

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

JAY A. OCHANPAUGH
(CRD No. 2506226),

Respondent.

Expedited Proceeding
No. FPI050008

Hearing Officer – DRP

PANEL DECISION

December 20, 2005

Respondent is barred from association with any member firm in any capacity for refusing to produce information pursuant to requests issued under NASD Procedural Rule 8210.

Appearances

James M. Stephens, Regional Counsel, Kansas City, MO for the Department of Enforcement.

Jay A. Ochanpaugh *pro se*.

DECISION

I. Procedural History

The Department of Enforcement instituted this expedited proceeding against Jay A. Ochanpaugh (Ochanpaugh or Respondent) after he failed to comply with requests for information issued by NASD staff pursuant to NASD Procedural Rule 8210. On July 20, 2005, pursuant to NASD Procedural Rule 9552, the Department sent Respondent a Notice that he would be suspended from associating with any member firm in any capacity on August 15, 2005, unless by that date, he complied with the requests for information or submitted a written request for a hearing.

On August 8, 2005, Respondent filed with the Office of Hearing Officers a timely written request for a hearing. Respondent requested that the Notice be set aside, asserting that NASD

lacked authority to suspend his license because a third-party had refused to comply with the staff's requests for information.

Pursuant to Rules 9559(d)(2) and (d)(5), a Hearing Panel, consisting of the Hearing Officer and two former members of NASD's District 9 Committee, held a telephonic hearing on October 12, 2005. Enforcement offered 21 exhibits and called one witness, NASD Compliance Specialist Curtis Calvert. Respondent offered two exhibits and testified on his own behalf.¹

II. Findings of Fact and Conclusions of Law

A. Ochanpaugh

Respondent was registered as an investment company/variable products representative with NASD member firm Northwestern Mutual Investment Services, LLC (Northwestern) from November 1994 until the firm terminated his registration in January 2004. He was associated with another member firm from March 18, 2004 to June 23, 2004.² Since that time, he has not been associated or registered with any NASD member.³ (CX-1.)

¹ References to the hearing transcript are noted as Tr. Enforcement's exhibits are cited as CX; Respondent's exhibits are cited as RX.

² Prncor Financial Services Corporation declined to register Respondent due to his failure "to provide fully responsive, complete and/or timely responses to multiple requests by NASD and the firm for information about outside business activity relating to a church for which Ochanpaugh is pastor and president." (CX-1 at 2.)

³ Respondent is subject to NASD jurisdiction pursuant to Art. V, Section 4 of NASD's By-Laws, because the staff's requests for information related to conduct that occurred while Respondent was registered and were issued within two years of his association with a member firm.

B. Wisdom Mission

In December 2003, Respondent founded Wisdom Mission, an Internet-based church.⁴ In his capacity as president, Respondent had “full and complete autonomy and authority to conduct the affairs” of Wisdom Mission, which included unilateral authority to amend the Articles of Corporation, hold legal title and equitable interest in all real and other property, and contractually bind the church. Moreover, Respondent handled church funds.⁵ He and his former secretary, CG, opened, and were signatories on, the church’s checking account. (Tr. 35-36, 105-106, 155; CX-4 at 5, 8-11; CX-20; CX-21; RX-1.)

One of the church’s “ministry objective[s]” was to serve as a pass-through bill paying entity for its members. Respondent solicited individuals to donate an amount equal to the donor’s home mortgage or automobile payment, plus 10%. The church then paid the donor’s bills and retained the remaining tithe as a donation. This mechanism was designed to allow the donor to declare the entire amount as an itemized charitable deduction, thereby reducing his taxable income. Respondent ended this practice in early January 2004, after learning that the

⁴ Its full name is “The Office of the First Presiding Patriarch (President), and his successors, a corporation sole, over/for Wisdom Mission (an Eleemosynary society).” Respondent, who was the First Presiding Patriarch, testified that he had been performing “pastor-type” duties for several years when he and some others decided to start a church and he “was determined to be president and pastor.” (Tr. 97-98; CX-4 at 8.)

⁵ Respondent denied having any involvement with the church’s finances, other than opening a checking account; he submitted unsworn statements from CG, church Treasurer, and NJ, a church Elder, to corroborate his claim. According to the Articles of Corporation, however, [a]ll the gold and silver belongs to the Creator ... and all He is placing in the hands of Wisdom Mission and Jay Alan Ochanpaugh, President[,] is being used for His glory and His purposes ... [and] the President has the God-given authority and right to support the Ministry of Wisdom Mission through whatever means necessary, including, but not limited to the free will tithes and offerings of like-minded men and women ...” (Tr. 103; CX-4 at 9; RX-1; RX-2.)

