SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

Securities Exchange Act of 1934
Rel. No. 50343 / September 10, 2004

Admin. Proc. File Nos. 3-11380 and 3-11381

In the Matter of the Applications of

MARSHALL FINANCIAL, INC.

For Review of Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF ASSOCIATION ACTION

Registered securities association found that member failed to pay fees related to arbitration proceedings but never imposed suspension and dismissed proceedings because member paid the fees before association's decision was served. Held, review proceedings dismissed.

APPEARANCES:

John J. Jagiela, for Marshall Financial, Inc.

Marc Menchel, Alan Lawhead, and Michael J. Garawski, for NASD.

Appeal filed: January 15, 2004
Last brief received: April 22, 2004

I.

Marshall Financial, Inc. ("Marshall"), an NASD member firm, appeals from two decisions by an NASD Hearing Officer involving Marshall's failure to pay member surcharges and administrative fees (collectively "the Fees") incident to four arbitration proceedings. In both decisions, the Hearing Officer found that NASD properly imposed the Fees upon Marshall and ordered that Marshall's NASD membership be suspended until it provided evidence that it had paid the Fees, made arrangements to pay the Fees through an installment payment plan, or declared bankruptcy. The suspensions were to take effect upon service of the orders. Marshall paid the Fees after the Hearing Officer entered the orders but before they were served on Marshall. As soon as Marshall paid the Fees, NASD dismissed both proceedings. 1/ Marshall then appealed the Hearing Officer's decisions to the Commission asserting, as the basis for its appeals, that the assessment of the Fees was "a breach of the contractual agreement between Marshall" and NASD. We base our findings on an independent review of the record.

II.

A. Background. In late 2000 and early 2001, several customers brought arbitration claims against Miller & Schroeder Financial, Inc. ("M&S"), an NASD member. Following the initiation of those proceedings, some M&S stockholders and employees formed a new broker-dealer, which they named "Marshall, Miller & Schroeder Financial, Inc." and later renamed "MM&S Financial, Inc." 2/ This firm, the applicant in these appeals, was subsequently renamed "Marshall Financial, Inc."

In July 2001, Marshall agreed to purchase selected M&S assets, including certain of that firm's accounts receivable, transferrable licenses, and the exclusive right to the "Miller &

1/ NASD has moved to consolidate the two proceedings in accordance with our Rule of Practice 201. 17 C.F.R. § 201.201 ("proceedings involving a common question of law or fact may be consolidated for hearing of any or all the matters at issue in such proceedings."). We have determined to grant NASD's motion.

2/ Although the record indicates that there was some overlap between the former employees of M&S and the employee-shareholders in Marshall, the extent of that overlap is unclear.

Schroeder" name. As part of this agreement, Marshall assumed certain of M&S's debts and liabilities but expressly did not assume "[l]iabilities arising out of any litigation or administrative or arbitration proceeding to which [M&S] . . . or any of [its] . . . affiliates is a party." 3/

Notwithstanding Marshall's disclaimer of liability for arbitration claims against M&S, a number of former M&S customers named Marshall as a party in their initial notices of claim, asserting that Marshall was liable as a successor in interest to M&S. 4/ Among these claimants were Leroy R. and Bonnie J. Cates and John R. Rohner who filed for arbitration in late 2001 and early 2002, respectively. Other claimants who already had commenced arbitration proceedings against M&S amended their claims to add Marshall as a party. These customers included Philip J. Salley and George E. McCauley who, on behalf of various family members or trusts, added Marshall as a party in their respective arbitration proceedings in January and August 2002.

Although Marshall was ultimately dismissed as a party in each of these proceedings, 5/ NASD Dispute Resolution staff assessed various fees against the firm in accordance with NASD rules. These fees included member surcharges, 6/ prehearing and

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3/ Marshall further disclaimed "[l]iabilities resulting from any violation by [M&S] or any employee, director, or agent of [M&S] or any of their respective affiliates or any predecessor for which [M&S] may be liable, of any Applicable Law, including without limitation . . . federal and state securities laws."

