

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

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DEPARTMENT OF ENFORCEMENT,	:	
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Complainant,	:	Disciplinary Proceeding
	:	No. C06980001
	:	
v.	:	
	:	
	:	<b>Hearing Panel Decision</b>
BLAKE VINCENT HIGH,	:	
(CRD #1332972)	:	
Plano, TX,	:	Hearing Officer - JMF
	:	
	:	
	:	Date: October 7, 1998
Respondent.	:	
	:	

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**ORDER AND DECISION GRANTING DEPARTMENT OF ENFORCEMENT'S  
MOTION FOR SUMMARY DISPOSITION**

On January 5, 1998 the Department of Enforcement ("Enforcement" or "Department") filed a Complaint in this disciplinary proceeding, alleging that Respondent Blake Vincent High ("High" or "Respondent") violated NASD Conduct Rule 2110 and NASD Procedural Rule 8210 by failing to provide testimony and information requested by NASD Regulation staff. High, through counsel, filed an Answer on January 30, 1998, denying that High violated Rules 2110 and 8210 as alleged in the Complaint.

The Department filed a Motion for Summary Disposition that is now pending before the Hearing Panel.<sup>1</sup> Respondent did not file any papers in opposition to

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<sup>1</sup> The Department's Motion for Summary Disposition was accompanied by a Statement of Undisputed Facts, a Memorandum of Points and Authorities, and a Declaration of Reed Durant, an NASD examiner in the Dallas District Office. Mr. Durant's Declaration ("Durant Decl.") was accompanied by two exhibits, Respondent's CRD extract ("Exhibit A") and the December 4, 1997 letter to Respondent requesting information and testimony pursuant to Rule 8210 ("Exhibit B").

Enforcement's Motion for Summary Disposition.

The Hearing Officer held a Pre-Hearing Conference on February 20, 1998 to clarify Respondent's Answer.<sup>2</sup> At that Pre-Hearing Conference, Respondent's counsel indicated that Respondent requested a Hearing and that High had asserted "his Fifth Amendment right not to testify to certain matters." (Tr. at 5).

For the reasons set forth below, the Hearing Panel grants the Department's motion.

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

#### **I. Background**

Respondent was a registered representative associated with Rauscher Pierce Refsnes, Inc. ("Rauscher") from June, 1994 until February 26, 1996, when Respondent resigned.<sup>3</sup> Rauscher promptly filed a Form U-5 with the NASD, indicating that Rauscher had received allegations that Respondent gave gifts and gratuities in excess of the permissible levels.<sup>4</sup> Respondent admitted that Rauscher "listed allegations of giving gifts and gratuities in excess of levels permitted" on the U-5, but stated that he was unaware whether any such allegations ever were made by anybody.<sup>5</sup> NASD Regulation staff

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<sup>2</sup> Citations to the transcript of the February 20, 1998 Pre-Hearing Conference will hereafter be cited as "Tr."

<sup>3</sup> See Durant Decl., Exhibit A.

<sup>4</sup> Complaint ¶ 2. See also Durant Decl. ¶ 4, and Exhibit A thereto.

<sup>5</sup> Answer at ¶ 2.

thereafter began an investigation into the allegations that Respondent gave gifts and gratuities in excess of permissible levels.<sup>6</sup>

NASD Regulation staff sent a letter to Respondent requesting information, pursuant to Rule 8210, on December 4, 1997.<sup>7</sup> The NASD Regulation staff's December 4, 1997 letter, sent to High's address of record as reflected in the Central Registration Depository ("CRD")<sup>8</sup>, specifically requested that Respondent provide: (1) a written, detailed chronology identifying all dates that High met with a certain individual; (2) detailed written responses to questions concerning whether High had given items of value to a certain individual and whether High had made use of other names or aliases; and (3) that High provide testimony to NASD Regulation staff on December 22, 1997.<sup>9</sup>

Respondent failed to provide testimony or the written information requested by the staff pursuant to Procedural Rule 8210.

## II. Legal Discussion

### A. Jurisdiction

Although not currently registered with the Association, Respondent is subject to the NASD's jurisdiction in this proceeding. Article V, Section 4(a) of the NASD's By-Laws provides that the NASD retains jurisdiction over formerly registered persons who are no longer associated with any member firm for two years after the effective date of termination of registration. Moreover, Article V, Section 4 specifically permits the

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<sup>6</sup> Durant Decl., ¶2.

<sup>7</sup> Durant Decl., Exhibit B.

<sup>8</sup> \_\_\_\_\_, Plano, Texas \_\_. Durant Decl., Exhibit A. See also \_\_\_\_ Durant Decl., Exhibit B.

<sup>9</sup> Durant Decl. at ¶ 4 and Exhibit B attached thereto. Chris Carrie, Esq., Respondent's counsel, was copied on the December 4, 1997 Rule 8210 request to Respondent. See Exhibit B to the Durant Decl. at 2.