IRS does not allow a deduction for this type of quid pro quo donation.⁶ (Tr. 18-19, 98-100, 115; CX-5 at 8; CX-15 at 1.)

On learning that Respondent was soliciting donations to Wisdom Mission and that an individual had come to Northwestern to deliver an envelope containing a check payable to the church, the firm opened an investigation to determine whether Respondent had engaged in undisclosed outside business activities. Respondent refused to answer questions about the church in response to a written request from Northwestern, but asserted that he was “not engaging in ... business activities that have not been previously disclosed to and approved by” the firm. Though Respondent had disclosed several outside business activities, he did not include Wisdom Mission.⁷ (Tr. 18-20, 22, 24; CX-18 at 1-2; CX-19.)

C. NASD’s Investigation

In January 2004, Northwestern suspended Respondent and reported the disciplinary action to NASD pursuant to Rule 3070. After contacting Northwestern regarding the circumstances of Respondent’s suspension, NASD opened an investigation to determine whether Respondent’s undisclosed involvement with Wisdom Mission violated NASD Conduct Rule 3030 regarding outside business activity.⁸ The investigation focused on what Wisdom Mission

⁶ Respondent defined a quid pro quo donation as one where the individual receives something of value in return for his or her donation. (CX-5 at 8.)

⁷ On October 1, 2003, Respondent disclosed his involvement as principal officer and owner of “Wi\$dom A\$\$et Advi\$or\$.” On the firm’s outside activity form, he wrote that all outside insurance business has been “put to” this corporation. Though Respondent testified that he was not required to do so, he also disclosed his involvement with “Wi\$e Coun\$el” on October 1, 2003, which he listed as a non-profit charitable 501(c)(3) organization. He described his duties as counseling people with debt or cash flow problems. (Tr. 119-120; CX-16 at 1, 13, 17.)

⁸ NASD Conduct Rule 3030 provides that “[n]o person associated with a member in any registered capacity shall be employed by, or accept compensation from, any other person as a result of any business activity ... outside the scope of his relationship with his employer firm, unless he has provided prompt written notice to the member ... in the form required by the member.”

was designed to do and whether it constituted an outside business activity for which Respondent received compensation. (Tr. 16-18, 20.)

The staff reviewed documents provided by Northwestern, which did not explain who received and disbursed funds on behalf of Wisdom Mission and for what purpose. Thus, on March 31, 2004, the staff sent a letter to Respondent requesting information and documents pursuant to NASD Procedural Rule 8210.⁹ The staff requested “a complete explanation of” Wisdom Mission and a list of all persons involved with the organization, including contributors who were Northwestern customers. In addition, the staff asked Respondent to provide financial records, including copies of bank statements, and a detailed description regarding the tithes, including how the funds were disbursed and the purpose of any payments using those funds. (Tr. 25-26; CX-3.)

In his response dated April 13, 2004, Respondent denied any wrongdoing and stated that he was unable to answer many of the staff’s questions pursuant to Wisdom Mission’s “Covenant of Silence.”¹⁰ Respondent wrote that the church no longer accepted quid pro quo donations and no “monies were held or distributed.” He also denied having “directly received monies of church members.” Citing language from the firm’s outside business activity form, he asserted that he was not required to disclose Wisdom Mission to Northwestern but had nonetheless

⁹ Under NASD Procedural Rule 8210, NASD staff has the right to require a member, person associated with a member, or person subject to [NASD’s] jurisdiction to provide information ... in writing ... with respect to any matter involved in [an] investigation ...; and ... [to] inspect and copy the books, records, and accounts of such member or person with respect to any matter involved in the investigation.

¹⁰ The covenant prohibited the President from discussing or otherwise revealing documents or records “without incurring ... penalties ... subject to self-assessment for the full amount indicated.” Because the release of information concerning Wisdom Mission was necessary for opening bank accounts and obtaining private funding, however, Respondent crafted a provision in March 2004 that allowed him to divulge information regarding the church’s accounts or business upon written request. Respondent testified that the Articles of Corporation and the March 2004 amendment were templates, and in reality, only church Elders could approve the release of information. (Tr. 145-150; CX-4 at 6, 20-21.)

discussed his “position and excitement with Wisdom Mission” with his former supervisor in December 2003. (CX-4.)

