

Regulation”) investigation of possible manipulation of three initial public offerings by Monroe Parker Securities, Inc. The Chief Hearing Officer consolidated these proceedings. Both Respondents then filed answers admitting that they did not appear as requested, denying that their actions impeded NASD Regulation’s investigation, and asserting that they did not appear upon advice of counsel because they were the subject of related criminal charges. Levitov and Angeline feared that their Fifth Amendment privileges against self-incrimination would be jeopardized if they gave testimony to NASD Regulation because it had given transcripts of their previous testimony in another disciplinary proceeding to the criminal prosecutors.

Enforcement filed a motion for summary disposition, and the Hearing Panel found that Levitov and Angeline violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110. The Hearing Panel then conducted a hearing on the issue of sanctions and ordered that Levitov and Angeline each be censured, fined \$10,000, and suspended from associating with any NASD member in any capacity for a period of 18 months commencing May 22, 1998.

Appearances

Jonathan I. Golomb, Esq., Senior Attorney, and Rory C. Flynn, Esq., Chief Litigation Counsel, Washington, DC, for the Department of Enforcement.

Diarmuid White, Esq. for Richard Steven Levitov.

David Gordon, Esq. for Ralph Joseph Angeline.

DECISION

I. Introduction

On June 22, 1998, Enforcement filed Complaints against Levitov and Angeline alleging that they violated NASD Conduct Rule 2110 and NASD Procedural Rule 8210 by failing to provide testimony and documents requested by NASD Regulation. On August 31, 1998, Enforcement filed a Motion for Summary Disposition, and on December 21, 1998, the Hearing Panel granted the motion on the issue of liability and continued the proceeding to January 11, 1999, for a hearing on the issue of sanctions. A copy of the Hearing Panel's order granting partial summary disposition is attached as Exhibit A. The Hearing Panel's findings and conclusions in that order are incorporated in this Decision.

On January 11, 1999, the Hearing Panel, composed of two current members of the District Committee for District 10 and the Hearing Officer, conducted a hearing on the issue of sanctions. Enforcement called Claire Catan to testify. Ms. Catan is a supervisor of examiners with NASD Regulation.¹ Levitov and Angeline did not testify or present documentary evidence.

Based upon the evidence submitted at the hearing and the Stipulations filed by the Respondents, the Hearing Panel concludes that Levitov and Angeline each should be censured, fined \$10,000, and suspended from associating with any NASD member in any capacity for a period of 18 months commencing May 22, 1998.

¹ References to the testimony are cited as "Tr. [page]."

II. Discussion

NASD Procedural Rule 8210(a)(1) authorizes the NASD to require an associated person “to provide information orally, in writing, or electronically . . . with respect to any matter involved in [an] investigation” The Rule provides a means for the NASD to carry out its regulatory mandate in the absence of subpoena power. As such, the Rule is a “key element in the NASD’s effort to police its members.”² A failure to respond “undermines the NASD’s ability to carry out its self-regulatory functions,”³ and frustrates its ability “to conduct investigations and thereby protect the public interest.”⁴ For these reasons, the NASD Sanction Guidelines treats a complete failure to respond seriously and recommends a fine of \$25,000 to \$50,000 and a bar.⁵ On the other hand, where mitigation exists, or the respondent did not respond timely or completely, the Guidelines recommend a lesser fine and a suspension of up to two years.

In this case, Enforcement recommends that the maximum sanctions under the Guidelines be assessed against Levitov and Angeline. Enforcement bases its recommendation on its view that Levitov’s and Angeline’s refusals to appear and testify in May 1998 were the equivalent of complete failures to respond.⁶ In other words, Enforcement argues that there are no mitigating factors to be taken into consideration in

² In re Richard J. Rouse, 51 S.E.C. 581, 1993 SEC LEXIS 1831, at *7 (1993).

³ In re Joseph Patrick Hannan, Exchange Act Release No. 40438, 1998 SEC LEXIS 1955, at *9 (Sept. 14, 1998).

⁴ In re Barry C. Wilson, Exchange Act Release No. 37867, 1996 SEC LEXIS 3012, at *14 (Oct. 25, 1996) (quoting Rouse, 51 S.E.C. at 588, 1993 SEC LEXIS 1831, at *16).

⁵ NASD Sanction Guidelines 31 (2d ed. 1998).

⁶ See Rouse, 51 S.E.C. 581.

setting the sanctions in this proceeding. The Hearing Panel disagrees with this view of the evidence.

Under the Guidelines, the following factors are relevant to sanctions: (1) the regulatory importance of the information sought by Enforcement; (2) the degree of response by Levitov and Angeline; and (3) Levitov's and Angeline's lack of disciplinary history.

