NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. PHILLIP J. MILLIGAN (CRD #1874103) Guttenberg, NJ and Fort Lee, NJ, Respondent.	:	Disciplinary Proceeding No. C10990058 **Hearing Panel Decision** Hearing Officer - Ellen B. Cohn November 22, 1999

Digest

The Department of Enforcement's Complaint alleges that the Respondent, Phillip J. Milligan ("Milligan" or the "Respondent"), violated Procedural Rule 8210 and Conduct Rule 2110 by failing to appear for on-the-record testimony on three occasions. In his amended Answer, Milligan denied that his failure to appear for testimony constituted a violation of Rules 8210 and 2110. Respondent claimed that he declined to appear and, instead, invoked his Fifth Amendment rights because of his status as a defendant in a pending federal criminal proceeding, but that he remained hopeful the criminal proceedings would be resolved in a manner that would permit him to testify. Prior to the hearing, the Hearing Panel granted, in part, the Department of Enforcement's motion for summary disposition, holding that the undisputed facts established, as a matter of law, that Milligan violated Rules 8210 and 2110 by failing to appear for testimony on

one occasion. The Panel concluded that Respondent's invocation of the Fifth Amendment did not excuse his failure to cooperate in an NASD Regulation, Inc. (NASDR) investigation, and that the pendency of a criminal proceeding in which he was a defendant did not allow him to impose conditions concerning the timing of his cooperation. The Panel also concluded, however, that the Department of Enforcement (Enforcement) failed to introduce adequate evidence, in support of its motion for summary disposition, to demonstrate that NASDR sent Milligan Rule 8210 requests asking him to appear for testimony on the other two occasions, and conducted a hearing on this issue and on the issue of sanctions. Following the hearing, the Panel concluded that Milligan violated Rules 8210 and 2110 by failing to appear for testimony on three occasions, as alleged in the Complaint, and barred Milligan from association with any member firm in any capacity.

Appearances

Gene Carasick, Esq., Regional Counsel, Atlanta, Georgia, and Rory C. Flynn, Chief Litigation Counsel, Washington, DC (Of Counsel) for the Department of Enforcement.

Gary G. Becker, Esq. and Renato C. Stabile, Esq., Law Offices of Gerald B. Lefcourt, New York, New York for Respondent Phillip J. Milligan.

DECISION

I. Introduction

On April 27, 1999, Enforcement filed a one cause Complaint against Milligan alleging that he violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110 by failing to appear for on-the-record testimony on August 8, September 5, and September 30, 1997. Milligan, through his counsel, filed an Answer to the Complaint on May 21, 1999, and filed an amended

Answer on June 18, 1999.[1] In his amended Answer, Milligan denied that his repeated failure to appear for testimony constituted a violation of Rules 8210 and 2110. He alleged, as an affirmative defense, that he did not "intentionally or willfully fail to appear to give testimony," but had advised NASDR staff, through his counsel, that

> in view of his status as a criminal defendant in proceedings pending in the United States District Court for the Eastern District of New York he was respectfully invoking his rights under the Fifth Amendment to the United States Constitution, and that he was hopeful that those proceedings would be resolved in a manner that would permit him to cooperate fully with NASD. (Answer, ¶ 11.)

On July 1, 1999, Enforcement moved for summary disposition, pursuant to Rule 9264, requesting that the Hearing Panel: (1) find that Milligan violated Rules 8210 and 2110, as alleged in the Complaint; and (2) fine Milligan $50,000 and bar him from association with any member firm in any capacity. Milligan opposed the motion reiterating the position he advocated in his affirmative defense. For the reasons set forth in the Hearing Panel's Order on the motion,[2] which are more fully articulated in this Decision, the Hearing Panel rejected Milligan's defense. However, the Hearing Panel granted Enforcement only partial summary disposition on liability because it demonstrated only that NASDR sent Milligan a Rule 8210 request asking him to appear for testimony on September 30, 1997 and did not submit sufficient evidence to show the

[1] At the Initial Pre-Hearing Conference, the Hearing Officer directed Milligan to file an amended Answer because his original Answer failed to specifically admit, deny, or state that he was unable to obtain sufficient information to admit or deny the allegations in the Complaint, as required by Rule 9215(b). (See Initial Pre-Hearing Order, dated June 14, 1999; Transcript of Initial Pre-Hearing Conference, pp. 9-11.) At the Initial Pre-Hearing Conference, Milligan's counsel also clarified that Respondent requested a hearing in this proceeding and did not intend to waive this right by failing to include a specific request for a hearing in his Answer. (See Initial Pre-Hearing Order; Transcript of Initial Pre-Hearing Conference, p. 8.)

