

**Gonchar v National Association of Securities  
Dealers, Inc.**

2006 NY Slip Op 30324(U)

February 7, 2006

Supreme Court, New York County

Docket Number: 0101445/2006

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: EDMEAD  
Justice

PART 35

GONCHAR, ANDREW T.,  
ET AL  
- v -  
NAT'L ASSOCIATION OF  
SECURITIES DEALERS, INC ET AL

INDEX NO. 101445/06  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 01  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

APPEAR IN PERSON AT THE CLERK'S OFFICE TO FILE THIS MOTION AND TO TAKE DEED (141B)  
1000 N. YORK STREET  
NEW YORK, NY 10001  
CLERK'S OFFICE

Motions sequence #001 and #002 are consolidated for joint disposition and are decided in accordance with the accompanying Memorandum Decision.

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED and ADJUDGED that order to show cause is denied, and the petition and Article 78 proceeding is dismissed; and it is further

ORDERED that the order to show cause for leave to intervene is denied; and it is further

ORDERED that petitioners serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and judgment of the Court.

Dated: 2/7/06

CAROL EDMEAD  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY I.A.S. PART 35

-----X  
ANDREW PAUL GONCHAR AND  
POLYVIOS TONY POLYVIOU,

Petitioners,

**DECISION/ORDER**

-against-

Index No. 101445-2006  
Mot. Seq. No. 001 and 002

THE NATIONAL ASSOCIATION OF SECURITIES  
DEALERS, INC., THE DEPARTMENT OF  
ENFORCEMENT, AND HEARING OFFICER  
DANA R. PISANELLI,

Respondents.

-----X  
**CAROL R. EDMOND, J.S.C.:**

**MEMORANDUM DECISION**

Petitioners Andrew Paul Gonchar and Polyvios Tony Polyviou (“petitioners”) move by order to show cause pursuant to CPLR §7801 *et seq.* §2302 and §7805 and Article 63 for a order reversing a determination by the respondent Hearing Officer Dana R. Pisanelli (the “Hearing Officer”) of the National Association of Securities Dealers, Inc. (the “NASD”), which quashed the subpoenas issued by petitioners in connection with an NASD’s disciplinary proceeding against petitioners (the “Determination”). Petitioners also seek a preliminary injunction enjoining the NASD and the Hearing Officer from preventing petitioners from issuing subpoenas in such proceeding pending determination of the Article 78 application.<sup>1</sup>

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<sup>1</sup> Petitioners, who worked at CIBC World Markets, Inc., now known as Oppenheimer & Co., Inc. (“Oppenheimer”), previously commenced arbitration proceedings against Oppenheimer in 2002 for defamation, constructive termination, breach of contract, and lost business opportunity. Such proceeding has been stayed pending completion of the underlying disciplinary hearing.

Petition

On August 3, 2004, the respondent, Department of Enforcement of NASD (the "DOE"), commenced a disciplinary proceeding, alleging *inter alia*, that petitioners, while working at Oppenheimer, charged unfair, excessive, undisclosed markups to their retail customers in connection with 142 convertible bond transactions, in violation of federal securities laws and NASD rules (the "Disciplinary Proceeding"). As part of the Disciplinary Proceeding, the DOE moved for leave to offer the expert testimony of David C. Shimko, PhD ("Shimko"), an alleged expert in the area of convertible bonds. Shimko's resume reflected that he had previously been employed or affiliated with various entities, including Bankers Trust Corporation, Harvard Business School, and University of Southern California. Petitioners believe that the DOE will present Shimko's qualifications as an expert to the Hearing Panel, as well as testimony in support of the claim that petitioners wrongfully and fraudulently charged their retail convertible bond customers in the pricing of the bonds. In order to obtain documents to cross-examine Shimko on his credentials and experience trading convertible bonds, counsel for petitioners issued subpoenas pursuant to CPLR 2302 to Shimko's former employers for personnel records and to the company that published an article written by him. The DOE objected to the issuance of the subpoenas, and the Hearing Officer requested that the parties present their positions as to the authority of an attorney to issue subpoenas in the context of a NASD disciplinary proceeding.

The Hearing Officer issued a determination quashing the subpoenas, on the grounds that the NASD's procedures do not permit the issuance of subpoenas and that such procedures preempt the CPLR.

