

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Disciplinary Proceeding

No. C10000102

Hearing Officer—Andrew H. Perkins

Hearing Panel Decision

March 21, 2001

Formerly registered representative charged with violating NASD Procedural Rule 8210 and NASD Conduct Rule 2110 by failing to respond to two pre-complaint and two post-complaint requests for information. The Hearing Panel found that Respondent responded late to the post-hearing requests and ordered that this Decision serve as a letter of caution. The Hearing Panel dismissed the remaining charge.

Appearances

For the Complainant: Evan D. Jay, Jay M. Lippman, and Evan J. Gordon (David E. Shellenberger and Rory C. Flynn, Of Counsel).

For the Respondent: _____ appeared *pro se*.

DECISION

I. INTRODUCTION

This enforcement proceeding commenced after the Respondent _____

(“_____”) failed to respond to two requests for information issued by NASD Regulation,

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision C10000102.

Inc. (“NASD Regulation”) pursuant to NASD Procedural Rule 8210. The requests were dated December 30, 1998, and January 19, 1999. At the time, _____ was not employed in the securities industry. NASD Regulation staff sent the requests to _____ at _____, _____, his most current residential address recorded in the Central Registration Depository (“CRD”).

The Department of Enforcement (“Enforcement”) filed the Complaint against _____ on June 13, 2000, alleging that he violated NASD Conduct Rule 2110 and NASD Procedural Rule 8210 by failing to respond to the requests for information. _____ did not answer the Complaint within the time provided by the NASD Code of Procedure; therefore, on July 12, 2000, Enforcement served him with a Second Notice of Complaint. On the same day, NASDR staff received a letter from _____, dated June 26, 2000, in which he denied that he ever received the requests for information because they were sent to an out of date address.

_____ alleged that on May 1, 1998, he had moved from his CRD address to _____, _____ and that on May 5, 1998, he had submitted a letter to the registration department of his former firm, _____ (“_____”), informing it of his change of address. _____ also complained that more than a month before the Complaint was filed he had requested Evan D. Jay (“Jay”), counsel for Enforcement in this proceeding, to provide him with a copy of the Rule 8210 requests so that he could provide “adequate and intelligent answers,” but he had heard nothing further from Jay until

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision C10000102.

he received a copy of the Complaint. Over Enforcement's objection,¹ the Hearing Officer accepted _____'s letter as his Answer to the Complaint and scheduled an Initial Pre-Hearing Conference.

At the Initial Pre-Hearing Conference _____ reiterated the claims in his Answer. He also pointed out that in July 1999, he joined _____, Inc. ("_____") in an unregistered capacity and that his current residential address was _____, _____. _____ explained, as he had alleged in his Answer, that on August 1, 1999, he provided _____ with an updated Uniform Application For Securities Industry Registration Or Transfer (Form U-4) with his new address. Following a discussion of the issues _____ raised, the Parties agreed to a hearing date and pre-hearing schedule. The Initial Pre-Hearing Order dated September 19, 2000, set forth the agreed schedule, which, among other deadlines, required the Parties to file their pre-hearing submissions by November 17, 2000.

Confronted with _____'s claims, Enforcement sent him two post-complaint requests for information pursuant to Rule 8210 dated September 22 and October 12, 2000. These requests sought the production of "any document containing [his] current or former residential address, including any change of address form [he] submitted to either _____ Broker-Dealer or TD _____." Notably, these requests covered the materials supporting _____'s defenses and required that he produce them earlier than the agreed deadline in the

¹ Enforcement objected on the grounds that _____ letter did not comply with the Rules governing the form and filing of papers although it "appears to deny the allegations in the Complaint." (Not. of Receipt of Correspondence from Resp't at 1.)

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision C10000102.

Initial Pre-Hearing Order. In effect, Enforcement sought to accelerate _____'s document disclosure and remove the oversight of that production from the Hearing Officer.²

Enforcement did not receive a response to either of the post-complaint requests; accordingly, on December 12, 2000, Enforcement moved to amend the Complaint to add an additional cause to the Complaint charging _____ with additional violations of Rules 2110 and 8210. _____ did not oppose the amendment. Thus, on December 18, 2000, the day before the hearing, the Hearing Officer granted Enforcement's motion.

