

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C10970176
	:	
	:	DECISION AS TO RESPONDENT
	:	ROBERT FITZPATRICK
	:	
v.	:	Hearing Panel
	:	
SFI INVESTMENTS, INC.,	:	October 20, 1998
(BD#21663), et al.,	:	
	:	
ROBERT FITZPATRICK,	:	
(CRD#842159),	:	
Clifton Park, New York,	:	
	:	
	:	
Respondents.	:	

DIGEST

On November 21, 1997, the Department of Enforcement ("Enforcement") or ("Complainant") served a Complaint on Respondents SFI Investments, Inc. ("SFI"), Frank Joseph Fasano ("Fasano"), Barbara Diane Halpern ("Halpern"), Kevin Maurice Smith ("Smith"), Jeffrey Barnett Bronfman ("Bronfman"), Robert Fitzpatrick ("Fitzpatrick"), Christopher David Chu ("Chu"), and Peter Steven Haynes ("Haynes"). The original Complaint asserted six (6) causes of action against Respondent SFI and the individuals identified above who formerly were associated with SFI, including Respondent Fitzpatrick who was SFI's Director of Compliance during the relevant period.

The only cause of action addressed in this decision is Revised Cause Six of the Complaint ("Revised Cause Six") against Respondent Fitzpatrick, which alleges that between January 1996 and July 1996, Respondents Fitzpatrick and SFI failed to respond in a timely manner to repeated requests for information from NASD Regulation, Inc. ("Enforcement") in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110.¹ Specifically, Revised Cause Six alleges that Respondents Fitzpatrick and SFI failed to respond in a timely manner to Enforcement's requests for information set forth in five (5) letters to Respondents Fitzpatrick and SFI and three (3) communications to SFI's counsel requesting three categories of documents as to the sales activities of Respondents Chu and Haynes:² commission runs; payroll records evidencing payment of commissions; and confirmations of sales.

The Hearing Panel found that Respondent Fitzpatrick failed to respond in a timely manner to provide two (2) of the categories of documents at issue, commission runs and payroll records, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. Accordingly, the Hearing Panel determined that a fine of \$2,500.00 and a suspension for a period of three (3) weeks (15 business days) were appropriate sanctions. Further, the Hearing Panel assessed the cost of the Hearing against Respondent Fitzpatrick.

With respect to the third category of documents, sales confirmations, the Hearing Panel found that Enforcement's initial requests were not sufficiently clear and that the period of time

¹ The Revised Sixth Cause of Complaint as to Respondents Fitzpatrick and SFI was filed on July 27, 1998 and narrowed the claims against Respondent Fitzpatrick by alleging some, but not all, of the violations originally alleged in the Sixth Cause of Complaint. At the request of Respondent Fitzpatrick and with the concurrence of Enforcement, the claims in the Revised Sixth Cause of Complaint were severed for purposes of the hearing.

² Respondents Chu and Haynes are charged with functioning in the capacity of general securities representatives without NASD registration, in violation of NASD Membership and Registration Rule 1031(a) and NASD Conduct Rule 2110.

between clarification of the request and production of those documents does not support a finding of violations of NASD Procedural Rule 8210 and NASD Conduct Rule 2110.

APPEARANCES

Andrew W. Reich, Esq., Regional Counsel, Leonard J. Amoruso, Esq., Chief Counsel, and Anita B. Zigman, Esq., Associate Chief Counsel, NASD Department of Enforcement, District No. 10, New York, New York. Rory C. Flynn, Chief of Litigation, NASD Regulation, Inc., Department of Enforcement, Washington, D.C.

Robert K. Fitzpatrick, Esq.

DECISION

I. Introduction

On November 14, 1997, Enforcement served a Complaint asserting various charges against eight (8) Respondents. The Complaint alleges six (6) causes of action against SFI, an NASD member firm since 1988, and seven (7) individuals formerly associated with SFI, including Respondent Fitzpatrick, who was SFI's Director of Compliance during the relevant time period. Cause One relates to alleged improper trading activities by Respondents Smith and Bronfman and is the subject of a separate disciplinary hearing scheduled for October 1998. Causes Two through Five charge Respondents SFI, Fasano, Halpern, Chu, and Haynes with various violations.³ The charges against Respondents Chu and Halpern have been settled. Revised Cause Six, filed on July 27, 1998, alleges violations against Respondents Fitzpatrick and SFI for failure to respond in a timely manner to Enforcement's requests for information pursuant to NASD Procedural Rule 8210. As noted above, the Hearing as to Respondent Fitzpatrick was severed, and this decision relates only to the charges against him in Revised Cause Six.

³ The charges against Respondents SFI, Fasano, and Haynes are subject to Motions for Entry of Default Decision.