[2] See Order Granting in Part and Denying in Part Enforcement's Motion for Summary Disposition, dated September 24, 1999.

issuance of Rule 8210 requests requiring his appearance on the other two occasions.[3] In addition, the Panel determined that additional evidence and argument were required in order to assess sanctions. Enforcement requested the imposition of the maximum sanctions recommended in the applicable NASD Sanction Guideline for a failure to respond in any manner,[4] based on unsupported claims that Milligan's failure to cooperate impeded the investigation. Milligan, on the other hand, indicated that there were mitigating factors he wished to bring to the Hearing Panel's attention.

On September 27, 1999, the Hearing Panel, composed of two current members of the District Committee for District 10 and the Hearing Officer, conducted a hearing for the purpose of receiving evidence and hearing argument relating to Milligan's alleged failure to appear for testimony on August 8 and September 5, 1997, and on the issue of sanctions.[5] At the hearing, the Parties did not call any witnesses,[6] but relied on their pre-hearing stipulations[7] and documentary

[3] Enforcement submitted no direct evidence to demonstrate that NASDR issued these requests. The record on the motion did not include copies of the letters NASDR sent to Milligan requesting his appearance on August 8 and September 5, 1997. And, although one of the letters Enforcement submitted did include a summary of NASDR's efforts to obtain Respondent's testimony on these dates, the Hearing Panel did not find this unsworn, hearsay statement adequate to make any findings regarding the allegations pertaining to his failure to appear on August 8 and September 5, 1997.

[4] NASD Sanction Guidelines 31 (1998 ed.).

[5] References to the transcript of the hearing are cited as "Tr. ___."

[6] At the outset of the hearing, Enforcement indicated that it sought to introduce testimony from a former NASDR employee who had participated in the subject investigation. The Hearing Panel declined to allow Enforcement to introduce this testimony because Enforcement previously had advised Respondent's counsel that it did not intend to call any witnesses at the hearing. See Tr. 7-21.

[7] References to the Parties' Stipulations, which were filed on September 7, 1999, are cited as "Stip. ¶ ___."

evidence. Enforcement offered six exhibits (CX 1-6) and Respondent offered three exhibits (RX 1-3), all of which were admitted in evidence without objection.[8]

II. Facts

A. Background

Milligan first registered with the NASD in April 1991. From approximately September 1993 until approximately July 1997, Milligan was associated with J.P. Milligan, a former NASD member firm. (Stip. ¶ 1; CX 1.) On March 11, 1997, a criminal complaint was filed against Milligan in the United States District Court for the Eastern District of New York and, on July 16, 1997, Respondent was indicted in United States v. Milligan, 97 CR 663 (RJD) (E.D.N.Y.). (Stip. ¶ 2.) Milligan entered a guilty plea in that action and, as a result, he is subject to statutory disqualification. (Tr. 65-66.)

B. Milligan's Failures to Appear for Testimony

By letter dated July 22, 1997, NASDR requested, pursuant to Rule 8210, that Milligan appear on August 8, 1997 at its offices in New York, for an on-the-record interview concerning "activities" at J.P. Milligan, Inc. and "other issues." In its July 22 letter, NASDR also advised Milligan that his failure to comply with its request could result in disciplinary action against him. NASDR sent the July 22 letter to Milligan, via conventional first class and certified mail, at the then current address of the offices of J.P. Milligan and at his last known residential address as

[8] After the hearing and after the record was closed, the Hearing Panel received the following post-hearing submissions from the Parties: (1) a letter, dated September 29, 1999, from Milligan's counsel; (2) a letter dated October 8, 1999 from Enforcement; (3) a letter dated October 13, 1999 from Milligan's counsel; and (4) a letter, dated October 25, 1999 from Milligan's counsel attaching excerpts from the transcript of Milligan's felony sentencing hearing. All of these submissions pertain to the issue of Respondent's inability to pay a fine. The Hearing Panel has determined not to impose any fine in light of a post-hearing amendment to the relevant NASD Sanction Guideline. Accordingly, the Panel need not consider whether Respondent's untimely claim of inability to pay or the Parties' post-hearing submissions, all of which were filed without prior leave of the Hearing Panel, were appropriate.

reflected in the Association's Central Registration Depository (the "CRD Address"). (Stip. ¶¶ 3, 8; CX 2; Tr. 24-25.) On August 4, 1997, NASDR sent an identical letter to Milligan, via Federal Express, at Quantum Group, Ltd. ("Quantum Group") (the successor broker-dealer to J.P. Milligan, Inc.) requesting, pursuant to Rule 8210, that he appear for testimony on August 8, 1997. (Stip. ¶ 4, CX 3.) Milligan did not receive either the July 22 or August 4 letters (Stip. ¶¶ 3-4; see also CX 2-3)[9] and did not appear for testimony on August 8, 1997. (Stip. ¶ 5.)

