NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. MALVINDER SONNY MATHARU (CRD No. 2650655), Respondent.	Disciplinary Proceeding No. C02050006 Hearing Officer – DRP **PANEL DECISION** August 8, 2005

Respondent is barred from associating with any NASD member in any capacity for refusing to provide testimony, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110.

Appearances

For the Department of Enforcement: David A. Watson, Regional Counsel, San Francisco, CA (Rory C. Flynn, Of Counsel, Washington, DC).

For the Respondent: I. Reza Gharakhani, Esq., Rostow & Auster LLP, Los Angeles, CA.

DECISION

I. Procedural History

The Department of Enforcement filed a one-count Complaint on January 12, 2005, charging that during an on-the-record interview with NASD staff, Respondent Malvinder Sonny Matharu (Respondent or Matharu) refused to provide testimony, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. Respondent filed an Answer in which he contested the charges and requested a hearing.

On March 21, 2005, Enforcement filed a motion for summary disposition, pursuant to Rule 9264, supported by the declaration of an Enforcement staff member and six exhibits. On April 8, 2005, Respondent filed his opposition to the motion, supported by his declaration and

one exhibit. The Hearing Panel, which included the Hearing Officer, a current member of the District 2 Committee, and a former member of the District 2 Committee, considered the papers filed by the parties and determined that Enforcement was entitled to summary disposition as a matter of law. For the reasons stated below, the Hearing Panel granted Enforcement's motion as to liability and sanctions on May 20, 2005.[1]

II. Jurisdiction

Respondent Matharu was first employed in the securities industry in 1995, and was registered with Morgan Stanley Dean Witter Inc. (Morgan Stanley) from May 1, 1996 until October 5, 2001. After leaving Morgan Stanley, he was employed by another member firm before moving to U.S. Bancorp Investments, Inc. (U.S. Bancorp), where he was registered as a general securities representative from April 19, 2002 until March 26, 2003. Since March 2003, Respondent has not been associated or registered with another member firm. (Horwitz Decl. ¶3; CX-1; CX-3, pp. 7-8.)

Respondent is subject to NASD jurisdiction pursuant to Art. V, Section 4 of NASD's By-Laws, because the Complaint, which was filed within two years of the termination of Respondent's registration with U.S. Bancorp, alleges a failure to provide testimony during the two-year period following termination.

III. Facts

On December 17, 2002, NASD commenced an investigation involving Respondent and several accounts he handled at Morgan Stanley. As part of the investigation, the staff obtained

[1] Enforcement's exhibits are cited as CX; Respondent's sole exhibit is cited as RX.

documents from the Securities Exchange Commission, which included e-mails that Respondent had provided to the SEC.[2] (Horwitz Decl. ¶¶2, 4.)

By letter dated July 24, 2003, the staff requested that Respondent appear for an on-the-record interview, pursuant to NASD Procedural Rule 8210.[3] The interview was scheduled to take place at NASD's District Office in Los Angeles on August 11, 2003. Respondent retained counsel to represent him, and after discussions between counsel and the staff, the interview was rescheduled for September 25, 2003. (Horwitz Decl. ¶¶5-6; CX-2, CX-3; Matharu Decl. ¶5.)

On September 25, 2003, Respondent appeared with counsel at NASD's office in Los Angeles. Respondent was placed under oath, and the staff advised that his "attendance … was requested in accordance with Procedural Rule 8210, which requires [him] to answer the [s]taff's questions and answer them truthfully. Failure to do so could lead to the imposition of disciplinary proceedings." The staff questioned Respondent for approximately two hours, primarily focusing on the accounts of customers SB and CS.[4] Respondent answered all questions posed by the staff. At Respondent's request, the interview ended at 11:30 a.m., to be continued on a mutually agreeable date. (Horwitz Decl. ¶¶7-8; CX-3, pp. 6, 87, 93, 97; Matharu Decl. ¶¶7-8.)