NASD to file a complaint against a formerly associated person during this period of retained jurisdiction, based upon that person's failure to provide information, pursuant to NASD procedural Rule 8210, while subject to the NASD's jurisdiction.<sup>10</sup> Because this Complaint was filed within two years of the date Respondent's registration was terminated,<sup>11</sup> NASD Regulation has jurisdiction to bring this disciplinary proceeding.

B. Summary Disposition

Rule 9264(d) of the NASD Code of Procedure permits a Hearing Panel to grant summary disposition when "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." In this case there is no issue of material fact. It is not contested that Respondent failed to testify or provide the information requested by NASD;<sup>12</sup> Respondent admits that he did not fully answer questions posed to him by the Department.<sup>13</sup>

With no issue of material fact present, the only issue to be determined in this action is whether the Respondent raised a reasonable defense, as a matter of law, for his refusal

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<sup>10</sup> See NASD Notice to Members 92-19.

<sup>11</sup> Enforcement filed this Complaint on January 5, 1998.

<sup>12</sup> See Durant Decl. ¶5. Respondent did not deny in his Answer that he failed to provide the staff with the information requested in the December 4, 1997 Rule 8210 letter. At the Pre-Hearing Conference, counsel for Enforcement indicated that Respondent's Answer was unclear as to the allegation that Respondent failed to provide the staff with documents, noting that the Respondent seemingly admitted the allegation in paragraph 4 of the Complaint; however, the Answer references section one of the Complaint rather than four. Tr. at 14; Answer at ¶ 4. The Hearing Officer granted Respondent's counsel leave to file an amended Answer by March 6, 1998. Tr. at 30; Initial Pre-hearing Conference Order, dated March 2, 1998 at ¶3. No amended Answer has been filed. Rule 9215(b) permits any allegation not denied in whole or in part to be deemed admitted. As such, the allegation that Respondent failed to provide written information requested by the staff will be deemed admitted. In any event, the Durant Declaration makes clear that Respondent never provided any of the requested information to the staff.

<sup>13</sup> Tr. at 5; Answer at ¶ 5.

to provide the requested information. The sole defense raised is whether a Respondent can exercise a fifth amendment privilege to avoid providing testimony or information to the NASD.

C. Failure to Provide Written Information and Testify

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.”<sup>14</sup> A failure to respond “undermines the NASD’s ability . . . to carry out its self-regulatory functions,”<sup>15</sup> and frustrates its ability “to conduct investigations and thereby protect the public interest.”<sup>16</sup>

The Respondent, through his attorney, claims to be asserting his fifth amendment privilege not to testify in this proceeding.<sup>17</sup> The Supreme Court has held that the Fifth and Fourteenth Amendments protect individuals only against violations of constitutional rights by the government, not by private actors.<sup>18</sup> As such, “the [Respondent] may not assert

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<sup>14</sup> In re Richard J. Rouse, 51 S.E.C. 581, 1993 SEC LEXIS 1831, at \*7 (1993).

<sup>15</sup> In re John J. Fiero, Exchange Act Release No. 39544, 1998 SEC LEXIS 49, at \*5 (Jan. 13, 1998).

<sup>16</sup> 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).

<sup>17</sup> Tr. at 5.

<sup>18</sup> Lugar v. Edmondson Oil Co., 457 U.S. 922, 936-37 (1982).

constitutional claims against the NASD, a private entity organized as a not-for-profit corporation under Delaware law.”<sup>19</sup>

In this case, there is no doubt that High refused to provide the requested information.<sup>20</sup> Respondent’s purported reason for refusing to comply does not excuse his conduct.<sup>21</sup> First, the invocation of the Fifth Amendment privilege against self-incrimination simply is not a legally cognizable defense to a violation of the Rule 8210.<sup>22</sup> Second, “[a]n associated person who has relied on advice of counsel in refusing to respond to an NASD request for information has no substantive defense to an allegation of failure to respond to requests for information.”<sup>23</sup> Reliance on advice of counsel is not a substantive defense to a violation that does not require proof of scienter, such as the Rule 8210 violation here,<sup>24</sup> although it may be relevant in assessing sanctions.<sup>25</sup>

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<sup>19</sup> District Business Conduct Committee For District No. 10, Complainant, v. Stratton Oakmont, Inc., 1996 NASD Discip. LEXIS 52, \*24 (NBCC 1996).

<sup>20</sup> See Answer at ¶ 4-5; Durant Decl. at ¶5; Tr. at 5-6, 8-9, and 12.

<sup>21</sup> See Tr. at 8-9.