A. *Background of the Investigation and Regulatory Importance of the Information Requested*

The background of the investigation that led up to Enforcement's requests for information in April 1998 is relevant to the issue of sanctions in this case. Enforcement began an investigation of the initial public offerings of Sonics and Materials, Inc., Big City Bagels, and Net Smart Technologies in approximately April 1996, two years before the Respondents were requested to appear for on-the-record interviews.⁷ The focus of the investigation was Monroe Parker Securities, Inc. ("Monroe Parker") and whether it had manipulated the market for these securities or violated other provisions of the securities laws.

It is not clear from the record what, if anything, Enforcement did on this investigation between April 1996 and October 1997, but in or about October 1997 Enforcement deposed five individuals who either then or previously were associated with Monroe Parker.⁸ The record is also silent concerning any further work on the investigation until April 1998 when Ms. Catan took the testimony of Levitov and

⁷ Tr. 15.

⁸ Tr. 16.

Angeline. What is clear from the evidence, however, is that Ms. Catan knew in April 1998 that Levitov and Angeline were named in an NASD disciplinary action involving Monroe Parker that had been filed on December 23, 1997.⁹ She was also aware that the criminal authorities in New York were conducting a parallel investigation of Levitov and Angeline concerning their activities at Monroe Parker.¹⁰

B. Levitov's and Angeline's Response

Enforcement also knew that Levitov and Angeline were represented by counsel in the disciplinary proceeding. Accordingly, Enforcement contacted their counsel before the requests for information were sent, and they agreed to accept service of the requests.¹¹ At first, both Levitov and Angeline cooperated with Enforcement. They agreed to appear and testify at the time requested by Enforcement, or earlier if it could be arranged.¹² However, on May 7, 1998, they were arrested and charged with several felonies in a complaint brought by the New York State Attorney General's Office.¹³ As a result, they both requested adjournments of their scheduled on-the-record interviews.

On May 21, 1998, Angeline's counsel requested that Angeline's on-the-record interview scheduled for May 27 be postponed until the criminal matter was resolved.¹⁴ On May 22, 1998, Levitov's counsel requested a four week adjournment of his testimony scheduled for May 28 "so that the direction of the criminal matters [could] be clarified."¹⁵

⁹ Levitov Stipulation ¶ 3.

¹⁰ Tr. 18-19.

¹¹ Levitov Complaint ¶ 6; Angeline Complaint ¶ 6.

¹² Angeline Stipulation ¶ 5.

¹³ Angeline Stipulation ¶ 8; Levitov Stipulation ¶ 4.

¹⁴ Angeline Stipulation ¶ 11.

¹⁵ Levitov Stipulation ¶ 6.

In each case Enforcement denied the request. Accordingly, Angeline's and Levitov's counsel promptly advised Enforcement that their clients would not appear as scheduled. These were Levitov's and Angeline's first requests for postponements.

C. Levitov's and Angeline's Disciplinary History

Levitov has worked in the securities industry for more than 26 years without disciplinary action being taken against him other than the other case involving Monroe Parker, which is not yet final.¹⁶ Similarly, Angeline has worked in the securities industry for more than 29 years without disciplinary action being taken against him other than the same other case involving Monroe Parker.¹⁷

D. Conclusion

The overall purpose of sanctions in NASD disciplinary proceedings is to remediate misconduct and protect the investing public.¹⁸ To accomplish this purpose, it is necessary to consider the facts and circumstances of each case and balance the concepts of remediation and deterrence. The NASD Sanction Guidelines provide a range of sanctions for particular violations to assist the Hearing Panel in this process, but it is up to the Hearing Panel to set the appropriate level of sanctions, taking into consideration the unique facts of each case.

In determining the appropriate sanctions in this case, the Hearing Panel considered the particular circumstances of this case, reviewed the applicable sanction guideline, and reviewed the prior decisions of the National Adjudicatory Council

¹⁶ Levitov Compl. ¶ 2.

¹⁷ Angeline Compl. ¶ 2.

¹⁸ Guidelines 3.

(“NAC”) and the SEC that imposed sanctions for failing to respond to a request for information where the respondent was also subject to parallel criminal proceedings.

In analogous cases, both the NAC and the SEC have imposed lighter sanctions than those requested by Enforcement in this case. In District Business Conduct Committee for District No. 8 v. Martin Patrick Flanagan, Complaint No. C8A930038, 1996 NASD Discip. LEXIS 13 (NBCC Jan. 5, 1996), the respondent did not respond timely to three requests for information because he was the subject of a federal criminal investigation. Once the respondent believed that he was no longer subject to criminal prosecution, he came forward, provided the requested information, and volunteered additional information about similar misconduct to that which was under investigation by the NASD.¹⁹ In reviewing the sanction imposed by the District Business Conduct Committee (“DBCC”), the NBCC noted that the respondent showed respect for the importance of the predecessor rule to NASD Procedural Rule 8210 by appearing when requested even if only to assert his Fifth Amendment privilege.²⁰ The NBCC therefore set aside the \$10,000 fine imposed by the DBCC and modified the six-month suspension to run from the time the respondent was terminated from his firm.

