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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondents.

Disciplinary Proceeding
No. CAF000013

Hearing Officer—AHP

**ORDER DENYING RESPONDENTS' MOTION FOR SUMMARY DISPOSITION AND
MOTION TO DISMISS THE FOURTH CAUSE OF ACTION AND SUPPLEMENTING
ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DISPOSITION ON
CAUSE FOUR OF THE COMPLAINT AGAINST RESPONDENTS**

Introduction

In this disciplinary proceeding, the Department of Enforcement ("Enforcement") alleges in the Fourth Cause of the Complaint that Respondents _____ ("_____") and _____ ("_____") violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110 by refusing to appear for their on-the-record interviews as scheduled by NASD Regulation, Inc. (NASDR) staff. On August 21, 2000, the Respondents moved for an order granting them summary "judgment" and

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dismissing the Fourth Cause of the Complaint.¹ On September 12, 2000, Enforcement filed its opposition to the motion and cross-moved for summary disposition on the Fourth Cause of the Complaint.²

For the reasons set forth below, the Extended Hearing Panel has determined to deny the Respondents motion and to grant the Complainant's Motion for Summary Disposition.³

Legal Standard for Summary Disposition

Code of Procedure Rule 9264(d) provides that the Hearing Panel "may grant [a] 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."⁴ Under the analogous federal court summary judgment procedure, it is clear that the moving party (in this case, Enforcement) bears the initial burden of showing "the absence of a genuine issue of material fact."⁵ If the moving party meets its initial burden, the opposing party must come forward with specific facts "showing that there is a genuine issue for trial."⁶ At the same time, however, at the summary judgment stage, it is incumbent on the court

¹ Although styled a motion for summary judgment, the Extended Hearing Panel has deemed it a motion for summary disposition under Rule 9264. In support of the motion, the Respondents submitted a Memorandum of Law and 7 exhibits (Resp't. Exs 1-7). The Respondents failed to file a Statement of Undisputed Facts, as required by Rule 9264.

² This Order does not address Enforcement's motion, which must be decided by the full Extended Hearing Panel.

³ On March 22, 2001, the Extended Hearing Panel issued an Order Granting Complainant's Motion for Summary Disposition on Cause Four of the Complaint Against Respondents _____ and _____. The Respondents thereafter filed a notice of appeal in which they indicated that it was not clear from the Order whether it was meant to be a final disposition as to Cause Four of the Complaint. This Order is issued, in part, to clarify the Panel's ruling and to dispose of the remaining motions pertaining to Cause Four.

⁴ See also Department of Enforcement v. Usher, Complaint No. C3A980069, 2000 NASD Discip. LEXIS 5, at n.3 (NAC April 18, 2000) (reiterating summary disposition standard).

⁵ Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

⁶ Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986).

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to resolve all ambiguities and draw all reasonable inferences in favor of the nonmoving party.⁷ A motion for summary judgment will not be granted if the trier of fact could resolve an outcome-determinative issue in favor of the non-moving party.⁸

Discussion

A. Undisputed Facts

The facts relevant to the Respondents' motion are undisputed. By letter, dated December 14, 1998, NASD Regulation requested, pursuant to Rule 8210, that the Respondents appear on January 7 and 8, 1999, for on-the-record interviews concerning "certain trading activity of _____."

(Resp't Ex. 1.) At the request of the Respondents' counsel, NASD Regulation agreed to adjourn their testimony until January 21, 1999, and February 1, 1999. (Id.) However, on January 20, 1999, _____'s counsel informed NASD Regulation that, due to pending, related criminal investigations, he desired a further adjournment of the on-the-record interview or an agreement to limit the scope of the questioning or the use of any information _____ provided NASD Regulation. (Resp't Ex. 2.) Similarly, Respondent _____' former counsel informed NASD Regulation on January 22, 1999, that he also had become aware of the related criminal investigation. (Resp't Ex. 7.) In light of this information, _____ requested an indefinite adjournment of his on-the-record interview. (Id.) Although NASD Regulation did not agree to a further adjournment, neither of the Respondents appeared for their testimony.