<sup>22</sup> E.g., In re Vladislav S. Zubkis, Exchange Act Release No. 40409, n. 2 (September 8, 1998) (“It is well established, however, 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.”). See also In re Edward C. Farni II, 51 S.E.C. 1118, 1994 SEC LEXIS 1630, at \*3-4 (1994) (“a refusal to provide information is a violation [of Rule 8210], without regard to invocation of the right of self-incrimination”); In re Daniel C. Adams, 47 S.E.C. 919, 921 (1983); In re Richard Neuberger, 47 S.E.C. 698, 699 (1982); In re Vincent Musso, 47 S.E.C. 606, 609 (1981); In re Lawrence H. Abercrombie, 47 S.E.C. 176, 177 (1979).

<sup>23</sup> In the Matter of District Business Conduct Committee For District No. 5 v. Sundra Escott-Russell, Complaint No. C05960074 (National Adjudicatory Council, September 18, 1998) at 7, citing In re Michael Markowski, 51 S.E.C. 553, 557 (1993), aff’d, 34 F.3d 99 (2<sup>nd</sup> Cir. 1994).

<sup>24</sup> See also, e.g., In re Louis Feldman, Exchange Act Release No. 34933, 57 S.E.C. Docket 2512, 1994 SEC LEXIS 3428, at \*5-6 (Nov. 3, 1994); DBCC No. 1 v. John Thomas Higley, Complaint No. C01950034, 1997 NASD Discip. LEXIS 5, at \*9-11 (NBCC March 5, 1997).

<sup>25</sup> See, e.g., DBCC No. 1 v. John Thomas Higley, 1997 NASD Discip. LEXIS 5, at \*9-11.

Failure to provide testimony to NASD, absent a legally recognizable reason for such a failure, is a violation of Conduct Rule 2110 and Procedural Rule 8210. As the law clearly shows, Respondent is not entitled to a fifth amendment privilege in an NASD proceeding; therefore High could not properly decline to provide requested information to the NASD on fifth amendment grounds.

Because Respondent has failed to distinguish his case from these prior precedents, the panel has an obligation to follow prior precedent and find that Respondent has no fifth amendment privilege in an NASD proceeding. Because the claim of a fifth amendment privilege was the sole defense raised by Respondent for not providing the information requested by NASD, and this defense has no legal grounds, the Respondent has not provided an adequate defense for his failure to provide requested information to the NASD.

D. 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.<sup>26</sup> Enforcement has requested that High be censured, barred and fined \$20,000.

NASD Procedural Rule 8210(a)(1) authorizes the NASD to require persons associated with a member of the NASD to report "orally or in writing with regard to any matter" under investigation. The purpose of this rule is to provide a means for the NASD to carry out its regulatory functions in the absence of subpoena power; it is a "key element

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<sup>26</sup> NASD Sanction Guideline at 31 (1998 ed.).

in the NASD's effort to police its members."<sup>27</sup> Failure to respond subverts the NASD's ability to carry out its regulatory responsibilities.<sup>28</sup> For this reason, failure to provide information upon request is a serious violation of Association Rules.<sup>29</sup>

High was required to be familiar with the NASD's rules and regulations, and it is well-settled that invocation of the privilege against self-incrimination does not excuse compliance with a Rule 8210 request. The Hearing Panel sees no reason to impose a sanction below those recommended by the Guidelines. More specifically, whether Respondent is the subject or target of a criminal investigation and may or may not become involved in a future criminal proceeding is not a mitigating factor in determining sanctions.

The Hearing Panel, having considered all of the arguments, hereby censures Respondent Blake Vincent High, fines him \$25,000, and bars him from association with any NASD member in any capacity. These sanctions shall become effective on a date to be fixed by the Association, but not earlier than 45 days from the date that this decision becomes the final disciplinary action of NASD.

## **CONCLUSION**

The Hearing Panel determined that there are no disputes of material fact in this proceeding, and that Enforcement is entitled to judgment as a matter of law. Therefore, the Hearing Panel grants Enforcement's Motion for Summary Disposition, and censures

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<sup>27</sup> Richard J. Rouse, Exchange Act Release No. 32,658, 51 S.E.C. 581 (1993), 1993 SEC LEXIS 1831, at \*7 (citing former Article IV, Section 5).

<sup>28</sup> John L. Malach, Exchange Act Release No. 32, 743, 51 S.E.C. 618 (1993), 1993 SEC LEXIS 2026, at \*7 (citing former Article IV, Section 5).

<sup>29</sup> 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").

Respondent High, fines him \$25,000, and bars him from associating with any 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 of this decision.

**SO ORDERED**

Hearing Panel

by: \_\_\_\_\_  
Joseph M. Furey  
Deputy Chief Hearing Officer

Copies to: Blake Vincent High (via first class and certified mail)  
Christopher J. Bebel, Esq. (via first class mail and facsimile)  
Chris Carrie, Esq. (via first class mail and facsimile)  
Rory C. Flynn, Esq. (via first class mail)