Because Respondent failed to provide most of the information and documents requested, the staff sent a follow-up letter pursuant to Rule 8210 on May 10, 2004. On May 19, Respondent again asserted the Covenant of Silence but wrote that church Elders might reconsider the release of bank records. (Tr. 29-30; CX-5; CX-6.)

On June 4, 2004, the staff sent a third letter to Respondent pursuant to Rule 8210, again requesting documents related to Wisdom Mission’s bank account. On June 16, 2004, Respondent provided copies of the December 2003 and January 2004 bank statements from a church checking account at F & M Bank, which had been sent to a post office box Respondent had established years before. In reviewing the statements, the staff noted three transactions where deposits were approximately 10% above the amount debited from the account and decided to seek Respondent’s testimony.¹¹ (Tr. 30-32, 34, 36-37, 108-110; CX-7; CX-8.)

On August 20, 2004, Respondent provided testimony at an on-the-record (OTR) interview. He brought with him, and provided to the staff, a copy of the signature page for a Wisdom Mission checking account. Though the account number was redacted, and the document had been faxed by Citizens Bank, Respondent told the staff it was the signature page for the Wisdom Mission account at F & M Bank. Respondent and CG were each authorized to sign checks on this account. Respondent also brought with him, and provided to the staff, a copy of an F & M Bank deposit slip dated December 8, 2003, in the amount of \$1,652.41.

¹¹ The statements show a \$2,500.56 deposit and \$2,276.63 debit on December 31, 2003; a \$1,425.59 deposit and \$1,299.25 debit on January 2, 2004; and a \$485.24 deposit and \$443.83 debit on January 12, 2004. (CX-8 at 2, 3.)

Respondent told the staff this represented the initial deposit in the account.¹² (Tr. 33, 37-39, 106; CX-9; CX-20; CX-21.)

After the OTR, the staff initiated a discussion with Respondent to correct his mistaken belief that NASD had suspended him. During the conversation, the staff told Respondent that he would soon receive a written request for copies of three checks, so the staff could determine whether Respondent had received any compensation from Wisdom Mission. Pursuant to Rule 8210, the staff sent a letter to Respondent on August 25, 2004, requesting copies of three checks and a signed statement explaining which transactions were part of the program to pay church members' bills. The staff noted that failure to comply could result in disciplinary action. (Tr. 40-41, 71; CX-9.)

In his reply of September 3, 2004, Respondent referenced a letter from CG, who identified herself as Wisdom Mission's Scribe/Treasurer. CG wrote that "three deposits were made [on the dates in question] in varying amounts by six individuals/families," and the checks paid for "the financial needs of three church members." She refused to provide copies of the checks, citing confidentiality concerns related to revealing church members' identity. She represented that she had reviewed Respondent's 2003 year-end client list at his request, and none of his clients had donated to, or received money from, Wisdom Mission. Respondent stated that he had "every reason to believe" CG and noted that he had asked her to remove him from the church's bank records, although he believed he had "done nothing wrong." (CX-10.)

On October 21, 2004, the staff sent a follow-up letter to Respondent, once again requesting copies of three checks pursuant to Rule 8210. The staff again noted that

¹² Respondent testified that he never made deposits to, or withdrawals from, the account and never saw any checks. (Tr. 162.)

Respondent's failure to comply with the request could subject him to disciplinary action.

(Tr. 42-43; CX-11.)

Respondent failed to provide the checks, but in a letter dated October 28, 2004, he asserted that as pastor, he has "set [himself] apart from the money," and his title as president is a "formality." He reiterated that he had been removed from Wisdom Mission's checking account and maintained that he "cannot produce it, as I am now not authorized too (sic)." He denied any wrongdoing and challenged the staff's "insistence to release church records out of [his] control."

(Tr. 43; CX-12.)

The staff could not determine whether Wisdom Mission was an outside business activity for which Respondent received compensation and closed the investigation. (Tr. 43, 55, 70, 79, 86.)

D. Discussion

Procedural Rule 8210 authorizes NASD, in the course of an investigation, to require members and persons subject to NASD's jurisdiction to "provide information ... in writing ... with respect to any matter involved in the investigation." Rule 8210 further states that "no ... person shall fail to provide information ... pursuant to this Rule." Because NASD lacks subpoena power over its members, a "failure to provide information fully and promptly undermines ... NASD's ability to carry out its regulatory mandate."¹³

Because of Procedural Rule 8210's central importance to NASD's regulatory mission, respondents may not impose conditions on their obligation to provide information.¹⁴ Recipients

¹³ *Dep't of Enforcement v. Benz*, No. C01020014, 2004 NASD Discip. LEXIS 7, at *18 (NAC May 11, 2004) (quoting *Brian L. Gibbons*, 52 SEC 791, 794 (1996) *aff'd*, 112 F.3d 516 (9th Cir. 1997) (table)).

