

**NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. CAF980014
v.	:	
	:	Hearing Panel Decision
MICHAEL PLOSHNICK	:	
(CRD # 1014589)	:	Hearing Officer - JN
Boca Raton, Florida	:	
	:	Date: December 7, 1998
	:	
Respondent.	:	

**ORDER AND DECISION GRANTING DEPARTMENT OF ENFORCEMENT'S
MOTION FOR SUMMARY DISPOSITION**

The Department of Enforcement filed a Complaint in this disciplinary proceeding, alleging that Respondent Michael Ploshnick violated NASD Conduct Rule 2110 and Procedural Rule 8210 by failing to provide testimony and information requested by the NASD staff. Respondent, through counsel, filed an answer denying liability. As purported justification for his refusal to respond, Ploshnick relied on a stay entered by a Hearing Officer in another proceeding where he was also a Respondent (Department of Enforcement v. Meyers Pollock Robbins, Inc., No. C04970029).

The Department filed a Motion for Summary Disposition, contending that Ploshnick's reason for refusing to testify was insufficient as a matter of law. Respondent opposed the Motion. By order of October 26, 1998, the Hearing Panel granted Enforcement's Motion as to liability, denied it as to sanctions, and directed that the

hearing scheduled for November 17, 1988 be limited to the question of appropriate sanctions.

Enforcement sought reconsideration of the above denial and proposed that specific sanctions be imposed by summary disposition. Respondent represented that he would accept the proposed sanctions, subject to appellate rights as to liability. By order of November 12, 1998, the Hearing Panel granted the Department's Motion for Summary Disposition as to sanctions and canceled the hearing.

This Order and Decision sets out the Panel's reasons for granting summary disposition as to liability and sanctions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Undisputed Facts

Respondent Ploshnick - the president, financial operations officer and principal of Meyers Pollock Robbins, Inc. - was a central figure in the NASD staff's investigation of whether that firm violated the anti-fraud provisions of the federal securities laws and various NASD rules (Ex. A, p.1; Ex. C).¹ As part of its investigation, the staff sought investigative testimony from him (Exs. A, B, D, G, H, I, and J).

Meanwhile, a Hearing Officer, at the request of a United States Attorney, had stayed another disciplinary proceeding involving the firm (Department of Enforcement v. Meyers Pollock Robbins, Inc., No. C04970029). After Respondent's counsel in the instant case sought assurances that the staff's questioning would not reach matters

involved in the stayed case, Enforcement's counsel stated:

¹ The prefix "Ex." refers to the exhibits attached to the Department's Motion for Summary Disposition.

...we are focused on our own investigation and we are taking Mr. Ploshnick's testimony as part of that investigation. We do not intend to question Mr. Ploshnick about any other investigation or proceeding. However, we will not limit the scope of Mr. Ploshnick's interview or of our investigation (Ex. H).

Respondent's counsel then wrote to the staff, stating his belief that "the stay imposed...on the NASD extends to your inquiry" and explaining that upon the advice of counsel, Respondent would not appear for testimony (Ex. E). In various pre-hearing statements, Ploshnick's counsel consistently explained that his client had declined to appear because the staff refused to assure counsel that the requested testimony would not impinge on the stayed case.² In a pre-hearing conference on August 25, 1998, Enforcement made clear that the testimony requested earlier would not have involved matters at issue in the stayed case. See footnote 3. Infra.

II. Legal Discussion

A. Jurisdiction

The Complaint alleged that Respondent was associated with Meyers Pollock Robbins, Inc., a former NASD member, and became registered in 1975. Respondent's answer did not deny this allegation, and it is thus deemed admitted (Rule 9215(b)). Respondent's registration with the Association is corroborated by an entry on the CRD extract submitted with Enforcement's Motion: "NASD Status - 6/11/98 - Suspended" (Ex. C). Persons registered with the Association agree to submit to its jurisdiction and to comply with its Rules (Form U-4; Article V, Section 2(a)(1) of the NASD By-Laws), and

² "All he wants and all he is entitled to is some acknowledgment from the NASD that they are going to respect the stay that is in existence" (Transcript, May 29, 1998, p. 14); "And why this all erupted is only because no one would give a parameter...I just said...give us some assurance that...you know what you're asking has nothing to do with the other case" (Transcript, August 25, 1998, pp. 7, 8-9); "...my defense of this is that Mr. Ploshnick was not given sufficient precautions, was not afforded precautions by the staff to make sure that they would not impinge on that proceeding which had been subsequently stayed" (Transcript, September 29, 1998, p. 14). See also Declaration of Leon B Lipkin, October 6, 1998.

the Association is empowered to impose sanctions on persons associated with members (Article XIII, Section 1 of the NASD By-Laws).