In support of Article 78 relief, petitioners argue that the Determination deprives them the

right to fully cross-examine the DOE's expert witness, which in turn denies them their right to due process. Moreover, the Determination interferes with petitioners' right to utilize CPLR 2301(a), which specifically gives counsel a right to issue subpoenas in an administrative proceeding. Petitioners contend that their ability to cross-examine Shimko is critical due to the esoteric nature of the transactions, *to wit*: the trading of convertible bonds, and the potential irreparable resulting harm in the loss of petitioners' licenses, their reputations and their livelihoods. Further, petitioners also contend that they intend to call witnesses to the hearing, who are not subject to the NASD's jurisdiction. The DOE and petitioners both list fact witnesses over which the NASD has no jurisdiction, and there is no way to ensure the presence of petitioners' witnesses other than through CPLR 2302 (a). Petitioners assert that the Determination stymies their efforts to present a defense employing testimonial evidence, because the subpoena method is the only method available to compel the testimony of such witnesses. Thus, through this Article 78 proceeding, petitioners seek to enforce their right to issue subpoenas pursuant to CPLR 2302(a) to compel witness testimony at the Disciplinary Proceeding.

Petitioners further maintain that they need not wait until the disposition of the Disciplinary Proceeding in order to have their redress now. The Disciplinary Proceeding and the Hearing Officer's actions are quasi-judicial in nature as contemplated by Article 78, and prohibition is a remedy available to both restrain the assumption of jurisdiction and prevent the NASD from exceeding its powers. Although petitioners may appeal to the NASD's National Adjudicatory Council, it may do so only after the Disciplinary Proceeding is completed when the harm has already been done.

It is also argued that petitioners will suffer grave and irreparable harm by being subject to an unfair and potentially biased Disciplinary Proceeding, in violation of a constitutional right, without the ability to effectively cross-examine the DOE's expert witness or present the testimony of fact witnesses necessary to refute the claims.

By separate order to show cause, counsel for petitioners moves for leave to intervene, arguing that the Hearing Officer interfered with his legal duty under New York's Code of Professional Responsibility, EC 6-1, 7-1, and 7-15, to competently and zealously advocate on the petitioners' behalf and present a complete defense in the Disciplinary Proceeding.

#### Respondents' Opposition

Respondents oppose both orders to show cause, arguing that (1) Shimko will not testify at the Disciplinary Proceedings, rendering the subpoenas moot; (2) CPLR 2302 does not apply to NASD proceedings; (3) in any event, CPLR 2302 is preempted by conflicting federal law, which requires petitioners to exhaust their administrative remedies at NASD, at the SEC, and finally seek judicial review exclusively in the U.S. Court of Appeals; (4) NASD is not a proper subject of an Article 78 proceeding, because NASD is not a state "public body or public official" and because the challenged NASD decision is not "final;" and (5) petitioners cannot state a constitutional claim because the NASD is not a state actor, and therefore not subject to constitutional claims of violation of due process. Further, petitioners' counsel's separate, yet derivative order to show cause fails for the same reasons.

#### Analysis

While ordinarily the function of a preliminary injunction is to preserve the *status quo* until a final determination upon the merits can be made, "[t]here is no question that in a proper

case the Supreme Court has power as a court of equity to grant a temporary injunction which mandates specific conduct ...” (*McCain v. Koch*, 70 N.Y.2d 109, 116, 511 N.E.2d 62, 64, 517 N.Y.S.2d 918, 920 (1987); *see also*, *State v. Solil Management Corp.*, 128 Misc.2d 767, 491 N.Y.S.2d 243 (Sup.Ct.N.Y.Co.1985)). The decision whether to grant a motion for preliminary relief is committed to the sound discretion of the trial court (*see*, *Doe v. Axelrod*, 73 N.Y.2d 748, 750, 532 N.E.2d 1272, 1273, 536 N.Y.S.2d 44, 45 (1988); *Jiggetts v. Perales*, 202 A.D.2d 341, 342, 609 N.Y.S.2d 222, 223 (1st Dep’t 1994)).

