

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of

Department of Market Regulation,

Complainant,

vs.

Anthony John Orlando, Jr.,
New York, NY,

and

Philip Anthony Orlando,
Pelham, NY,

Respondents.

DECISION

Complaint No. CMS030269

Dated: May 18, 2005

Respondents refused to appear for testimony and failed to respond to requests for documents in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. Held, findings and sanctions affirmed.

Appearances

For the Complainant: Jeffrey K. Stith, Esq., and Laurie A. Doherty, Esq., NASD Department of Market Regulation, Rockville, Maryland.

For the Respondents: Jason Pickholz, Esq., Pickholz Law Firm, LLP, New York, New York.

DECISION

I. Background

Pursuant to NASD Procedural Rule 9311, Anthony John Orlando, Jr. ("Anthony Orlando") and his brother, Philip Anthony Orlando ("Philip Orlando"), appeal a March 30, 2004 Hearing Panel decision finding that Anthony and Philip Orlando (together "the Orlandos") refused to appear for testimony and failed to respond to requests for documents in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. The Hearing Panel barred the Orlandos for these violations. After a thorough review of the record, we conclude that the Hearing Panel's findings were appropriate, and we affirm the bar imposed on the Orlandos by the Hearing Panel.

Anthony Orlando entered the securities industry in 1993. In June 2000, he became associated with NASD member Park Capital Securities, LLC ("Park Capital" or "the Firm") as a general securities principal. Anthony Orlando served as the Firm's Chief Operating Officer and Executive Vice President. Philip Orlando entered the securities industry in 1995. Philip also became associated with Park Capital in June 2000 as a general securities principal. Philip Orlando served as the Firm's Chief Executive Officer. In addition, the Orlandos each own 50% of Park Capital Financial Group ("PCF Group"). PCF Group is a private company that owns 75% of Park Capital. On January 15, 2004, Park Capital filed Uniform Termination Notices for Securities Industry Registration ("Forms U5") terminating the registration of the Orlandos, and they have not been registered with any NASD member since that date.

II. Procedural History

NASD's Department of Market Regulation ("Market Regulation") filed a complaint on November 17, 2003, alleging that Anthony and Philip Orlando failed to: (1) appear for on-the-record testimony; and (2) provide requested documents to Market Regulation in violation of NASD Procedural Rule 8210¹ and NASD Conduct Rule 2110.² In response, the Orlandos filed an answer in which they contested the charges and requested a hearing. On January 20, 2004, the Orlandos filed a motion to compel Market Regulation to produce, among other things, documents containing communications between Market Regulation and any governmental authority regarding the Orlandos or Park Capital. On January 27, 2004, Market Regulation filed

¹ NASD Procedural Rule 8210 requires that NASD member firms and associated persons provide information to NASD investigators upon request. *Robert Fitzpatrick*, Exchange Act Rel. No. 44956, 2001 SEC LEXIS 2185, at *8 (Oct. 19, 2001).

² NASD Conduct Rule 2110 requires that NASD members and associated persons shall, in conducting their business, "observe high standards of commercial honor and just and equitable principles of trade." We have previously determined that a violation of NASD Procedural Rule 8210 is also a violation of NASD Conduct Rule 2110. *Dep't of Enforcement v. Hoeper*, Complaint No. C02000037, 2001 NASD Discip. LEXIS 37, at *5 (NAC Nov. 2, 2001).

a motion in opposition to the Orlandos' motion to compel stating that it properly withheld these documents pursuant to NASD Procedural Rule 9251(b)(1)(A), (B), and (C).³ On February 3, 2004, the Hearing Panel issued an order denying the portion of the Orlandos' motion to compel that sought production of Market Regulation's communications with governmental authorities. Shortly thereafter, on February 12, 2004, Market Regulation filed a motion for summary disposition pursuant to NASD Procedural Rule 9264,⁴ which the Orlandos opposed. On March 3, 2004, a Hearing Panel heard oral arguments on the motion, and in a decision issued on March 30, 2004, the Hearing Panel granted Market Regulation's motion for summary disposition. This appeal followed.