Sometime after August 8 and before August 18, 1997, Milligan became aware that NASDR had requested his testimony (Tr. 27) and contacted NASDR staff. (Stip. ¶ 8.) At that time, Milligan advised the staff that he was represented by counsel and provided the staff the names of his counsel. He also advised the staff that he was not associated with Quantum Group or J.P. Milligan and that he was no longer receiving mail at his CRD Address, and provided the staff his correct mailing address in Fort Lee, New Jersey. (Id.)[10] On August 18, 1997, Gary G. Becker, Esq., counsel for Milligan, orally advised NASDR staff that Milligan was a defendant in a criminal action in the United States District Court for the Eastern District of New York, and that because of Milligan's Fifth Amendment concerns, he could not provide on-the-record testimony at that time. Mr. Becker also indicated that Milligan wished to cooperate with NASDR after his criminal proceedings were resolved in a manner that permitted him to do so. (Stip. ¶ 9.)

By letter dated August 18, 1997, which was addressed to Mr. Becker and also sent to Milligan, NASDR requested, pursuant to Rule 8210, that Milligan appear on September 5, 1997

[9] Milligan's CRD Address, i.e., _____, Guttenberg, New Jersey, _____, was no longer current as of July 1997. (Stip. ¶ 6.) And, in or about the second week of August 1997, the President of Quantum Group advised NASDR staff that Milligan was not associated with the firm and was no longer receiving mail at the firm's address. (Stip. ¶ 7; see also RX 1.)

at its offices in New York for testimony. In its August 18 letter, NASDR reminded Milligan that a failure to comply may result in the "imposition of disciplinary sanctions against him." (Stip. ¶ 10; CX 4.) In response, on September 5, 1997, Mr. Becker orally advised NASDR staff that Milligan would not provide testimony at that time, reiterating the statements he made during his August 18 conversation with the staff. (Stip. ¶ 11.) Milligan in fact did not appear for testimony on September 5, 1997. (Stip. ¶ 12.)

By letter dated September 16, 1997, NASDR requested, pursuant to Rule 8210, that Milligan appear for testimony on September 30, 1997. (Stip. ¶ 13.) In its September 16 letter, NASDR advised Milligan that a failure to comply "may be deemed violative of NASD Procedural Rule 8210 and NASD Conduct Rule 2110 and may therefore result in the imposition against [him] of disciplinary sanctions, including but not limited to a censure, a fine and a bar from associating with any member firm in any capacity." (CX 5.) NASDR sent its September 16 letter to Milligan, via conventional first class and certified mail, at his CRD Address and the Fort Lee Address, and sent a copy of the letter to Milligan's counsel. (Stip. ¶ 13; CX 5.) Milligan received the letter (Stip. ¶ 13), but did not appear for testimony on September 30, 1997. (Stip. ¶ 15.) Instead, by letter dated September 29, 1997, Milligan's counsel advised NASDR that:

> Mr. Milligan is a defendant in a criminal action now pending in the United States District Court for the Eastern District of New York, United States v. Milligan, 97 Cr. 663 (RJD). Under these circumstances, Mr. Milligan respectfully invokes his Fifth Amendment right to remain silent. We are hopeful that the proceedings in the Eastern District will be resolved in a manner that will permit Mr. Milligan to cooperate with [NASDR] fully. For now, however, he must respectfully invoke his Fifth Amendment rights.

(CX 6; see also Stip. ¶ 14.)

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[10] _____, ____, _____, Fort Lee, New Jersey _____ (the "Fort Lee Address"). (See CX 5.)

Although the record contains no evidence as to the precise subject matter of the investigation, there is no dispute that its requests for Milligan's on-the-record testimony were made in connection with a *bona fide* NASDR investigation. (Tr. 27-28.)

By letter dated January 8, 1998, NASDR staff advised Milligan that it intended to recommend the institution of a formal complaint, charging him with violations of NASD Procedural Rule 8210 and NASD Conduct Rule 2110 based on his failure to appear for testimony. In its January 8 letter, NASDR offered Milligan the opportunity to make a written submission detailing why a formal complaint should not be issued. (Stip. ¶ 16; RX 2.) By letter dated January 30, 1998, Milligan's counsel responded by repeating the statements he made in his September 29, 1997 letter to NASDR. (Stip. ¶ 17; RX 3.) There was no further contact between NASDR and Milligan or his counsel until the Complaint in this proceeding was filed. (Stip. ¶ 19.)

As of September 27, 1999, when the hearing in this proceeding was held, Milligan's sentencing in the federal criminal proceeding was scheduled for October 1, 1999. Despite his impending sentencing, Respondent introduced no evidence to demonstrate that he directly, or through counsel, made any effort to contact NASDR to reschedule his testimony.

