



Conduct Rule 2110 and NASD Procedural Rule 8210. The Complaint alleged that the NASDR staff, as part of an investigation involving the creation, sale, distribution, and bulletin board listing of certain “shell companies,” sent Respondent a letter dated March 1, 2000 requesting certain documents. After Respondent failed to produce the documents, the NASDR staff sent him another letter, captioned “Second Request for Information and Documents,” on June 7, 2000. On June 8, 2000, Respondent responded to the June 7, 2000 request indicating that he needed time to consult with his counsel. In response, Enforcement extended the deadline by which Respondent could produce the documents. By a letter dated June 29, 2000, Respondent’s counsel reported that Respondent refused to produce the documents sought.

#### **B. Answer**

Respondent denied that he received the March 1, 2000 request, but admitted that he received the June 7, 2000 request and that he did not produce the requested documents. Respondent argued that he should not be sanctioned for failing to provide the requested information for several reasons that may be categorized as (i) jurisdictional, (ii) the invalidity of the Rule 8210 request, and (iii) certain constitutional and statutory protections.

#### **C. The Hearing**

The Hearing was held in Boca Raton, Florida on March 15, 2001, before a Hearing Panel composed of the Hearing Officer and two current members of the District No. 7 Committee.<sup>1</sup> Enforcement presented William Park, an NASDR examiner, as its only witness. The Hearing Panel admitted exhibits CX-1, CX-2, CX-4 -- CX-9, and CX-12 over the

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<sup>1</sup> References to the testimony set forth in the transcript of the March 15, 2001 Hearing will be designated as “Tr.” References to exhibits presented by Respondent will be designated as “RX-,” and references to exhibits presented by Enforcement will be designated as “CX-.”

objections of Respondent. Respondent testified on his own behalf, and offered exhibits RX-1 and RX-2, which were admitted. The Hearing Panel also took official notice of several facts over the objection of Enforcement.

## **II. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **A. Introduction**

#### **1. Background of Respondent**

Respondent entered the securities industry in 1988 with Royce Park Investments, Inc. (CX-2, p. 4). He was subsequently registered with Litwin Securities, Inc.; Sunpoint Securities, Inc.; Emanuel and Company; and Reynolds Kendrick Stratton, Inc. (Id.). Respondent was registered with J. Alexander Securities, Inc. (“J. Alexander”) from April 1995 through May 1999 as a general securities representative, general securities principal, and options principal. (CX-2, p. 5). J. Alexander filed a Form U-5 Uniform Termination Notice for Securities Industry Registration terminating Respondent’s association with the firm on May 28, 1999. (CX 2, p. 5). Respondent has not been associated with another member firm since his association with J. Alexander Securities, Inc. was terminated. (CX-2, p. 3).

#### **2. Respondent’s Refusal to Produce Documents**

On March 1, 2000, Enforcement sent Respondent a letter requiring him to produce certain financial records (including bank records and tax returns) and copies of his passports used in 1997 through 1999. (CX-1). The letter specifically noted that the request was made pursuant to Procedural Rule 8210, and noted that failure to respond could constitute grounds for disciplinary action. (Id.). The letter was sent, via first class mail and overnight delivery, to

Respondent's address as listed in the Central Registration Depository ("CRD")<sup>2</sup> and to an address that Enforcement believed to be more a current residential address, \_\_\_\_\_, Pompano Beach, Florida \_\_\_\_\_ ("Pompano address"). (Tr. p. 73). The NASDR staff obtained the Pompano address from an autotrack database on March 1, 2000. (Tr. p. 39; CX-12). Previously, at a February 19, 1999 on-the-record interview, Respondent gave his home address as \_\_\_\_\_, Parkland, Florida \_\_\_\_\_ ("Parkland address"). (Tr. p. 57).

The March 1, 2000 mailing sent to Respondent's CRD address via overnight delivery was returned with a notation that the recipient had moved. (Tr. p. 50; CX-4). The mailing sent via overnight delivery to the Pompano address was returned with a notation that Respondent had refused to accept service of the package. (Tr. p. 52; CX-5).