The test is whether a movant has shown: “(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of the equities tipping in the moving party’s favor” (*Housing Works, Inc. v. City of New York*, 255 A.D.2d 209, 213, 680 N.Y.S.2d 487, 491 (1st Dep’t 1998)). Preliminary injunctive relief is a drastic remedy, which will only be granted if it is established that there is a clear right to the relief under the law and the facts (*Koultukis v. Phillips*, 285 AD2d 433, 728 NYS2d 440 (1st dept 2001)).

At the outset, the Court notes that the issue surrounding the purported expert testimony of Shimko is moot. Respondents assert that Shimko is not testifying in the Disciplinary Proceeding. Therefore, the branch of petitioners’ order to show addressed to the Determination which quashed the subpoena served upon Shimko’s former employers and associations is denied and dismissed as moot.

With respect to the branch of petitioners’ order to show cause which seeks an order reversing the Determination which precludes petitioners from issuing further subpoenas through their counsel, the Court denies such request and dismisses this petition.

The NASD is a private non-profit Delaware corporation and a self-regulatory organization registered with the United States Securities and Exchange Commission (the "SEC") as a national securities association pursuant to the Maloney Act of 1938, 15 U.S.C. §§78(o)-3, *et seq.*, amending the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §§78(a), *et seq.* It is part of a comprehensive mechanism for regulating the securities markets, acting under the supervision of the ("SEC"). The NASD Code of Procedure, approved by the SEC, governs NASD disciplinary proceedings against securities firms and their representatives. Further, the NASD has been assigned the responsibility by the SEC for conducting investigations and commencing disciplinary proceedings against member firms and their associated member representatives in compliance with the *federal securities laws and regulations* (see 15 U.S.C. §78o-3(b)(7)).

The decisions made by a Hearing Panel of the NASD are appealable to the NASD National Adjudicatory Council ("NAC"), which may affirm, modify or reverse the Hearing Panel's decision. NAC decisions may then be appealed to the SEC, and from the SEC to the United States Court of Appeals (see *Austin Mun. Sec., Inc. v. NASD*, 757 F.2d 676, 690 [5th Cir. 1985]; see also *Swirsky v. National Ass'n of Securities Dealers*, 124 F.3d 59 (Mass.) (1997) (as a result of broker's failure to invoke the third tier of the review process, the district court lacked subject matter jurisdiction, and it properly dismissed the complaint)).

The doctrine of exhaustion of remedies is stated in *Myers v. Bethlehem Shipbuilding Corp.*, (303 U.S. 41, 50-51, 58 S.Ct. 459, 463-64, 82 L.Ed. 638 (1938)), where the Supreme Court noted the "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been

exhausted." The central purpose of this doctrine is "the avoidance of premature interruption of the administrative process" (*id. citing McKart v. United States*, 395 U.S. 185, 193, 89 S.Ct. 1657, 1662, 23 L.Ed.2d 194 (1969); *see Portela-Gonzalez v. Secretary of the Navy*, 109 F.3d 74, 79 (1st Cir.1997)).

Petitioners herein failed to exhaust the remedies available under the NASD rules. Further, contrary to petitioners' contentions, in this case, resort to the correct appeals procedure would not have been a "futile act." Moreover, none of the four exceptions to the exhaustion requirement have been established (*see Guitard v United States Secretary of the Navy*, 967 F 2d 737 (2d Cir 1992)). Thus, this Court lacks jurisdiction to entertain petitioners' claims herein.

In any event, the Court rejects petitioners' alleged right to issue a subpoena in the Disciplinary Proceeding pursuant to CPLR 2302(a). CPLR 2302(a) provides:

Subpoenas may be issued without a court order by . . . an attorney of record for a party to . . . an administrative proceeding or an arbitration . . .in relation to which proof may be taken or the attendance of a person as a witness may be required . . . .

Contrary to petitioners' contention, CPLR 2302 does not apply to the Disciplinary Proceeding herein brought by the NASD (*see Matter of the Application of NASD Regulation, Inc., Department of Enforcement v Rosato*, Index. No. 119971/98, J. Beverly S. Cohen). It is uncontested that none of the cases to which petitioners cite where CPLR 2302 was invoked involved a disciplinary proceeding brought by the NASD.