III. Legal Discussion

A. Jurisdiction

Although not currently registered, Milligan is subject to the Association's jurisdiction in this proceeding. (Stip. ¶ 1.) Pursuant to Article V, Section 4 of the NASD's By-Laws, a person whose association with a member is terminated remains subject to the Association's jurisdiction for two years after the effective date of termination of registration. During this two-year period

of retained jurisdiction, the Association may file a complaint against a formerly associated person "based upon . . . such person's failure, while subject to the NASD's jurisdiction . . . to provide information requested by the NASD pursuant to the Rules of the Association . . . ." Thus, individuals who remain subject to NASD disciplinary proceedings also remain obligated to cooperate with the NASD in its investigations.[11]

The Complaint was filed within two years after Milligan's termination from J.P. Milligan, and it is based on his failures to respond to Rule 8210 requests issued during the two-year period of retained jurisdiction. Accordingly, the Association had jurisdiction to bring this disciplinary proceeding against Milligan and to request information from him.

B. Respondent's Failure to Provide Information and Documents

NASD Procedural Rule 8210(a)(1) authorizes the NASD to require an associated person "to provide information orally, in writing, or electronically . . . with respect to any matter involved in [an] investigation . . . ." The Rule provides a means for the NASD, in the absence of subpoena power, to obtain information from its members and associated persons in connection with its investigations.[12] As such, the Rule is a "key element in the NASD's effort to police its

[11] See, e.g., District Business Conduct Committee No. 10 v. Veisman, Complaint No. C10960060, 1997 NASD Discip. LEXIS 36, at *9 (May 20, 1997); NASD Notice to Members 92-19, 1992 NASD LEXIS 50, at *5-6 (April 1992).

[12] In re Daniel C. Adams, 47 S.E.C. 919 (1983).

members."[13] A failure to respond "undermines the NASD's ability . . . to carry out its self-regulatory functions,"[14] and frustrates its ability "to conduct investigations and thereby protect the public interest."[15]

In this case, NASDR requested, pursuant to Rule 8210, that Milligan appear for on-the-record testimony on three occasions in connection with a *bona fide* investigation concerning "activities" at J.P. Milligan, a former NASD member firm. NASDR provided Milligan adequate constructive notice of its request that he appear for testimony on August 8, by sending it by mail to Milligan's CRD Address,[16] and it is apparent that Milligan and/or his counsel received actual notice of NASDR's requests for his appearance on September 5 and September 30. There also is no dispute that Milligan failed to appear for scheduled testimony on all three occasions.

Respondent argued in opposition to Enforcement's summary disposition motion that his conduct did not constitute a violation of Rules 8210 and 2110, because he did not ignore NASDR's requests or refuse to provide testimony, but merely requested a postponement until the criminal proceeding against him was resolved. Milligan, through his counsel, responded to NASDR's requests only for the purpose of communicating that he was invoking his "Fifth Amendment right to remain silent" and that he remained hopeful he would be able to cooperate with NASDR at some unspecified time in the future – after and depending on how the criminal

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[13] In re Richard J. Rouse, 51 S.E.C. 581, 1993 SEC LEXIS 1831, at *7 (1993). See also, e.g., In re Joseph P. Hannan, Exchange Act Release No. 40438 (Sept. 14, 1998) ("Since the NASD lacks subpoena power, it must rely upon Rule 8210 in connection with its obligation to police the activities of its members and associated persons.").

[14] In re John J. Fiero, Exchange Act Release No. 39544, 1998 SEC LEXIS 49, at *5 (Jan. 13, 1998), rev'd on other grounds, Summary Order No. 98-4103 (2d Cir. Jan. 20, 1999).

[15] In re Barry C. Wilson, Exchange Act Release No. 37867, 1996 SEC LEXIS 3012, at *14 (Oct. 25, 1996) (quoting Rouse, 51 S.E.C. at 588, 1993 SEC LEXIS 1831, at *16).

[16] See Rule 8210(d).

proceeding was resolved. That Milligan did not simply ignore NASDR's requests and held out the hope of future cooperation is not the equivalent of compliance. It is well-established that persons subject to the Association's jurisdiction have a duty to cooperate fully and promptly with NASDR's requests, In re Brian L. Gibbons, 52 S.E.C. 791 (1996), and are not free to impose conditions on their response, including the appropriate time for responding to such requests. In re Charles R. Steadman, 51 S.E.C. 1228 (1994); In re Michael David Borth, 51 S.E.C. 178 (1992).