⁷ Patrick v. LeFevre, 745 F.2d 153, 160 (2d Cir. 1984). See also, e.g. American Cas. Co. v. Nordic Leasing, Inc., 42 F.3d 725, 728 (2d Cir. 1994) (in determining whether summary judgment is appropriate, the court "must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor") (quoting Consarc Corp. v. Marine Midland Bank, N.A., 996 F.2d 568, 572 (2d Cir. 1993)).

⁸ Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

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Enforcement ultimately charged both Respondents with violations of Conduct Rule 2110 and Procedural Rule 8210.

The Respondents' registrations with the National Association of Securities Dealers, Inc. ("NASD") terminated on August 5, 1998, before NASD Regulation requested their testimony pursuant to Procedural Rule 8210. (Compl. ¶¶ 3, 4.) They have not been registered with the NASD since that time. (Id.)

In their Memorandum of Law in Support of their Motion for Summary Judgment Dismissing the Fourth Cause of Action ("Resp'ts Mem."), the Respondents contend that Enforcement does not have authority under Procedural Rule 8210 to discipline the Respondents for failure to provide information when the refusal occurred after the effective date of the termination of their registration with the NASD. In essence, the Respondents argue that Article V, § 4 of the NASD By-Laws, entitled "Retention of Jurisdiction," only authorizes Enforcement to file a complaint for "conduct which commenced prior to the [Respondents'] termination." (Resp'ts Mem. at 8.) According to the Respondents, their failure to provide testimony occurred, if at all, on January 21 and February 1, 1999, after the effective date of their terminations. (Id.)

B. Ruling

The Respondents' argument overlooks the plain language of Article V, § 4, which provides in relevant part that the NASD retains jurisdiction to file a complaint based "upon [a formerly registered] person's failure, while subject to the NASD's jurisdiction as provided [by this Article], to provide information requested by the NASD pursuant to the Rules of the Association." In 1992 the NASD

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issued Notice to Members 92-19 which announced, in accordance with long-standing policy and precedent,⁹ that “associated persons are required to provide information to the Association and may be subject to disciplinary action for failing to respond to a request for information even though the registration had been terminated, canceled, or revoked.”¹⁰ Otherwise, the NASD would be impeded in its investigation of misconduct whenever an associated person’s registration terminated. As Enforcement points out, under the Respondents’ interpretation of Article V, § 4, if an associated person resigned, he or she could refuse to cooperate with an NASD Regulation investigation without consequence. Such a construction would unduly limit NASD Regulation in carrying out its responsibilities as a self-regulatory organization.

The Respondents’ collateral argument also is equally unavailing. The Respondents argue that they have the right to condition their cooperation with NASD Regulation in order to preserve their Fifth Amendment right against self-incrimination. Underlying this argument is Respondents’ assumption that NASD Regulation sought information from them for use by the criminal authorities in the related criminal proceedings. But it is well established that a person subject to the NASD’s jurisdiction does not have the right to second guess the legitimacy of NASD Regulation’s requests for information,¹¹ or to pick and choose among the questions he or she will answer. To the contrary, it is well-established that persons

⁹ See, e.g., Market Reg. Comm. v. Vladislav Steven Zubkis, No. CMS950129, 1997 NASD Discip. LEXIS 47, at *12 (NBCC Aug. 12, 1997); District Bus. Conduct Comm. No. 10 v. Veisman, No. C10960060, 1997 NASD Discip. LEXIS 36, at *9 (May 20, 1997) (citing In re Reed A. Hatkoff, 51 S.E.C. 991 (1994) and NASD Notices to Members 92-19 (Apr. 1992), 90-61 (Oct. 1990), and 87-16 (Mar. 1987)); Department of Enforcement v. Ansula Pet Hwa Liu, No. C04970050, 1999 NASD Discip. LEXIS 32, at * 15-16 (Nov. 4, 1999).

¹⁰ NASD Notice to Members 92-19, 1992 NASD LEXIS 50, at *5-6 (April 1992).

¹¹ In re Michael David Borth, 51 S.E.C. 178, 180 (1992).

