

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C06980015
	:	
v.	:	
	:	
	:	Hearing Panel Decision
TERRY DON RADER	:	
(CRD #369900)	:	Hearing Officer - EBC
Dallas, Texas,	:	
	:	November 24, 1998
	:	
Respondent.	:	

**ORDER AND DECISION GRANTING ENFORCEMENT’S
MOTION FOR SUMMARY DISPOSITION**

Introduction

On June 17, 1998, the Department of Enforcement (Enforcement”) filed a one cause Complaint against Terry Don Rader (“Rader” or “Respondent”) alleging that he violated NASD Conduct Rule 2110 and NASD Procedural Rule 8210 by failing to respond to three requests for information. On August 6, 1998, Rader, through his counsel, filed an Answer denying the allegations in the Complaint. The Department of Enforcement (Enforcement) has moved, pursuant to Code of Procedure Rule 9264, for entry of an order and decision granting it summary disposition against Rader. Enforcement also has requested that Rader be censured, fined \$25,000, and barred for his failures to respond. Rader has opposed the motion.

Having carefully considered Enforcement’s motion and supporting materials, and Respondent’s papers in opposition, the Hearing Panel has concluded that the undisputed facts

establish, as a matter of law, that Rader violated Rules 2110 and 8210, as alleged in the Complaint. The Hearing Panel also has determined to impose the sanctions requested by Enforcement. These sanctions are consistent with the applicable NASD Sanction Guideline, and the Hearing Panel has considered, but rejected, Rader's arguments for a downward departure from the minimum sanctions recommended in the Guideline. Therefore, the motion is granted and this Order and Decision is issued.

Background

Enforcement's Complaint alleges that Rader failed to respond to requests for information and documents sent to him on January 21, February 23, and March 27, 1998, and thereby violated Rules 2110 and 8210. In his Answer, in addition to denying the allegations, Rader asserts, as an affirmative defense, that he did "respond" to these requests. He also claimed that, because he is the "target" of a federal criminal investigation "relative to the underlying subject matter of the Complaint," he is entitled to an "abatement" of this disciplinary proceeding pending the conclusion of the federal criminal investigation.

On September 30, 1998, Enforcement filed the summary disposition motion that is now pending before the Hearing Panel.¹ On October 28, 1998, Respondent, through his counsel, filed papers in opposition to Enforcement's motion.² Among other things, Respondent argues that the Hearing Panel should defer ruling on the motion for summary disposition pending the outcome of the federal grand jury investigation. (Respondent's Opposition, p. 2.) To do so would be

¹ In support of its motion, pursuant to Code of Procedure Rule 9264(c), Enforcement submitted a Statement of Undisputed Facts, a Memorandum of Points and Authorities, and six exhibits, including a Declaration of Stacy Hagar, a Special Investigator at the Office of NASD Regulation, Inc. (NASDR) in Dallas, Texas.

² In support of his opposition, Respondent submitted a "Response in Opposition to Complainant's Motion for Summary Disposition," accompanied by a "Declaration of Fact," executed by Daniel K. Hagood ("Hagood Decl."), who is one of the two attorneys representing Respondent in this proceeding, and two exhibits.

tantamount to staying this proceeding. The Hearing Officer previously denied Respondent's request for a stay of this proceeding and, for the reasons articulated by the Hearing Officer in denying Respondent's earlier request for a stay,³ the Hearing Panel declines to defer determination of the summary disposition motion.

Findings of Fact and Conclusions of Law

I. Facts

The Parties' submissions in support of, and in opposition to, the motion for summary disposition establish the following undisputed facts.

A. Rader's Background

Rader first registered with the NASD in July 1972 as a general securities representative and principal, while he was associated with Weber, Hall, Sale & Associates, Inc. After leaving Weber Hall, from approximately March 1991 through October 1997, Rader was registered as, among other things, a general securities representative and principal with Weber Investment Corporation ("Weber" or the "Firm"). (CX 1.)⁴ On or about November 11, 1997, Weber filed a Uniform Termination Notice for Securities Industry Registration (Form U-5) on Rader's behalf. The Form U-5 disclosed that the Firm had "discharged" Rader as a result of alleged violations of "internal policies and procedures" and "trading violations." (Hagar Decl. ¶ 2; CX 1.) Rader is not currently associated with any member firm. (CX 1.)

³ On September 11, 1998, Rader moved to stay this proceeding during the pendency of the criminal investigation, claiming that, pursuant to the Fifth Amendment, he has the right to refuse to provide information to the NASD related to matters at issue in the criminal investigation. The Hearing Officer denied the motion for the reasons stated during an October 6, 1998 Pre-Hearing Conference and in a written Order. (See Transcript of October 6, 1998 Pre-Hearing Conference, pp.4-5; Order Denying Motion to Stay Proceeding, dated October 23, 1998.)