Further, Milligan's reason for failing to appear for scheduled testimony is not a valid defense. His status as a defendant in a criminal proceeding does not allow him to invoke the Fifth Amendment in response NASDR's requests: the privilege against self-incrimination simply does not apply in NASD investigations and proceedings. As stated by the Court of Appeals for the Second Circuit with respect to New York Stock Exchange proceedings:

> interrogation by the New York Stock Exchange in carrying out its own legitimate investigatory purposes does not trigger the privilege against self-incrimination. . . . Most of the provisions of the Fifth Amendment, in which the self-incrimination clause is embedded, are incapable of violation by anyone except the government in the narrowest sense. . . . [T]his is but one of many instances where government relies on self-policing by private organizations to effectuate the purposes underlying federal regulating statutes.

United States v. Solomon, 509 F.2d 863, 867, 869 (1975). The courts have repeatedly held that NASDR, in performing its statutory mandate, is not a government actor.[17] Accordingly, the invocation of the Fifth Amendment privilege against self-incrimination cannot be a valid defense

[17] See, e.g., Jones v. SEC, 115 F.3d 1173, 1182-83 (4th Cir. 1997) (rejecting claim based on the Fifth Amendment's Double Jeopardy Clause because the NASD is not a government agency); Datek Securities, Inc. v. NASD, 875 F. Supp. 230, 234 (S.D.N.Y. 1995) (dismissing Fifth and Fourteenth Amendment claims challenging the fairness of a disciplinary proceeding because the NASD is not a state actor.) See also, e.g., District Business Conduct Committee No. 10 v. Gerald Cash McNeil, Complaint No. C3B960026, 1999 NASD Discip. LEXIS 3, at *13-15 (NAC Jan, 21, 1999).

to a violation of Rule 8210. E.g., In re Vladislav S. Zubkis, Exchange Act Release No. 40409, n.2 (September 8, 1998) ("It is well established . . . that the self-incrimination privilege does not apply to questioning in proceedings by self-regulatory organizations, since such entities are not part of the government."); In re Edward C. Farni II, 51 S.E.C. 1118, 1994 SEC LEXIS 1630, at *3 (1994) ("a refusal to provide information is a violation [of Rule 8210], without regard to invocation of the right against self-incrimination"); In re Daniel C. Adams, 47 S.E.C. 919, 921 (1983) (an invocation of the Fifth Amendment privilege would not affect the right of the NASD to sanction the respondent for his refusal to provide information, since the NASD is not a part of the government); In re Richard Neuberger, 47 S.E.C. 698, 699 (1982); In re Lawrence H. Abercrombie, 47 S.E.C. 176, 177 (1979). See also District Business Conduct Committee No. 10 v. Gerald Cash McNeil, 1999 NASD Discip. LEXIS 3, at * 13-15 (rejecting respondent's argument that he was deprived of his Fifth Amendment right against compelled self-incrimination because the District Business Conduct Committee denied his request to postpone the hearing until after his pending criminal action had been resolved).[18]

Moreover, Milligan's status as a defendant in a criminal proceeding, even if it involved the same issues that were the subject of an NASDR investigation,[19] did not entitle him to postpone his cooperation. Dual or parallel proceedings and investigations are not uncommon in the securities industry. The "Association's disciplinary and regulatory function coexists with

[18] Even in civil proceedings where parties may assert a Fifth Amendment privilege, the trier of fact may draw an adverse inference based on a defendant's invocation of such privilege. See, e.g., Baxter v. Palmigiano, 425 U.S. 308, 318 (1976); United States v. One Parcel of Property Located at 15 Black Ledge Drive, 897 F.2d 97, 103 (2d Cir. 1990); SEC v. Bremont, 954 F. Supp. 726, 732-33 (S.D.N.Y. 1997).

[19] Milligan did not provide any evidence to show that NASDR's investigation and the criminal proceeding involved substantially similar issues and, in any event, the question of relatedness between the two is irrelevant in determining the legal adequacy of his defense for noncompliance. The Panel does, however, find the absence of any evidence of relatedness between the two proceedings of some relevance in considering sanctions. See infra, p. 16.

other forums of redress, whether they be governmental or judicial, and the NASD's process does not stop when another entity's process begins." Market Surveillance Committee v. Wakefield Financial Corp., Complaint No. MS-936, 1992 NASD Discip. LEXIS 124, at *36 (NBCC May 7, 1992) (finding no unfair prejudice to the respondents as a result of the hearing panel's refusal to stay the disciplinary proceeding pending the outcome of criminal proceedings). See also In re Dan Adlai Druz, Exchange Act Release No. 36306, 60 S.E.C. Docket 911, 1995 SEC LEXIS 2572, at *34 (Sept. 29, 1995) (rejecting respondent's argument that the New York Stock Exchange should have stayed its disciplinary action pending the completion of a criminal case), aff'd, 103 F.3d 112 (2d Cir. 1996).[20]