On June 7, 2000, a second Rule 8210 request was sent to Respondent at the Pompano Beach address.<sup>3</sup> (Tr. p. 52; CX-6). The second request sent to the Pompano address was received by Respondent on June 8, 2000. (CX-7). As indicated above, Respondent first indicated that he needed to consult with counsel regarding the request, and later, through counsel, Respondent refused to provide the documents sought. (CX-7; CX-9).

## **B. Legal Discussion**

Although he refused to produce the documents, Respondent argued that he should not be found liable for violating Rules 8210 and 2110 because (i) the NASDR did not have jurisdiction to issue the Rule 8210 request, (ii) the Rule 8210 request was invalid as mailed and

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<sup>2</sup> Respondent's CRD address is \_\_\_\_\_, Coral Springs, FL \_\_\_\_\_. (CX-2, p. 1).

<sup>3</sup> A courtesy copy of the request was also sent to Respondent's counsel. (CX-6, p. 1).

as drafted, and (iii) the Rule 8210 request violated Respondent's constitutional rights. For the reasons discussed below, the Hearing Panel concludes that Respondent failed to raise any legally valid defenses and, therefore, he violated Rules 8210 and 2110 by failing to produce the documents requested.

### **1. Jurisdiction**

Respondent argued that the NASD did not have jurisdiction to issue the Complaint because the Rule 8210 request for information was issued after termination of Respondent's registration. Respondent argued that a Rule 8210 request issued to an individual after he has left the industry is not valid.

Respondent's argument ignored the plain and unambiguous language of the NASD Bylaws and Rules. Article V, Section 4 of the NASD By-Laws creates a two-year period of retained jurisdiction over a person whose association with a member has been terminated and who is no longer associated with any member.<sup>4</sup> The jurisdiction covers conduct that occurred prior to termination of an individual's association and failures to provide information requested, pursuant to Rule 8210, during the period of retained jurisdiction.

Rule 8210 provides that the Association shall have the right to require a person to provide information to the Association upon request as long as the person is subject to the Association's jurisdiction, which includes a two-year period after a person's registration is

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<sup>4</sup> Article V, Section 4 provides that a " person whose association with a member has been terminated and is no longer associated with any member of the NASD . . . shall continue to be subject to the filing of a complaint under the Rules of the Association based upon . . . such person's failure, while subject to the NASD's jurisdiction as provided herein, to provide information requested by the NASD pursuant to the Rules of the Association, but any such complaint shall be filed within: (a) two years after the effective date of termination of registration. . . ."

terminated. By becoming registered with the NASD, Respondent agreed to be bound by the NASD's Bylaws and Rules.<sup>5</sup>

Respondent also argued that, although he may have agreed to be bound by the rules of the NASD, he did not also automatically agree to be subject to NASDR, a subsidiary of the NASD. Because the requests for information were issued by the NASDR's staff, not the NASD's, Respondent argued that he was not obligated to respond. Respondent claimed to be unaware of any NASD rule that provided that a person who is registered with the NASD, automatically becomes subject to NASDR regulation. (Tr. pp. 245-246).

Effective April 11, 1996, the NASD adopted Rule 0130, which provides that the NASD delegates to its subsidiaries, NASDR and NASDAQ, the authority to act on behalf of the Association as set forth in a Plan of Allocation and Delegation ("Plan of Allocation") adopted by the NASD's Board of Governors and approved by the Securities and Exchange Commission ("SEC").<sup>6</sup> Part II Section A(1)(e) of the Plan of Allocation specifically provides that the NASD delegates to the NASDR the responsibility to examine and investigate NASD members and associated persons to determine if they have violated Association or MSRB rules, the federal securities laws, and other laws. Section A(1)(f) thereof provides that NASDR has the responsibility to administer the Association's enforcement and disciplinary programs

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<sup>5</sup> See Michael Markowski, 51 S.E.C. 553, 1993 SEC LEXIS 1695, at \*11 (June 30, 1993), aff'd 34 F.3d 99 (2<sup>nd</sup> Cir. 1994).