Although the Flanagan decision is distinguishable from the present case because the respondent in Flanagan had time to come forward and testify before he was found to have violated the NASD rule, it is closely analogous to the present case. Here, the evidence strongly suggests that Levitov and Angeline would have come forward and cooperated once the criminal case was resolved. They had cooperated with the NASD

¹⁹ Flanagan, 1996 NASD Discip. LEXIS at *25-26.

²⁰ Id. at *26.

while the criminal investigation was ongoing, and it was only after they had been arrested that they asked for an adjournment of their scheduled on-the-record interviews.

Another instructive case is In re: Edward C. Farni, Exchange Act Release No. 34106, 56 S.E.C. Docket 2076 (May 25, 1994). In Farni the respondent appeared for an on-the-record interview before the NASD and, on advice of counsel, refused to answer any questions claiming his Fifth Amendment privilege against self-incrimination.²¹ At the time of the scheduled interview the respondent was the target of a criminal investigation. Two months later, and after a complaint was filed by the NASD charging him with failing to respond, the respondent retained new counsel, appeared, and testified. The SEC found that the respondent's refusal to testify earlier was improper, and it upheld the NASD's sanctions of a censure, a \$10,000 fine, and a suspension of 30 days.

More recently, in a case that did not involve parallel criminal proceedings, the SEC imposed a \$500 fine and no suspension where an inexperienced, unregistered respondent failed to appear and testify. The respondent in In re: Joseph Patrick Hannon, Exchange Act Release No. 40438, 1998 SEC LEXIS 1955 (Sept. 14, 1998) contended that he could not leave his job to appear at the time and location requested by the NASD. Although the SEC reaffirmed the general rule that a respondent may not second guess or impose conditions on the NASD's requests for information, it considered his inexperience and prior cooperation as substantial mitigating factors. The SEC specifically credited the respondent with his cooperation with the NASD before he was requested to appear for a deposition.

²¹ In re: Edward C. Farni, Exchange Act Release No. 34106, 56 S.E.C. Docket 2076, 1994 SEC LEXIS 1630, at *3 (May 25, 1994).

The Hearing Panel's took these cases into consideration and concluded that lesser sanctions than those requested by Enforcement are appropriate.

Although the Hearing Panel recognizes that the Respondents were not relieved of their obligation to supply requested information because they were subject to criminal prosecution, there are factors that mitigate against imposing the maximum sanctions under the sanction guideline, which Enforcement requests. The record clearly shows that Levitov and Angeline had cooperated with NASD Regulation's investigation of Monroe Parker by supplying documents and appearing for their sworn testimony in the other Monroe Parker disciplinary proceeding.²² It is also undisputed that they "showed respect for the importance of [Rule 8210] requests by responding timely."²³ They promptly advised Enforcement that they did not possess any of the documents requested by Enforcement, and they sought to reschedule their testimony. Moreover, the Respondents did not intentionally conceal information.

The Hearing Panel also considered the impact of delay in securing their testimony. The underlying investigation was two years old at the time Enforcement requested Levitov and Angeline to testify. Enforcement had already collected substantially all of the documents it required and had interviewed at least five registered representatives who had been at Monroe Parker. In addition, Ms. Catan candidly admitted that a delay of four weeks would not have diminished the value of their testimony. Under these circumstances, the Hearing Panel concludes that Respondents' requested adjournment would not have had a substantial impact on the NASD Regulation's investigation.

²² Tr. 31.

Accordingly, the Hearing Panel orders that Richard Steven Levitov and Ralph Joseph Angeline each be censured, fined \$10,000, and suspended from associating with any NASD member in any capacity for a period of 18 months commencing May 22, 1998, the latest date they notified NASD Regulation that they would not appear for their on-the-record interviews due to their arrest in the parallel criminal proceedings. In addition, they are ordered to pay, jointly and severally, the costs of this proceeding in the amount of \$1,042.50, which includes an administrative fee of \$750 and the hearing transcript cost of \$292.50.²⁴

HEARING PANEL

By: Andrew H. Perkins
Hearing Officer

Copies to:

Richard Steven Levitov (via certified and first class mail)
Ralph Joseph Angeline (via certified and first class mail)
David Gordon, Esq. (via first class mail)
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²³ See District Business Conduct Committee for District No. 8 v. Martin Patrick Flanagan, Complaint No. C8A930038, 1996 NASD Discip. LEXIS 13, at *26 (NBCC Jan. 5, 1996).

²⁴ The Hearing Panel considered all of the arguments of the parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.