Upon learning from the Hearing Officer's legal assistant on or about December 14, 2000, that the motion to amend was going to be granted, Enforcement assumed that the hearing would be adjourned although its motion did not request a postponement. Without verifying its assumption, and without speaking to _____, counsel for Enforcement told its witnesses not to appear. Accordingly, no one appeared on behalf of Enforcement at the scheduled commencement of the hearing on December 19, 2000. _____ did appear on time prepared to present his defense.

In order to proceed with the hearing, members of the Hearing Panel had to make numerous telephone calls to locate counsel for Enforcement. After nearly an hour's delay, the Hearing Panel was informed that counsel for Enforcement had been located. Shortly, Jay M. Lippman, Esq. informed the Hearing Panel that he would enter an appearance in this proceeding

² In this regard, the Hearing Panel notes that the Notice of issuance of the first post-complaint 8210 request did not disclose the nature of the documents requested. The Notice only stated that the "Complainant has invoked NASD Procedural Rule 8210 to obtain documents." The Hearing Panel further notes that Enforcement did not inform the Hearing Officer that it issued a second post-complaint 8210 request, as is required by Rule 9251(a)(2).

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision C10000102.

so that Jay could be a witness. Mr. Lippman also advised the Hearing Panel that he would be joined by a third attorney, Evan J. Gordon, once he arrived.³

The Hearing Panel, composed of NASD Hearing Officer Perkins and two current members of the District Committee for District 10, then proceeded with the hearing.⁴

Enforcement presented one witness⁵ and eight exhibits (CX-1 through CX-8). Respondent, appearing *pro se*, testified and introduced one exhibit (R-1).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Respondent's Background in the Securities Industry

_____ was born in Russia in 1972 and emigrated to the United States when he was 17 years old after living as a refugee in Australia and Italy. In 1993 he joined the U.S. Army and served until his discharge in November 1995. After leaving the U.S. Army, _____ joined _____. He passed the Series 7 examination in March 1996 and became registered as a General Securities Representative on March 25, 1996. _____ worked at _____ from January 1996 to September 8, 1998, at which time he resigned. Thereafter, he was unemployed until July 19, 1999, when he joined _____. _____ currently works in _____'s back office in an unregistered capacity. (CX-1.)

³ Mr. Gordon had served a notice of appearance on December 14, 2001, which arrived at the Office of Hearing Officers on December 21, 2000.

⁴ The transcript of the hearing is cited as "Tr. ____."

⁵ Enforcement's sole witness was Jay, one of the attorneys representing Enforcement in this proceeding. Jay had direct evidence regarding the post-complaint requests for information, but he had no first-hand knowledge of the facts surrounding the first two requests because he was not assigned to this investigation until the Spring of 2000, after the original requests for information had been issued.

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision C10000102.

B. Jurisdiction

The NASD has jurisdiction over _____ and the charges alleged in the First Cause of the Amended Complaint under Article V, Section 4 and of the NASD's By-Laws, which creates a two-year period of retained jurisdiction over formerly registered persons, covering conduct that began before their registrations terminated. The By-Laws also impose a continuing duty on formerly registered representatives to respond to requests for information issued by the NASD during this two-year period of retained jurisdiction. _____'s registration as a General Securities Representative with _____ terminated effective October 6, 1998. Enforcement filed the Complaint on July 13, 2000, within two years of that date, and the Complaint alleged failures to respond that occurred during the period of retained jurisdiction.

The NASD also has jurisdiction over _____ and the charges alleged in the Second Cause of the Amended Complaint. At the time the post-complaint requests were made pursuant to Rule 8210 and the Amended Complaint was filed, _____ was associated with _____ in an unregistered capacity. The NASD has the power to discipline and impose sanctions against unregistered persons who are associated with a member firm when they are performing job functions and activities related either to investment banking or the securities business.⁶ In such cases, unregistered persons function as "associated persons," as defined by Article I(ee) of the Association's By-Laws.

⁶ See Market Regulation Comm. v. Vladislav Steven Zubkis, No. CMS950129, 1997 NASD Discip. LEXIS 47 (NBCC Aug. 12, 1997); District Business Conduct Comm. No. 8 v. Ashvin R. Shah, No. C8A920044, 1993 NASD Discip. LEXIS 254, at *16-17 (NBCC Aug. 30, 1993).