¹⁴ See, e.g., *Robert Fitzpatrick*, Exchange Act Release No. 44,956, 2001 SEC LEXIS 2185, at *11-12 (Oct. 19, 2001) (holding that NASD alone determines the type of production that it needs) (citation omitted).

of information requests are obligated to provide the information requested promptly or explain why they are unable to do so.¹⁵ NASD is not required to justify its requests.¹⁶

Respondent advances several objections to the staff's August 25 and October 21, 2004 requests for information pursuant to Rule 8210. He contends that Wisdom Mission was not a business activity he was required to disclose to Northwestern; NASD lacks authority to request records from a third-party entity or church; and he does not have possession or control of the checks.

With respect to his obligation to disclose Wisdom Mission to Northwestern, Respondent points to the firm's outside business activity form, which did not require disclosure of non-investment-related activity "that is exclusively charitable, civic, religious or is tax exempt." Nor did the firm's written procedures mandate disclosure for "appropriate, non-compensated involvement in non-profit organizations."¹⁷ The Hearing Panel notes, however, that the firm's written procedures required "written notification ... of any employment or income-producing activity (whether direct or indirect) not previously disclosed on the Form U-4 that exceeds the scope of" the firm's activities.¹⁸

Respondent claims his involvement with Wisdom Mission is exclusively religious, and he denies having received compensation from his church activities. If true, he would not have been required to disclose his outside activity to Northwestern according to the firm's procedures or pursuant to NASD rules. Under the facts of this case, however, the Hearing Panel finds that it

¹⁵ *Id.* at *9–12 & nn.11 & 16.

¹⁶ *Id.* at *11–12 & n.16.

¹⁷ CX-16 at 4; CX-17 at 3.

¹⁸ CX-17 at 1.

was reasonable for NASD to investigate whether Wisdom Mission was in fact a business activity for which Respondent received compensation.

One of the church's stated objectives was to serve as a pass-through entity, allowing individuals to deduct as a charitable donation what was essentially a bill-paying service by Wisdom Mission, for which it charged a 10% fee. Though Respondent denied that any money was distributed pursuant to this plan, he founded Wisdom Mission to "educate ... empower and ... facilitate those on a path of *financial* and spiritual freedom."¹⁹ (emphasis added) He helped design the bill-paying mechanism, solicited "donations," and had access to the church's bank account. Given these facts, NASD had a reasonable basis for investigating whether Respondent's involvement with Wisdom Mission was an undisclosed business activity for which he received compensation, in possible violation of Rule 3030, and properly invoked Procedural Rule 8210 to request information from Respondent.

In furtherance of its investigation, NASD had authority to request that Respondent produce the checks. Contrary to Respondent's assertion that Wisdom Mission is a third-party over which NASD lacks jurisdiction, the Hearing Panel finds that Wisdom Mission was under the control of, and served as the alter ego of, Respondent. Respondent's testimony, that documents affording him complete and autonomous authority for Wisdom Mission were mere templates that did not accurately reflect his role, simply lacked credibility. The Hearing Panel similarly finds that unsworn statements by Respondent's associates, CJ and NJ, do not outweigh the express terms of Wisdom Mission's organizational documents, which permitted Respondent to comply with the staff's request.

¹⁹ CX-4 at 9.

The Hearing Panel also rejects Respondent's contention that the checks were not in his possession or control and that church Elders refused to release them. Respondent was a signatory on the checking account, made the initial deposit to the account, and used his personal post office box as the address for the account. Moreover, he had previously provided copies of bank statements and produced bank records during the OTR. The Panel finds Respondent's refusal to comply with the staff's narrow request for three checks, which might have confirmed whether Wisdom Mission was a business activity for which Respondent received compensation, somewhat suspicious.

Significantly, Respondent only asked CG to remove him from bank records *after* NASD's August 25, 2004 request. His response to the staff's October 21, 2004 request was also telling. After reiterating that he had been removed from the checking account, he wrote that he "cannot produce [the checks], as [he is] *now* not authorized" to do so. (emphasis added) The clear implication is that he could have produced the checks when the staff first requested them, but refused to do so. Providing an explanation of how the funds had been spent, in lieu of producing independent documentation that could confirm or dispute Respondent's account, was simply inadequate and does not fulfill Respondent's obligations under Rule 8210.