4/ In December 2001, Marshall obtained a preliminary injunction against a group of M&S customers who had named Marshall in an arbitration proceeding not at issue in these proceedings. In enjoining that arbitration, the court held that Marshall was not a successor in interest to M&S with respect to the claims at issue in the arbitration. Marshall, Miller & Schroder, Inc. v. Behnke, No. 01-CV-2264-J (CGA) (C.D. Cal. Dec. 26, 2001).

5/ The bases for these dismissals is not clear from the record.

6/ NASD Code of Arbitration Procedure Rule 10333(a) provides that each NASD member who is named as a party to an arbitration proceeding shall "be assessed a non-refundable surcharge . . . when the Director of Arbitration perfects

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hearing processing fees, 7/ and forum fees. 8/ Marshall paid a portion of these fees, and NASD withdrew funds from accounts Marshall maintained with NASD to cover certain of the other fees that had been assessed. Despite these payments and credits, NASD Dispute Resolution determined that Marshall still owed a total of $5,950 with respect to the Cates, Rohner, and McCauley proceedings and $4,300 with respect to the Salley proceedings.

B. NASD Proceeding. Marshall refused to pay the balance of the amounts that had been assessed. Consequently, on March 17, 2003, NASD gave Marshall written notice that, in accordance with NASD Code of Procedure Rule 9531, 9/ Marshall would be suspended from NASD membership based on its failure to pay amounts assessed in connection with the Cates, Rohner, and McCauley arbitrations. On August 7 and September 10, 2003, NASD gave Marshall notice that Marshall would be suspended based on its failure to pay the amounts assessed in connection with the Salley arbitration. Marshall requested a hearing to challenge NASD's determinations to suspend its membership, which NASD granted. 10/

6/ (...continued)
service of the claim naming the member . . .." NASD Manual at 7605 (2000). In its Rules, NASD has established a graduated schedule of member surcharges increasing with the amount at issue in the arbitration.

7/ NASD Code of Arbitration Procedure Rule 10333(d) provides that parties to an arbitration will be assessed a "non-refundable process fee" for each stage of a proceeding, including the "prehearing" and "hearing" stages. NASD Manual at 7605-06 (2000).

8/ Under NASD Code of Arbitration Procedure Rule 10332(c), the arbitration panel is authorized to determine "the amount chargeable to the parties as forum fees and shall determine who shall pay such forum fees." NASD Manual at 7601 (2000).

9/ Rule 9531(a) provides that "[NASD] staff may issue a written notice suspending . . . the membership of a member . . . who has failed to pay a fee, due, assessment or other charge . . . ." NASD Manual at 7431 (2000).

10/ Rule 9532(a) of NASD's Code of Procedure provides that "within five days after the date of service of a notice issued under Rule 9531, the member . . . may file a request
(continued...)

Marshall argued before the NASD Hearing Officer that, among other things, the Fees were not properly imposed because the arbitrations involved transactions that occurred before Marshall existed. Marshall further argued that the Fees were wrongly imposed on Marshall because the claimants were not and had never been customers of Marshall.

The NASD Hearing Officer found, in both proceedings, that Marshall owed the Fees and had not paid them. 11/ In ruling against Marshall, the Hearing Officer noted, among other things, that the rules at issue contain no requirement that a party named in a complaint "be ultimately determined to be liable or even correctly named." The Hearing Officer further observed that there is no "requirement in the rules that the subject matter of the complaint be determined to be arbitrable" and that, upon becoming an NASD member, Marshall (like all NASD members) "agreed to pay the dues, assessments, and other charges as shall be fixed in the arbitration forum in accordance with the NASD Rules." 12/

In both proceedings, the Hearing Officer ordered that Marshall be suspended until it provided evidence that it had paid the Fees, made arrangements to pay the Fees through an installment payment plan, or declared bankruptcy. The suspensions were to take effect "as of the date of service" of the Hearing Officer's decisions. Before each of the decisions was served, however, Marshall paid the respective Fees and NASD dismissed both of the proceedings.

III.

10/ (...continued)
for a hearing." NASD Manual at 7432 (2000). NASD considered the amounts assessed in the Cates, Rohner, and McCauley arbitrations in one proceeding, and those assessed in the Salley arbitration in another proceeding.