By way of background, the Complaint states that Respondent Fitzpatrick has been registered with NASD (“the Association”) in various capacities since 1977.⁴ The Complaint further states that from on or about January 1, 1996 to July 23, 1997, Respondent Fitzpatrick was registered with the Association and was employed by Respondent SFI as Director of Compliance.⁵ Respondent Fitzpatrick currently is registered with the Association and is employed by member firm Merit Capital Associates, Inc.⁶

Revised Cause Six alleges that in letters to Respondent Fitzpatrick dated February 14, March 1, March 19, April 9, and May 1, 1996, Enforcement requested production of commission runs and payroll records with respect to the sales activities of Respondents Chu and Haynes.⁷ The requests were made pursuant to NASD Procedural Rule 8210 and required that responses be received no later than February 29, March 15, March 27, April 17, and May 13, 1996, respectively.⁸ Revised Cause Six charges that the commission runs and payroll records were not received until July 29, 1996.⁹

⁴ Complaint at ¶6. Respondent Fitzpatrick has been registered as a General Securities Representative (“GSR”) since 1977, a Registered Options Principal (“ROP”) since 1981, a General Securities Principal (“GSP”) and a Financial and Operations Principal (“FINOP”) since 1982, and as a Municipal Securities Principal (“MSP”) since 1990.

⁵ Id.

⁶ Id.

⁷ Revised Cause Six at ¶¶ 39, 41, 43, 46, and 50; JEs-2, 3, 4, 6, and 8. The majority of the documents admitted at the Hearing were Joint Exhibits and are referenced herein as “JE.”

⁸ Id. at ¶51. The letters subsequent to February 14, 1996 with respect to these documents repeated the requests previously made.

⁹ Id. at ¶57.

Revised Cause Six also alleges that the April 9 and May 1, 1996 letters requested that Respondent Fitzpatrick produce sales confirmations for Respondents Chu and Haynes.¹⁰ These requests also were made pursuant to NASD Procedural Rule 8210 and required responses by April 17 and May 13, 1996, respectively. Revised Cause Six charges that the requested sales confirmations were not produced in their entirety until August 19 and August 21, 1996.¹¹

Revised Cause Six charges that the only written responses received from Respondent Fitzpatrick to Enforcement's requests were by letters dated March 20 and April 18, 1996.¹² In the March 20, 1996 letter, Respondent Fitzpatrick purported to respond to various issues raised in the March 1 letter, but did not produce the requested commission runs or payroll records or give any indication when such documents might be produced.¹³ In the April 18, 1996 letter, Respondent Fitzpatrick again set forth a purported response to the document requests but still failed to provide the requested commission runs or sales confirmations, in addition to the admitted failure to produce the requested payroll records.¹⁴

In addition to the requests sent directly to Respondent Fitzpatrick, the Complaint states that on May 7, 1996, Enforcement faxed its May 1 letter to counsel recently retained to represent SFI.¹⁵ On June 3, 1996, Enforcement sent a letter to SFI's counsel, with copies to Respondent

¹⁰ Id. at ¶¶ 46 and 50.

¹¹ Id. at 57.

¹² Id. at ¶44 and 48; JEs-5 and 7.

¹³ Id. at ¶44; JE-5.

¹⁴ Id. at ¶48; JE-7. Enforcement charges (id. at 49) that Respondent Fitzpatrick's statement therein was false: "In the case of Messrs. Chu and Haynes, the only information we have not been able to deliver to you are our payroll records which are voluminous. The information is readily available but not readily separable from all our other employees. You can come to our office and inspect those documents if you wish." JE-7.

¹⁵ Id. at ¶53; JE-9.

Fitzpatrick and others, again attaching a copy of its May 1, 1996 letter.¹⁶ No response was received. A final letter was sent to SFI's counsel on July 19, 1996. That letter again itemized the documents that still had not been produced, including commission runs, payroll records, and sales confirmations with respect to Respondents Chu and Haynes.¹⁷

Respondent Fitzpatrick does not deny that he was the Director of Compliance for SFI during the relevant time period, that he received Enforcement's repeated requests for information,¹⁸ or that the documents at issue were not produced until the dates identified in Revised Cause Six. Rather, Respondent Fitzpatrick asserts that it was the responsibility of SFI's financial personnel to compile the requested financial information.¹⁹ Respondent Fitzpatrick asserts that the Enforcement examiner, Mr. Mathies,²⁰ had a history of dealing with the financial people of the firm.²¹

Respondent Fitzpatrick also asserts that when he received Enforcement's February 14, 1996 letter which, among other things, requested sales memoranda, he called Mr. Mathies and asked him if he meant sales confirmations, not sales memoranda. Respondent Fitzpatrick states

¹⁶ Id. at ¶54; JE-10.

¹⁷ Id. at ¶56; JE-11. The commission runs, payroll records, and certain other confirmation slips finally were produced by SFI's counsel to Enforcement on July 29, 1996. On August 19 and 21, 1996, SFI's counsel delivered to Enforcement various other documents, including certain sales confirmations for Respondents Chu and Haynes. Id. at ¶57.

¹⁸ Respondent Fitzpatrick stipulated that he received each of the letter requests for information identified in the Revised Cause Six. Joint Stipulations As To Documents, July 23, 1998.

¹⁹ Answer to Revised Sixth Cause of Complaint ("Answer") at ¶¶1 and 4. Respondent Fitzpatrick states that when he received the February 14 and March 1, 1996 letters he gave copies to the firm's financial personnel and asked them to compile the financial information requested therein.