⁴ All references to Enforcement's exhibits are cited as "CX __," with the exception of Ms. Hagar's Declaration, which is cited as "Hagar Decl. ¶ __." All references to Respondent's exhibits are cited as "RX __."

On or about February 24, 1998, the United States Attorney's Office for the Northern District of Texas sent Rader a letter informing him that he was a "target" of a federal grand jury investigation relating to his possible violations of "federal fraud statutes," while he was employed at Weber. (RX A.)

B. Rader's Failures to Respond

In connection with an investigation of the circumstances surrounding Rader's termination from Weber, NASDR staff attempted to obtain information from him. (See generally Hagar Decl.; CX 2-5.) By letter, dated January 21, 1998, NASDR requested, pursuant to Rule 8210, that Rader provide, not later than February 3, 1998, various documents and a written explanation regarding, among other things, his trading activities in certain securities. (CX 2, pp. 1-2.) The January 21 letter was sent to Rader, via first class and certified mail, return receipt requested, at his address of record as reflected in the Central Registration Depository ("CRD Address").⁵ (Hagar Decl. ¶ 3; CX 2, pp. 3-4.)

On February 2, 1998, Knox Fitzpatrick, Esq., counsel for Respondent,⁶ requested an extension of time for Rader to respond to the January 21 letter. NASDR staff agreed to extend Rader's time to provide the requested information until February 10. (Hagar Decl. ¶ 4.) After Rader failed to provide any information by the extended deadline, by letter, dated February 23, 1998, NASDR staff requested, pursuant to Rule 8210, that Rader immediately provide the information and documents sought in its January 21 letter, and enclosed a copy of that letter. The February 23 letter also advised Rader that his continued failure to comply could result in disciplinary action against him, and the imposition of a bar and substantial fines. (CX 3, p. 1.)

⁵ _____, Dallas Texas _____. (CX 1.)

⁶ Mr. Fitzpatrick is also one of the attorneys representing Respondent in this proceeding.

The February 23 letter was sent to Rader, via first class and certified mail, return receipt requested, at his CRD Address. (Hagar Decl. ¶ 6; CX 3, pp. 2-3.)

On February 24, 1998, at the request of Rader's counsel, Mr. Fitzpatrick, NASDR staff met with him and Mr. Hagood to discuss the requests for information to Respondent. At the meeting, Respondent's counsel requested that NASDR postpone its investigation. (Hagar Decl. ¶ 7.) On February 25, 1998, NASDR staff advised Mr. Fitzpatrick that it had declined to postpone the investigation and gave Respondent an extension, until March 20, to provide the information and documents requested in the January 21 letter. (Hagar Decl. ¶ 8.) After that deadline had passed, on March 23, Mr. Fitzpatrick requested yet a third extension, until March 27, for Rader to provide the information. NASDR staff agreed to the requested extension, but advised Rader, through his counsel, that no further extensions would be granted and that Rader's failure to make a complete and timely response to its January 21 request for information could constitute the basis for disciplinary action against him. (Hagar Decl. ¶ 9; CX 4.)

On March 26, 1998, Mr. Hagood advised NASDR staff that Respondent would not provide the information requested in the January 21 letter because Respondent "was under investigation by a federal grand jury." (Hagood Decl.)

Nonetheless, by letter, dated March 27, 1998, NASDR again requested, pursuant to Rule 8210, that Rader immediately provide the information and documents it originally sought in its January 21 letter, and enclosed a copy of that letter as well as its February 23 letter. (Hagar Decl. ¶ 10; CX 5, p. 1.) The March 27 letter reminded Rader that his continued failure to comply could result in disciplinary action against him, and the imposition of a bar and substantial fines. (CX 5,

p. 1.) The March 27 letter was sent to Rader, via first class and certified mail, return receipt requested, at his CRD Address. (Hagar Decl. ¶ 10; CX 5, pp. 2-3.)

To date, Rader has not provided any of the information or documents requested by NASDR staff pursuant to Rule 8210. (See generally Hagar Decl.; see also Respondent's Opposition, p. 2.)

II. Legal Discussion

A. Jurisdiction

Although not currently registered, Rader is subject to the Association's jurisdiction in this proceeding. 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.⁷

Rader was associated with Weber and registered with the NASD until November 11, 1997, when Weber terminated him. The Complaint was filed within two years after the effective date of termination of his registration, 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

⁷ See, e.g., DBCC 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).

had jurisdiction to bring this disciplinary proceeding against Rader and to request information from him.