Further, the case *Crimmins v. American Stock Exchange* (368 F Supp 270 (SDNY 1973)) upon which petitioners rely in support of its contention that counsel may issue subpoenas in the Disciplinary Proceeding is unpersuasive. The Court in *Crimmins* stated, *in dicta*, that though CPLR 2302 "*seems* to empower administrative panels such as the Exchange disciplinary panel to issue subpoenas without a court order, the very same provision extends a like power to all

attorneys of record in administrative hearings. Plaintiff offers no reason, and we see none why the Exchange was required to issue subpoenas when plaintiff himself was possessed with the requisite power.”

Based on the above, the Court determines that it lacks subject matter jurisdiction to address petitioners’ contentions, and that CPLR 2302(a) does not apply to the Disciplinary Proceeding at issue.

Even if this proceeding is properly brought as one under Article 78, it cannot be said that the Hearing Officers’ Determination was arbitrary and capricious, or an abuse of discretion, or taken "without sound basis in reason and ... without regard to the facts" (*Matter of Pell v Board of Education*, 34 N.Y.2d 222, 231(1974)). It is well settled that the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld (*see, e.g., Matter of Mounting & Finishing Co. v. McGoldrick*, 294 N. Y. 104, 108; *Matter of Colgate-Palmolive-Peet Co. v. Joseph*, 308 N. Y. 333, 338; *Udall v. Tallman*, 380 U. S. 1, 16-18; *Power Reactor Co. v. Electricians*, 367 U. S. 396, 408). Statutory construction is the function of the courts “but where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited” (*Mounting & Finishing Co.* , 294 N. Y. at p. 108; *Board v. Hearst Publications*, 322 U. S. 111, 131). The administrative determination is to be accepted by the courts if it has "warrant in the record" and a reasonable basis in law' (same citation). 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body' (*Rochester Tel. Corp. v. U. S.*, 307 U. S. 125, 146)."

Here, in rendering the Determination, the Hearing Officer reviewed and cited to the

NASD rules, and explained the applicability of the CPLR in light of the existing NASD rules governing disciplinary hearings. The Hearing Officer cited to the authority given to parties by the NASD to request the Hearing Officer to direct the production of evidence at the Disciplinary Hearing, as well as the authority given to the Hearing Officer to issue such a directive. The rules governing a hearing officer's power (Rule 8210) to compel a witness to appear and give testimony in a disciplinary proceeding, which petitioners acceded to when joining the NASD, were considered by the Hearing Officer. While there is no provision for attorneys to issue "subpoenas" on behalf of a respondent in a NASD disciplinary proceeding, the NASD Rules provide for a similar compulsory method for securing a witness' appearance for disciplinary proceedings (Rule 9252). Therefore, it cannot be said that the NASD is "silent" as to a party's ability to compel a witness to appear at a disciplinary proceeding on his or her behalf.

The remaining contentions of petitioners lack merit in any event.

Counsel's separate order to show cause for leave to intervene is denied. The Court can decide the essential issue raised in petitioners' motion independent from counsel's moving papers, and the alleged right to secure witnesses for the Disciplinary Proceeding is one belonging to the petitioners.

Since petitioners will not prevail on their Article 78 Petition, injunctive relief is denied.

Based on the foregoing, it is hereby

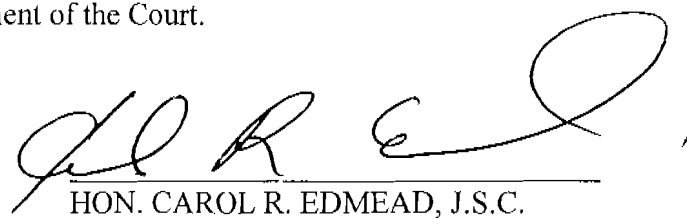
ORDERED and ADJUDGED that order to show cause is denied, and the petition and Article 78 proceeding is dismissed; and it is further

ORDERED that the order to show cause for leave to intervene is denied; and it is further

ORDERED that petitioners serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and judgment of the Court.

Dated: February 7, 2006



HON. CAROL R. EDMED, J.S.C.

**CAROL EDMED**  
J.S.C.

**Title Judgment** ... **to Clerk** ... **To** ... **obtain entry** ... **must** ... **appear in person at the designated Clerk's Desk (Room 141B).**