²⁰ Mr. Mathies is the compliance examiner who was responsible for the examination of SFI which resulted in the filing of the Complaint. Transcript of Proceedings ("Tr."), August 3, 1998, at 25.

²¹ Answer at ¶1.

that Mr. Mathies told him he wanted sales memoranda.²² Accordingly, Respondent Fitzpatrick contends that when he received the April 9, 1996 letter requesting sales confirmations he "was totally confused."²³ Respondent alleges that he called Mr. Mathies' office immediately upon receipt of the April 9 letter, but that none of his calls was returned.²⁴

When Respondent Fitzpatrick received Enforcement's May 1, 1996 letter he immediately brought the letter to the attention of Mr. Fasano who then hired outside counsel for SFI.²⁵ Respondent Fitzpatrick was told that everything from then on should be directed to outside counsel.²⁶

The Parties presented evidence to a Hearing Panel in a one (1) day Hearing held in New York on August 3, 1998. Mr. Mathies was the only witness who testified for Enforcement. Respondent Fitzpatrick testified on his own behalf and offered no other witnesses.

II. Background of the Proceedings and Position of the Parties

Enforcement contends that, as the person to whom the Rule 8210 requests were directed, and as SFI's Director of Compliance, Respondent Fitzpatrick's responsibility was to ensure that the requested documents were produced in a timely manner.²⁷ Enforcement argues that Respondent Fitzpatrick cannot escape such responsibility, or avoid findings of violations of NASD Rules 8210 and 2110, by seeking to transfer the responsibility for production of the

²² *Id.* at ¶2.

²³ *Id.* at ¶¶8-9.

²⁴ *Id.* at 8.

²⁵ *Id.* at 12.

²⁶ *Id.*

requested documents to others, such as the firm's financial personnel or SFI's outside counsel.²⁸ Enforcement also asserts that Respondent Fitzpatrick never suggested that Enforcement contact other persons to obtain those financial documents; nor did Respondent Fitzpatrick explain why it would be so difficult to produce the requested materials.²⁹

Respondent Fitzpatrick's position is that the Rule 8210 requests contained misstatements, that production of financial documents was not his responsibility, that after May 1, 1996, when outside counsel was retained, responding to the NASD requests was counsel's responsibility, and that he acted reasonably under the circumstances.³⁰

III. Findings of Fact and Conclusions of Law

A. Evidence Presented at the Hearing

As noted above, the majority of facts in this disciplinary proceeding are not disputed. Respondent Fitzpatrick does not deny that he received the requests for information referenced in Revised Cause Six; nor does he deny that the documents at issue were not produced to Enforcement until the dates identified in Revised Cause Six.

Enforcement presented evidence that the commission runs and payroll records relating to Respondents Chu and Haynes were requested in eight (8) letters and faxes to Respondent Fitzpatrick and/or SFI's counsel beginning in February 1996 and continuing until July 19, 1996.³¹

²⁷ Complainant's Pre-Hearing Submission On Claim Against Respondent Fitzpatrick ("Complainant's Pre-Hearing Submission") at 5.

²⁸ *Id.* at 5-6 and Complainant's Post-Hearing Brief On Claim Against Respondent Fitzpatrick ("Complainant's Post-Hearing Brief") at 2.

²⁹ Complainant's Post-Hearing Brief at 2-3. Further, Enforcement's position is that, to the extent that "SFI's files were voluminous and cumbersome, the NASD staff would be less able than firm employees to review and compile the necessary documents." *Id.* at ¶3.

³⁰ Tr. at 98-99, 103-04, 106; Answer at ¶¶ 1, 4, 12, 14, 17-21; and [Post-Hearing] Legal Brief [of Respondent].

Mr. Mathies testified that these documents were not produced until July 29, 1996, at the earliest.³² Further, Enforcement presented evidence that certain sales confirmations relating to the activities of Respondents Chu and Haynes that had been requested in five (5) of the letters and faxes to Respondent Fitzpatrick and/or SFI's counsel beginning on April 9, 1996, were not produced until July 29, August 19, or August 21, at the earliest.³³

Mr. Mathies testified that Respondent Fitzpatrick's two written responses, of March 20 and April 18, 1996, were inadequate and did not include the requested documents.³⁴ Mr. Mathies also testified that, contrary to the statement contained in Respondent Fitzpatrick's April 18 response, none of the requested information had been produced.³⁵ With respect to the payroll records, Mr. Mathies testified that he did not view Respondent Fitzpatrick's invitation to inspect those records at the firm as an acceptable response.³⁶

On cross-examination, Mr. Mathies agreed that Enforcement's February 14 and March 1, 1996 letters did not clearly request sales confirmations and that the April 9, 1996 letter properly

³¹ Tr. at 28-29, 33-34, 41, 44-48; JEs-2-4, 6, 8-11. Mr. Mathies testified that he requested these documents because he "wanted to get a complete picture of the extent to which the individuals were conducting a securities business, or acting in a capacity of a registered rep, while not registered at the firm at SFI." Tr. at 30.

³² Tr. at 49-50, JE-12.