C. The Pre-Complaint Information Requests—The First Cause of the Amended Complaint

It is undisputed that _____ did not respond to either of the pre-complaint 8210 requests sent to him at his CRD address by certified mail, return receipt requested, and regular first-class mail. It is uncontested that _____ did not sign a certified mail receipt, and Enforcement submitted no evidence that he was living at the CRD address at the relevant time. Indeed, the evidence shows that NASD Regulation staff learned that the CRD address was out of date but failed to send a copy of the 8210 requests to the forwarding address provided by the US Postal Service. Moreover, Enforcement has not contended that _____ actually received the pre-complaint requests at the CRD address. Thus, the threshold question presented by the First Cause of the Complaint is whether NASD Regulation staff gave _____ adequate “constructive” notice of the pre-complaint 8210 requests.

1. Background

On or about October 2, 1998,⁷ _____ filed a Uniform Termination Notice For Securities Industry Registration (Form U-5) on _____’s behalf that disclosed that two former customers, ZS and BS, had lodged a complaint with _____, alleging that _____ had engaged in certain improper sales practices. (CX-1.) To investigate these allegations, on December 30, 1998, NASDR staff sent _____ a request for information pursuant to Rule 8210 that requested that he supply a detailed statement regarding ZS and BS’s complaint. (CX-

⁷ There is some ambiguity about the precise date because Enforcement only provided excerpts of _____’s CRD record as recorded in the current Internet-based system known as WebCRD, which only provides summary information of filings made before July 7, 1999, the date the NASD converted the data to WebCRD.

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision C10000102.

2.) The return receipt for the certified mailing shows that the certified mailing was delivered by the US Postal Service on January 26, 1999, and signed for by "N. _____." ⁸ (CX-2, at 2.)

NASDR staff re-sent the same request for information on January 19, 1999, to _____ at the CRD address. The January 19 Request enclosed the original request and gave _____ until January 29, 1999, to respond. (CX-3.) In this case, the US Postal Service returned the certified mailing. On the returned envelope the CRD address had been crossed out and a new address handwritten below: _____, _____, _____, _____. (CX-3, at

3.) The returned envelope also contained notes and stamps indicating that delivery was attempted and that the letter was unclaimed. One of the stamps on the returned envelope bears the address of the _____ Post Office, indicating that the letter may have been forwarded to _____. (Id.)

Although the January 19 Request was returned bearing a forwarding address, NASDR staff did not send the request to the new address or otherwise follow up to determine if this was _____'s current address. Instead, the case was referred for the filing of a disciplinary complaint.

At the time NASD Regulation Staff sent _____ the first two requests, he was neither registered with the NASD nor working in the securities industry. (CX-1.) _____ also was no longer living at the CRD address. (Tr. 66-67.)

_____ lived with his parents at the CRD Address until May 2, 1998, at which time he moved in with his fiancée, _____, at _____, _____, _____

⁸ _____'s father is _____. _____ testified, however, that it did not appear to be his father's signature and that his father denied signing for the letter. (Tr. 86-87.) Enforcement introduced no evidence

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision C10000102.

_____. (Tr. 66, 72-73.) His parents also moved from the CRD address to _____
_____, _____, ___ on September 30, 1998, several months before NASD Regulation
Staff sent _____ the first two requests for information. As a result, _____ claims that
neither of the information requests sent regarding ZS and BS's complaint ever reached him.

2. Notice of the Pre-Complaint Information Requests

To establish a violation of Rules 8210 and 2110, Enforcement must show by a
preponderance of the evidence that the person charged with the failure to respond received
proper notice of the request for information. NASD Procedural Rule 8210(d) provides:

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 residential address of the person as reflected in the Central Registration
Depository. If the . . . Association staff responsible for mailing or otherwise
transmitting the notice to the . . . person has actual knowledge that the address in
the Central Registration Depository is out of date or inaccurate, then a copy of
the notice shall be mailed or otherwise transmitted to: (1) the last known . . .
residential address of the person as reflected in the Central Registration
Depository, and (2) any other more current address of the . . . person known to
the . . . Association staff who is responsible for mailing or otherwise transmitting
the notice.