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subject to the NASD's jurisdiction have a duty to cooperate fully and promptly with NASD

Regulation's requests¹² and are not free to impose conditions on their response.¹³ It is equally well settled that NASD Regulation, in performing its statutory mandate, is not a state actor and its investigations and proceedings therefore do not trigger the privilege against self-incrimination or any other constitutional protections.¹⁴

The identical arguments were recently rejected by the United States District Court for the Southern District of New York in D.L. Cromwell Investments, Inc. v. NASD Regulation, Inc., No. 01 Civ. 0728, 2001 U.S. Dist. LEXIS 1912 (S.D.N.Y. Feb. 26, 2001). In D.L. Cromwell, the Plaintiffs, targets or subjects of a federal grand jury investigation, sought an injunction barring NASD Regulation from compelling them to testify in an investigation and commencing any proceeding to punish them for asserting their privileges against self-incrimination. The Plaintiffs' contended that the "Rule 8210 demands [had] been issued by [NASD Regulation] as an agent for the government in order to coerce them into surrendering their privileges against self-incrimination by threatening them with permanent banishment from the securities industry if they decline to testify in the NASD investigation." (Id. at *12.) The court found, however, that the Fifth Amendment prohibits only governmental action, and the NASD

¹² In re Brian L. Gibbons, 52 S.E.C. 791 (1996), petition for review denied, 112 F.3d 516 (9th Cir. 1997) (table).

¹³ In re Joseph Patrick Hannan, Exchange Act Release No. 40438, 1998 SEC LEXIS 1955, at *11 (Sept. 14, 1998).

¹⁴ 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), cert. denied, 523 U.S. 1072 (1998); Datek Securities Corp. 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., U.S. v. Shvarts, 90 F. Supp. 2d 219, 222 (E.D.N.Y. 2000) ("[i]t is beyond cavil that questions put to the defendants by the NASD in carrying out its own legitimate investigative purposes do not activate the privilege against self-incrimination"); Department of Enforcement v. Fernandez, Non-Summary Proceeding, slip op., at pp. 5-6 (June 23, 2000 NAC).

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and NASD Regulation are private entities. “Hence, even if the individual plaintiffs are being compelled to give evidence against themselves by the threat of NASD sanctions, [NASD Regulation’s] actions raise no Fifth Amendment issue unless it fairly can be said that its actions are fairly attributable to the government.” (*Id.* at *13.) In this case, however, _____ and _____ have presented no evidence to show that NASD Regulation was acting on behalf of the government.

Similarly, in Department of Enforcement v. Richard Stephen Levitov, No. CAF980025, 1999 NASD Discip. LEXIS 30 (Nov. 1, 1999) the National Adjudicatory Council (NAC) rejected the identical argument now made by the Respondents. In Levitov, the respondents, who were then under indictment in a related matter, argued that if they testified for NASD Regulation before their criminal cases were resolved, Enforcement would turn over the transcripts of their on-the-record interviews to the criminal authorities and that they would thereby be deprived of their Fifth Amendment rights. The Levitov respondents also questioned Enforcement’s motives, suggesting that the real purpose of the requests for information was to feed information to the criminal authorities.¹⁵ In rejecting these defenses, the NAC held that “respondents in failure-to-respond cases cannot raise the purpose of the information requests as part of a substantive defense.” (*Id.* at *13-14.) The fact that state and criminal authorities also had commenced similar investigations, or that Enforcement may share information with those authorities, does not relieve associated persons of their obligation to cooperate fully and testify when requested by NASD Regulation, nor is NASD Regulation obligated to postpone its investigation or its interviews because of pending criminal charges or investigations. (*Id.* at *15.) Thus, the Respondents’

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motion is denied and the Complainant's Motion for Summary Disposition is granted on the issue of liability. The Extended Hearing Panel will determine the appropriate sanctions for the Respondents' violations following the hearing in this case at which time it will issue its Decision in accordance with NASD Code of Procedure Rule 9268. At the hearing, Respondents _____ and _____ may present evidence in mitigation of sanctions consistent with the terms of this Order.

SO ORDERED.

Andrew H. Perkins
Hearing Officer

Dated: Washington, DC
April 17, 2001

¹⁵ The Extended Hearing Panel also notes that, as in Levitov, there is no evidence supporting Respondents' contention.