³³ Id. at 50. Because there was some initial confusion as to whether Enforcement's February 14, 1996 letter requested sales confirmations, Enforcement agreed to give Respondent Fitzpatrick "the benefit of the doubt" and that the April 9, 1996 letter would be considered the first request for this information. Id. at 16-17, 41, 51-52, 55-57.

³⁴ Id. at 35, 41-42; JEs-5, 7.

³⁵ Tr. at 42.

³⁶ Id. at 43. More specifically, Mr. Mathies testified that he needed copies of those documents and that the contact he had with the firm previously "was not cordial, and the requests had not been productive up to that date." Id. In Mr. Mathies' view, "the burden was upon the firm to produce the documents when asked" * * * and "that the documents were probably more readily accessible to the firm, or that the firm would be more familiar with the documents." Id.

should be considered the first such request for this information.³⁷ In response to further examination, Mr. Mathies testified that he sent Enforcement's Rule 8210 requests to Respondent Fitzpatrick because he understood he was the "compliance director and the person that would be responsible for production of documents."³⁸ Mr. Mathies responded affirmatively when asked by Respondent Fitzpatrick if he was not "invited" to review the voluminous payroll records at SFI's offices.³⁹

Respondent Fitzpatrick made a short statement on his own behalf which, in substantial part, was a reiteration of what is reflected in the exhibits, the testimony of Mr. Mathies, and Respondent Fitzpatrick's pre-hearing submissions.⁴⁰ In addition, Respondent Fitzpatrick testified that after receiving the April 9, 1996 letter requesting sales confirmations, he called Mr. Mathies' office three times, but that Mr. Mathies never returned his phone calls.⁴¹ He also testified that after May 1, 1996 when outside counsel was retained, he was instructed by Mr. Fasano, the President of SFI, to deliver everything to outside counsel, which he did.⁴²

In concluding his direct testimony, Respondent Fitzpatrick testified that after receiving the May 1 letter, he did not have time to address document production, that the requests for sales

³⁷ Tr. at 51-52, 56-57.

³⁸ Id. at 66, 68. In response to a question from the Hearing Panel, Mr. Mathies testified that he typically tenders requests for financial documents and other materials to an organization's compliance officer if the organization has a compliance officer. Tr. at 86-87.

³⁹ Id. at 73.

⁴⁰ Id. at 77-82.

⁴¹ Id. at 80. Mr. Mathies testified on direct that he did not recall ever receiving any telephone messages from Respondent Fitzpatrick that he did not return.

⁴² Id. at 81.

confirmations were not clear, and that the requests were not directed to the proper persons as far as financial records were concerned.⁴³

On cross-examination, Enforcement introduced a portion of an on-the-record interview of Mr. Fasano, during which Mr. Fasano testified that Respondent Fitzpatrick was responsible for responding to inquiries made by the NASD.⁴⁴ Respondent Fitzpatrick admitted that Mr. Fasano hired him to be compliance director at SFI and discussed with him the obligations of the position, including responding to certain inquiries from the NASD.⁴⁵ In response to further questioning, Respondent Fitzpatrick admitted that he never indicated to Mr. Mathies that he was not responsible for producing financial records; nor did he identify any other person at SFI to whom such requests should be directed.⁴⁶

Respondent Fitzpatrick was asked several questions by the Hearing Panel. He first was asked why it took so long to produce the requested documents.⁴⁷ He responded that he did not have access to the records and that SFI was having difficulty getting someone assigned to make the necessary copies for Enforcement.⁴⁸

Respondent Fitzpatrick also was asked whether, based on his experience, he should have known that if Enforcement's repeated requests for information in letters directed to him were ignored, that he would be the person held responsible.⁴⁹ Respondent Fitzpatrick gave the same

⁴³ Id. at 81-82.

⁴⁴ Complainant's Ex.-1.

⁴⁵ Tr. at 98-102.

⁴⁶ Id. at 105.

⁴⁷ Id. at 113.

⁴⁸ Id. at 114.

responses he provided earlier in his testimony.⁵⁰ As a follow-up question, Respondent Fitzpatrick was asked why, if he believed it was not his responsibility to produce payroll and commission records, he did not inform the NASD that he did not have those records and to whom such requests should be directed.⁵¹ Respondent Fitzpatrick replied that “[t]he fact is that I have – I never got that responsibility that, not that I was released of it.”⁵²

B. Findings

1. Commission runs and payroll records

The evidence presented at the Hearing demonstrates that Enforcement requested commission runs and payroll records with respect to Respondents Chu and Haynes in eight communications to Fitzpatrick and/or SFI's counsel beginning on February 14, 1996 to and including July 19, 1996.⁵³ The evidence also demonstrates that these documents were not sent to Enforcement until July 29, 1996.⁵⁴ Respondent Fitzpatrick does not dispute these facts. The only issue raised by Respondent Fitzpatrick for the Hearing Panel's determination is whether he should be held responsible for the untimely production of the documents.

The very defense offered by Respondent Fitzpatrick was rejected by the SEC in Rouse: "The duty to respond is in no way dependent on one's status or title within a firm but falls upon

⁴⁹ Id. at 115-117.