Thus, in situations where a respondent failed to receive actual notice of a request issued
pursuant to Rule 8210, he or she may nevertheless be deemed to have received the request
where the notice is sent to an accurate and current CRD address. If, however, the person
responsible for sending the notice has actual knowledge that the CRD address is out of date or
inaccurate, he or she must also send a copy of the notice to any more current address known to
the sender. See Department of Enforcement v. Bernard San Juan Rondez, No. C01990002,
2000 NASD Discip. LEXIS 4, at *10, 13 (NAC Apr. 10, 2000).

that _____'s father received the December 30 Request and gave it to his son.

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision C10000102.

In this case, in January 1999, NASD Regulation staff learned that _____'s CRD address was out of date. The US Postal Service returned the January 19 Request with notations indicating _____'s forwarding address. (CX-2.) Nevertheless, the staff failed to mail a copy of either the December 30 or January 19 Request to _____ at the new address. Thus, these were not valid Rule 8210 requests. The Hearing Panel will therefore dismiss the First Cause of the Complaint. When NASD Regulation staff learned that _____ had moved it was obligated to send a copy of the requests to his new address before it could charge him with violating Rules 8210 and 2110 for failing to respond. Cf. Rondez, 2000 NASD Discip. LEXIS 4 (upholding separate, multiple mailings of identical Rule 8210 requests to Respondent's out-of-date CRD address and an alternate address known to NASD Regulation staff).

D. The Post-Complaint Information Requests—The Second Cause of the Amended Complaint

1. Background

When NASD Regulation staff failed to receive a response to the 8210 request dated January 19, 1999, it referred the case for the institution of this disciplinary proceeding. On May 9, 2000, Jay sent a "Wells letter"⁹ to _____, which invited him to make a submission with respect to NASD Regulation staff's "preliminary determination to request authorization to institute formal disciplinary action against [him] for a violation of NASD Conduct Rule 2110 and

⁹ A "Wells letter" refers to a letter sent by NASD Regulation Staff notifying a respondent that a recommendation of formal disciplinary charges is being considered and usually provides the respondent with an opportunity to submit a written statement explaining why such charges should not be brought. NASD Notice to Members 97-55 (Aug. 1997). See also Procedures Relating to the Commencement of Enforcement Proceedings and Termination of Staff Investigations, Rel. No. 33-5310 (Sept. 27, 1972) (discussing recommendations of the Advisory Committee on Enforcement Policies, which came to be known as the "Wells Committee," including the suggestion that persons be given the opportunity to present a statement to the Securities and Exchange Commission ("SEC") regarding an investigation pre-complaint).

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision C10000102.

NASD Procedural Rule 8210 by failing to respond to an NASDR request for documentation and/or information.” (CX-4.) The letter provided no further information about the proposed charge or NASD Regulation’s investigation. Jay sent the letter to _____ by certified mail, return receipt requested, and regular first-class mail at the out-of-date CRD address.

_____ testified at the hearing that he received the certified mailing containing the Wells letter because the US Postal Service delivered it to his wife standing outside their church at _____, _____, _____. (Tr. 70-71; CX-4, at 4.) _____ stated that his wife signed the certified mailing receipt “_____ J.” To corroborate that it was not his signature, _____ produced a copy of his passport bearing his signature. The signatures did appear to be different, as did his signature on the documents supplied by _____ and _____.

The day after he received the Wells letter, _____ called Jay and told him that he now resided at _____ and that he was employed by _____. (Tr. 71-72.) _____ also told Jay that he did not know what the letter was about. (Tr. 88.) In response, Jay refused to give _____ any further information and told him he had to respond to the Wells letter as it was. (Tr. 88.)

On June 12, 2000, Enforcement filed the Complaint and served it on _____ by mailing it to his outdated CRD address and two addresses in _____, ____: _____ and _____. At the hearing, Enforcement did not explain how it came to learn of the _____ address, which is the address _____ testified belonged to his church and at which address the Wells letter was received by his wife.