III. Facts

The allegations in the complaint stem from Market Regulation's investigation of the Orlandos' sale of stock to some of Park Capital's customers and whether these sales violated antifraud provisions of the federal securities laws and NASD rules.⁵ In connection with this

³ NASD Procedural Rule 9251(b)(1) states that Market Regulation may withhold a document requested by a respondent if: (A) it is privileged or constitutes attorney work product; (B) it is an examination or inspection report, an internal memorandum, or other note or writing prepared by an NASD employee that shall not be offered in evidence; (C) the document would disclose (i) an examination or investigatory technique or guideline, (ii) the identity of a confidential source, or (iii) an examination, investigation, an enforcement proceeding, or any type of civil or criminal enforcement action under consideration by or initiated by NASD, a federal, state or foreign regulatory authority or self-regulatory organization; or (D) the Hearing Officer grants leave to withhold a document or category of documents as not relevant to the subject matter of the proceeding, or for other good cause shown.

⁴ NASD Procedural Rule 9264 provides that in a disciplinary action, either the complainant or a respondent may move for summary disposition of any or all of the causes of action against the respondent. Here, Market Regulation is the moving party and bears the initial burden of proving that there are no genuine issues of material fact in dispute. If Market Regulation fails to meet this burden, summary disposition should not be granted. If Market Regulation meets this burden, however, the burden then shifts to the respondents to set forth specific facts showing that there is a genuine issue in dispute. If the respondents fail to make such a showing, Market Regulation's motion for summary disposition should be granted. *See Dep't of Enforcement v. Shvarts*, Complaint No. CAF980029, 2000 NASD Discip. LEXIS 6, at *10 n.11 (NAC June 2, 2000) (citations omitted).

⁵ Market Regulation's investigation began in early 2002, and sought to determine whether: (1) in connection with a private offering of PCF Group securities, the Orlandos had made material misrepresentations to prospective investors with regard to the financial condition of PCF Group; (2) PCF Group had paid undisclosed bonuses to its employees for recommending certain securities; and (3) PCF Group had either received or shared in the proceeds of sales of stock by some of Park Capital's other customers.

investigation, Market Regulation requested that the Orlandos appear for on-the-record interviews and that they provide certain documents pursuant to NASD Procedural Rule 8210.

Specifically, on July 22, 2003, Market Regulation sent letters to Anthony and Philip Orlando requesting, among other things, documents reflecting the financial condition of PCF Group. The Orlandos produced some of the requested documents,⁶ but in their answer to Market Regulation's complaint, explained that they did not produce PCF Group's financial records because they were either in the possession of Park Capital's former counsel or its clearing firm.

Market Regulation's July 22, 2003 letter also requested that the Orlandos appear at NASD's Rockville, Maryland offices in September 2003 for on-the-record interviews. At the request of the Orlandos' counsel, these interviews were postponed until October 2003.⁷ On October 2, 2003, Market Regulation sent a letter to the Orlandos listing several categories of documents requested in the July 22, 2003 letter that had not yet been produced. On October 7, 2003, counsel for the Orlandos sent a letter to Market Regulation stating that the Orlandos would not be appearing for their scheduled on-the-record interviews.⁸ The October 7, 2003 letter also asserted that the requested documents were the "corporate records" of PCF Group and that the Orlandos would not be producing any additional documents. Neither of the Orlandos appeared for his interview, nor provided any additional documents to Market Regulation.

IV. Discussion

The material facts in this case are undisputed and demonstrate the Orlandos' failure to comply with NASD rules. After reviewing the record in this matter, we affirm the Hearing Panel's findings as to the alleged misconduct and the Hearing Panel's decision to grant Market Regulation's motion for summary disposition under NASD Procedural Rule 9264.