⁵⁰ Id. at 115-16. See also id. at 112. "Mr. Fasano told me that the financial people would still be responsible for the financial records of the firm. * * * I would handle the inquiries, which I did. I made sure they got to the proper people."

⁵¹ Id. at 116-17.

⁵² Id. at 117.

⁵³ JEs-2-4, 6, 8-11.

⁵⁴ Tr. at 48-50 and JE-12.

any associated person to whom a request is directed."⁵⁵ The decision in Rouse makes clear that Respondent Fitzpatrick's purported defenses that he was not the proper person to whom requests for financial documents should have been directed⁵⁶ and/or that after outside counsel was retained he was relieved of his responsibility to respond to Enforcement's requests are unavailing.⁵⁷ Respondent Fitzpatrick was SFI's Director Compliance and, by his own admission, responsible for responding to requests for information.⁵⁸ Moreover, the requests for information were addressed specifically to him and, even after outside counsel was retained, Respondent Fitzpatrick was aware that the documents had not been provided.⁵⁹

As noted in Rouse, at a minimum, Respondent Fitzpatrick "had a duty to respond himself or supervise others diligently with adequate follow-up to ensure a prompt response to the NASD."⁶⁰ Not only did Respondent Fitzpatrick fail to respond to Enforcement's repeated requests for information, but the evidence demonstrates that he failed to supervise others

⁵⁵ In the Matter of the Application of Rouse ("Rouse"), 54 SEC Docket No. 1263, Exchange Act Release No. 32,658, 1993 SEC LEXIS 1831, at *10 (July 19, 1993). The SEC further stated: "There can be no question that Rouse was the proper person to respond. Not only had he accepted the position as the firm's director of compliance * * *, but the requests at issue were addressed specifically to him. At the very least, Rouse had a duty to respond himself or to supervise others diligently with adequate follow-up to ensure a prompt response to the NASD."

⁵⁶ Respondent Fitzpatrick continually asserts that he was not responsible for the financial records of the firm. Tr. at 98, 102, 112, 117-18. See also Post-Hearing Legal Brief at 1, 2-3. His position misses the point. While he may not have been responsible for maintaining the financial records of the firm, the Hearing Panel found that he was responsible for producing such records or for ensuring that others did.

⁵⁷ Respondent Fitzpatrick attempts to distinguish the decision in Rouse by arguing that, unlike the respondent in that case, he did contact Enforcement to explain why the deadlines could not be met. Legal Brief at 1. The record, however, does not support this contention. There is no evidence that Respondent Fitzpatrick ever provided such information. Moreover, in response to a direct question from the Hearing Panel on why it took so long to produce the requested materials, all Respondent Fitzpatrick could say was that the firm was having trouble getting someone assigned to copy the documents. Tr. at 113-14.

⁵⁸ Tr. at 101-02.

⁵⁹ Tr. at 106-07.

⁶⁰ Rouse, 1993 SEC LEXIS, at *10.

diligently, including outside counsel, to ensure that the NASD received the documents it was seeking in a timely manner.

Respondent Fitzpatrick also argues that the hiring of outside counsel and his delivery of documents to counsel somehow relieved him of responsibility to respond to the requests for information and for failing to produce the requested materials.⁶¹ This clearly is not the case. Attempts by respondents to shift to counsel the responsibility for responding to Rule 8210 requests routinely have been rejected.⁶² As the Association recently noted in rejecting a defense that failure to respond was the fault of respondent's attorney -- "[w]e reject this argument because the Commission has held that the duty to respond to requests for information cannot be shifted to others."⁶³ The Association has made clear that "[t]he duty to respond to requests for information is an individual one and cannot be shifted to others."⁶⁴

With respect to the payroll records, Respondent Fitzpatrick's reliance on the statements in his April 18, 1996 letter also is unavailing as a defense.⁶⁵ Respondent Fitzpatrick provided no

⁶¹ Tr. at 103-106.

⁶² See, e.g., In the Matter of the Application of Borth ("Borth"), 53 SEC Docket 37, Exchange Act Release No. 31,602, 1992 SEC LEXIS 3248, at *6-7 (Dec. 16, 1992)[rejecting defense that respondent "prepared the information timely while others, namely the Firm's attorneys, were responsible for untimely delivery to the NASD"]. Respondent Fitzpatrick argues that Borth is not applicable to the present case because the respondents were not asked for financial records. Legal Brief at 2. The issue of the type of documents requested is not dispositive of whether the person to whom the requests are addressed bears responsibility to respond in a timely manner or to ensure that others do. Respondent Fitzpatrick also argues that respondents in Borth admitted they had not responded or had not responded fully prior to the hearing. (emphasis added by Respondent Fitzpatrick). The fact that Enforcement received such information in advance of the Hearing does not excuse Respondent Fitzpatrick's failure to respond to Enforcement's requests in a timely manner. See Borth at *7.

⁶³ District Business Conduct Committee for District 10 v. Veisman ("Veisman"), Complaint No. C10960060, 1997 NASD Discip. LEXIS 36, at *11 (NBCC May 20, 1997), citing Borth.