The National Adjudicatory Council (NAC), in Department of Enforcement v. Levitov, Complaint No. CAF980025, slip op. (NAC Nov. 1, 1999), recently re-affirmed these general principles.[21] In Levitov, after respondents were arrested on New York state criminal charges, one respondent requested a four-week adjournment of his testimony so that the direction of the criminal matter could be clarified before he testified, and the other respondent requested an adjournment until the criminal matter was resolved. The staff refused to grant the requested adjournments and respondents failed to appear for testimony. The NAC, in affirming the Hearing Panel's decision on liability, stated:

> [t]he respondents were not entitled as a matter of right to adjourn the dates set for their Rule 8210 testimony, regardless of New York State's filing of criminal charges . . . . Furthermore, respondents' desire to resolve the proceedings or, as

[20] Likewise, federal courts routinely have acknowledged that the SEC and the Justice Department may each seek to enforce the federal securities laws, by pursuing "simultaneously or successively" separate civil and criminal actions arising out of the same set of operative facts. See, e.g., SEC v First Financial Group of Texas, Inc., 659 F.2d 660, 666-69 (5th Cir. 1981); SEC v. Grossman, 121 F.R.D. 207, 209-10 (S.D.N.Y. 1987); SEC v. Musella, Fed. Sec. L Rep. (CCH) ¶ 99,156 (S.D.N.Y. 1983).

[21] The NAC issued its decision in Levitov after the Hearing Panel issued its ruling on Enforcement's summary disposition motion in this proceeding.

> Levitov requested, to clarify the direction of the criminal matter, provides no excuse for their failure to appear to testify. (Slip op., at 6.)

The Hearing Panel concludes, based on the controlling precedent, that Respondent has failed to raise any legally valid defense for his failure to appear for testimony in connection with a *bona fide* NASDR investigation. Accordingly, the Hearing Panel has determined that Milligan violated NASD Conduct Rule 8210 by failing to appear for testimony on three occasions, i.e., August 8, September 5, and September 30, 1997, and that his failure to cooperate did not comport with high standards of commercial honor and just and equitable principles of trade and, therefore, constitutes a violation of NASD Conduct Rule 2110.[22]

IV. Sanctions

The applicable NASD Sanction Guideline recommends that where an individual respondent did not respond in any manner, a bar should be "standard," but if "mitigation exists, or the person did not respond timely," adjudicators should consider suspending the individual in any or all capacities for up to two years.[23] The Guideline thus recognizes that a refusal to provide

[22] 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. In re 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).

[23] NASD Sanction Guidelines 31 (1998 ed.). The version of the Guideline in effect at the time of the hearing also recommended the imposition of a fine ranging between $25,000 and $50,000 in cases where the individual did not respond in any manner, and Enforcement requested that Milligan be fined $50,000. Thereafter, the NASD issued Notice to Members 99-86 (Oct. 1999) advising its members that the NAC had adopted various policies regarding the imposition and collection of monetary sanctions, including a policy whereby NASDR generally will not impose a fine if an individual is barred for violations of Rule 8210. This policy, which is to be treated as an amendment to the Guideline, applies to all Hearing Panel decisions issued on or after November 1, 1999. Consistent with this policy the Hearing Panel has declined to impose any fine against Milligan.

information is a serious violation given NASDR's inability to subpoena required information.[24] In this case, Enforcement requested that Respondent be barred for his failure to provide testimony.

Respondent argued that there are mitigating factors present that weigh in favor of imposing a less severe sanction than a bar, specifically that: (1) he did not ignore NASDR's requests, but timely advised NASDR that he was invoking the Fifth Amendment in response to its requests; (2) because of the pendency of the criminal proceeding, he had a legitimate reason for refusing to testify; (3) he asserted his Fifth Amendment rights in good faith and on reliance of the advice of counsel; (4) he intends to comply sometime in the future; and (5) his failure to cooperate did not impede NASDR's investigation.

The Hearing Panel does not find that these factors – either alone or in combination – mitigate the gravity of Milligan's failure to testify. The Panel does not consider mitigative the fact that Milligan timely responded to NASDR's requests by asserting his Fifth Amendment rights and unilaterally postponing his testimony for an indefinite period. As the NAC stated, in Levitov,

> [w]e do not consider mitigative the fact that respondents answered timely by requesting an adjournment of the scheduled interviews. Rule 8210 indicates that Association staff may require a person to provide information and/or testify. A request for an adjournment of a scheduled appearance for testimony, regardless of the reason for the request, is not a response and should not be considered as mitigative of the failure to respond. Treatment of an adjournment request as mitigative of the underlying misconduct would encourage individuals who are not inclined to respond, first to request an adjournment or continuance in order to reduce the sanction that ultimately may be imposed for a failure to respond. (Slip op. n.20, at 10-11.)