Upon receipt of the Complaint (which _____ refers to in his testimony and his Answer as a letter), _____ again called and spoke to Jay. _____ again explained to Jay that he did not know what the Wells letter and the Complaint were about and that he had never received copies of the Rule 8210 requests. He further told Jay that he did not recognize the complaining customers' initials referenced in the Complaint, and he was not familiar with their complaint. _____ therefore asked Jay to provide additional information so that he could provide the information requested in the first two Rule 8210 requests, but Jay declined.¹⁰ (Tr. 64-65, 88-90.) Since ZS and BS were no longer cooperating with the NASD, Jay testified that he was no longer interested in receiving _____'s response. (Tr. 58, 61-62.) Accordingly, Jay did not give _____ an opportunity to respond to the Rule 8210 requests. Unable to learn more about the complaints against him, _____ responded by sending a letter to the District Director for District 10, which is the letter that was eventually accepted as _____'s Answer over Enforcement's objections.

2. Enforcement's Investigation of _____'s Defenses

At the Initial Pre-Hearing Conference on September 19, 2000, _____ explained his defenses and reiterated many of his frustrations with Enforcement. In particular, _____ explained that the reason he had not received the Rule 8210 requests was that he had moved from his CRD address. He claimed that he had updated his Form U-4 right after he moved in May 1998, and he blamed the NASD for failing to have his correct address on file.

In an effort to investigate _____'s claims, on September 22, 2000, Enforcement sent Rule 8210 requests for information to _____, _____, and _____. (CX-5; CX-

¹⁰ Jay did not challenge _____'s characterization of their conversation.

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision C10000102.

6; CX-8.) In essence, each of the requests asked for documents reflecting _____'s current or former residential address, including any documents reflecting a change of address submitted by _____ to _____ or _____.

_____ 's response dated September 27, 2000, enclosed the following documents: (1) _____ 's Form U-4 dated December 11, 1996; (2) Form U-5 dated September 30, 1998; (3) Partial Form U-5 dated December 12, 1997; (4) signature page of Form U-4 dated January 29, 1996; (5) resignation letter dated September 8, 1998; and (6) miscellaneous papers relating to his application for employment. (CX-5.) All of these documents reflected _____ 's CRD address. Notably, however, there are numerous missing documents. Most importantly, _____ 's CRD record indicates that after filing the original Form U-4 on March 5, 1996, _____ filed 12 amendments.¹¹ (CX-1.) Among those, two amendments to the first page of the Form U-4 were filed in June 1998, immediately after _____ moved from the CRD address to _____ Ave., _____, _____. Enforcement did not follow up with _____ about the missing documents.

_____ 's response dated October 3, 2000, enclosed the following documents: (1) _____ 's Application For Employment; (2) _____ 's fingerprint card; (3) _____ 's Associate Status Form; and (4) _____ 's Medical and Dental Plan Coverage Election Form. (CX-8.) The Application For Employment dated June 28, 1999, and the Associate Status Form dated July 19, 1999, both show _____ 's current residential address as _____, _____, _____. On the other hand, the Medical and Dental Plan Coverage Election Form dated June 23, 2000, shows his residential address as _____

_____, _____, _____. Enforcement did not follow up with _____ about the discrepancies between its records and _____'s CRD address.

3. _____'s Responses to the Post-Complaint Information Requests

As discussed above, the request for information dated September 22, 2000, requested that _____ provide copies "of any document containing [his] current or former residential address, including any change of address form submitted [by him] to either _____ or _____, Inc.," (CX-6.) Enforcement submitted no evidence that _____ had any of these documents in his possession. _____ testified that when he received the request he asked _____ to give him a copy of his Form U-4, which it did. _____ then called Jay and told him that he would not be able to get the documents to him before October 3, 2000, the deadline in the request letter. (Tr. 91-92.) _____ claims that he sent Jay the _____ Form U-4 and the other documents in Exhibit R-1 on October 3, 2000, by regular mail. (Tr. 92.) Jay testified that he did not receive the mailing.

Jay then sent an identical request to _____ on October 12, 2000. (CX-7.) When _____ received this letter, he called Jay. (Tr. 94.) _____ testified that a few days later he re-sent the documents by regular mail. (Tr. 94-95.) His best recollection is he made this mailing around October 18, 2000. Jay testified that he also did not receive this mailing.

Finally, _____ testified that about two weeks before the hearing, Jay called _____ to discuss settlement. (Tr. 96.) During that conversation, Jay told _____ that he

¹¹ The request to Continental specifically requested it to produce all Form U-4s and amendments. (CX-5.)

