

**NASD OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant

v.

JAMES J. BRAZIL  
(CRD No. 3035802),

Respondent.

Expedited Proceeding  
No. FPI050010

Hearing Officer – Rochelle S. Hall

**PANEL DECISION**

January 26, 2006

**Respondent violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110 by failing to provide information as requested by NASD staff. For these violations, Respondent is barred from associating with any member in any capacity.**

**Appearances**

David F. Newman, Esq., Regional Counsel, Philadelphia, PA, for the Department of Enforcement

Sal Cagnetti, Jr., Esq., Scranton, PA, for James J. Brazil

**DECISION**

**I. Procedural History**

On or about August 3, 2005, NASD's Department of Enforcement ("Enforcement") sent to James J. Brazil ("Brazil" or "Respondent") a Notice of Intent to Suspend under NASD Rule 9552 ("Notice"). The Notice stated that Brazil had violated NASD Rule 8210 by failing to respond to requests for information from NASD staff and that he would be suspended on August 28, 2005.

On August 23, 2005, Brazil filed a request for a hearing pursuant to NASD Rule 9552(e). This timely request for a hearing stayed Brazil's suspension date.

On October 6, 2005, Enforcement filed a Motion in Limine to preclude Respondent from seeking to elicit certain testimony from Enforcement's witnesses or using documents that were identified on Respondent's pre-hearing exhibit list. The documents related to a federal grand jury subpoena issued to Respondent that he believed related to the same conduct that was being investigated by NASD. Respondent filed his opposition on October 10, 2005. He argued that he should be allowed to elicit testimony and use the documents to support his claim that NASD's 8210 requests constitute state action and therefore he should be allowed to assert his Fifth Amendment right against self-incrimination to avoid responding. The Hearing Officer granted Enforcement's Motion in Limine on October 11, 2005.

A hearing was held on October 14, 2005 before a Hearing Panel composed of the Hearing Officer and two former members of NASD's District 9 Committee.<sup>1</sup>

## **II. Findings of Fact**

Brazil was employed in an unregistered capacity by member firm Commerce Capital Markets, Inc. from March 1998 until March 2000. He became employed, also in an unregistered capacity, with member firm Hefren-Tillotson, Inc. ("Heffren") in June 2000. On May 10, 2004, Brazil was permitted to resign because he "failed to take and pass the Series 52 test."<sup>2</sup>

In May 2004, during a routine examination of Heffren, Steve Kach ("Kach") an NASD examiner, obtained information that caused him to suspect that Brazil might have been involved in selling securities to municipalities and therefore was required to be

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<sup>1</sup> The hearing transcript is referred to as "Tr." Enforcement called two witnesses: Steve Kach and Donald Litteau, both NASD examiners. Brazil was not present, except through counsel, and did not call any witnesses. Enforcement introduced 5 exhibits into evidence (CX1-CX3, CX5, CX7). Brazil did not introduce any exhibits.

<sup>2</sup> CX2.

registered with NASD.<sup>3</sup> On May 24, 2004, Kach, pursuant to NASD Rule 8210, sent a letter to Brazil requesting that he provide information and documents concerning his employment activities by June 7.<sup>4</sup> The letter was sent by registered mail to Brazil's address as listed in the Central Registry Depository ("CRD").<sup>5</sup> Brazil apparently received the letter; it was not returned, and Brazil's counsel stated in a letter to the NASD that he was writing in reference to NASD's May 24, 2004 letter to Brazil.<sup>6</sup> Brazil has never provided the information requested.

### **III. Conclusions of Law**

NASD Procedural Rule 8210 requires NASD member firms and associated persons to provide information to NASD investigators upon request.<sup>7</sup> The purpose of Rule 8210 is to provide a means for NASD to carry out its regulatory functions in the absence of subpoena power, and it is a key element in the NASD's effort to police its members.<sup>8</sup> Because Brazil did not provide the information requested, NASD staff was not able to complete its investigation.<sup>9</sup> Brazil has thus far refused to provide the information NASD requested. Consequently, we find that he has violated Rule 8210. A violation of Rule 8210 also constitutes a violation of Rule 2110.<sup>10</sup>

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<sup>3</sup> Tr. at 13-14.

<sup>4</sup> CX3.

<sup>5</sup> CX1; CX3.

<sup>6</sup> Although Enforcement produced evidence that it had sent three additional requests for information to Brazil, it was only able to prove that Brazil received the May 24 letter. Nevertheless, Brazil had constructive notice of all four letters, since they had been sent to his then-current CRD address. (CX3; CX4; CX5; CX6; Tr., at 41; 9-22).

<sup>7</sup> See *Robert Fitzpatrick*, Exchange Act Release No. 44956, 2001 SEC LEXIS 2185, at \*8 (Oct. 19, 2001).

<sup>8</sup> *Richard J. Rouse*, Securities Exchange Act, Release No. 32658, 1993 SEC LEXIS 1831 (July 19, 1993); *Dep't. of Enforcement v. Justin F. Ficken*, Complaint No. C11040006 (NAC, Dec. 7, 2005).

<sup>9</sup> Tr. at 18.

<sup>10</sup> *Dep't. of Enforcement v. Hoeper*, Complaint No. C02000037, 2001 NASD Discip. LEXIS 37 at \*5 (NAC Nov. 2, 2001).