B. Summary Disposition

1.) Respondent's Refusal to Appear

Rule 9264(d) of the NASD Code of Procedure permits a Hearing Panel to grant summary disposition when "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." In ruling on such a motion, "the facts alleged in the pleadings of the [Respondent] shall be taken as true,..." (Id.). Applying Rule 9264(d) to this record, the Panel concludes that the Department is entitled to summary disposition.

In this case there is no issue of material fact. It is undisputed that the NASD sought Respondent's testimony under Rule 8210, and that he failed to provide such testimony. It is also undisputed that Respondent relied on counsel's advice that he need not appear because the staff refused to assure counsel that the questioning would not reach matters at issue in the stayed case.

There is no factual dispute about the circumstances surrounding Respondent's refusal to furnish the requested investigative testimony. The question is whether these undisputed facts entitle the Department to summary disposition. The issue turns on the staff's refusal to give counsel assurance concerning the absence of any relationship between the requested testimony and the stayed case. Viewing the record in the light most

favorable to Respondent,³ the Panel concludes that as a matter of law, his reliance on counsel's advice concerning the staff's conduct does not constitute a defense to a violation of Rules 8210 and 2110.

First, it is well settled that advice of counsel is not a defense to a refusal to respond under Rule 8210. As the National Adjudicatory Council recently stated “[a]n associated person who has relied on advice of counsel in refusing to respond to an NASD request for information has no substantive defense to an allegation of failure to respond to requests for information.” District Business Conduct Committee for District No. 5 v. Sundra Escott-Russell, No. C05960074, (NAC, September 18, 1998) at 7 (citing In re Michael Markowski, 51 S.E.C. 553, 557 (1993), aff'd, 34 F.3d 99 (2d Cir. 1994). See also Market Surveillance Committee v. John Roger Faherty, No. CMS020005 (NAC, October 14, 1998, slip op. at 16): “[w]e acknowledge that reliance on counsel [though possibly mitigative] does not excuse a party’s failure to respond,....”

The question thus narrows to whether Respondent had the right to insist on assurances that the questioning would not impinge on the subject matter of the stayed case. The Panel believes that such a “right” would clash with the language and purpose of the Rule, as well as with cases construing it. For these reasons, the Panel concludes that Ploshnick could not lawfully demand staff assurances as to subject matter, as a pre-condition to furnishing investigative testimony under Rule 8210.

³ Respondent’s counsel repeatedly contended that (1) the present prosecutor never checked with the prosecutor in the stayed case to be sure that the requested testimony would not overlap; and (2) that until the August 25, 1998 pre-hearing conference, Enforcement repeatedly declined to state that the requested testimony would not involve the stayed case. Under Rule 9264(d), the Panel assumes (with Respondent) that these contentions are factually correct.

As here relevant, the Rule creates an obligation for associated persons “to provide information orally...with respect to any matter involved in [an] investigation...” The request for Respondent’s testimony was part of the staff’s investigation into possible violations of law by his firm (Exs. A and B), and Enforcement thus established the predicate for its Rule 8210 request. The Rule requires the provision of information about “any matter” involved in an investigation. That language is broad and sweeping; it contains no conditions, exceptions, or qualifications which support limitations on the proper “matter” for staff inquiry. On its face, the Rule leaves no room for any limitation - let alone Ploshnick’s asserted right to refuse to appear until he received assurances about the subject of the staff’s inquiries.

Moreover, the purpose of the Rule is wholly inconsistent with any such “right.” As the SEC has stated:⁴

We have repeatedly stressed the importance of cooperation in NASD investigations. We have also emphasized that the failure to provide information undermines the NASD’s ability to carry out its self-regulatory functions. Since the NASD lacks subpoena power, it must rely on rule 8210 in connection with its obligation to police the activities of its members and associated persons. Failures to comply are serious violations because they subvert the NASD’s ability to carry out its regulatory responsibilities (footnote citations omitted).

Indeed, the Rule has a remedial purpose and should be flexibly construed. Reed A. Hatkoff, Exchange Act Rel. No. 33087, 1993 SEC LEXIS 2872 at *8 (1993). To allow associated persons to prescribe conditions for their testimony would thwart that remedial purpose. See also Variable Investment Corp., Exchange Act Rel. No. 15154, 1978 SEC LEXIS 746 at *4 (1978), rejecting a proposed “limitation” on the scope of NASD’s inquiry: “the Association had authority to investigate any unresolved problems or indications of

⁴ Joseph Patrick Hannan, Exchange Act Rel. No. 40438, 68 S.E.C. Docket 24, 26 (September 14, 1998).

impropriety which came to light, and to require that applicants furnish it with pertinent information and records...”.