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision C10000102.

still had not received the information from _____. _____ told Jay that he would mail it again, which he testified that he did in early December. (Tr. 96-97.) Jay did not suggest that _____ use a different method to forward the documents. (Id.) By the time of the hearing on December 19, Jay had not received the third mailing.

_____ brought the documents composing Exhibit R-1 with him to the hearing. Thus, although late, _____ ultimately complied with Enforcement's request.

E. Enforcement's Contentions

Enforcement contends that the resolution of this case turns on the Hearing Panel's assessment of _____'s credibility. (Tr. 103.) In essence, Enforcement urges the Hearing Panel to reject _____'s testimony on the grounds that it is inherently incredible.

Enforcement argues that the evidence is "perhaps" more consistent with a finding that _____ either neglected to respond timely to the post-complaint information requests or he intentionally refused to supply the requested documents when Enforcement requested them. (Tr. 102.) In support of its attack on _____'s credibility, Enforcement points to four factors that it argues demonstrate the unreliability of _____'s testimony: (1) the lack of proof that _____ updated his residential addresses with _____ and _____; (2) the unbelievable nature of the conclusion that _____ and _____ would have failed to report _____'s address changes three or four times; (3) the address in the heading on _____'s resignation letter to _____ dated September 8, 1998, contained the CRD address; and (4) his wife's receipt of the Wells letter that Enforcement sent to the CRD address in May 2000. (Tr. 103-05.) As discussed below, the Hearing Panel finds that none of these factors establishes that _____'s testimony should be disregarded.

F. _____'s Credibility

1. _____'s CRD Address

A central tenet of Enforcement's case against _____ is its conclusion that _____ failed to cause his Form U-4 to be updated to reflect his address changes. However, a close examination of the evidence does not support Enforcement's conclusion. _____ testified unequivocally that he informed _____ of his move from the CRD address in writing on May 5, 1998. Enforcement has no direct evidence contradicting _____'s testimony. Enforcement instead relies on the fact that the records _____ provided to Enforcement in September 2000 did not contain an amended Form U-4. In doing so, however, Enforcement completely ignores the fact that _____ did not provide numerous amendments to _____'s Form U-4, including two that _____ filed shortly after _____'s move. Accordingly, the Hearing Panel finds that the records produced by _____ do not contradict _____'s testimony.

The Hearing Panel also notes that the documentation produced by _____ directly contradicts Enforcement's statement that there is no "documentary evidence that would support any of [_____'s] claims that . . . he provided [his] current updated residential address . . . to either _____ or to _____." (Tr. 103.) The _____ records show that _____ completed a Form U-4 when he joined the firm showing his address as _____, _____, _____.¹² (R-1.) And _____'s Medical and Dental Plan Coverage Election Form dated June 2000 shows his address as _____,

¹² Interestingly, _____ did not produce a copy of _____ Form U-4 in response to Enforcement's document request dated September 22, 2000, although it was requested to do so. Moreover, Enforcement did not follow up with _____ to obtain a copy of the form.

_____, _____. (CX-8, at 6.) Contrary to Enforcement's argument, these facts strongly support the Hearing Panel's conclusion that _____ did keep his firms apprised of his address changes.

2. Failure to Update CRD

Enforcement's second prong of attack on _____'s credibility is that it is unbelievable that _____ and _____ would have failed three or four times to update CRD with his change of address. However, the Hearing Panel finds this argument to be based on a false premise. While there is no obvious explanation in the record to explain _____'s failure to update _____'s address in May 1998, the evidence does not show that _____ also failed to update CRD. _____ joined _____ in an unregistered capacity. Thus, _____ only made a non-registered fingerprint filing on _____'s behalf, which does not contain his residential address. (CX-1.) If Enforcement had reviewed _____'s CRD record carefully, it would have realized that _____ had not filed a Form U-4 for _____ because he was hired in an unregistered capacity. Accordingly, the Hearing Panel concludes that this factor does not undermine _____'s credibility.