11/ The Hearing Officer found that Marshall had been over-charged $350 in connection with the McCauley arbitration and made a corresponding reduction in the amount that Marshall owed.

12/ The Hearing Officer, who presided over both proceedings, made these observations in her decision regarding the Salley arbitration fees.

Marshall does not directly challenge the action of the NASD Hearing Officer in determining to suspend the firm based on its failure to pay the Fees. 13/ Rather, Marshall argues that the Commission should set aside the earlier action of NASD staff in assessing the Fees which, Marshall asserts, was a "breach of the express written contract to arbitrate between the NASD and the member." 14/ According to Marshall, because it had no customer relationship with any of the parties seeking arbitration, it cannot be a party to an arbitration proceeding brought by them, nor subject to the imposition of the Fees.

NASD argues that we should deny Marshall's appeal for lack of jurisdiction. According to NASD, the action of its Hearing Officer did not implicate any of the four jurisdictional bases presented in Section 19(d) of the Exchange Act. 15/ NASD further argues that Marshall's appeal should be dismissed as moot. 16/

13/ Marshall also does not challenge NASD's calculation of the Fees.

14/ We note that Marshall sought an injunction against NASD seeking abatement of the amounts Marshall had been assessed in connection with arbitration proceedings related to its alleged relationship with M&S. Marshall's arguments in support of its action included a claim of breach of contract by NASD. MM&S Financial, Inc. v. NASD, Civil Action No. 02-424 (D. Minn.). The district court dismissed Marshall's complaint, and the United States Court of Appeals for the Eighth Circuit affirmed that dismissal. MM&S Financial, Inc. v. NASD, 364 F.3d 908 (8th Cir. 2004).

15/ NASD argues that this appeal does not concern an NASD action that: (1) imposes a final disciplinary sanction on an NASD member; (2) denies membership or participation to an applicant; (3) prohibits or limits any person with respect to access to services offered by NASD or an NASD member; or (4) bars any person from becoming associated with an NASD member. These are the criteria set out in the Exchange Act that give this Commission jurisdiction over an appeal of NASD action. 15 U.S.C. § 78s(d). NASD also contends that, because of the similarity between the issues and the parties here and those in another NASD proceeding we dismissed in 2003, see infra note 17, we should dismiss Marshall's appeal on the basis of collateral estoppel.

16/ In the alternative, NASD argues that, if the Commission

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In late 2003, we dismissed a similar appeal by Marshall on the basis of mootness, Marshall Financial, Inc. ("Marshall I"). 17/ In that earlier appeal, Marshall challenged NASD's assessment of fees related to certain arbitration proceedings which were subsequently dismissed as to Marshall. As we held in Marshall I, "[i]t is well-recognized that the federal courts will dismiss a matter as moot unless the complaining party has 'suffered some actual injury that can be redressed by a favorable judicial decision.'" 18/ Although the NASD Hearing Officer ordered that Marshall be suspended because of its failure to pay the Fees, the orders were not to take effect until they were served on Marshall. As it has done here, Marshall paid the amounts due before NASD served the suspension orders, and, consequently, Marshall was never suspended.

Marshall expressly concedes, in its briefs to us, that the "parties and issues are identical as those raised in [Marshall I]." 19/ It nevertheless argues (as it did in Marshall I) that the matter is not moot because a favorable Commission decision would result in Marshall being "reimbursed for the fees which it was erroneously assessed and more importantly, it would have a precedent to use in order to prevent the NASD from incorrectly

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16/ (...continued)
reaches the merits of Marshall's appeal, the Commission should affirm NASD's action because Section 19(f) of the Exchange Act requires the Commission to uphold NASD actions when: (1) the specific grounds upon which the NASD based its action exist in fact; (2) NASD conducted the proceeding in accordance with its rules; and (3) 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.

17/ Securities Exchange Act Rel. No. 48917 (Dec. 12, 2003), 81 SEC Docket 3241. This proceeding was also related to Marshall's alleged ties to M&S.

18/ Marshall I, 81 SEC Docket at 3241 (quoting GTE California, Inc. v. FCC, 39 F.3d 940, 945 (9th Cir. 1994)(internal quotation omitted)). See also Enrico's Inc. v. Rice, 730 F.2d 1250, 1254 (9th Cir. 1984).