[24] Rouse, 1993 SEC LEXIS 1831, at *11. See also, e.g., In re Barry C. Wilson, 1996 SEC LEXIS 3012, at *14 ("[a]bsent subpoena power, members and associated persons must cooperate fully in providing information requested by the NASD in order for the NASD to carry out its regulatory functions. . . . Failing to cooperate with the NASD is a serious violation.").

Further, in this case, the Respondent made a conscious and knowing decision not to comply despite the fact that NASDR clearly advised him that a failure to comply could result in disciplinary action against him and the imposition of a bar. Even when the staff informed Milligan that it intended to recommend the institution of formal disciplinary action against him, he did not offer to testify. The assertion of the privilege against self-incrimination – even if upon advice of counsel – "is not mitigative of a refusal to respond to NASD investigative requests . . . ." District Business Conduct Committee No. 7 v. Joiner, Complaint No. C07940022, 1994 NASD Discip. LEXIS 200, at *12 (NBCC Dec. 8, 1994).[25] The Hearing Panel believes that if NASDR, as a matter of course, were to treat the assertion of the Fifth Amendment as mitigative for purposes of sanctions, this would be tantamount to recognizing the existence of a privilege that clearly does not apply in the Association's investigations or disciplinary proceedings: only the state, not private entities, is prohibited from offering an individual the "Hobson's choice between self-incrimination or loss of employment." In re Vincent Musso, 47 S.E.C. 606, 1981 SEC LEXIS 994, at *8-9 (1981).

Moreover, notwithstanding Respondent's claim that he invoked his Fifth Amendment rights in good faith, he introduced no evidence to establish the extent to which, if at all, the

[25] The Hearing Panel also notes that Milligan has failed to demonstrate good faith reliance on advice of counsel. To establish this claim, a respondent must show that he: (1) made complete disclosure to counsel; (2) sought advice as to the legality of his conduct; (3) received advice that his conduct was legal; and (4) relied in good faith on that advice. E.g., Markowski v. SEC, 34 F.3d 99, 104-05 (2d Cir. 1994); SEC v. Savoy Industries, Inc., 665 F.2d 1310, 1314 n.28 (D.C. Cir. 1981); In re John Thomas Gabriel, 51 S.E.C. 1285, 1292, 1994 SEC LEXIS 2864 (Sept. 13, 1994), aff'd, 60 F.3d 812 (2d Cir. 1995) (Table); In re William H. Gerhauser, 1998 SEC LEXIS 2402, at *24 n.26. There is nothing in the record to suggest that Milligan obtained advice from his counsel that it was lawful to refuse to comply with a Rule 8210 request based on a invocation of the Fifth Amendment privilege, or that his invocation of the privilege would be considered a *bona fide* defense in a subsequent disciplinary action based on his failure to comply.

subject matter of the criminal proceeding and NASDR's investigation overlapped. Obviously, the risk of self-incrimination and any prejudice that might result from giving testimony in a civil proceeding during the pendency of a criminal proceeding is substantially more likely if there is significant overlap between the issues in the two proceedings. Trustees of the Plumbers and Pipefitters Nat'l Pension Fund v. Transworld Mechanical, Inc., 886 F. Supp 1134, 1139 (S.D.N.Y. 1995). Nor did Milligan appear for testimony and selectively refuse to answer questions put to him: instead, he invoked a blanket Fifth Amendment privilege without even determining the extent to which the questions may have called for self-incriminatory responses.[26] The Panel also questions the sincerity of Milligan's representations that he intends to cooperate with NASDR after the conclusion of his criminal proceeding. Although Milligan's sentencing was scheduled for October 1, 1999 – only four days after the hearing in this proceeding – he introduced no evidence at the hearing to show that he or his counsel made any effort to contact NASDR to set a date for his testimony or otherwise cooperate after he is sentenced.[27]

And, although the Hearing Panel is unable to reach any conclusion about the extent to which Milligan's failure to cooperate impeded the staff's investigation, the Panel rejects Respondent's suggestion that his failure to cooperate had no adverse affect on the investigation. In this regard, Milligan argued that Enforcement's failure to bring this disciplinary action

[26] This is not say that the assertion of the Fifth Amendment privilege in cases where there is substantial overlap between an NASDR investigation and criminal proceeding or that a selective assertion of the privilege necessarily would mitigate a respondent's failure to comply with a Rule 8210 request.

