

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 57138 / January 14, 2008

Admin. Proc. File No. 3-12618

In the Matter of the Application of

WEDBUSH MORGAN SECURITIES, INC.
c/o Jerry S. Phillips, Esq.
Loeb & Loeb LLP
10100 Santa Monica Boulevard, Suite 2200
Los Angeles, CA 90067-4120

For Review of Disciplinary Action Taken by

NASD

ORDER DISMISSING PROCEEDINGS

I.

Wedbush Morgan Securities, Inc. (“Wedbush” or “the Firm”), an NASD member firm and a registered broker-dealer, appeals from a March 15, 2007 decision by an NASD Hearing Officer (the “Decision”) finding that Wedbush had failed to make full payment of all post-award interest due under an arbitration proceeding against the Firm. ^{1/} On May 26, 2006, an NASD arbitration panel awarded forty-three claimants compensatory damages and attorneys’ fees totaling \$3,801,933.00 against Wedbush, plus fees and administrative costs (the “Award”). Under the Decision, the Hearing Officer ordered that Wedbush’s NASD membership be suspended effective at the opening of business on March 23, 2007, until the Firm provided

^{1/} On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD’s Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Rel. No. 56146 (July 26, 2007), 72 FR 42190 (Aug. 1, 2007) (SR-NASD-2007-053). Because the NASD action here was taken before that date, we continue to use the designation NASD.

documentary evidence that it had paid the full Award, including all post-award interest, settled the Award with the Firm's arbitration claimants, or declared bankruptcy. Wedbush paid the amount due under the Decision on March 22, 2007. Thus, the suspension never took effect. Wedbush then appealed the Decision to the Commission asserting, as the bases for its appeal, that the Decision was flawed and based on erroneous facts and that Wedbush was denied due process in its proceeding before the NASD Hearing Officer. We base our findings on an independent review of the record.

II.

A. Background At issue in the proceeding below was the proper construction of Rule 10330(h) of NASD's Code of Arbitration Procedure with respect to the portion of the Award and the number of days for which Wedbush owed post-Award interest. ^{2/} In a letter dated May 26, 2006 (the "May 26 NASD Letter"), NASD transmitted the Award to Wedbush's counsel. The May 26 NASD Letter stated, "Pursuant to Rule 10330(h) of the [NASD Arbitration] Code, the responsible party must pay any monetary awards within 30 days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction. If an award is not paid within 30 days, the responsible party must pay post-judgment interest at the legal rate or as provided in the award by the arbitrator(s)." The May 26 NASD Letter went on to say, "The 30-day period ends on: June 28, 2006."

On June 26, 2006, Wedbush filed a Petition to Vacate Arbitration Award or, in the Alternative, to Correct Arbitration Award in the United States District Court for the Central District of California (the "Petition") that challenged \$2,351,635.00 of the Award. It sent claimants' counsel a copy of the Petition and a check for \$1,450,298.00, "the amount of the Award the enclosed Petition does not challenge." Although Wedbush's letter transmitting this check to claimants' counsel is dated June 26 and marked "VIA MESSENGER," the record suggests that claimants' counsel may not have received the check until June 27. On August 3, 2006, Wedbush's Petition was dismissed, and on November 7, 2006, Wedbush hand-delivered a check issued by Wedbush to claimants' counsel in the amount of \$2,351,635.00, the principal amount of the Award at issue in the Petition. On November 8, 2006, claimants' counsel requested that NASD suspend or cancel Wedbush's NASD membership for failure to pay the Award in full, claiming that, after the November 7 payment, Wedbush still owed an additional \$118,503.69 in interest. This amount purportedly reflected \$32,290.53 in interest that had accrued on the full amount of the Award during the period prior to Wedbush's June 27 payment, plus \$86,213.16 in interest on the portion of the Award disputed in the Petition through

^{2/} Rule 10330(h) of NASD's Code of Arbitration Procedure states, in relevant part, "All monetary awards shall be paid within thirty (30) days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction. An award shall bear interest from the date of the award: (1) if not paid within thirty (30) days of receipt, (2) if the award is the subject of a motion to vacate which is denied, or (3) as specified by the arbitrator(s) in the award."