19/ Marshall claims that it is "seeking to appeal the ruling in [Marshall I] and therefore the ruling is not final." In fact, however, that decision was not appealed, and the time for filing such an appeal has expired.

assessing those fees in the first place." Marshall further argues that, in the event we decline to consider the firm's appeals, Marshall will be denied due process and we will be thwarting "the fundamental purpose of the securities laws which [is] 'to achieve a high standard of business ethics in the securities industry.'" We are unpersuaded by Marshall's arguments.

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. 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." 20/ In the event Marshall had been suspended because of its failure to pay the Fees, Section 19(e) would authorize the setting aside of that suspension under appropriate circumstances. The suspension, however, was never imposed, and therefore cannot now be set aside. 21/

As one court has recently stated, "'[t]he test for mootness is whether the relief sought would, if granted, make a difference to the legal interests of the parties.'" 22/ "Although we, like other administrative agencies, have 'substantial discretion to determine whether the resolution of an issue . . . is precluded by mootness,'" 23/ we have "declined to consider an appeal where

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20/ 15 U.S.C. § 78s(e).

21/ Exchange Act Section 19 does not appear to authorize the setting aside of NASD's Fees assessment or authorize "remission" of the Fees.

We note that, although Marshall asked NASD, in January 2002, to abate amounts NASD had assessed in connection with the arbitration proceedings in which Marshall had then been named, there is no indication that the firm subsequently sought a reduction or refund of any of those amounts or amounts subsequently assessed, including the Fees.

22/ Coalition for Gov't Procurement v. Fed. Prison Indus., Inc., 365 F.3d 435, 458 (6th Cir. 2004) (quoting Bowman v. Corrections Corp. of Am., 350 F.3d 537, 550 (6th Cir. 2003)).

23/ Marshall, 81 SEC Docket at 3242 (quoting Blinder, Robinson & (continued...)

'even a favorable decision by the Commission would entitle [the applicant] to no relief.'" 24/ Such a situation confronts us here.

We perceive no relief that is available here. Specifically, there was no suspension imposed on Marshall, so there is no suspension that we can lift. Marshall's desire for helpful precedent, without anything more substantial at stake in the controversy, does not persuade us that this case is not moot. Under the circumstances, we have determined to dismiss Marshall's appeals. 25/

An appropriate order will issue. 26/

By the Commission (Chairman DONALDSON and Commissioners GLASSMAN, GOLDSCHMID, and CAMPOS); Commissioner ATKINS not participating.

Jonathan G. Katz
Secretary

23/ (...continued)
Co., Inc., Exchange Act Rel. No. 29496 (July 29, 1991), 49 SEC Docket 717, 718). See also Beatrice J. Feins, 51 SEC 918, 920 n.8 (1993) ("Commission has substantial discretion in determining whether to decline deciding an appeal on mootness grounds."). As we have also noted, the Administrative Procedure Act "provides that an agency may in its discretion issue a declaratory order to terminate a controversy or remove uncertainty." Blinder, Robinson, 49 SEC Docket at 718.

24/ Marshall, 81 SEC Docket at 3242 (quoting Blinder, Robinson, 49 S.E.C. Docket at 718).

25/ In light of our determination to dismiss on the basis of mootness, we do not reach the issue of whether the appeals would also be precluded by collateral estoppel or by a lack of jurisdiction.

26/ We have considered all of the arguments advanced by the parties. We reject or sustain them to the extent that they are inconsistent or in accord with the views expressed herein.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT of 1934
Rel. No. 50343 / September 10, 2004

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MARSHALL FINANCIAL, INC.

For Review of Action Taken by

NASD

ORDER DISMISSING APPLICATIONS FOR REVIEW OF ACTION OF REGISTERED SECURITIES ASSOCIATION

On the basis of the Commission's opinion issued this day, it is

ORDERED that Marshall Financial, Inc.'s applications for review of NASD action related to the assessment and payment of surcharges and fees in connection with certain arbitration proceedings be, and they hereby are, dismissed.

By the Commission.

Jonathan G. Katz
Secretary