⁶⁴ District Business Conduct Committee for District No. 1 v. Gowadia, Complaint No. C01950010, 1997 NASD Discip. LEXIS 68, at *16-17 (NBCC, November 5, 1997), citing Borth.

⁶⁵ Therein, Respondent Fitzpatrick states that the payroll records are "voluminous" and "not readily separable from all of our other employees" and that "[y]ou can come to our office and inspect those records if you wish." JE-7. See also Tr. at 81, 118.

information to Enforcement, and offered no evidence at the Hearing, even in response to a direct question from the Panel,⁶⁶ as to why it was so difficult to produce the payroll records. Further to the extent the payroll records were "voluminous," the Hearing Panel finds that the burden properly should fall on Respondent and his firm since Enforcement would be less able than firm employees to review and compile the necessary documents.⁶⁷

The finding of the Hearing Panel in this respect is supported by the decision in Wedbush⁶⁸ which holds that a firm is not entitled to shift the burden of reviewing the firm's files onto NASD staff. In Wedbush, the SEC specifically noted that the task of compiling the requested information "required application of the firm's knowledge of past events and the location of pertinent documents."⁶⁹

Respondent Fitzpatrick attempts to distinguish the decision in Wedbush on several grounds, all of them unavailing.⁷⁰ He particularly notes the language of Article IV Section 5 of the NASD's Rules of Fair Practice cited by the SEC which requires member firms to supply information requested by the NASD "for purpose of any investigation or determination as to the

⁶⁶ Tr. at 114.

⁶⁷ Mr. Mathies testified, and it was undisputed by Respondent Fitzpatrick, that an on-site inspection of original records would not have been productive since he (Mathies) needed copies of the requested documents and because Respondent Fitzpatrick and SFI had not been cooperative in the past. Tr. at 43.

⁶⁸ In the Matter of the Application of Wedbush Securities, Inc. ("Wedbush"), 40 SEC Docket 710, Exchange Act Release No. 34-25504, 1988 SEC LEXIS 568, at *18-22 (March 24, 1988).

⁶⁹ Id. at *22, n.16.

⁷⁰ Legal Brief at 3-4. Respondent Fitzpatrick argues that the firm in Wedbush never attempted to turn over the task of compiling the requested information to Enforcement as Respondent Fitzpatrick did here. This distinction is irrelevant. Enforcement need not accept the burden or responsibility of locating, reviewing, and compiling relevant documents to assist a firm in complying with a Rule 8210 request for information.

filing of a complaint."⁷¹ The SEC found that "[a]s a member of the Association, [respondent] should have realized the overriding importance of assisting the NASD's investigation of serious regulatory problems at the firm."⁷² By comparison, Respondent Fitzpatrick argues that he "inquired to see if any complaints or serious regulatory problems existed and was rebuffed by the NASD."⁷³

Respondent Fitzpatrick cannot escape liability so easily. When he was hired as SFI's Director of Compliance Respondent Fitzpatrick knew there were regulatory problems at the firm. At that point, the examination of SFI had been ongoing for several months.⁷⁴ Indeed, Respondent Fitzpatrick testified that he "came into this firm trying to help them, because I had an exam going on since June."⁷⁵ Moreover, any suggestion by Respondent Fitzpatrick that Rule 8210 requests are proper only if a complaint has been filed is clearly erroneous and totally contrary to long-standing practice and the purpose of Rule 8210.⁷⁶ Indeed, the proper construction of the very language of the former version of Rule 8210 quoted by Respondent Fitzpatrick contradicts his position.

⁷¹ Legal Brief at 3 (emphasis by Respondent Fitzpatrick). Respondent Fitzpatrick also argues that the action in Wedbush was brought against the member, not the compliance officer. Id. at 2. This distinction is without merit. Decisive precedent firmly establishes that disciplinary actions for violations of NASD Procedural Rule 8210 are not limited to member firms only. Further, as a long-standing member of the industry and a registered representative with several registrations, Respondent Fitzpatrick should know that he would be held responsible for failing to respond in a timely manner. As the SEC noted in Borth, "[i]n order for the NASD to carry out its regulatory functions, it must have the full and prompt cooperation **of persons associated with members** when requests for information are made." 1992 SEC LEXIS 3248, at *7 (emphasis added).

⁷² Wedbush at *21.

⁷³ Legal Brief at 4.

⁷⁴ Tr. at 25-27; see also CX-2.

⁷⁵ Tr. at 77.

⁷⁶ See, e.g., Rouse, 1993 SEC LEXIS 1831, at *7.

Based on the foregoing, the Hearing Panel finds that there is no dispute as to when the Rule 8210 requests for information were sent and received by Respondent Fitzpatrick or that the requested commission runs and payroll records were not produced until months after the original request, and only after repeated requests for such information. The Hearing Panel also finds that, as the person to whom such requests were directed and as SFI's Director of Compliance, Respondent Fitzpatrick was responsible for producing the requested documents on a timely basis or ensuring that others did. Because he failed to do so, the Hearing Panel finds that Respondent Fitzpatrick violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110.