<sup>6</sup> In November 1994, the NASD Board of Governors appointed the Select Committee on Structure and Governance ("Select Committee") to review the NASD's corporate governance structure and to recommend changes to enable the NASD to better meet its regulatory and business obligations. Following the recommendations of the Select Committee, the NASD proposed reorganizing its corporate structure. NASDAQ was given sole responsibility to operate and oversee the NASDAQ market and other over-the-counter markets, while NASDR was given responsibility for regulation and member and constituent services. Exchange Act Rel. No. 39326, 1997 LEXIS 2375, at \*4 (Nov. 14, 1997).

including investigations, adjudication of cases and the imposition of fines and other sanctions. Finally, Section A(1)(c) thereof provides that NASDR has the responsibility to take necessary or appropriate action to assure compliance with Association policy and Association and MSRB rules.

Therefore, when an individual becomes registered with the NASD, he does automatically become subject to regulation by NASDR. Consequently, NASDR staff had the authority to issue the Rule 8210 requests to Respondent, and Respondent had the responsibility to respond to requests from the NASDR staff.

The uncontroverted evidence at the Hearing established that Respondent was associated with J. Alexander until he was terminated on May 28, 1999. (CX-2, p. 5). The NASDR staff issued the requests for information to Respondent within two years of Respondent's May 1999 termination of registration. The Complaint alleged a failure to produce documents pursuant to a request issued during the period of retained jurisdiction. Enforcement filed the Complaint on July 24, 2000, within two years of the termination of Respondent's association with J. Alexander.

Therefore, the Hearing Panel finds that the NASD has jurisdiction over Respondent for purposes of this proceeding, pursuant to Article V, Section 4 of the NASD By-Laws.

## **2. Rule 8210 Request was Valid**

### ***a. Adequate Notice of Rule 8210 Request***

Respondent argued that, by sending the Rule 8210 requests to Respondent's CRD address and to the additional Pompano address, rather than the Parkland address, which

Respondent had provided to the NASD in 1999, the NASDR staff violated Rule 8210(d) and, consequently, did not effect good service of the request.

Rule 8210(d) provides that, in order for a request to be deemed received, if the staff who is responsible for mailing the notice has knowledge that the CRD address is inaccurate and knows of a more current address, the staff must send a copy of the request to the more current address as well as the CRD address. The “constructive notice” provided in Rule 8210(d) is irrelevant, however, if, as in this case, there is proof of actual receipt of the request.

In this case, Respondent admitted he actually received the June 7, 2000 request although it was addressed to the Pompano address. (Tr. p. 229; CX-7). In addition, although the March 1, 2000 letter was addressed to the Pompano address, Respondent admitted that he received and rejected a federal express package that contained the March 1, 2000 request.<sup>7</sup> (Tr. p. 211). Because Respondent actually received the June 7, 2000 Rule 8210 request, he had adequate notice of the request and is liable for failing to respond.<sup>8</sup>

***b. Rule 8210 Request was Not Overreaching***

Respondent argued that the requests, in this case, which sought documents such as Respondent’s 1997 and 1998 federal tax returns, bank records, and passport, were not authorized under Rule 8210(a)(1) because the information sought by the NASDR staff was not “with respect to any matter involved in the investigation” being conducted. Respondent argued

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<sup>7</sup> The federal express package indicated it was sent from Mr. Park, but it did not list the NASD or NASDR and had no return phone number. (CX-5). Respondent indicated that he did not remember that Mr. Park was with the NASD and he was wary of accepting packages that did not have a phone number to confirm from whom it was sent. (Tr. p. 211).

<sup>8</sup> In any event, Mr. Park testified that he believed the more current address for Respondent was the Pompano address that he obtained on March 1, 2000. (Tr. p. 40). Because Rule 8210(d) requires that the staff

that Enforcement had an obligation to show that the particular documents requested were relevant to the investigation, and not simply that the staff issued the requests as part of an investigation.<sup>9</sup> (Tr. p. 240).

