

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of	
Department of Enforcement,	<u>DECISION</u>
Complainant,	Complaint No. C07030055
vs.	Dated: February 10, 2005
PAZ Securities, Inc. Boca Raton, FL,	
and	
Joseph Mizrachi Boca Raton, FL,	
Respondents.	

**Respondents failed to respond to staff requests for information. Held,
Hearing Panel's findings and sanctions are affirmed.**

Appearances

For the Complainant: Joel Beck, Esq., NASD Department of Enforcement.

For the Respondents: Sameer Rastogi, Esq.

Opinion

Pursuant to NASD Procedural Rule 9311, respondents PAZ Securities, Inc. ("PAZ" or "the Firm") and Joseph Mizrachi ("Mizrachi") (together, the "respondents") appeal a December 31, 2003 Hearing Officer default decision. After a thorough review of the record in this proceeding, we find that the Hearing Officer's entry of default was proper, and respondents did not establish good cause for their failure to participate in the proceedings before the Hearing Officer. We also find that respondents violated Procedural Rule 8210 and Conduct Rule 2110 by failing to respond to three written requests for information. We bar Mizrachi from associating with any NASD member in any capacity and expel the Firm.

I. Background

Mizrachi entered the securities industry and associated with PAZ in 1986 as a general securities representative. Mizrachi became a general securities principal later that year. Mizrachi has remained associated with PAZ in both capacities. Mizrachi also has served as the Firm's president since 1986.

PAZ became a member of NASD in April 1986. The Firm is located in Boca Raton, Florida. The Firm's Uniform Application for Broker-Dealer Registration ("Form BD") lists Mizrachi as one of four control persons at the Firm. The Firm's Form BD also shows that Mizrachi holds an ownership interest in the Firm of "25% but less than 50%."

II. Factual and Procedural History

On August 14, 2003, NASD's Department of Enforcement ("Enforcement") filed a complaint against Mizrachi and the Firm. The complaint alleged that respondents failed to provide requested information in violation of Procedural Rule 8210 and Conduct Rule 2110. Enforcement sent a copy of the complaint and notice of complaint via certified mail, return receipt requested, and by first class mail to respondents at the Firm's current address as reflected in the Central Registration Depository ("CRD"®). Enforcement also sent the complaint and notice of complaint via certified mail, return receipt requested, and first class mail to Mizrachi at his most current residential address as reflected in CRD. The Postal Service returned the certified mailings to NASD marked "unclaimed."¹ The first class mailings were not returned.

After the time for respondents to file an answer had passed, on September 12, 2003, Enforcement sent another copy of the complaint and a second notice of the complaint to respondents at the Firm's CRD address and Mizrachi's residential address via certified mail, return receipt requested, and by first class mail. The Postal Service returned receipts with signatures evidencing that the certified mailings were delivered. The signature on the return receipt from the mailing sent to the Firm's CRD address appeared to be "C.J. Mizrachi." The signature on the return receipt from the mailing sent to Mizrachi's home address appeared to be "Mizrachi." The first class mailings were not returned.

On September 26, 2003, Douglas L. Westendorf ("Westendorf") notified Enforcement that respondents had retained him to represent them in this disciplinary proceeding. Later that same day, Westendorf filed a request for an extension to file an answer, which the Hearing Officer granted. The Hearing Officer ordered respondents to file an answer by October 20, 2003.² Respondents did not file an answer or otherwise respond to the second notice of complaint.

¹ The certified mailing sent to Mizrachi's residential address was returned to Enforcement with the residential address blacked out and the Firm's address handwritten in its place.

² Prior to Westendorf's request for an extension, respondents were due to file an answer by September 29, 2003.

On November 18, 2003, Enforcement filed a motion for default supported by the declaration of counsel for Enforcement, and four exhibits. These exhibits consisted of: (1) a copy of a CRD printout evidencing the Firm's address and listing Mizrachi as the Firm's president and contact employee; (2) a copy of a CRD printout evidencing Mizrachi's residential address and association with the Firm; (3) a copy of envelopes containing the August 14, 2003 certified mailings that were returned to Enforcement marked "unclaimed"; and (4) a copy of the signed certified mailing return receipts for the September 12, 2003 certified mailings.³

The Firm's vice president and respondent's brother, Simon Mizrachi, telephoned Enforcement counsel on December 15, 2003, and asked how the Firm could "get out of this mess." Enforcement counsel informed Simon Mizrachi that Enforcement had filed a motion for a default decision against respondents and that respondents could file a response with the Hearing Officer. Enforcement counsel also told Simon Mizrachi that the Hearing Officer could issue a default decision if respondents failed to respond to the complaint. Enforcement counsel reiterated to Simon Mizrachi that neither the Firm nor his brother had responded to the information requests, which were the subject of the complaint, and that Enforcement sought to bar Mizrachi and expel the Firm.