Wedbush's November 7 payment. Claimants' counsel asserted that the interest would continue to accrue going forward.

On November 9, 2006, NASD informed Wedbush that it intended to suspend the Firm's NASD membership because of its "failure to comply with the award." The suspension would take effect on November 30, 2006, unless the Firm first paid the Award in full or requested a hearing. On November 16, 2006, Wedbush responded to NASD, disputing claimants' counsel's calculation of the interest Wedbush owed on the Award and stating, "Wedbush is making its own calculation of interest on the Award and will pay that calculated amount once those efforts have been completed." Soon thereafter, Wedbush delivered to claimants' counsel a check in the amount of \$104,373.94, together with a letter stating that this amount reflected "the correct calculation of interest due." Claimants' counsel challenged Wedbush's calculation of the interest due and requested that NASD suspend Wedbush's membership for failure to pay the Award in full. Wedbush requested the NASD hearing that produced the Decision.

B. NASD Proceeding At the hearing, NASD and Wedbush disputed the amount of interest Wedbush owed on the Award. NASD claimed that Wedbush's partial payment of \$1,450,298.00 on June 27 did not relieve Wedbush of the obligation to pay interest on that partial payment because, NASD argued, NASD Arbitration Rule 10330(h) does not permit partial payments within thirty days of receipt of an award. Wedbush responded that NASD's calculation of interest on the entire amount of the Award was improper because Wedbush's partial payment of \$1,450,298.00 on June 27 occurred within the 30-day period set forth under NASD Arbitration Rule 10330(h). According to Wedbush, it only ever owed interest on the \$2,351,635.00 challenged in the Petition.

The Decision rejected NASD's position, stating, "Giving credit to such partial payments [as Wedbush made on June 27] encourages the losing party to pay the undisputed amount of an award, which benefits the prevailing party. If [NASD] Enforcement's construction is applied, there is less incentive for the losing party to pay the undisputed portion of an award promptly."

However, on its own motion, the Decision found that Wedbush's June 27 partial payment was not timely because it was not made within thirty days of the date on "which Wedbush's attorney received" the Award, which the Decision stated was May 26, 2006. The Decision dismissed the significance of the June 28 due date specified in the May 26 NASD Letter on the grounds that the thirty-day requirement in NASD Rule 10330(h) is unambiguous and cannot be superseded by an NASD staff letter. The Decision did not state the basis for its finding that Wedbush's attorney received the Award on May 26, 2006, but stated that the thirty days concluded on June 25, 2006. The Decision found that the pendency of the Petition stayed Wedbush's obligation to pay interest on the challenged portion of the Award. The Decision accordingly calculated that Wedbush owed \$16,620.70 in unpaid interest, after accounting for all of the payments made by Wedbush through November 30, 2006. The Decision ordered Wedbush's NASD membership to be suspended unless it made payment of this interest before

March 23, 2007. On March 22, 2007, Wedbush paid all amounts due under the Decision, and the suspension thus did not take effect.

III.

On appeal, Wedbush requests that we: “(a) reverse the Decision, (b) find that no interest or costs were due from Wedbush, (c) order NASD to pay all costs attendant to this and the underlying proceeding, and (d) order [claimants’ counsel] to return all monies paid by Wedbush to it under the Decision.” According to Wedbush, the NASD Hearing Officer’s Decision was based on what Wedbush asserts was an erroneous assumption that the Award was due on June 25, 2006. Wedbush argues that NASD itself had conceded before the Hearing Officer that the May 26 NASD Letter stated that the Award was due on June 28 and that, as a result, Wedbush did not argue this point before the Hearing Officer.