Mr. Park, the NASD investigator, testified that the investigation sought to determine whether Respondent, J. Alexander Securities, and others violated NASD rules or federal securities laws, in connection with (i) the creation of shell companies, (ii) the distribution of over 90 percent of the shares of the shell companies to friends and relatives of Respondent and others associated with J. Alexander, (iii) the listing on the over-the-counter bulletin board of the shell companies, and (iv) the subsequent aftermarket trading of shares of shell companies, including several large block purchases by offshore accounts of a firm, the contact person of which was an associate of Respondent. (Tr. p. 19).

Also, the investigation involved a review of (i) mergers between the public shell companies and the private companies that wanted to go public through a reverse merger, (ii) compensation generated by the mergers received by Respondent or anyone else associated with J. Alexander, and (iii) the subsequent trading of the shares of the post-merger companies in the offshore accounts of Respondent and others associated with J. Alexander, which sold shares of the post-merger companies in large blocks. (Tr. p. 20). The review period consisted of the fall of 1996 through 1999. (Id.). The staff reviewed approximately 35 different issues that followed

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send the notice to the CRD address and to the most current address known to the staff, Mr. Park complied with the requirements of Rule 8210(d), and Respondent is deemed to have received the requests.

<sup>9</sup> Respondent argued that virtually all of the material requested, which included checks for electricity bills, telephone bills, and charitable contributions, was not related to the investigation. (Tr. pp. 200-201, 204-205, 240-241).

the same pattern of creation of shell companies, distribution of shares, bulletin board listing, and subsequent substantial aftermarket trading of shares. (Id.).

Mr. Park, who issued the Rule 8210 requests, testified that the purpose of the requests was to determine whether Respondent received any cash payments, as well as any securities, for arranging mergers between the public shell companies and the private companies, and if any proceeds from the sale of shares in the public shell companies or the post-merger companies were delivered to Respondent. (Tr. pp. 21-22). Specifically, Mr. Park issued the Rule 8210 requests for Respondent's bank accounts and tax records in an effort "to follow the money." (Tr. p. 21). With respect to the request for Respondent's passport, the offshore accounts were located in the Cayman Islands, and the passport could have shown if Respondent was in the Cayman Islands at or around the time the offshore accounts were opened. (Tr. p. 22).

Respondent did not argue that the documents requested by Mr. Park would not be helpful to the investigation, but rather that the request as drafted was too broad, and would require him to provide personal information that had nothing to do with the investigation. (Tr. p. 204). When he received the request, however, Respondent, made no effort to negotiate with the NASD to narrow the request. Instead, he simply refused to provide any of the information. (Tr. pp. 226-227).

As the SEC has stated, "[a]ny problems or concerns that a member firm or its associated persons might have in responding to an information request in a timely and complete manner should be raised, discussed and resolved with the NASD in the cooperative spirit and

prompt manner contemplated by [Rule 8210].”<sup>10</sup> The case law is clear that a person subject to NASD jurisdiction cannot refuse to provide documents because he or she does not believe they are relevant to the investigation.<sup>11</sup>

The Hearing Panel finds that Enforcement met its burden of showing that the requests were made in connection with an authorized investigation. Having found that the requests were authorized, the Hearing Panel finds that Respondent did not have the option of refusing to provide specific documents because he believed the specific documents were not relevant to the investigation. If Respondent believed the requests were overbroad, he had the responsibility to attempt to negotiate with the NASDR’s staff to narrow the requests. In any event, the Hearing Panel does not find that the requests were unduly broad.

### **3. Respondent’s Constitutional Rights Not Violated by Rule 8210 Request**

Lastly, Respondent argued that the requests violated Respondent’s right to privacy under the First and Fourteenth Amendments to the U.S. Constitution; Art. I, Sec. 23 of the Florida Constitution; and Respondent’s privilege against self-incrimination under the Fifth Amendment to the U.S. Constitution.