Respondents filed no response to the motion for default and no response to the information requests. On December 31, 2003, the Hearing Officer issued a decision, which found that respondents had defaulted by failing to answer the complaint. The decision accepted the allegations contained in the complaint as true, found that respondents admitted the allegations by way of their default, and ordered Mizrachi barred and the Firm expelled.

On January 26, 2004, respondents filed a notice of appeal, a motion to vacate the default decision, and contemporaneously submitted copies of the Rule 8210 requests and a response. The NASD Office of General Counsel notified respondents that the National Adjudicatory Council ("NAC") would not consider the appeal while the Office of Hearing Officers considered the motion to vacate the default. In the motion to vacate the default, respondents argued that their attorney's neglect caused their default because they relied on Westendorf to respond on their behalf. In addition, Mizrachi argued that he never received the information requests because he was out of the country when NASD served the requests. Mizrachi also contended that the default was moot as a result of respondents furnishing a response to the requests. Enforcement filed a response to the motion to vacate the default on January 30, 2004. Enforcement's response included a second declaration of Enforcement counsel and a printout from CRD showing Mizrachi as the Firm's president and a control person and Simon Mizrachi as the Firm's vice president and also a control person.

³ Enforcement served a copy of the motion for default with the related exhibits on Westendorf at his law firm and on respondents at the Firm's CRD address and Mizrachi's residential address via first class mail.

On February 18, 2004, the Hearing Officer denied respondents' motion to vacate the default, finding that respondents had failed to show good cause. This appeal followed. Respondents again assert that their attorney Westendorf was to blame for their default and that Mizrachi never received the Rule 8210 requests because he was out of the country when NASD served the information requests. We have considered this appeal based upon the written record.

III. Discussion

We first address whether the Hearing Officer below properly determined that respondents were in default. We find that the determination was correct. We next consider whether respondents demonstrated good cause for their failure to participate in the proceedings before the Hearing Officer. We find they have not. Finally, we consider the merits of this appeal and conclude that the allegations as set forth in Enforcement's complaint are substantiated.

A. Hearing Officer's Entry of Default

NASD Procedural Rule 9269 allows a Hearing Officer to enter a default when a respondent fails to file an answer or otherwise respond after a specified time from NASD serving a second notice of complaint. We find that Enforcement properly served respondents with the first and second notices of complaint to respondents' addresses listed in CRD. See NASD Procedural Rule 9134(b)(1), (2) (allowing for service at address listed in CRD). We therefore find that respondents had notice of the complaint.⁴ See Dep't of Enforcement v. Verdiner, Complaint No. CAF020004, 2003 NASD Discip. LEXIS 42, at *5 n.1 & 6 (NAC Dec. 9, 2003) (finding respondent received constructive notice when complaint was mailed to respondent's CRD address). It is undisputed that respondents failed to file an answer to the complaint. Thus, the Hearing Officer's entry of default was proper.

B. Respondents' Failure to Show Good Cause

NASD Procedural Rule 9344(a) governs when a respondent appeals a default decision. Rule 9344(a) states that the NAC will consider the appeal on the basis of the written record without the opportunity for oral argument unless the respondent demonstrates good cause for his failure to participate in the proceedings below. If the NAC determines that a respondent establishes good cause, then it is NASD's policy to remand the case for an evidentiary hearing.

The record reflects that Enforcement served all the correspondence in this matter properly to respondents' addresses listed in CRD. Cf. Lance E. Van Alstyne, 53 S.E.C. 1093, 1099 (1998) (dismissing appeal of motion to set aside NASD default decision and finding complaint properly served upon respondent at CRD address was sufficient notice of the action despite respondent's claims of never actually receiving complaint); Eric M. Diehm, 51 S.E.C. 938, 941 n.14 (1994) (rejecting argument that NASD sent notice to the wrong address because notice was sent to respondent's last known CRD address). NASD received a signed receipt for the certified

⁴ In addition, respondents' attorney filed a request for an extension to file an answer.

mailings of the second notice of complaint. And Mizrachi concedes in his affidavit, filed in support of respondents' motion to vacate, and in his brief to the NAC that he had actual notice of the complaint filed as of September 20, 2003, when he returned to the Firm after being out of the country.⁵

Respondents assert that they did not answer the complaint because the attorney they had retained and relied upon to handle this matter was dilatory. Mizrachi contends that he was out of the United States from October 24, 2003, to December 3, 2003, and during that time, he believed that his attorney was adequately representing him and the Firm. Respondents, however, were due to file their answer by October 20, 2003, which was not a date that Mizrachi contends that he was out of the country. Moreover, respondents presented no evidence to support the assertion that their attorney was negligent. With the exception of Westendorf's request for an extension to file an answer, the record is silent regarding Westendorf's representation of respondents. Mizrachi made no claim that he ever communicated with his attorney or his brother Simon Mizrachi at any time when Mizrachi was either traveling abroad or when he was in the United States regarding the status of this disciplinary matter against him.