Finally, the Panel rejects Respondent's assertion that church Elders refused to release the checks. Church documents, particularly the Articles of Corporation and accompanying affidavit, confer all powers on Respondent, including the authority to divulge financial information and

documents. Furthermore, Respondent testified several times that he would refuse to provide the checks to NASD, even if he had the ability to do so.²⁰

For the foregoing reasons, the Hearing Panel concludes that Respondent willfully refused to provide information the staff requested, in violation of NASD Procedural Rule 8210.²¹

III. Sanctions

Under NASD Procedural Rule 9559(n)(1), the Hearing Panel may “approve, modify or withdraw any and all sanctions or limitations imposed by the notice ... and may impose any other fitting sanctions, pursuant to Rule 8310(a).” NASD Sanction Guidelines for Failure to Respond or Failure to Respond Truthfully, Completely, or Timely to Requests Made Pursuant to NASD Procedural Rule 8210 state that a bar should be standard where an individual did not respond.²²

While Respondent cooperated with some aspects of the investigation, “providing selective responses does not mitigate” or excuse this misconduct.²³ Furthermore, the Hearing Panel considers several factors aggravating circumstances that justify Enforcement’s

²⁰ Respondent testified that he “wouldn’t give up” the requested information, because his “income is certainly not suffering” since leaving Northwestern, and he is “doing very, very, very well financially.” He further testified that the issue has “nothing to do with NASD rules” and that even if church Elders gave approval, he would refuse to provide the checks to protect the confidentiality of church members. (Tr. 134, 165-169.)

²¹ Though not fully articulated, Respondent also argued that NASD’s requests violated his First Amendment rights; he was presumably referring to the constitutional right to freedom of religion. Respondent’s claim is without merit, because the Constitution restricts only governmental action, and NASD is not a state actor. *See, e.g., D. L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 132 F. Supp. 2d 248, 251-53 (S.D.N.Y. 2001), *aff’d*, 279 F.3d 155, 162 (2d Cir. 2002), cert. denied, 537 U.S. 1028 (2002); *Marchiano v. NASD*, 134 F. Supp. 2d 90, 95 (D.D.C. 2001). Contrary to Respondent’s contention, SEC oversight of NASD does not convert a private entity to a state actor. *See Jackson v. Metropolitan Edison, Co.*, 419 U.S. 345, 350 (1974).

²² *NASD Sanction Guidelines* at 35 (2005 ed.).

²³ *Dep’t of Market Regulation v. Ryan & Co.*, No. FPI040002, http://www.nasd.com/web/groups/enforcement/documents/nac_disciplinary_decisions/nasdw_015645.pdf (citing *Barry C. Wilson*, 52 S.E.C. 1070, 1075 (1996)).

recommendation of a bar. Respondent, who had previously provided financial documents relevant to the staff's inquiry, obstructed the investigation by removing himself from the church checking account then asserting that he was unable to comply with the staff's request. Moreover, the requested documents were highly relevant to the staff's investigation. Furthermore, Respondent refused to provide the information despite warnings that the staff could initiate a disciplinary proceeding, which could result in the suspension or revocation of his license. Indeed, Respondent's continued refusal to comply with his obligations under NASD Procedural Rule 8210 troubles the Hearing Panel, and we consider lesser sanctions insufficient to prevent a recurrence of misconduct.²⁴ Accordingly, the Hearing Panel bars Respondent from associating with any member firm in any capacity.

IV. Order

Respondent Jay A. Ochanpaugh is barred from associating with any member firm in any capacity for refusing to produce information, in violation of NASD Procedural Rule 8210. The bar shall become effective immediately if this Decision becomes the final action of NASD.

Respondent is also ordered to pay hearing costs of \$2,183.71, which includes an administrative fee of \$750 and hearing transcript costs of \$1,433.71.²⁵

SO ORDERED.

Dana R. Pisanelli
Hearing Officer
For the Hearing Panel

Dated: December 20, 2005
Washington, DC

²⁴ See Notice to Members 04-17 (Mar. 2004), General Principles Applicable to all Sanction Determinations No. 3.

²⁵ The Hearing Panel has 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: Jay A. Ochanpaugh (*via overnight and first class mail*)
James M. Stephens, Esq. (*via electronic and first class mail*)
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