Respondent recognized that the constitutional and statutory privileges provide protection against governmental, not private, action. The Supreme Court has repeatedly held that private entities, even those intimately involved in governmental regulatory schemes, are not thereby

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<sup>10</sup> In re. Richard J. Rouse, 51.S.E.C. 581, 584, n. 9 (1993).

<sup>11</sup> General Bond & Share Co. v. SEC, 389 F.3d 1451(10<sup>th</sup> Cir. 1994); In re Michael David Borth, Exchange Act Rel. No. 31602; In re David Weiss, Complaint No C02950056 (NBCC, Jan. 21, 1997).

made government actors.<sup>12</sup> The NASDR is a private not-for-profit corporation organized under the laws of Delaware and is a self-regulatory organization registered with the SEC as a national securities association pursuant to the 1938 Maloney Act Amendment to the Securities Exchange Act of 1934, 15 U.S.C. § 78o et seq.<sup>13</sup> The courts have specifically held that the NASD, in performing its statutory mandate and central role, is not a government actor.<sup>14</sup>

Respondent sought to distinguish the cases holding that the NASD is not a government agent on the ground that it became a government agent, subject to the constitutional protections, in 1998, when the NASD set up its criminal assistance prosecution unit (“CPAG”) to provide assistance and advice to federal and state law enforcement authorities investigating securities matters. Respondent contended that once the NASD created the CPAG, the NASD made itself a government agent.

A substantially similar argument was rejected recently by the United States District Court for the Southern District of New York in D.L. Cromwell Investments, Inc. v. NASD Regulation, Inc., No. 01 Civ. 0728, 2001 U.S. Dist. LEXIS 1912 (S.D.N.Y. Feb. 26, 2001). In D.L. Cromwell, the plaintiffs, subjects of a federal grand jury investigation, sought an injunction barring the NASDR staff from compelling them to testify in an investigation and

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<sup>12</sup> See National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 193 (1988); San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 544 (1987).

<sup>13</sup> Desiderio v. National Association of Securities Dealers, Inc., 191 F.3d 198, 199 U.S. App. LEXIS 23269 (Sept. 22, 1999), cert. denied, 2001 U.S. LEXIS 112 (Jan. 8, 2001).

<sup>14</sup> See Jones v. S.E.C., 115 F.3d 1173, 1182-83 (4th Cir. 1997) (rejecting claim based on the Fifth Amendment's Double Jeopardy Clause because NASD is not a government agency), cert. denied, 118 S. Ct. 1512 (1998); Datek Secs. v. NASD, 875 F. Supp. 230, 234 (S.D.N.Y. 1995) (dismissing Fifth and Fourteenth Amendment claims regarding a disciplinary proceeding because the NASD is not a state actor); First Jersey Secs., Inc. v. Bergen, 605 F.2d 690, 698 & 699 n.5 (3d Cir. 1979), cert. denied, 444 U.S. 1074 (1980) (holding that NASD is not a state actor); Graman v. NASD, No. Civ. A. 97-1556, 1998 WL 294022 (D.D.C. Apr. 27, 1998) (same); United States v. Bloom, 450 F. Supp. 323, 330 (E.D. Pa. 1978) (same).

commencing any proceeding to punish them for asserting their privileges against self-incrimination. The plaintiffs contended that the “Rule 8210 demands [had] been issued by [NASDR] as an agent for the government in order to coerce them into surrendering their privileges against self-incrimination by threatening them with permanent banishment from the securities industry if they decline to testify in the NASD investigation.” (Id. at \*\*12).

The court rejected this argument. The court explained that a state is responsible for a private decision only where it exercised coercive power or provided significant encouragement for the private action. (Id. at \*\*13). The court explained that the mere existence of CPAG did not even remotely establish that there is any connection between Rule 8210 requests and the government. (Id. at \*\*17). “Hence, even if the individual plaintiffs are being compelled to give evidence against themselves by the threat of NASD sanctions, [NASDR’s] actions raise no Fifth Amendment issue unless it fairly can be said that its actions are fairly attributable to the government.” (Id. at \*\*13).