B. Summary Disposition

Code of Procedure Rule 9264(d) provides that the Hearing Panel “may grant the motion for summary disposition if there is no genuine issue with regard to any material fact and the Party that files the motion is entitled to summary disposition as a matter of law.”⁸ It is well-established that the moving party, in this case Enforcement, bears the initial burden of showing “the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The substantive law governing the case will identify those facts which are material and “only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

If the moving party meets that initial burden, the opposing party must come forward with specific evidence demonstrating the existence of a genuine dispute of material fact. Id. at 249. In so doing, the non-moving party “must do something more than simply show that there is some metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986) (citations omitted). “The pivotal question will always be whether the non-moving party has produced sufficient evidence that a reasonable jury could find for him at a trial on the matter.” Pickett v. RTS Helicopter, 128 F.3d 925, 928 (5th Cir. 1997).

⁸ Code of Procedure Rule 9264(a) permits Enforcement or a respondent to file “a motion for summary disposition of any or all the causes of action in the complaint” Motions for summary disposition may be filed, without leave of the Hearing Officer “[a]fter a Respondent’s answer has been filed and Documents have been made available to that Respondent for inspection and copying pursuant to Rule 9251” Enforcement filed its motion in accordance with the Rule: it was filed after Rader answered the Complaint and after Enforcement made its documents available to Respondent for inspection and copying. (See Enforcement’s Memorandum, p. 2.)

In this case, there is no issue of material fact in dispute: to the contrary, Respondent admits that he did not provide the requested information and documents.⁹ Thus, the only issue to be decided by the Hearing Panel is whether, as a matter of law, Rader has raised a reasonable defense for his refusal to provide the requested information and to the charged rule violations. Respondent has raised two defenses. He asserts that he did respond to the requests – albeit for the sole purpose of advising NASDR staff that he would not comply. Second, he claims that the pendency of a criminal investigation, in which he is a “target,” excuses his noncompliance, because during the pendency of that investigation, he is entitled to exercise his Fifth Amendment rights in refusing to provide information to NASDR.

C. 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 to carry out its regulatory mandate in the absence of subpoena power. As such, the Rule is a “key element in the NASD’s effort to police its members.”¹⁰ A failure to respond “undermines the NASD’s ability . . . to carry out its self-regulatory functions,”¹¹ and frustrates its ability “to conduct investigations and thereby protect the public interest.”¹²

⁹ Respondent states, in his papers in opposition to Enforcement’s summary disposition motion, “it is true that Respondent has not provided the specific information requested by the Complainant” (Respondent’s Opposition, p. 2.)

¹⁰ In re Richard J. Rouse, 51 S.E.C. 581, 1993 SEC LEXIS 1831, at *7 (1993).

¹¹ In re John J. Fiero, Exchange Act Release No. 39544, 1998 SEC LEXIS 49, at *5 (Jan. 13, 1998).

¹² 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).

In this case, NASDR sent Rader three written requests for information and documents in connection with its investigation relating to his possible violation of Weber's policies and trading violations. After receiving three extensions of time to respond, Rader, through his counsel, advised NASDR that he would not provide the requested information and documents. Rader argues that, by advising NASDR that he would not comply, he is not guilty of a "wholesale" failure to respond. His construction of Rule 8210 is untenable: the Rule requires persons subject to the Association's jurisdiction to cooperate in the Association's investigations, not simply to acknowledge that they have received a request for information and decided not to comply. Otherwise, the NASD's Rule 8210 powers would be meaningless and its ability to conduct investigations would be severely impeded, as it would be required to depend solely on voluntary cooperation. No matter how finely Respondent would like to parse the word "respond," the fact is that he did refuse – on a "wholesale" basis – to provide any of the information or documents requested.

Further, Rader's purported reason for refusing to comply does not excuse his conduct. The pendency of a criminal investigation in which he is a target, even if it implicates the same issues as are the subject of NASDR's investigation,¹³ does not allow him, based on assertions of the Fifth Amendment privilege, to remain silent and refuse to provide information and documents, or to impose conditions concerning the timing of his cooperation in an NASDR investigation.

¹³ Rader has not provided any information to substantiate his claim that the NASD's investigation and the criminal investigation involve substantially similar issues. However, the question of relatedness between the two investigations is irrelevant in determining the legal adequacy of his defense for noncompliance and, for purposes of this Decision, the Hearing Panel has assumed that the two investigations involve overlapping issues.