---

[2] In 2001, the SEC served Respondent with a subpoena for documents and testimony related to its investigation of Respondent's customers SB and CS. Though Respondent provided documents, he informed the SEC that if called to testify, he would assert his Fifth Amendment privilege against self-incrimination. (Horwitz Decl. ¶4; Matharu Decl. ¶¶2-3.)

[3] In the letter, Respondent was advised that counsel could represent him at the interview. The letter also referenced an addendum, which included additional information regarding the interview. Of particular note, the addendum stated that "NASD staff does not release copies of exhibits to testimony but you may review these exhibits at NASD's offices." (CX-2.)

[4] SB and CS opened several accounts with Respondent at Morgan Stanley. According to Respondent, these accounts were hedge funds, one of which contained assets of more than 30 million dollars. (CX-3, pp. 36-37, 39.)

At the conclusion of Respondent's testimony, the staff and counsel discussed additional documents in Respondent's possession. The staff specifically requested that Respondent provide copies of 20 to 25 e-mails that Respondent testified he had sent to "higher echelon" individuals at Morgan Stanley. Counsel agreed to supply the e-mails, as well as some correspondence, to the staff. (Horwitz Decl. ¶9; CX-3, pp. 94-97; Matharu Decl. ¶9; RX-A.)

After the September 25 interview, the staff and counsel had several discussions about Respondent's request to review documents in NASD's possession and scheduled a meeting for that purpose on October 21, 2003. Prior to the meeting, the staff contacted counsel by telephone and e-mail to advise that while the staff would permit him to review documents that Respondent had previously provided to the SEC, counsel would not be allowed to review documents NASD had obtained from other sources. In response, counsel suggested they reschedule the meeting. (Horwitz Decl. ¶¶10-12; CX-4, CX-5; Matharu Decl. ¶¶10, 12.)

The meeting was never rescheduled. On November 20, 2003, Respondent again appeared with counsel at NASD's office in Los Angeles to resume his on-the-record interview. The staff reminded Respondent that he remained under oath and that his "testimony is required" pursuant to Rule 8210, then questioned him about his prior testimony for approximately one hour. (Horwitz Decl. ¶14; CX-6, pp. 104, 106, 115, 116, 127, 130, 135-136, 137, 145; Matharu Decl. ¶¶13, 14.)

The staff then handed Respondent a packet consisting of e-mails and other documents, which were numbered 1 through 70. After the packet was marked as Exhibit 1, counsel requested a copy of the exhibit for his files, which the staff denied. He asked whether a copy of Exhibit 1 would be attached to the transcript and objected when the staff said it would not. Counsel opined that it would be difficult to follow the staff's questions when reading the

transcript unless he had a copy of the pertinent document or had the entire document read into the record. He stated that it is "customary" to attach exhibits to deposition transcripts. (CX-6, pp. 148-151.)

The staff responded that this was an investigative interview, not a deposition, and that many of the documents had been obtained from other parties during the course of NASD's investigation. Accordingly, the staff would not release them or attach the exhibits to the transcript, but told counsel he could review the documents once his client concluded his testimony. Counsel questioned whether the staff would be true to its word in light of the meeting they had arranged for a similar purpose, which was ultimately cancelled. The staff noted "on the record" that once Respondent concluded his testimony, counsel would be permitted to review the transcript and the exhibits, and drew a distinction between allowing counsel to review documents before and after investigative testimony. (CX-6, pp. 151-153.)

Over counsel's objection, the staff posed a question regarding page one of Exhibit 1. After Respondent answered, the staff identified page one of the exhibit by date and author. Counsel again objected on the grounds that the exhibit would not be attached to the transcript. The staff asked a few more questions about the document, which Respondent answered. (CX-6, pp. 153-157.)