In this case, Respondent presented no evidence that the requests issued by the NASDR staff in this case were “fairly attributable to the government.” Respondent’s conclusory assertions provide no grounds for finding the NASDR infringed Respondent’s constitutional rights when it requested Respondent to produce certain documents.

The Hearing Panel concludes, based on controlling precedent, that Respondent has failed to raise any legally valid defense for his failure to produce the documents requested in connection with a *bona fide* NASDR investigation.

Accordingly, the Hearing Panel finds that Respondent violated NASD Procedural Rule 8210 and thereby failed to observe the high standards of commercial honor and just and equitable principles of trade, as required by NASD Conduct Rule 2110.<sup>15</sup>

### III. SANCTIONS

The NASD Sanction Guidelines (“Guidelines”) provide that in the case of a failure to respond, “a bar should be standard.”<sup>16</sup> Enforcement recommended that the Hearing Panel bar Respondent from associating with any member in any capacity.

Respondent urged as mitigating factors his concern that the requests were overbroad and violated his constitutional rights, and his concern that staff would not maintain the confidentiality of the information.<sup>17</sup> Respondent seemed to suggest that, because of his concern that there were some things in the request that the NASDR did not need or would not adequately safeguard, (i) he had the right to refuse to produce any of the requested documents, and (ii) he should not have to suffer any consequences for such refusal.

If Respondent sincerely believed that the Rule 8210 request was overbroad, he was obligated to raise his concern and attempt to negotiate with the staff to narrow the request. If Respondent had a sincere concern that certain information be kept confidential, he was obligated to raise that concern and seek assurances of confidentiality from the NASDR staff. He could not simply decide on his own to refuse to provide any information.

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<sup>15</sup> The SEC has consistently recognized that a violation of another NASD Rule constitutes a violation of the requirement to adhere to “just and equitable principles of trade” set forth in Rule 2110. William H. Gerhauser, Exchange Act Release No. 40639, 68 S.E.C. Docket 1238, 1243, 1998 SEC LEXIS 2402, at \*20-21 (Nov. 4, 1998).

<sup>16</sup> NASD Sanction Guidelines, p. 39 (2001).

<sup>17</sup> Respondent testified that because of his religious beliefs he was particularly concerned that his charitable contributions remain confidential. (Tr. pp. 197-198).

This is a very serious violation. The SEC stated that “[w]e have repeatedly stressed the importance of cooperation in NASD investigations. We have also emphasized that the failure to provide information undermines the NASD’s ability to carry out its self-regulatory functions. . . . Failures to comply are serious violations because they subvert the NASD’s ability to carry out its regulatory responsibilities.”<sup>18</sup>

The Hearing Panel does not find that overbreadth and confidentiality concerns raised by Respondent—either alone or in combination—mitigate the gravity of Respondent’s refusal to produce the requested documents, or justify a sanction less than that recommended in the Guidelines. The Hearing Panel finds that Respondent made a conscious and knowing decision to refuse to comply despite the fact that NASDR staff clearly advised him that a failure to comply could result in disciplinary action against him and the imposition of sanctions.

Given the lack of mitigating factors and Respondent’s continuing refusal to produce any documents to the NASDR staff, the Hearing Panel finds that a bar from associating with any member in any capacity, as requested by Enforcement, is appropriate.

#### **IV. CONCLUSION**

The Hearing Panel finds that Respondent violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110 as alleged in the Complaint. The Hearing Panel bars Respondent from association with any member firm in any capacity. The Hearing Panel also assesses costs against the Respondent in the amount of \$2,393.16 consisting of a \$750.00 administrative fee

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<sup>18</sup> In re Joseph Patrick Hannan, Exchange Act Rel. No. 40438 (Sept. 14, 1998).

and \$1,643.16 for the cost of the Hearing transcript. The bar shall become effective immediately upon this Decision becoming the final disciplinary action of the NASD.<sup>19</sup>

**SO ORDERED.**

Hearing Panel

by: \_\_\_\_\_  
Sharon Witherspoon  
Hearing Officer

Date: Washington, DC  
June 27, 2001

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<sup>19</sup> 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.