Even after Enforcement discussed the default motion with Simon Mizrachi during a telephone conversation on December 15, 2003, respondents did not respond to the default motion. The record reflects that at every opportunity respondents ignored these proceedings until the Hearing Officer imposed significant sanctions against them—consequences that respondents could no longer ignore. We find that respondents have not demonstrated good cause for their failure to participate in the proceedings before the Hearing Officer. Cf. Michael Markowski, 51 S.E.C. 553, 557 (1993) (holding associated person's obligation to cooperate with NASD is unequivocal), aff'd, 34 F.3d 99 (2d Cir. 1994). We find respondents instead showed complete inattention to these proceedings. Accordingly, we have considered this appeal on the basis of the written record and without oral argument from the parties.

C. Evidentiary Basis for the Findings of Violation

The Hearing Officer deemed as admitted the allegations of the complaint against respondents and incorporated the allegations into the default decision as findings of fact. After a review of the evidence, we affirm the Hearing Officer's finding that respondents violated Procedural Rule 8210 by failing to respond to requests for information.⁶

⁵ In Mizrachi's affidavit, he attested to traveling abroad on the following dates: from January 2003 to August 2003; on September 20, 2003, he returned to the United States, but the record is silent as to when he left on this trip; from October 24, 2003, to December 3, 2003; and on January 9, 2004, he returned to the United States, but the record is silent as to when he left.

⁶ Procedural Rule 8210 authorizes NASD, in the course of its investigations, to require members to provide information orally, in writing, or electronically "with respect to any matter involved in [an] investigation." As the Securities and Exchange Commission has emphasized, 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. Brian L. Gibbons, [Footnote continued on next page...]

The complaint alleged that NASD sought information from respondents after conducting a routine examination of the Firm in February 2003. On May 6, 2003, Enforcement sent a request for information pursuant to Procedural Rule 8210 via Airborne Express overnight courier to Mizrachi at the Firm's CRD address.⁷ Among other things, NASD sought information related to the Firm's compliance with continuing education requirements, the job duties of certain persons registered with the Firm, and the adequacy of the Firm's supervisory procedures. The letter asked respondents to provide the requested information by May 13, 2003. Airborne Express delivered the letter on May 7, 2003.

On May 14, 2003, an NASD supervisor spoke with Simon Mizrachi regarding the Firm's failure to respond to the May 6, 2003 information request. Simon Mizrachi acknowledged receipt of the request, stated that the Firm would respond, and stated that he would alert his brother, respondent Mizrachi, of the need to respond to the request. Respondents, however, did not provide the requested information or otherwise respond to the May 6, 2003 request.

On May 20, 2003, Enforcement sent a second request for information pursuant to Rule 8210 to Mizrachi at the Firm's CRD address via Airborne Express overnight courier. Airborne Express delivered the letter on May 21, 2003. The letter asked respondents to respond by May 27, 2003, and specifically stated that failure to respond could result in disciplinary action. Respondents did not respond to the May 20, 2003 request.

On July 23, 2003, Enforcement sent a third request for information pursuant to Rule 8210 via certified and first class mail to Mizrachi at the Firm's CRD address and to Mizrachi's residential address of record in CRD. The letter requested that respondents submit the information by August 4, 2003, and stated that, if respondents failed to respond timely, Enforcement counsel would recommend that NASD file a formal disciplinary action against the Firm and Mizrachi. Enforcement received return receipt cards for the certified mailings sent to the Firm and to Mizrachi's residential address evidencing a delivery date of July 28, 2003, and July 30, 2003, respectively. Both return cards were signed by "C.J. Mizrachi." The Postal Service returned neither of the first class mailings to Enforcement. Respondents did not respond to Enforcement's July 23, 2003 letter.

It is uncontested that respondents did not respond to the information requests until after the Hearing Officer had issued a default decision against respondents. Furthermore, respondents concede that the Firm received the information requests at the Firm's CRD address, and

[cont'd]

52 S.E.C. 791, 794 (1996), aff'd, 112 F.3d 516 (9th Cir. 1997). A person violates Procedural Rule 8210 when he fails to provide full and prompt cooperation when NASD makes a request for information. Id. A violation of Rule 8210 is also a violation of Conduct Rule 2110. Robert Fitzpatrick, Exchange Act Rel. No. 44956, 2001 SEC LEXIS 2185, at *13 (Oct. 19, 2001).