When the staff posed a question about page seven of Exhibit 1, counsel again asked whether the document would be attached to the transcript. After the staff reiterated that none of the documents would be attached to the transcript, counsel argued that without attaching exhibits to the transcript, reading them into the record, or providing him with copies, they could be lost or altered. He stated that unless the staff took such "precautions," he would "instruct [his] client not to answer" questions about the documents. Counsel, who was not satisfied with the staff's

explanation that the exhibits would be kept in NASD's investigative file, instructed Respondent not to answer questions posed by the staff. Respondent stated that "under advice of counsel," he would not answer questions about documents unless the staff provided copies to counsel, attached copies to the transcript, or took "precautions" to prevent the documents from being altered. (CX-6, pp. 157-162.)

The staff stated there was no reason to continue the interview unless Respondent answered questions about the documents. The staff explained to Respondent that under Rule 8210 he is required to answer questions, and that his failure to do so, even on the advice of counsel, could result in disciplinary action against him and a permanent bar from association with any NASD member firm. After counsel repeated the reasons why his client would not testify about the documents, the staff asked Respondent directly if he understood the consequences of refusing to answer the staff's questions. Matharu replied, "I understand that you guys are strong-arming me into answering questions without following proper procedure and you have your own procedure. So if you need to bar me, let's stop f***ing around and do what you gotta do and stop wasting my time." The staff concluded the interview. (CX-6, pp. 162-164.)

IV. Discussion

Procedural Rule 9264 provides that either the complainant or a respondent may move for summary disposition of any or all causes of action in the complaint, as well as any defense raised in the answer. The Hearing Panel may grant summary disposition if there is no genuine issue with regard to any material fact, and the moving party is entitled to summary disposition as a matter of law. As the moving party here, Enforcement bears the burden of demonstrating there

are no genuine issues of material fact.[5] If Enforcement meets this burden, Respondent must come forward with specific facts showing that there is a genuine issue in dispute.[6] Absent such a showing, summary disposition should be granted.[7]

There is no genuine dispute as to the material facts set forth above, and based on those facts, Enforcement is entitled to summary disposition as a matter of law.[8] The Complaint charges that Respondent violated Rule 8210, which provides:

> For the purpose of an investigation … [NASD] staff shall have the right to: (1) require … a person associated with a member … to provide information orally, in writing, or electronically … and to testify … under oath or affirmation … with respect to any matter involved in the investigation ….

Rule 8210 further states that "no … person shall fail to provide information or testimony … pursuant to this Rule."

This authority is critical to NASD's effective performance of its self-regulatory function. To perform that function, NASD must be able to gather information, and in the absence of subpoena power, NASD must rely on Rule 8210 to obtain information from members and associated persons in the course of its investigations.[9] For this reason, the SEC has "repeatedly stressed the importance of cooperation in NASD investigations[,] … [and] emphasized that the

---

[5] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

[6] *Matsushita Elec. Indus. Corp. v. Zenith Radio Co.*, 475 U.S. 574 (1986).

[7] *See Dep't of Enforcement v. Shvarts*, No. CAF980029, 2000 NASD Discip. LEXIS 6, at *10 n. 11 (NAC June 2, 2000) (citations omitted).

[8] Though Respondent claimed to dispute material facts in his opposing papers, in reality, he argued that the record did not support Enforcement's contention that his conduct violated Rule 8210.

[9] *Dep't of Enforcement v. Quattrone*, No. CAF030008, 2004 NASD Discip. LEXIS 17, at *46 (NAC Nov. 22, 2004), *appeal docketed* No. 3-11786 (SEC Dec. 28, 2004).

failure to provide information undermines the NASD's ability to carry out its self-regulatory functions."[10]

Accordingly, members and associated persons have a duty to cooperate fully and promptly with NASD requests for information.[11] Failure to comply is a serious violation, because it subverts NASD's ability to carry out its regulatory responsibilities.[12]

Respondent, who was formerly registered with NASD through Morgan Stanley and U.S. Bancorp, was subject to Rule 8210. For purposes of an on-going investigation, Enforcement staff required Respondent to appear for an on-the-record interview. Through counsel, Respondent refused to testify regarding documents presented during investigative testimony, unless certain conditions were met.