⁶ The Orlandos assert that prior to receiving Market Regulation's Rule 8210 request in July 2003, they had previously produced documents responsive to the request in April 2002 and April 2003 as part of the investigation. The Orlandos further assert that Market Regulation also was granted access to documents responsive to the July 2003 request during an earlier on-site review of Park Capital's files in December 2002. Market Regulation offered no evidence to contradict these assertions. In addition, the Orlandos also produced some documents responsive to the July 2003 request on August 19, 2003.

⁷ Market Regulation accommodated the request of the Orlandos' counsel by agreeing to conduct Anthony Orlando's interview on October 2, 2003 and Philip Orlando's interview on October 9, 2003. Pursuant to another request by the Orlandos' counsel on the eve of Anthony Orlando's scheduled interview, Market Regulation agreed to reschedule Anthony Orlando's interview for October 8, 9, and 10, 2003.

⁸ In this letter, the Orlandos made no reference to their Fifth Amendment rights.

A. The Hearing Panel's Grant of Summary Disposition Is Permissible Under the Securities and Exchange Act

As an initial matter, the Orlandos contend that the Securities and Exchange Act ("Exchange Act") does not permit the Hearing Panel's summary disposition of this case pursuant to NASD Procedural Rule 9264. Specifically, the Orlandos argue that summary disposition is prohibited in this case under Exchange Act Section 15A(h)(3). Exchange Act Section 15A(h)(3) identifies three instances where registered securities associations like NASD may take summary action against a member or an associated person. The Orlandos argue that because Section 15A(h)(3) does not expressly include a disciplinary action under NASD Procedural Rule 8210 or NASD Conduct Rule 2110 among these instances, Congress forbade securities associations from allowing summary disposition of such actions. The Orlandos' position is misguided.

First, under Exchange Act Section 15A(b)(8), summary disposition of NASD disciplinary proceedings is appropriate. Exchange Act Section 15A(b)(8) requires that NASD rules be "in accordance with the provisions of [Exchange Act Section 15A(h)], and, in general, provide a fair procedure" for disciplinary proceedings. 15 U.S.C. §78o-3(b)(8). Exchange Act Section 15A(h)(1)'s "fairness" requirement is met provided that: (1) respondents are given notice; (2) respondents are given an opportunity to be heard; (3) a record is kept; and (4) the specific grounds on which the decision is based are set forth. *See* 15 U.S.C. §78o-3(h)(1). All of these fairness requirements were met in this case.⁹ Moreover, the SEC authorized NASD Procedural Rule 9264, NASD's summary disposition rule, when it approved changes in NASD's Code of Procedure in August 1997 and expressly indicated that it found these procedures to be consistent with the standards and objectives set forth in the Exchange Act, particularly the fairness requirements arising from Exchange Act Section 15A(b)(8).¹⁰

Second, the Orlandos have confused the procedures for summary disposition of disciplinary actions under the NASD Procedural Rule 9200 series with the procedures for summary proceedings under the NASD Procedural Rule 9500 series. The procedures for summary disposition of disciplinary actions under the 9200 series are authorized and governed by Exchange Act Section 15A(h)(1), while the procedures for summary proceedings under the Rule 9500 series are authorized and governed by Exchange Act 15A(h)(3). The Orlandos' argument is therefore based on an interpretation of a statutory provision that has no relevance here. Consequently, we find that the Exchange Act did not prohibit the Hearing Panel's grant of summary disposition in this matter.

⁹ Here, the Orlandos were given notice of the alleged NASD Procedural Rule 8210 and NASD Conduct Rule 2110 violations, a hearing was conducted on the record in which the Orlandos, represented by counsel, were able to dispute the allegations, and NASD issued a written decision on March 30, 2004, setting forth the basis for its findings.

¹⁰ *See Order Approving Proposed Rule Change Regarding NASD's Disciplinary Proceedings*, Exchange Act Rel. No. 34-38908, 1997 SEC LEXIS 1617, at *92 (Aug. 7, 1997).