2. Sales Confirmations

As noted in this decision, there was confusion as to whether Enforcement's February 14, 1996 letter (JE-2) requested sales confirmations. This especially is true in light of the conversation between Respondent Fitzpatrick and Mr. Mathies after receipt of that letter when Mr. Mathies told Respondent Fitzpatrick he wanted sales memoranda, not sales confirmations.⁷⁷ Because of this confusion, Enforcement agreed that the April 9, 1996 letter (JE-6) properly would be considered the first request for this information.⁷⁸

Mr. Mathies testified that he discussed the issue of sales confirmations with Respondent Fitzpatrick in the telephone call on March 12, 1996 and, thereafter, Mr. Mathies corrected his terminology to request confirmations in his April 9, 1996 letter.⁷⁹ Respondent Fitzpatrick disagrees and testified that sales confirmations never were discussed during the March telephone

⁷⁷ Tr. at 52, 55, 77-78.

⁷⁸ Id. at 17, 57.

⁷⁹ Id. at 38, 57-58.

call.⁸⁰ Respondent Fitzpatrick further testified that with receipt of the April 9 letter he recognized that Mr. Mathies now was requesting sales confirmations.⁸¹ Even though that letter specifically asked for sales confirmations, Respondent Fitzpatrick testified that he did not think Mr. Mathies wanted those documents because of the prior conversation.⁸² Although the request for sales confirmations was repeated in subsequent letters (JEs-8-10), these documents were not produced until August 1996.⁸³

The Hearing Panel finds that Respondent Fitzpatrick did not violate NASD Procedural Rule 8210 and NASD Conduct Rule 2110 by failing to produce the requested sales confirmations until several months after the April 9 request. Its decision is predicated on several grounds: the initial confusion as to whether Enforcement was seeking sales memoranda or sales confirmations; the conflicting testimony of Mr. Mathies and Respondent Fitzpatrick as to whether sales confirmations were discussed during the March 12, 1996 telephone conference; Respondent Fitzpatrick's testimony, that even after receiving the April 9 letter, he still did not think Enforcement wanted sales confirmations because of his prior conversation with Mr. Mathies; and the fact that the time period between the April 9 request and production was not that lengthy, especially in view of the other factors.

IV. Sanctions

The NASD 1998 Sanction Guidelines ("Sanction Guidelines") recommend a fine of \$2,500 to \$25,000 for failure to respond in a timely manner to requests made pursuant to NASD Procedural Rule 8210 and NASD Conduct Rule 2110, and that the Hearing Panel consider

⁸⁰ *Id.* at 78-80.

⁸¹ *Id.* at 121.

⁸² *Id.* at 96-97.

suspending the responsible individual in any or all capacities with respect to any or all activities or functions for a period of up to 30 business days.⁸⁴ The Sanction Guidelines recommend that the Hearing Panel consider the nature of the information requested, the number of requests made, the time respondent took to respond, and the degree of regulatory pressure required to obtain a response. The Sanction Guidelines also recommend that the Hearing Panel consider the principal considerations listed on pages 8-9.⁸⁵

The evidence demonstrates that the information requested was extremely important to the ongoing NASD investigation of SFI. As Mr. Mathies testified, and it was undisputed by Respondent Fitzpatrick, the requested documents related directly to the capacity in which Respondents Chu and Haynes were conducting a securities business, or acting in the capacity of registered representatives, without being registered. Further, the undisputed evidence demonstrates that it took multiple requests, over a period of months, to obtain the information and that it was not until several months after the initial request for commission runs and payroll records that such information finally was made available by SFI's outside counsel.⁸⁶

As discussed below, the Hearing Panel also considered other relevant factors listed on pages 8-9 of the Sanction Guidelines, including the absence of evidence of any prior disciplinary history for Respondent Fitzpatrick.⁸⁷ There also is no evidence that Respondent Fitzpatrick engaged in a pattern of misconduct.

⁸³ Id. at 50.

⁸⁴ Sanction Guidelines at 31. The Sanction Guidelines recommend different levels of sanctions depending on whether the respondent failed to respond truthfully, failed to respond completely, or failed to respond in a timely manner. The recommended sanctions which are applicable here are for failure to respond in a timely manner

⁸⁵ Id.

⁸⁶ In the intervening time, Respondent Fitzpatrick did not produce any of the requested documents.

The Hearing Panel finds, however, that Respondent Fitzpatrick took no action to employ corrective measures in an effort to respond to NASD Enforcement's requests in a timely manner or to institute procedures to avoid a recurrence of such incidents. Similarly, although there is no evidence that Respondent Fitzpatrick purposefully attempted to delay the investigation of SFI and the sales practices of Respondents Chu and Haynes, he certainly did not assist Enforcement's investigative efforts.

The Hearing Panel also finds that, at a minimum, Respondent Fitzpatrick's conduct was negligent. Enforcement's requests for information, all which were addressed to him, repeatedly advised of the consequences of failing to respond in a timely manner.⁸⁸ As the Hearing Panel noted during its questioning of Respondent Fitzpatrick, as an attorney and a long-standing member of the securities industry with several registrations to his name, Respondent Fitzpatrick certainly should have understood the consequences of failing to respond and that Enforcement would look to him as the responsible person in the absence of any indication to the contrary.