[27] Although counsel claimed that Milligan would not be in a position to provide testimony to NASDR until after he exhausted his appellate rights (Tr. 50-51), he also acknowledged that "there was virtually no chance of an appeal." (Tr. 51.) Pursuant to Milligan's plea agreement, he was precluded from appealing unless the district court judge imposed a sentence that was outside the federal sentencing guidelines that he and the Government had agreed should apply. (Id.)

promptly after NASDR sent him its last request for testimony supports an inference that his failure to cooperate did not impede the investigation. His underlying assumption, i.e., that disciplinary proceedings necessarily are brought to compel cooperation, is incorrect: the SEC has repeatedly admonished respondents that "[t]he NASD should not have to bring a disciplinary proceeding . . . in order to obtain compliance with its rules relating to investigations."[28] Moreover, although Enforcement introduced no evidence to demonstrate the degree to which its investigation depended on Milligan's testimony, there is no dispute that his testimony was requested in connection with a *bona fide* investigation and that he has refused to provide testimony for more than two years. It is reasonable to conclude that even if Milligan were to now testify, such belated cooperation would have diminished value.

The Hearing Panel recognizes that, in Levitov, the NAC determined to depart from the Guidelines and declined to impose an unconditional bar when respondents refused to testify after they had been arrested by state authorities and indicted by federal authorities.[29] However, there were various mitigating circumstances present in that case, which are not present here. In Levitov, the respondents had cooperated in a similar NASDR investigation before they were arrested and demonstrated a willingness to cooperate with NASDR in the subject investigation prior to the inception of a parallel criminal proceeding. The Panel also notes that while the NAC treated as mitigative the staff's refusal to grant one respondent a limited, four week adjournment of his testimony, it declined to treat as mitigative the staff's refusal to grant the other respondent

[28] John A. Malach, Exchange Act Release No. 32743, 54 S.E.C. Docket 2064, 1993 SEC LEXIS 2026 (Aug. 12, 1993).

[29] In Levitov, the NAC imposed a one year suspension that automatically will convert to a bar if respondents have not at that time complied with the staff's requests. Slip op., at 1, 11.

an "open-ended extension" pending resolution of a criminal proceeding – the extension that Milligan, in essence, granted himself in this case. Slip op. at 10 & n.19.[30] The Panel likewise does not find compelling Milligan's argument that this case should be considered, for purposes of imposing sanctions, as analogous to cases where respondents provided requested information or testimony in an untimely manner.[31]

Finally, the Panel observes that the NAC, in Levitov, repeatedly cautioned that its decision to depart from the Guideline was limited to the "unique" facts and circumstances presented in that case. The NAC further made explicit that it did not "intend to depart from the long line of NAC and SEC cases that state that respondents . . . may not impose conditions on their responses," and stated:

> [s]imilarly, we are not departing from our previous holdings that NASD Regulation has no obligation to postpone investigations because of actions taken by other regulators or criminal authorities. To do so would, in our view, severely undercut the usefulness of Procedural Rule 8210. (Slip op., at 10.)

This case, however, does not present any "unique" facts and circumstances or any other reasons to justify a downward departure from the "standard" sanction recommended in the Guideline. Therefore, the Hearing Panel, having considered all of the evidence and arguments submitted by the Parties, hereby bars Milligan from association with any NASD member in any capacity.[32] In

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[30] The NAC stressed that none of these factors excused respondents' misconduct and that any one of the factors, alone, may not be mitigating. Slip op., at 10.

[31] E.g., Edward C. Farni II, 51 S.E.C. 1118; District Business Conduct Committee for District No. 8 v. Martin Patrick Flanagan, III, Complaint No. C8A930038 (NAC Jan. 5, 1996). See also Levitov (where the NAC recognized that cases where respondents failed to respond in a timely manner were not instructive as to sanctions where respondents did not provide the requested testimony.)

[32] The Panel notes that apart from the bar it has imposed, pursuant to Article III, Section 4(g)(1)(iii) of the NASD's By-Laws, Milligan in fact is subject to statutory disqualification as a result of having pleaded guilty to a felony. In any event, this does not affect the propriety of imposing a bar: he will cease to be statutorily disqualified ten years after the entry of his guilty plea.

addition, Milligan is ordered to pay costs in the amount of $1,358, which includes an administrative fee of $750 and hearing transcript costs of $608. These sanctions shall become effective on a date set by the NASD, but not earlier than 30 days after the date of service of the decision constituting final disciplinary action of the NASD; provided, however, that the bar shall become effective immediately upon this Decision becoming the final disciplinary action of the NASD.[33]

Hearing Panel

By: _____
Ellen B. Cohn
Hearing Officer

Copies to:

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Mr. Phillip J. Milligan (via overnight courier and first class mail/
return receipt requested)

[33] 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.