B. The Orlandos Failed to Comply with Market Regulation's Rule 8210 Requests

NASD Procedural Rule 8210 requires persons associated with a member of NASD to provide information and to testify if requested with respect to an investigation, complaint, examination or proceeding authorized by NASD. NASD Procedural Rule 8210's purpose is to provide a means for NASD to carry out its regulatory functions in the absence of subpoena power and it is a "key element in the NASD's effort to police its members."¹¹ Here, pursuant to NASD Procedural Rule 8210, Market Regulation scheduled on-the-record interviews in October 2003 for both Anthony and Philip Orlando. On the eve of Anthony Orlando's scheduled interview, counsel for the Orlandos sent Market Regulation a letter indicating that the Orlandos would not appear for their on-the-record interviews, and in fact, neither of the Orlandos attended these interviews. Consequently, we find that the Orlandos did not comply with NASD Procedural Rule 8210.

In addition, NASD Procedural Rule 8210 requires persons associated with a member firm to provide NASD with access to their books and records,¹² and a "[f]ailure to provide [such] information fully and promptly undermines the NASD's ability to carry out its regulatory mandate."¹³ In response to Market Regulation's request for information, the Orlandos admit that they failed to provide documents relating to the financial condition of PCF Group.

An associated person who cannot provide the information sought by the NASD must "explain the deficiencies in his responses or answer as completely as he [is] able." *Joseph Patrick Hannan*, 53 S.E.C. 854, 859 (1998) (quoting *Robert A. Quiel*, 53 S.E.C. 165, 168 (1997)); see also *Dep't of Enforcement v. Christopher R. Van Dyk*, Complaint No. C3B020013, 2004 NASD Discip. LEXIS 12, at *25 (NAC Aug. 9, 2004) (stating that a registered person refusing to comply with a Rule 8210 request has the burden of articulating a legitimate rationale for such non-compliance). Here, the Orlandos claimed in their answer to Market Regulation's complaint that they could not provide the requested financial records because they were in the custody and control of Park Capital's former counsel, and he was experiencing difficulty obtaining them from storage.¹⁴ In the October 7, 2003 letter articulating the Orlandos' refusal to

¹¹ *Richard J. Rouse*, 51 S.E.C. 581, 584 (1993).

¹² NASD Procedural Rule 8210 states that "[f]or the purpose of an investigation, complaint, examination, or proceeding authorized by the NASD By-Laws or the Rules of the Association, an Adjudicator or Association staff shall have the right to . . . inspect and copy the books, records, and accounts of [a member or person associated with a member] with respect to any matter involved in the investigation, complaint, examination, or proceeding."

¹³ *Michael David Borth*, 51 S.E.C. 178, 180 (1992).

¹⁴ The Orlandos also asserted that these financial records might be in the custody and control of their clearing firm. It is undisputed, however, that the Orlandos' clearing firm

appear for their interviews, however, the Orlandos' counsel stated that these records were "corporate records" and that the Orlandos would not be producing them.

The Orlandos argue that these responses satisfied their obligation under NASD Procedural Rule 8210. We disagree. It is undisputed that the Orlandos failed to produce any documents in response to Market Regulation's requests for information regarding the financial condition of PCF Group, and on the record, the Orlandos failed to adequately explain the deficiencies in their responses to these requests. Even though the Orlandos were 100% owners of PCF Group, they failed to adequately explain why they were unable to produce PCF Group's financial records. First of all, in their October 7, 2003 letter, the Orlandos stated that some of these records were "corporate records"¹⁵ that were in the possession of Park Capital's former counsel and that he was experiencing difficulty retrieving the requested financial records from storage. The Orlandos, however, offered no written evidence of their efforts to obtain these documents from Park Capital's former counsel. Moreover, when Park Capital's former counsel later informed Market Regulation that he did not possess any of the requested financial records, the Orlandos offered no evidence to dispute his statement.