In his opposition to Enforcement's motion for summary disposition, Respondent advances two defenses to the charge that he violated NASD rules by refusing to answer questions during his on-the-record interview. He denies that his demand that copies of the documents be provided to counsel, or attached to the transcript, or read into the record in their entirety were "conditions" he imposed in exchange for giving testimony. According to Respondent, he simply "requested that an accurate transcript be recorded by either attaching the exhibits to the transcript or ensuring that the exhibits were not susceptible to alteration." He also argues that NASD staff "breached" the "agreement" to permit counsel to review documents in advance of Respondent's November 20, 2003 interview, thereby justifying his client's refusal to

---

[10] *Joseph P. Hannan*, Exchange Act Rel. No. 40438, 1998 SEC LEXIS 1955, at *9 (Sept. 14, 1998) (citations omitted).

[11] *Brian L. Gibbons*, Exchange Act Rel. No. 37170, 1996 SEC LEXIS 1291, at *7 (May 8, 1996), *aff'd*, 112 F.3d 516 (9th Cir. 1997).

[12] *Hannan*, 1998 SEC LEXIS 1955, at *9 (citation omitted).

answer questions about those documents absent the "procedural safeguards" counsel requested. The Panel rejects both defenses.

It is well established that persons subject to NASD's jurisdiction are not free to impose conditions on their responses to NASD's requests for information.[13] Contrary to Respondent's assertion, he did more than simply request that the staff take certain actions with respect to the exhibits presented during the investigative interview. Respondent flatly refused to answer questions about the exhibits unless the staff agreed to provide counsel with copies of the documents, or attach them to the transcript, or read each document into the record in its entirety.

Respondent and his counsel were on notice that the staff would deny their procedural requests regarding the exhibits. In the addendum to the request for testimony dated July 23, 2003, Respondent was advised that, subject to the staff's approval, he or his counsel could purchase a copy of the transcript or inspect the official transcript at NASD's office. The addendum also stated that the staff does not release copies of exhibits to testimony, which may be reviewed at NASD's offices. In light of Respondent's admission that he intended to assert his Fifth Amendment privilege against self-incrimination if called to testify by the SEC in a related investigation, the Panel believes that Respondent never intended to answer the staff's questions about documents obtained from the SEC, and that his demand for procedural "safeguards" was simply an attempt to justify his calculated refusal to testify.[14]

Even if Respondent's demand for so-called procedural safeguards was genuine, it was nonetheless unwarranted. There was no objective reason to believe the exhibits would be

---

[13] *Id*. at *11 (citation omitted); *Gibbons*, 1996 SEC LEXIS 1291, at *7 (citations omitted).

[14] The Fifth Amendment does not apply to NASD investigations and proceedings. *Dep't of Enforcement v. Steinhart*, No. FPI020002, 2003 NASD Discip. LEXIS 23, at *9 (Aug. 11, 2003) (citing *D.L. Cromwell Investments, Inc. v. NASD Regulation, Inc*., 279 F.3d 155, 161-163 (2d. Cir. 2002) (implicitly recognizing NASD's right to take disciplinary action when an associated person refuses to testify pursuant to Rule 8210)).

altered, or that the staff would deny counsel an opportunity to review the exhibits after the completion of Respondent's testimony. The staff was following stated NASD policy in this regard, a copy of which was provided to Respondent when the staff requested his testimony. That counsel was not permitted to review documents prior to the completion of Respondent's testimony, does not excuse Respondent from answering questions about those documents during his on-the-record interview.

More importantly, the "requests" were clearly conditions Respondent imposed, and when they were not met, he refused to answer questions. An individual subject to NASD jurisdiction may not dictate terms to NASD staff regarding his or her investigative testimony or select which questions to answer, and the Hearing Panel rejects Respondent's claim that he was justified in doing so here.