3. The Address on _____'s Resignation Letter

The Hearing Panel also finds it insignificant that the letterhead on _____'s September 8, 1998, resignation letter to _____ bore his outdated CRD address. When cross-examined about this, _____ explained that the letterhead was produced using a template stored on his home word processor and that he had not caught the discrepancy before he sent the letter to _____. (Tr. 81.) He stated that as a convenience he continued to use the CRD address on correspondence until his parents moved. (Tr. 84.) There is nothing

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision C10000102.

inherently incredible about this explanation.¹³ But more importantly the Hearing Panel finds that the discrepancy does not impeach _____'s credibility. By its nature, _____'s resignation letter does not amount to an affirmative representation of his current address. Unlike an official firm record, such as a Form U-4, _____ had not submitted the resignation letter to update or verify his current address. Indeed, he sent the letter to sever all ties with _____ and leave the securities industry.

4. Delivery of the Wells Letter

Finally, Enforcement argues that _____ "miraculously" received the Wells letter sent by Enforcement to _____ in May 2000. (TR. 105.) In making this argument, Enforcement in effect challenges _____'s claim that he moved from the CRD address in May 1998, two years earlier. But all the evidence supports that he did move then.

The Hearing Panel agrees that _____'s explanation of how he happened to obtain delivery of the Wells letter is unusual. But that by itself is not enough for the Hearing Panel to conclude that he manufactured that testimony. Indeed, all the evidence—including the internal documents Enforcement received from _____—shows that _____ was not living at the CRD address in May 2000. And Enforcement has not offered an alternative explanation of how the letter got to _____ when it was sent to an address that the US Postal Service had indicated was out of date as early as January 1999.

¹³ The Hearing Panel further notes that the telephone number in the letterhead is the number belonging to his fiancée, _____, and that the notation across the top of the letter reflects that it was faxed from her fax machine on September 8, 1998. (Tr. 82-83.) She lived at _____, _____, _____.

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision C10000102.

The Hearing Panel also finds it significant that on June 12, 2000, just one month after Jay spoke to _____, Enforcement served the Complaint at two addresses in addition to the CRD address: _____, _____, ___ and _____, _____, ____.

_____ testified that the _____ address is the address of their church and the address at which the Wells letter was delivered to his wife. (Tr. 70-71.) Enforcement did not challenge _____'s testimony or explain how it obtained the _____ address. The Hearing Panel concludes that it is likely that _____ told Jay about the circumstances of the delivery of the Wells letter when they spoke in May 2000, which tends to dispel the notion that _____ fabricated his testimony at the hearing. It strains credibility to conclude that _____ would have fabricated such a story in the conversation with Jay the day after he received the Wells letter, particularly in light of the fact that all the evidence suggests that at the time of their conversation _____ had no idea about the reason Enforcement sent him the letter.

In summary, the Hearing Panel concludes that Enforcement has not produced any evidence effectively discrediting _____'s testimony. To the contrary, having observed _____ testify, the Hearing Panel credits his testimony. The Hearing Panel finds that _____ advised _____ and _____ of his changes of address, and he therefore was not responsible for the fact that the CRD address was not updated.¹⁴ The Hearing Panel also finds that, although _____ took action to comply with the Enforcement's post-complaint requests for information, his efforts were inadequate. _____ had a duty to take reasonable

¹⁴ _____ cannot be faulted where the failure to update CRD is attributable to his firm's negligence. A registered representative cannot file a Form U-4 directly; it has to be done through the firm and signed by a person on behalf of the firm. *See* OHO Redacted Decision C10980008, <http://www.nasdr.com/pdf-text/oho0600_01red.txt>.

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision C10000102.

steps to assure that Enforcement actually received the requested documents once he learned that his mailings had not been received. Accordingly, the Hearing Panel finds that _____ violated NASD Conduct Rule 2110 and NASD Procedural Rule 8210 by his late production of documents.

III. SANCTIONS

Enforcement requests that _____ be suspended for one year in all registered capacities. (Tr. 63.) The Hearing Panel does not consider such a severe sanction to be warranted. Rather, under the facts and circumstances of this case, the Hearing Panel concludes that a letter of caution meets NASD Regulation's regulatory obligations.

The NASD Sanction Guidelines provide that the Hearing Panel should consider a fine¹⁵ and a suspension of up to two years for a failure to respond in a timely manner to a request for information made pursuant to NASD Procedural Rule 8210. NASD Sanction Guidelines 31 (1998 ed.). In determining the appropriate sanction within the suggested range, in addition to the general considerations applicable to all disciplinary proceedings, the Guideline specifically directs the Hearing Panel to consider the nature of the information requested. In this case, the Hearing Panel believes that consideration of the nature of information requested and the history of the proceeding demonstrate that a sanction less than the minimum suggested in the Guideline is appropriate.