SEC cases make clear that because Rule 8210 and its predecessor⁵ are critical to an organization which lacks subpoena power, “members and their associated persons may not impose conditions on their obligation to supply requested information.” John J. Fiero, Exchange Act Rel. No. 39544, 1998 SEC LEXIS 49 at *5 (1998) (citations omitted). As the Commission said of the pre-condition asserted there: “[I]n our view, Fiero’s refusal to testify unless the NASD allowed him to obtain a copy of his transcript as soon as it was prepared flouted a basic obligation imposed on NASD members and their associated persons” (Id., at *4).

Nor does the Hearing Officer’s stay in another proceeding involving Respondent and his firm create an exception to Rule 8210’s obligation. The Hearing Officer “stay[ed] this proceeding” (Ex. F, p. 2) - namely, Disciplinary Proceeding No. C04970029. At most, therefore, the order prevented Enforcement from further investigating the transactions pleaded in No. C04970029. But even under that view, the stay would not justify an outright refusal to appear for all investigative testimony. Ploshnick could have and should have appeared for the requested testimony, declining to answer any questions which impinged on the stay and answering any which did not.

Finally, the stay should not be read as conferring rights on Respondent. As the Hearing Officer explained in No. C04970029, Enforcement sought the stay at the request of the United States Attorney for the Western District of Tennessee, who was concerned that her investigation of individuals and entities “involved in certain securities offerings,

⁵ Former Article IV, Section 5, of the NASD By-Laws.

including unregistered securities sold by [Ploshnick's firm]", would be impeded if the proceeding went forward (Id.). For this same reason, she earlier obtained a stay in an SEC civil action brought against various defendants, including Ploshnick and the firm. In these circumstances, the Hearing Officer concluded that he "will grant the motion and stay this proceeding..." (Id.). The notion that a stay imposed for law enforcement purposes, at Enforcement's request, somehow protects Ploshnick against the Department's use of its investigatory powers stands the order on its head.

The Panel concludes that Respondent had no justification for his refusal to appear for the requested testimony and thus violated Rule 8210. Such conduct also violated Rule 2110's mandate for "high standards of commercial honor and just and equitable principles of trade."⁶

2.) Sanctions

The applicable NASD Sanction Guideline (1998) recommends that where an individual did not respond in any manner, "a bar should be standard" and a fine ranging between \$25,000 and \$50,000 should be imposed (at p. 31). In the instant case, the Department recommended that Respondent be censured, barred and fined \$25,000 (Complainant's Motion for Reconsideration of its Summary Disposition Motion, p. 3). By a submission received on November 11, 1998, Respondent's counsel replied: "Mr. Ploshnick will agree to the proposed sanction, i.e., bar, \$25,000 fine and costs. He does not waive his right to appeal."

⁶ Wheaton D. Blanchard, 46 S.E.C. 365, 366 (1976).

There is thus no dispute about the appropriateness of the proposed sanction. Accordingly, the Panel directs that Respondent Michael Ploshnick be censured⁷, fined \$25,000 and barred from association with any NASD member in any capacity.⁸

CONCLUSION

The Hearing Panel determined that there are no disputes of material fact in this proceeding, and that Enforcement is entitled to judgment as a matter of law. By summary disposition, the Hearing Panel thus finds that Respondent committed the violations alleged in the Complaint and censures him, fines him \$25,000 and bars him from associating with any NASD member in any capacity. These sanctions shall be come effective on a date to be fixed by the Association, but not earlier than 45 days from the date that this decision becomes the final disciplinary action of NASD.⁹

SO ORDERED
Hearing Panel

by: _____
Jerome Nelson
Hearing Officer

Dated: Washington DC
December 7, 1998

⁷ While accepting the bar and fine, counsel's response was silent as to Ploshnick's acceptance of the censure. The Panel sees no "genuine issue with regard to any material fact" involving a censure. As the SEC stated in Hannan, supra, "[f]ailures to comply [with requests under Rule 8210] are serious violations because they subvert the NASD's ability to carry out its regulatory responsibilities." Indeed, the Guidelines provide that a bar should be standard for refusals to respond. In these circumstances, and considering Respondent's acceptance of the bar and fine, the Panel concludes that a censure is properly included in the sanctions for Respondent's conduct.

⁸Because the parties agreed as to sanctions, there was no need for the Panel to consider the mitigative effect, if any, of Ploshnick's relying on the advice of counsel.

⁹ 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.

Copies to:
Michael Ploshnick

VIA CERTIFIED AND FIRST CLASS MAIL

Leon B. Lipkin, Esq.
James M. McNamara, Esq.
Rory C. Flynn, Esq.

ALL VIA FACSIMILE AND FIRST CLASS MAIL