In fact, throughout the entire disciplinary process, the Orlandos have refused to confirm whether or not these financial records were actually in their custody, in the custody of Park Capital's former counsel, or if such documents even exist. The Orlandos only asserted that if these documents were in their custody, Market Regulation was given access to them during an earlier on site review of Park Capital's records several months before Market Regulation's July 2003 request. The totality of the Orlandos' response, in effect, shifted the burden of locating,

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produced all documents in its possession relating to PCF Group to Market Regulation, and there were no records detailing PCF Group's financial condition in this production. Moreover, the Orlandos did not offer any explanation of what role, if any, their clearing firm had in Park Capital's private offering of PCF Group securities that would cause the clearing firm to retain possession of these records.

¹⁵ The Orlandos also stated in their October 7, 2003 letter to Market Regulation that they were considering obtaining separate counsel for Park Capital. There is no evidence in the record, however, that the Orlandos were unable to produce the requested financial documents due to any legal restriction or that these documents were outside of their control. We have previously found that a respondent's refusal to produce documents relating to the business activity of a private corporation in response to an NASD request for information was a violation of Rule 8210 where: (1) the respondent failed to identify any statute, privilege or other legal restriction that would preclude him from producing such documents; and (2) the documents were in the respondent's possession, custody or control. *See Van Dyk*, 2004 NASD Discip. LEXIS 12, at *25.

identifying and obtaining the requested documents to Market Regulation,¹⁶ and we find that such a response falls far short of the requirements of NASD Procedural Rule 8210.¹⁷

C. The Orlandos' Failure to Attend Their Interviews Was Not Justified Because of the Fifth Amendment Privilege.

The Fifth Amendment to the United States Constitution states that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself." The protections afforded by the Fifth Amendment, however, apply only to governmental conduct. *D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 161 (2d Cir. 2002). It is well established that the self-incrimination privilege does not generally apply to questioning in proceedings by self-regulatory organizations like NASD, because such entities are not part of the government. *United States v. Solomon*, 509 F.2d 863, 867 (2d Cir. 1975); *Daniel Turov*, 51 S.E.C. 235, 238 (1992).

In fact, actions by NASD may be treated as the action of the government only if NASD's actions are found to be "fairly attributable" to the government. *D.L. Cromwell*, 279 F.3d at 161 (stating that private actions are fairly attributable to the government where "there is a sufficiently close nexus between the State and the challenged action of the regulated entity . . . [and] that nexus exists . . . where the state has exercised coercive power [over a private decision] or has provided such significant encouragement, either covert or overt, that the choice must in law be deemed to be that of the State.") (citations omitted). The Orlandos, however, have not provided any evidence of coercion or encouragement by the government that would lead us to conclude that Market Regulation's actions in this case must be deemed to be the actions of the government.¹⁸

¹⁶ Compare *Fitzpatrick*, 2001 SEC LEXIS 2185, at *12 (holding that an associated person did not satisfy NASD Procedural Rule 8210 when he refused to deliver the requested payroll records of two employees to NASD, but instead invited NASD to his firm's office to search, inspect and copy all of its payroll records).

¹⁷ The Orlandos further argue that since Market Regulation, through its own efforts, was eventually able to obtain some of these documents from third parties, there could be no violation for their failure to provide them or, at the very least, that there is a question of fact as to whether the Orlandos complied with the request. This argument is without merit. As persons registered with NASD, the Orlandos had a duty to provide the documents requested by NASD at the time the requests were made. See *Fitzpatrick*, 2001 SEC LEXIS 2185, at *8 (citing *Borth*, 51 S.E.C. at 180)). The Orlandos' response to NASD's request was a breach of this duty and we find that the Orlandos' failure to provide the requested documents cannot be cured by Market Regulation's investigative efforts.