NASD responds that Wedbush’s appeal requests relief that the Commission is unable to order. According to NASD, the Commission lacks authority to order the arbitration claimants to return monies they received under the Award to Wedbush. As a result, according to NASD, Wedbush’s appeal is moot. 3/

Section 19 of the Securities Exchange Act of 1934 authorizes NASD members or persons associated with such members to seek review by us of action taken by NASD. Wedbush does not cite any basis for Commission jurisdiction over this proceeding. Under Section 19(d) of the Exchange Act, NASD action is subject to review by the Commission if it: (i) imposes a final disciplinary sanction on an NASD member; (ii) denies membership or participation to an applicant; (iii) prohibits or limits any person with respect to access to services offered by NASD or an NASD member; or (iv) bars any person from becoming associated with an NASD member. 4/ Exchange Act Section 19(e), which applies to disciplinary actions, authorizes us to “set aside” a sanction imposed in such a disciplinary action and, “if appropriate, remand to the self-regulatory organization for further proceedings.” 5/

3/ In the alternative, NASD argues that, if the Commission reaches the merits of Wedbush’s appeal, the Commission should affirm NASD’s action because Section 19(f) of the Securities Exchange Act of 1934 requires the Commission to uphold NASD actions when: (i) the specific grounds upon which NASD based its action exist in fact; (ii) NASD conducted the proceeding in accordance with its rules; and (iii) NASD applied its rules consistently with the purposes of the Exchange Act. 15 U.S.C. § 78s(f). NASD argues that its actions in connection with these matters satisfy each of these conditions.

4/ 15 U.S.C. § 78s(d).

5/ 15 U.S.C. § 78s(e).

If NASD's order imposing a suspension on the Firm had taken effect, Wedbush would have been subject to a final disciplinary sanction. However, as noted above, the Decision ordered Wedbush's membership to be suspended effective March 23, 2007, only if Wedbush did not pay the full amount due under the Decision by that date. Because Wedbush made full payment on March 22, the suspension never took effect. In addition, NASD did not deny Wedbush membership, prohibit or limit Wedbush's access to services, or bar any person from becoming associated with Wedbush, nor has Wedbush argued that the Decision did any of these things. Therefore, NASD took no action within the meaning of Section 19(d) of the Exchange Act that is subject to review by the Commission, and Wedbush's appeal must be dismissed for lack of jurisdiction. ^{6/} Under the circumstances, we have determined to dismiss Wedbush's appeal. ^{7/}

Notwithstanding this determination, we are concerned that the parties had no opportunity to develop evidence or legal arguments concerning the Decision's finding that Wedbush's June 27 payment was not made within thirty days of the date on which Wedbush received the Award. We also note that the Decision does not identify the basis for its finding that Wedbush received the Award on May 26 and does not address issues relating to the discrepancy between the thirty-day requirement in Rule 10330(h) and the June 28 due date for paying the Award stated in the May 26 NASD Letter. NASD may wish to consider these matters as part of its ongoing administration of its arbitration program.

Accordingly, it is ordered that Wedbush Morgan Securities, Inc.'s application for review be, and it hereby is, dismissed.

By the Commission.

Nancy M. Morris
Secretary

^{6/} See, e.g. Allen Douglas Secs., Inc., Exchange Act Rel. No. 50513 (Oct. 12, 2004), 83 SEC Docket 3570 (dismissing for lack of jurisdiction an appeal of NASD's determination to disapprove certain proposed subordinated loan agreements on the grounds that the NASD action was not reviewable under Section 19(d) of the Exchange Act); Russell A. Simpson, 53 S.E.C. 1042 (1998) (dismissing for lack of jurisdiction an appeal of NASD's dismissal of a customer complaint on the grounds that the NASD action was not reviewable under Section 19(d) of the Exchange Act).

^{7/} Exchange Act Section 19 does not appear to authorize the setting aside of NASD's assessment of interest on the Award, nor does it authorize the Commission to order claimants to return to Wedbush monies received under the Decision.