Throughout these proceedings, Brazil has asserted his Fifth Amendment right against self-incrimination as his only defense to the charge that he violated Rule 8210. Brazil's counsel responded to NASD's May 24 request in a letter dated July 9, 2004, by stating that until the conclusion of a grand jury investigation "Mr. Brazil [would] be unable to respond to [NASD's] questions."<sup>11</sup>

This defense has been considered and rejected in just these circumstances numerous times. The Fifth Amendment restricts only government conduct. Courts have consistently held that NASD is not a state actor, despite its regulatory functions or its cooperation with the SEC or criminal authorities.<sup>12</sup> Brazil argued that NASD investigators were working so closely with federal prosecutors that their investigation should be deemed to constitute "state action" sufficient to require this tribunal to recognize his constitutional protections. However, Brazil has not provided any evidence that NASD staff was working in concert with federal prosecutors, let alone that the staff's efforts render NASD's investigation "state action."

At the hearing, Brazil's counsel stated that the Hearing Officer's granting of Enforcement's motion in limine prevented him from obtaining evidence to show that NASD's request constituted "state action" because of coordinated activity between federal prosecutors and NASD investigators. He asserted that Brazil had thereby been denied his fundamental right to due process.<sup>13</sup> Brazil had sought to question NASD's investigator and attorney and to enter into evidence a federal grand jury subpoena and

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<sup>11</sup> CX 7.

<sup>12</sup> *D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 132 F. Supp. 2d, 251-53 (S.D.N.Y.2001), *aff'd*, 279 F.3d 155, 162 (2d Cir. N.Y. 2002), cert. denied, 537 U.S. 1028 (2002); *Marchiano v. NASD*, 134 F.Supp. 2d 90, 95 (D.D.C. 2001); *Dep't of Enforcement v. Justin F. Ficken*, Complaint No. C11040006 (NAC, Dec. 7, 2005).

<sup>13</sup> Tr. at 8, 47-48.

two wiretap inventories. Brazil's stated purpose in using this evidence was to show that "the government joined forces with the NASD in a collaborative effort to circumvent the Respondent's Constitutional rights..."<sup>14</sup> The only basis Brazil provided to the Hearing Officer to support his claim of government action was that the information sought by the grand jury was similar to that requested by NASD staff. The National Adjudicatory Council has rejected the argument that such meager evidence should provide the basis for allowing a further search:

Nor do we find that [respondents] should have been allowed, based on the minimal information that they provided regarding the [NASD] attorney, to have gone on a "fishing expedition" in an effort to produce evidence that the attorney, in requesting their appearances, was acting on behalf of any entity other than NASD...As a self-regulatory organization, NASD has an independent obligation to investigate possible rule violations, and respondents have offered no evidence that NASD was acting on anything other than its own investigation.<sup>15</sup>

At the hearing, the NASD investigator testified that he initiated his investigation and sent 8210 requests to Brazil because of information he found during a routine examination of Brazil's firm.<sup>16</sup> NASD was thus properly conducting its investigation of Brazil pursuant to its regulatory mandate. Whether NASD also cooperated with federal prosecutors pursuing an investigation of the same conduct is irrelevant in determining the propriety of NASD's investigation. Sharing information with or obtaining information from the government does not transform NASD's investigation into state action.<sup>17</sup> We therefore find that Brazil has raised no legitimate defense to his failure to provide the information requested by NASD staff.

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<sup>14</sup> Respondent's Response to Enforcement's Motion in Limine at 4.

<sup>15</sup> *Dep't. of Enforcement v. Frank Peter Quattrone*, Complaint No. CAF030008, 2004 NASD Discip. LEXIS 17, \*39 (NAC, Nov. 22, 2004); *Dep't. of Enforcement v. Respondent Firm*, Complaint No. CAF000013, 2003 NASD Discip. LEXIS 40, at \*34-35 (NAC Nov. 14, 2003).

<sup>16</sup> Tr., at 13-14.

<sup>17</sup> *Dep't. of Enforcement v. Frank Peter Quattrone*, *supra.*, at fn. 15.

#### **IV. Sanctions**

The NASD Sanction Guidelines provide that for failure to respond to a Rule 8210 request, “a bar should be standard.”<sup>18</sup> The National Adjudicatory Council has repeatedly held that a bar is appropriate when a respondent has refused to respond based on Fifth Amendment grounds.<sup>19</sup> In this case, we find no mitigating factors that would justify a sanction less than a bar. Consequently, we find that a bar is appropriate. In light of the bar, a monetary sanction would serve no remedial purpose.<sup>20</sup>

#### **V. Conclusion**

For violating Rules 8210 and 2110, Brazil is barred from associating with any member firm in any capacity. Brazil is also ordered to pay hearing costs of \$1,152.65, which includes an administrative fee of \$750 and \$402.65 for the hearing transcript. The bar shall become effective on the date this Decision issued.<sup>21</sup>

#### **HEARING PANEL**

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By: Rochelle S. Hall  
Hearing Officer

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<sup>18</sup> NASD Sanction Guidelines (2005 ed.) at 35.

<sup>19</sup> See *Dep't. of Enforcement v. Justin F. Ficken*, Complaint No. C11040006 (NAC Dec. 7, 2005); *Dep't. of Enforcement v. Frank Peter Quattrone*, Complaint No. CAF030008, 2004 NASD Discip. LEXIS 17 (NAC Nov. 22, 2004); *Dep't. of Enforcement v. Steinhart*, Complaint No. FPI020002, 2003 NASD Discip. LEXIS 23, at \*10-14 (NAC Aug. 11, 2003).

<sup>20</sup> *Dep't. of Market Regulation v. Geraci*, Complaint No. CMS020143, 2004 NASD Discip. LEXIS 19 (NAC Dec. 9, 2004).

<sup>21</sup> 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 this Decision.

Copies to:

James J. Brazil (*via overnight and first class mail*)

Sal Cognito, Jr., Esq. (*via facsimile and first class mail*)

David F. Newman, Esq. (*via electronic and first class mail*)