¹⁸ A private entity like NASD may also be treated as if it is a governmental actor if "the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State.'" *D.L. Cromwell*, 279 F.3d at 161 (citations omitted). The functions that courts have enumerated as being the exclusive prerogative of the government are extremely narrow. See *Perkins v.*

The Orlandos argue that Market Regulation's purpose for requesting on-the-record interviews was not for the legitimate goal of furthering its own investigation of Park Capital, but to provide criminal assistance to governmental authorities. The Orlandos' argument is based on Market Regulation's representation in its opposition to the Orlandos' motion to compel that the documents requested by the Orlandos were properly withheld pursuant to NASD Procedural Rule 9251(b)(1)(A), (B), and (C). NASD Procedural Rule 9251(b) permits Market Regulation to withhold a document requested by a respondent if the document would disclose, among other things, "a criminal enforcement action under consideration by, or initiated by . . . a federal, state, or foreign regulatory authority, or self-regulatory organization." Consequently, the Orlandos interpret Market Regulation's withholding of documents pursuant to this rule to be an "unqualified admission" that Market Regulation was assisting governmental authorities with the pursuit of a criminal prosecution against them.

In an Order Denying in Part and Granting in Part Respondents' Motion to Compel, the Hearing Panel refused to order Market Regulation to produce any documents involving communications with governmental authorities. In reaching this conclusion, the Hearing Panel concluded that NASD, as part of its self-regulatory responsibilities, often acknowledges that it receives information and cooperation from governmental authorities and that there is nothing improper or suspicious about such communications. We agree. We find that, without more evidence of coercion, Market Regulation's alleged communications with governmental authorities do not transform it into a state actor, particularly since the express provisions of NASD Procedural Rule 9251 contemplate such communications.

Finally, the Orlandos argue that because documents may exist that contain communications between Market Regulation and governmental authorities, whether Market Regulation is a "state actor" is a question of fact that would preclude summary disposition of the Orlandos' violations. The Orlandos further argue that if given the chance to review these documents and interview the NASD employees working on the Park Capital investigation, they

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Londonderry Basketball Club, 196 F.3d 13, 19 (1st Cir. 1999) (listing "the administration of elections, the operation of a company town, eminent domain, peremptory challenges in jury selection, and, in at least limited circumstances, the operation of a municipal park" as the only functions recognized by the Supreme Court as the exclusive prerogative of the government) (quoting *United Auto Workers v. Gaston Festivals, Inc.*, 43 F.3d 902, 907 (4th Cir. 1995)). Moreover, we are not aware of any decision in which NASD was found to be a state actor solely because of its power to discipline its membership under the Exchange Act, and we decline to adopt this position here. See *Marchiano v. National Ass'n of Sec. Dealers, Inc.*, 134 F. Supp. 2d 90, 95 (D.D.C. 2001) ("The court is aware of no case . . . in which NASD Defendants were found to be state actors either because of their regulatory responsibilities or because of any alleged collusion with criminal prosecutors.").

could establish that Market Regulation's requests pursuant to NASD Procedural Rule 8210 were a pretext for assisting governmental authorities.

Accepting the Orlandos' argument, however, would create a presumption that a question of fact as to whether NASD is functioning as a state actor arises when *any* NASD investigator withholds documents pursuant to NASD Procedural Rule 9251(b). Moreover, this presumption would subject NASD staff to a hearing as to whether its investigation has been compelled by the government any time Rule 9251(b) is invoked in a disciplinary proceeding. This reasoning is at odds with the purpose of NASD Procedural Rule 9251(b) and we decline to adopt such a radical position. In addition, as pointed out in the Hearing Panel decision, we have recently rejected similar arguments on this exact issue. *See Dep't of Enforcement v. Frank Peter Quattrone*, Complaint No. CAF030008, 2004 NASD Discip. Lexis 17, at *37-40 (NAC Nov. 22, 2004) (finding that respondent was not entitled to an evidentiary hearing on the issue of state action based on respondent's unsupported assertion that NASD and the SEC engaged in a "joint investigation" of respondent); *see also Dep't of Enforcement v. Respondent Firm, Frank J. Skelly, III, Craig H. Ross and Respondent 3*, Complaint No. CAF000013, 2003 NASD Discip. LEXIS 40, at *34-35 (NAC Nov. 14, 2003) (concluding that respondents should not be granted a hearing to interview an NASD attorney or allowed to go on a "fishing expedition" in an effort to produce evidence that the attorney was working on behalf of governmental authorities).