⁷ Due to a typographical error, the letter was dated May 7, 2003.

therefore, the Firm had notice of these requests. Mizrachi argues, however, that he never received the information requests as a result of his extensive travels abroad and his marital difficulties that precluded his receipt of mail sent to his residence. Even if true, Mizrachi's assertions are insufficient to extricate himself from compliance with Rule 8210. The record shows that Enforcement properly sent the information requests pursuant to the service provisions of Rule 8210(d), which state that, "[a] notice under this Rule shall be deemed received by the member or person to whom it is directed by mailing or otherwise transmitting the notice to the last known business address of the member or the last known residential address of the person as reflected in [CRD]." Therefore, Mizrachi had at least constructive notice of the three Rule 8210 requests. See, e.g., Dep't of Enforcement v. Hoeper, Complaint No. C02000037, 2001 NASD Discip. LEXIS 37, at *5 (NAC Nov. 2, 2001) (holding notice of Rule 8210 request sufficient when service made pursuant to Rule 8210(d)); see also Dep't of Enforcement v. Steinhart, Complaint No. FPI020002, 2003 NASD Discip. LEXIS 23, at *7-8 (NAC Aug. 11, 2003) (stating actual notice of Rule 8210 request not required). Additionally, Mizrachi's concession that the Firm received the information requests amounts to an admission of his constructive notice of the requests.

Moreover, the record shows that Mizrachi had actual notice of the Rule 8210 requests in August 2003 and continued to flout the rule by failing to respond. In Mizrachi's affidavit, he stated that he "began resuming [his] business activities" upon return to the United States in August 2003 and received "the NASD requests that were sent to [his] home."

We find, based on both the allegations in the complaint and the record evidence, that respondents received sufficient notice of Enforcement's requests for information and that respondents failed to respond to the requests, in violation of Procedural Rule 8210 and Conduct Rule 2110.

IV. Procedural Argument

Respondents argue that we should reject Enforcement's appellate brief because it was not timely served upon them. While we agree that Enforcement's service of its brief to respondents was not timely under NASD rules, we find that any delay in service was not material, respondents have shown no prejudice, and exclusion of Enforcement's brief would be an extreme penalty for a minimal delay in service.

In this case, Enforcement was due to file its brief and correspondingly serve it upon respondents by June 14, 2004. Enforcement counsel attested in his certificate of service that he sent Enforcement's brief via facsimile and by overnight commercial courier to respondents' counsel on June 14, 2004. Respondents do not dispute that their counsel received Enforcement's brief on June 14, 2004, via facsimile. Procedural Rule 9134, however, does not provide facsimile as a method for service. Service by express delivery is complete upon delivery. NASD Procedural Rule 9134(b)(3). Respondents assert that their counsel received Enforcement's brief by express delivery on June 17, 2004. Respondents set forth no argument evidencing that they were prejudiced by the untimely service, and we find none. We reject respondents' argument to disregard Enforcement's appellate brief.

V. Sanctions

The Hearing Officer barred Mizrachi from associating with any member firm and expelled the Firm for failing to respond to the information requests. The NASD Sanction Guideline ("Guideline") for a failure to respond provides that "if the individual did not respond in any manner, a bar should be standard."⁸ The Guideline also recommends, in an egregious case, expelling the firm.⁹

We affirm the Hearing Panel's imposition of a bar on Mizrachi and expulsion of the Firm for failing to respond to the requests made pursuant to Procedural Rule 8210. Contrary to respondents' argument, we find that there are no facts in mitigation. In addition, we find that this is an egregious case. Mizrachi and the Firm's disregard of their obligation to respond to Enforcement's repeated attempts to obtain information directly undermined NASD's regulatory responsibilities and its efforts to investigate possible violative activity engaged in by respondents.¹⁰ See Dep't of Enforcement v. Valentino, Complaint No. FPI010004, 2003 NASD Discip. LEXIS 15, at *14 (NAC May 21, 2003). We find that respondents' lack of response is tantamount to stonewalling and a willful refusal to comply. Thus, based on the record and the lack of any mitigating factors, we order Mizrachi barred from association with any NASD member firm in any capacity and the Firm expelled. The bar and expulsion imposed herein are effective as of the date of this decision.¹¹

On Behalf of the National Adjudicatory Council,

Barbara Z. Sweeney, Senior Vice President
and Corporate Secretary

⁸ See Guideline (2001 ed.) at 39 (Failure to Respond or Failure to Respond Truthfully, Completely, or Timely to Requests Made Pursuant to NASD Procedural Rule 8210). The applicable Guideline lists as principal considerations in determining sanctions the nature of the information requested and whether the requested information was provided. Id.

⁹ Id.

¹⁰ Mizrachi's self-described extended travels abroad and absences from the Firm for lengthy time periods do not in any way mitigate the lack of response to the information requests. The fact that respondents furnished a response to the information requests subsequent to the Hearing Officer issuing a default decision is also not mitigating. See Hoeper, 2001 NASD Discip. LEXIS 37, at *8.

¹¹ We have considered and reject without discussion all other arguments of the parties.