Enforcement sent the post-complaint requests for information to _____ to discover the documents that supported his defenses to the First Cause of Complaint. The requests were not sent in connection with an ongoing investigation. As discussed above, the purpose of the

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision C10000102.

requests was to force _____, who was not represented by counsel, to disclose the evidence in his possession that he claimed supported his defenses to the First Cause of the Complaint. In effect, Enforcement was using Rule 8210 as a discovery device. While under certain circumstances this is a permissible use of the Rule, the nature of this case did not require that the documents be produced before the hearing. This is not a complicated matter where such discovery arguably could have shortened the hearing or significantly simplified the issues in dispute.

Furthermore, under the Initial Pre-Hearing Order, _____ was obligated to exchange and file all documents he intended to introduce at the hearing. In the event _____ failed to do so, Enforcement had an appropriate remedy. It could have filed either a motion to require him to produce the material or a motion to preclude him from introducing any such evidence at the hearing. However, by converting _____'s obligation from one of complying with the Code of Procedure into one of complying with NASD Procedural Rule 8210, Enforcement sidestepped the mechanisms the Hearing Officer established—with the concurrence of the Parties—to manage this proceeding. The net effect was to raise the stakes needlessly for _____'s failure to timely prepare his case for hearing. The Hearing Panel finds that such use of Rule 8210, where the respondent could be barred from the securities industry for failing to respond, subverts the orderly and fair administration of the disciplinary proceeding. Preferably, Enforcement would have utilized the hearing process to prepare for the hearing, and, at a minimum, delayed instituting another action against _____ until after the hearing concluded. Finally, the Hearing Panel notes that Enforcement obtained the documents at

¹⁵ Enforcement did not request that the Hearing Panel impose a fine.

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision C10000102.

the hearing. Enforcement was not prejudiced at all. Under these circumstances, and in light of the fact that _____ was unrepresented, imposition of a substantial sanction is out of line with the seriousness of the offense.

The Hearing Panel also has taken into consideration NASD Regulation staff and Enforcement's conduct in this case, which may have contributed to many of the problems Enforcement attributes to _____. The Hearing Panel is troubled by the fact that NASD Regulation staff made no effort to give _____ actual notice of the original two requests for information once it learned that he had moved. Similarly, Enforcement refused to give _____ the opportunity to mitigate his exposure by allowing him to respond to the original request for information.¹⁶ Jay admits that he refused to send _____ a copy of the original request when _____ called him upon receiving the Wells Letter, and he even refused to supply _____ with such basic information as the identity of the complaining customers who were referred to in the Complaint by their initials. And, here again, no one followed up on _____'s claims that he had not received the original two requests and that he had given _____ and _____ his changes of address. Later, Enforcement received documents from _____ that tended to show that _____ had informed his firm of his address changes, but Enforcement did not follow up on that information either. In the Hearing Panel's view, each of these failures represents a missed opportunity to have ended this case, which would have avoided the ultimate problem created by _____'s tardiness in answering

¹⁶ The Hearing Panel believes that fundamental fairness required Enforcement to afford _____ the opportunity to mitigate his exposure, which he could not do if Enforcement did not give him a copy of the information request. The fact that Enforcement was no longer interested in pursuing the underlying case against _____ due to the complaining witnesses' refusal to cooperate in the investigation does not justify denying _____ the opportunity to cooperate once he learned of the Rule 8210 requests.

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision C10000102.

Enforcement's discovery demands. Under these circumstances, Enforcement's suggested sanction seems punitive.

In conclusion, the Hearing Panel finds that _____ understands his obligations to keep his records current and that there is not a significant likelihood that he will violate Rule 8210 in the future. Accordingly, he need not be suspended to protect the public or to ensure his compliance with the Rule in the future.

IV. ORDER

For the foregoing reasons, the Hearing Panel finds that a Letter of Caution will satisfy the NASD's remedial goals under the particular circumstances of this case. Accordingly, the Hearing Panel orders that this Decision shall constitute a Letter of Caution to

_____.¹⁷

Andrew H. Perkins
Hearing Officer
For the Hearing Panel

¹⁷ 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.