On the record before us, we find that the Orlandos have provided no meaningful evidence that Market Regulation collaborated with governmental authorities in its investigation of Park Capital. The Orlandos' claim that Market Regulation employees had communications with governmental authorities, without more evidence, does not contradict Market Regulation's assertion that its investigation of Park Capital was for the legitimate purpose of determining whether there was fraud committed in connection with the private offering of PCF Group securities.¹⁹ We find that the evidence proffered by the Orlandos does not support a conclusion that Market Regulation's request for an on-the-record interview with them was for an improper purpose and does not give rise to a triable issue of fact as to whether the NASD employees investigating Park Capital were state actors. We therefore affirm the Hearing Panel's finding that the Orlandos were not excused from their failure to attend their on-the-record interviews because of the Fifth Amendment privilege.

¹⁹ We also reject the Orlandos' argument that Market Regulation's investigation was not legitimate because the complaint against the Orlandos only alleged procedural violations, particularly in light of the difficulty that Market Regulation would have alleging substantive violations without access to the very financial records that the Orlandos failed to produce in violation of NASD Procedural Rule 8210.

V. Sanctions

The NASD Sanction Guidelines ("Guidelines") recommend that in the absence of mitigating factors, persons that fail to respond to an NASD Procedural Rule 8210 request should be barred.²⁰ The Orlandos argue that their lack of disciplinary history is a mitigating factor that would warrant a sanction less than a bar. We reject this argument. NASD maintains the highest expectations of its members and associated persons. The Orlandos' lack of a disciplinary history is consistent with this expectation and does not serve as a mitigating factor for their failure to comply with NASD's request for information. *See Dep't of Enforcement v. Roethlisberger*, Complaint No. C8A020014, 2003 NASD Discip. LEXIS 48, at *18 (NAC Dec. 15, 2003) (rejecting contention that respondent's lack of a disciplinary history should mitigate the severity of the sanctions imposed).

We also reject the Orlandos' contention that their efforts to comply with Market Regulation's request for documents should be a mitigating factor. As the Hearing Panel noted, Market Regulation was forced to file a complaint in order to encourage the Orlandos' cooperation with its investigation and the Orlandos still failed to provide all the requested information. NASD should not have to resort to such regulatory pressure in order to obtain cooperation with its investigations. *See Van Dyk*, 2004 NASD Discip. LEXIS 12, at * 29; *Dist. Bus. Conduct Comm. v. Blech*, Complaint No. C10960019, 1997 NASD Discip. LEXIS 72, at *9 (NBCC Dec. 1, 1997). We therefore find no mitigating factors in this case and conclude that a bar is warranted for the Orlandos' violation.

VI. Conclusion

We find that Anthony and Philip Orlando each failed to: (1) appear for on-the-record testimony; and (2) provide requested documents in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. We reject the Orlandos' argument that NASD is a state actor and that its Rule 8210 requests were improper.²¹ We therefore affirm the sanctions imposed by the Hearing Panel to reflect these findings.

²⁰ *See* Guidelines (2001 ed.) at 39.

²¹ We have also considered and reject without discussion all other arguments advanced by the parties.

Accordingly, both Anthony Orlando and Philip Orlando are barred from associating with any NASD member firm in any capacity. We also order Anthony and Philip Orlando to pay \$1,659.06 in appeal costs, jointly and severally.²² The bars will be effective as of the date of this decision.

On Behalf of the National Adjudicatory Council,

Barbara Z. Sweeney, Senior Vice President and
Corporate Secretary

²² Pursuant to NASD Procedural Rule 8320, any member that fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.