NASD disciplinary proceedings and investigations do not implicate the privilege against self-incrimination.¹⁴ 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). Accordingly, the invocation of the Fifth Amendment privilege against self-incrimination is simply not a valid defense 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

¹⁴ See, e.g., District Business Conduct Committee No. 10 v. Stratton Oakmont, Inc., Complaint No. C10950081, 1996 NASD Discip. LEXIS 52, at *25-28 (NBCC Dec. 5, 1996); District Business Conduct Committee No. 8 v. Kowalski, Complaint No. C8B950012, 1996 NASD Discip. LEXIS 60, at *25-26 (NBCC Oct. 23, 1996); Market Surveillance Committee v. Wakefield Financial Corp., Complaint No. MS-936, 1992 NASD Discip. LEXIS 124, at *36-37 (NBCC May 7, 1992).

government); In re Richard Neuberger, 47 S.E.C. 698, 699 (1982); In re Lawrence H. Abercrombie, 47 S.E.C. 176, 177 (1979).¹⁵

The Hearing Panel also recognizes that dual or parallel proceedings and investigations are not uncommon in the securities industry. The “Association’s disciplinary and regulatory function coexists with 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).¹⁶

The Hearing Panel concludes, based on the controlling precedent, that Respondent has failed to raise any legally valid defense for his failure to provide information and documents requested by NASDR in connection with its investigation. Accordingly, the Hearing Panel has determined that Rader violated NASD Conduct Rule 8210 by failing to comply with the requests for information, 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.

¹⁵ 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).

¹⁶ 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) (where the SEC rejected respondent’s claim that a New York Stock Exchange disciplinary action should have been stayed pending the completion of a criminal case.) Likewise, the courts have routinely 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).

Sanctions

The applicable NASD Sanction Guideline recommends that where an individual respondent did not respond in any manner, a bar should be standard and a fine ranging between \$25,000 and \$50,000 should be imposed.¹⁷ The Guideline thus recognizes that a refusal to provide information is a serious violation given NASDR's inability to subpoena required information.¹⁸ Enforcement has requested that Rader be censured, barred, and fined \$25,000, which is the minimum fine suggested in the Guideline. Rader argues that these sanctions are too severe, and that he should not be barred from the securities industry as a result of exercising his Fifth Amendment rights during the investigation. Respondent suggests that, in lieu of a bar, the Hearing Panel should consider suspending him or defer imposing sanctions entirely, pending the outcome of the federal grand jury investigation. Apparently, Rader hopes that he will be exonerated by the grand jury and that this, coupled perhaps with belated compliance with the requests for information, will serve as a mitigating factor in assessing sanctions.¹⁹

The Panel declines to adopt Rader's arguments. His invocation of the Fifth Amendment cannot justify a downward departure from the minimum sanction recommended in the Guideline. To do so would be tantamount to recognizing the existence of a privilege that clearly does not

¹⁷ NASD Sanction Guideline 31 (1998 ed.). The Hearing Panel does not construe the Guideline to mean that a completely non-substantive response justifies a downward departure from the minimum recommended sanction.

¹⁸ 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”).

¹⁹ Similarly, Rader argues that exculpatory evidence Enforcement may have obtained in its investigation of his alleged misconduct at Weber also may serve as a mitigating factor in imposing sanctions in this proceeding. See Respondent's Opposition, p. 3. Such evidence is likewise irrelevant in assessing sanctions for Rader's failure to provide information. See Order Denying Respondent's Request to Compel Production of Documents, dated November 3, 1998.

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). In addition, in this case, NASDR plainly advised Rader that his failure to provide the requested information could result in the imposition of a bar and substantial fines. He nonetheless made the decision to refuse to cooperate.

Nor is there any reason to defer imposing sanctions or to simply suspend Rader, pending the completion of the criminal investigation. Whether Rader is, or is not, exonerated by the federal grand jury has no bearing on the sanctions that should be imposed for his failures to provide information in connection with an NASDR investigation. And, the mere possibility that he may belatedly comply with the requests for information cannot be considered a mitigating factor.

Rader sought and obtained three extensions to provide the requested information only to then advise NASDR that he would not comply. Under these circumstances and because Rader has not demonstrated the existence of any persuasive mitigating factors, the Hearing Panel sees no reason to impose sanctions below those recommended in the applicable Guideline.²⁰

The Hearing Panel, having considered all of the evidence and arguments submitted by the Parties, hereby censures Respondent Terry Don Rader, fines him \$25,000, and bars him from association with any NASD member in any capacity. These sanctions shall become effective on a date set by the Association but not before the expiration of 45 days after the date this Decision becomes the final disciplinary action of the NASD.

²⁰ The Hearing Panel also notes that it does not construe the Guideline to mean that a completely non-substantive response should be viewed as a mitigating factor in assessing sanctions.

Order

The Hearing Panel has determined that there are no genuine issues with respect to any material fact and that Enforcement is entitled to judgment as a matter of law. Accordingly, the Hearing Panel grants Enforcement's Motion for Summary Disposition; concludes that Rader violated NASD Conduct Rule 2110 and NASD Procedural Rule 8210, as alleged in the Complaint; and censures Rader, fines him \$25,000, and bars him from association with any NASD member in any capacity.

SO ORDERED.

Hearing Panel

By: _____
Ellen B. Cohn
Hearing Officer

Copies to:

Mr. Terry Don Rader (via certified and first class mail)
George C. McGuigan, Jr., Esq. (via facsimile and first class mail)
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