Finally, the Panel notes that, in the addendum, Respondent was advised that he was "obligated, under NASD rules, to answer all questions asked by NASD staff." He was also warned during the interview, and specifically told during the discussion regarding the exhibits, that his refusal to answer questions could subject him to disciplinary action and a permanent bar. He was thus fully apprised of the possible consequences of his actions, and in fact, he challenged the staff to bar him.

The Hearing Panel finds that the material facts are undisputed, and establish, as a matter of law, that Respondent violated NASD Procedural Rule 8210 and Conduct Rule 2110 by refusing to respond to questions posed by the staff during an investigative interview.[15]

[15] A violation of Rule 8210 is also a violation of Rule 2110. *Dep't of Enforcement v. Hoeper*, No. C02000037, 2001 NASD Discip. LEXIS 37 at *5 (NAC Nov. 2, 2001) (citation omitted).

V. Sanctions

Absent mitigation, a bar is standard for a failure to respond to a Rule 8210 request.[16] Enforcement has requested that a bar be imposed, while Respondent contends that he should not be barred. Respondent argues that he made a "good faith effort" to testify and simply asked the staff to assure him that the exhibits would not be altered. He contends that he made his "willingness to testify known," and that it was the staff that elected to end the interview. Finally, he asserts that he reasonably relied on his counsel's advice.

The Panel rejects Respondent's claim of good faith, and once again notes that Respondent was fully apprised of NASD's policy regarding exhibits prior to his on-the-record interview. He was thus well aware that the staff would deny his requests to provide copies of exhibits or attach them to the transcript. He also knew that he would be able to review the exhibits at NASD's office after the conclusion of his testimony.

Furthermore, there was no basis for Respondent's specious claim that the exhibits might be altered, and the staff was fully justified in deciding to end the interview when Respondent refused to testify about the documents unless his conditions were met. By refusing to answer, Respondent impeded the staff's ability to pursue the investigation, and thereby undermined NASD's ability to carry out its regulatory mandate.

While the record shows that counsel advised Respondent to refuse to testify unless Enforcement complied with his demands, the staff warned Respondent that his refusal would likely result in disciplinary action and a recommendation that he be barred from association with any member firm. Respondent was thus fully aware of the possible, if not probable,

[16] *NASD Sanction Guidelines* (2005 ed.) at 35.

consequences of his actions, and under the circumstances, his reliance on counsel was not reasonable.[17]

A refusal to answer questions is "tantamount to a complete failure to respond" for sanctions purposes,[18] and the Panel finds no mitigating factors that would warrant a sanction less than a bar. In light of the bar, no fine will be imposed.

VI. Conclusion

Respondent Malvinder Sonny Matharu is barred from associating with any NASD member in any capacity for his refusal to testify during an on-the-record interview, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. The bar shall become effective immediately, should this Decision become NASD's final disciplinary action.[19]

SO ORDERED.

_____
Dana R. Pisanelli
Hearing Officer
For the Hearing Panel

Dated: August 8, 2005
Washington, DC

[17] *See* Steinhart, 2003 NASD Discip. LEXIS 23, at *11 (reliance on counsel's advice to take action that violates NASD rules is not reasonable). The Panel also notes Respondent's admission that if called to testify by the SEC, he would assert his privilege against self-incrimination, as well as his unsuccessful attempt to review the documents in advance of his interview. For these reasons, we believe that Respondent decided to risk a bar – by refusing to answer the staff's questions about documents NASD obtained from the SEC unless certain conditions were met – rather than risk civil charges or criminal prosecution. Reliance on the advice of counsel for strategic reasons is not mitigating. *Cf*. *Quattrone*, 2004 NASD Disc. LEXIS 17, at *53.

[18] *Steinhart*, 2003 NASD Discip. LEXIS 23, at *13.

[19] The Hearing Panel has 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.

Copies to: Malvinder Sonny Matharu (*via overnight and first class mail*)
I. Reza Gharakhani, Esq. (*via facsimile and first class mail*)
David A. Watson, Esq. (*via facsimile and first class mail*)
Rory C. Flynn, Esq. (*via first class mail*)