, and those rules or provisions would thereby be rendered invalid as applied.

Summary disposition has its merits, and it may be a logical procedure for SROs in the securities industry to have available to them in their disciplinary hearings. However, that is an issue that Congress must address if it is so inclined; it is not something that the SROs can implement unilaterally, even with SEC approval, given the clear text of the 1934 Act.

NOTES

1. Jason Pickholz is a shareholder in Akerman Senterfitt's New York office and is a member of its national White Collar, Parallel Proceedings, and Corporate Advisory Group.

2. Fed. R. Civ. P. 56, Advisory Committee Notes to 1937 Adoption.

3. *Id*.

4. Fed R. Civ. P. 56(a), (b).

5. *Id*.

6. *Id*.

7. *Id*.

8. Fed. R. Civ. P. 56(c).

9. *Id*.

10. Fed. R. Civ. P. 56(e).

11. Fed. R. Civ. P. 56, Advisory Committee Notes to 1963 Amendment.

12. *Id*.; Fed. R. Civ. P. 56(f).

13. It could be argued with equal force that because SRO disciplinary proceedings are heard by professional Hearing Officers rather than by a jury, disciplinary proceedings lack the same concerns regarding juror confusion or verdicts running contrary to the uncontroverted evidence. It could also be argued that costs, expenses, legal fees, and SRO salaries would be incurred for the extensive briefings and hearings required for summary judgment proceedings. Since in disciplinary proceedings the same Hearing Officers who determine a summary judgment motion would be presiding over and making all factual and legal rulings at a full evidentiary hearing, imposing the intermediate step of summary judgment in many instances would not provide significant enough savings in costs, expenses, and fees to overcome the important policy of allowing those who are accused of violations to present their full evidence and to confront their accusers (and their accusers' witnesses) at a live hearing before the ultimate finders of fact. For these reasons, it could be argued that it would be eminently more fair and impartial to allow respondents in SRO disciplin-

ary proceedings to be heard at a full hearing on the merits rather than denying them their "day in court" through summary procedures.

14. *See, e.g.*, *DOE v. Quattrone*, No. CAF030008, 2004 NASD Discip. LEXIS at *2 (NAC Nov. 22, 2004); *DOE v. McDonough*, Complaint No. CAF000040, 2001 NASD Discip. LEXIS 25 at *2-3 (June 26, 2001); *DOE v. Coniglione*, 2001 NASD Discip. LEXIS 29 at *2.

15. NASD Procedural Rule 9264(e) (emphasis added).

16. *See* n.12, above.

17. *See, e.g.*, *Quattrone*, 2004 NASD Discip. LEXIS 17 at *19 n. 12.

18. Fed. R. Civ. P. 56(f); Advisory Committee Notes to 1963 Amendment.

19. Such "summaries", prepared by party investigators who have no first hand knowledge of the underlying events, might raise hearsay and "best evidence" concerns in courtroom proceedings, especially when the underlying data is not produced to the other party and witnesses with first hand knowledge of the underlying information are not presented for live cross-examination and confrontation by the accused.

20. The NASD and its OHO have no power to compel non-Members and non-Associated Persons to appear, to provide evidence, or to give testimony at a depositions or evidentiary hearings. Where a non-registered person provides data or information to DOE or MRD on which they rely for their case, and then refuses to speak with respondent's counsel or to give testimony at the hearing, a respondent may be effectively precluded from confronting his or her accuser, and may be severely hampered in attempting to challenge the underlying data on which the summaries and accusations in the Complaint are based.

21. NASD Procedural Rule 8210(a) and 8210(a)(1).

22. *See, e.g.*, *DOE v. PAZ Secs., Inc. and Joseph Mizrachi*, Complaint No. C07030055, 2005 NASD Discip. LEXIS 1 at *1 (NAC Feb. 10, 2005) (firm expelled for not responding to three Rule 8210 requests); *MRD v. Orlando and Orlando*, No. CMS 030269 (March 30, 2004) (imposing lifetime ban on individuals for refusing to respond to Rule 8210 requests), *aff'd* (NAC May 18, 2005).

23. The claim of a violation of Rule 8210 is often coupled with a claim of a violation of NASD Conduct Rule 2110 ("A member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade") for the same conduct alleged. In such cases, liability on the 2110 claim typically follows as a matter of course from proof of the violation of Rule 8210.

24. *But see DOE v. Benz*, Complaint No. C01020014, 2004 NASD Discip. LEXIS 7 at *20 (NAC May 11, 2004) (Respondent "did not respond timely, which is all that is required to find a violation of Procedural Rule 8210").

25. *Desiderio v. NASD*, 191 F.3d 198, 201 (2d Cir. 1999), *cert. denied*, 531 U.S. 1069 (2001).

26. The remainder of the section provides that, even in such instances where summary suspension is authorized, a subsequent hearing is still required under 78o-3(h)(1) and (2), and the SEC retains the power to stay such suspension.

27. *See Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S 164, 184 (1994).

28. *Burns v. New York Life Insurance Co.,* 202 F.3d 616, 621 (2d Cir. 2000) (*citing, inter alia, Shearson/American Exp., Inc. v. McMahon,* 482 U.S. 220, 233-34 (1987)).

29. 15 U.S.C. §78s(b).

30. *See The Business Roundtable v. Securities and Exchange Comm'n,* 905 F.2d 406 (D.C. Cir. 1990).

31. *Max Marx Color & Chem. Co. Employees' Profit Sharing Plan v. Barnes*, 37 F. Supp. 2d 248, 253 (S.D.N.Y. 1999).

32. *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992).

33. NASD Procedural Rule 9264(e).