The Hearing Panel recognizes that the purpose of imposing sanctions is remedial, not punitive, and "should be designed to deter future misconduct and to improve overall business standards in the securities industry."⁸⁹ To this end, the Sanction Guidelines seek to impose remedial actions to protect the public from harm and to discourage future misconduct or noncompliance with the Association's rules and regulations. Accordingly, in imposing sanctions, the Hearing Panel also considered Respondent Fitzpatrick's continuing refusal to accept any

⁸⁷ JE-1. Respondent Fitzpatrick's CRD reflects that he has been in the industry since 1977 and has not previously had any disciplinary actions brought against him.

⁸⁸ JEs-4, and 6. The "warning" language was in bold typeface. Enforcement's May 1, 1996 letter (JE-6) stated that, because of SFI's continuing failure to respond, the matter would be referred to the District 10 Business Conduct Committee with a recommendation that a formal disciplinary complaint be filed for failure to respond. The letter cited the possible sanctions that could be imposed and invited a response. No response was received.

responsibility for failing to provide the requested documents on a timely basis or to ensure that others did.

Throughout his pleadings and in his presentation at the Hearing, Respondent Fitzpatrick consistently argued that he was not responsible for financial records and that providing copies of Enforcement's letters to the firm's financial personnel and/or producing documents to SFI's outside counsel fulfilled his obligations. This clearly is not the case and the Hearing Panel is troubled that, faced with a similar situation in the future, Respondent Fitzpatrick may react the same way.

Further, in imposing sanctions, the Hearing Panel considered the importance of timely compliance with NASD Procedural Rule 8210. This Rule provides the means for the Association to carry out its regulatory functions in the absence of subpoena power and, as the SEC has recognized, is a "key element in the NASD's effort to police its members."⁹⁰ There is no question that "[f]ailure to provide information fully and promptly undermines the NASD's ability to carry out its regulatory mandate."⁹¹ As recognized by the Sanction Guidelines and decisional precedent, violations of Procedural Rule 8210 also constitute violations of Conduct Rule 2110 which requires that "[a] member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade."⁹²

In imposing sanctions, however, the Hearing Panel's determination is tempered by the apparent personal friction which existed between Enforcement and Respondent Fitzpatrick. Given

⁸⁹ Sanction Guidelines at 3, General Principle 1.

⁹⁰ Rouse, 1993 SEC LEXIS 1831, at *7.

⁹¹ Borth, 1992 SEC LEXIS 3248, at *7.

the demeanor of the witnesses at the hearing and their testimony, it was evident to the Hearing Panel that the staff examiner and Respondent Fitzpatrick had difficulty working together almost from the inception of Respondent Fitzpatrick's employment at SFI.⁹³ In fact, Mr. Mathies admitted that there was a "contentious" relationship with Respondent Fitzpatrick and that, because of Respondent Fitzpatrick's "manner and behavior," this was the "most difficult experience I've had as an examiner."⁹⁴ Similarly, Respondent Fitzpatrick testified as to his frustration in working with Enforcement.⁹⁵ The Hearing Panel firmly is of the view that had there been a more cordial and productive working relationship between Enforcement and Respondent Fitzpatrick, a formal disciplinary proceeding with respect to the issues raised in Revised Cause Six would not have been necessary.⁹⁶

The Hearing Panel finds no other aggravating or mitigating factors. Accordingly, having considered all the evidence submitted by the Parties,⁹⁷ the Hearing Panel determines that a fine of \$2,500 and a suspension in all capacities, with respect to all activities and functions, for a period of three weeks (15 business days) are appropriate sanctions for the violations of NASD Procedural Rule 8210 and NASD Conduct Rule 2110 alleged against Respondent Fitzpatrick in

⁹² See also Veisman, 1997 NASD Discip. LEXIS 36, at *12 [affirming a finding that "Veisman's failure to cooperate with the Association did not comport with high standards of commercial honor and just and equitable principles of trade and, therefore, violated Conduct Rule 2110"].

⁹³ See, e.g., Tr. at 88-89.

⁹⁴ Tr. at 91.

⁹⁵ Id. at 77, 81, 97, 108-09, 116.

⁹⁶ For example, in response to questioning from the Hearing Panel, Mr. Mathies testified that, because relations with Respondent Fitzpatrick were contentious, he did not make follow-up phone calls in an effort to obtain the information as he may do in other cases. Id. at 88. Similarly, because of the obvious person friction between Enforcement and Respondent Fitzpatrick, Mr. Mathies was unwilling to review payroll records at SFI's offices. Tr. at 43, 73.

⁹⁷ 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.

Revised Cause Six of the Complaint. The costs of the Hearing (\$709.15) also are assessed against Respondent Fitzpatrick.

These sanctions shall become effective on a date set by the Association, but not before the expiration of 45 days after the date of this decision.

Hearing Panel

By _____
Ellen A. Efros
Hearing Officer

Copies to: Robert Fitzpatrick

VIA CERTIFIED AND FIRST-CLASS MAIL

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